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Record No. 3651

In the
Supreme Court of Appeals of Virginia
at Richmond

THE FIDELITY AND CASUALTY COMPANY
OF NEW YORK, A CORPORATION

v.

RICHARD HARLOW

FROM THE CIRCUIT COURT OF HANOVER COUNTY

RULE 14.

15. NUMBER OF COPIES TO BE FILED AND DELIVERED TO OPPOSING COUNSEL. Twenty copies of each brief shall be filed with the clerk of the court, and at least two copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

16. SIZE AND TYPE. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and names of counsel shall be printed on the front cover of all briefs.

M. B. WATTS, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

191 VA 64

RULE 14—BRIEFS

1. **Form and contents of appellant's brief.** The opening brief of the appellant (or the petition for appeal when adopted as the opening brief) shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned, and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the record where there is any possibility that the other side may question the statement. Where the facts are controverted it should be so stated.

(d) Argument in support of the position of appellant.

The brief shall be signed by at least one attorney practicing in this court, giving his address.

The appellant may adopt the petition for appeal as his opening brief by so stating in the petition, or by giving to opposing counsel written notice of such intention within five days of the receipt by appellant of the printed record, and by filing a copy of such notice with the clerk of the court. No alleged error not specified in the opening brief or petition for appeal shall be admitted as a ground for argument by appellant on the hearing of the cause.

2. **Form and contents of appellee's brief.** The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate reference to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this court, giving his address.

3. **Reply brief.** The reply brief (if any) of the appellant shall contain all the authorities relied on by him, not referred to in his petition or opening brief. In other respects it shall conform to the requirements for appellee's brief.

4. **Time of filing.** (a) *Civil cases.* The opening brief of the appellant (if there be one in addition to the petition for appeal) shall be filed in the clerk's office within fifteen days after the receipt by counsel for appellant of the printed record, but in no event less than thirty days before the first day of the session at which the case is to be heard. The brief of the appellee shall be filed in the clerk's office not later than fifteen days, and the reply brief of the appellant not later than one day, before the first day of the session at which the case is to be heard.

(b) *Criminal Cases.* In criminal cases briefs must be filed within the time specified in civil cases; provided, however, that in those cases in which the records have not been printed and delivered to counsel at least twenty-five days before the beginning of the next session of the court, such cases shall be placed at the foot of the docket for that session of the court, and the Commonwealth's brief shall be filed at least ten days prior to the calling of the case, and the reply brief for the plaintiff in error not later than the day before the case is called.

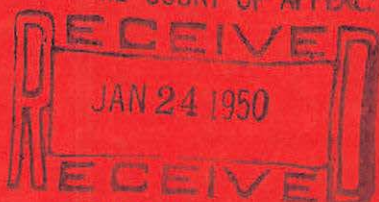
(c) *Stipulation of counsel as to filing.* Counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

5. **Number of copies to be filed and delivered to opposing counsel.** Twenty copies of each brief shall be filed with the clerk of the court, and at least two copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

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

7. **Non-compliance, effect of.** The clerk of this court is directed not to receive or file a brief which fails to comply with the requirements of this rule. If neither side has filed a proper brief the cause will not be heard. If one of the parties fails to file a proper brief he cannot be heard, but the case will be heard *ex parte* upon the argument of the party by whom the brief has been filed.

CLERK
SUPREME COURT OF APPEALS



RICHMOND, VIRGINIA

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278-234

IN THE
Supreme Court of Appeals of Virginia
AT RICHMOND

Record No. 3651

THE FIDELITY AND CASUALTY COMPANY OF NEW
YORK, A CORPORATION, Plaintiff-in-Error,

versus

RICHARD HARLOW, Defendant-in-Error.

PETITION FOR WRIT OF ERROR.

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

Your petitioner, The Fidelity and Casualty Company of New York, who was defendant in the Court below, and who is hereinafter referred to as "defendant," represents unto this Honorable Court that it is aggrieved by a final judgment of the Circuit Court of Hanover County, Virginia, against it in favor of Richard Harlow, hereinafter referred to as "plaintiff," in the sum of \$2,500.00 and interest rendered August 8, 1949.

FACTS.

Suit was brought by Richard Harlow against Edward Swoope in the Circuit Court of Hanover County to recover for
2* *personal injuries alleged to have been received in an automobile accident between a tractor (no trailer attached) being operated by Edward Swoope and a vehicle in which Harlow was riding. Execution on a judgment upon a verdict in the

sum of \$2,500.00 in favor of Harlow was returned "No Effects" and a garnishment was then brought by Harlow against The Fidelity and Casualty Company of New York, carrier of liability insurance upon the tractor being operated by Swoope at the time of collision. Swoope's employer, Tidewater Express Lines, Inc., owner of the equipment driven by Swoope, was not made a party defendant to the litigation as Swoope was admittedly upon his own pleasure at the time and agency was admittedly lacking.

The following additional facts—vital to the issue here involved have been stipulated by counsel (Tr., p. 62):

"It is stipulated and agreed between counsel for the purpose of shortening the record and deleting immaterial matter therefrom, that at the time of the collision out of which this cause of action is alleged to have grown the following facts and circumstances are admittedly true:

1. At the time of collision Edward Swoope was operating a tractor owned by Tidewater Express Lines, Incorporated, and no trailer was attached thereto.

2. That some time prior to the collision on the night of the accident in question, Edward Swoope uncoupled the tractor from his loaded trailer, which was parked in the vicinity of his home, and was, at the time of the collision, in the company of a girl and another man, riding in the tractor with him, upon his own pleasure."

SOLE ISSUE PRESENTED.

3* The policy of insurance issued by The Fidelity and Casualty Company of New York herein carried the usual "Omnibus Clause" (Tr., pp. 2-3) defining persons covered as:

"* * * any person while using the automobile* * * provided further the actual use is with the permission of the named insured * * *."

The sole issue before the Court is, therefore, whether, under the law of this State, Swoope was using this tractor at the time of the collision "*with the permission*" of Tidewater Express Lines, Inc. If the use was permissive, The Fidelity and Casualty Company of New York is liable; if the use *was not permissive*, The Fidelity and Casualty Company of New York is *not* liable.

COMMENT ON TESTIMONY.

The facts bearing upon this issue are clear and *undisputed*. We emphasize this fact because it further limits the duty of the Court and allows the entire attention of the Court to focus upon the single issue above stated.

These facts, briefly stated, are:

(1) Drivers were specifically prohibited against ever at any time using any of the automotive equipment of Tidewater Express Lines for personal uses or for anything other than business uses.

(a) Swoope testified (Tr., pp. 31-32-33) that on week-ends the trailers were loaded for an early morning take-off Monday and the drivers were permitted to park the tractors and loaded trailers at their homes over the week-end preparatory to 4* an early take-off Monday; *that he parked the equipment driven by him in a nearby parking lot a block from his home (Tr., p. 38); that he, and all drivers, *had instructions never* to detach the tractor from the trailer for personal use (Tr., p. 38); that he had *never* been given permission by any official of the company to use the tractor for his personal use (Tr., p. 40); that Mr. Prillaman, the local manager for Tidewater, had specifically instructed him not to ever use the equipment for personal use (Tr., pp. 41-42); that when he took the tractor for his personal use he attempted to conceal this unauthorized use from Mr. Prillaman (Tr., p. 43).

(b) Mr. Prillaman, local manager for Tidewater Express Lines, testified that each new driver was expressly instructed that the automotive equipment was never to be used for personal use (Tr., p. 45) under *any circumstances*; that from time to time he had checked upon the equipment over week-ends and had *never* found any unauthorized use (Tr., p. 46); that drivers were told that if they should ever use the equipment for personal use that they would be subject to *immediate dismissal* (Tr., p. 46); he had never been asked for the personal use of any of the equipment by any driver (Tr., p. 49) *and that he had never, 5* prior to this accident, had knowledge that any driver was using the equipment for his personal use (Tr., p. 49); that if he had had any information that Swoope was using the equipment for his personal use that he would have discharged him (Tr., p. 50); that immediately on hearing of the unauthorized use in this case he reported the facts to the Home Office in Baltimore who instructed him not to discharge Swoope (Tr., pp. 50, 51, 52); but that for this unauthorized use, Swoope was severely

reprimanded by the company's General Manager as well as by himself, Prillaman, and told that a repetition would result in immediate dismissal.

(c) At, (Tr., p. 64), is found a notice formerly posted at the Richmond office of Tidewater Express Lines directing that all trucks be parked at a designated spot. The only exception was Prillaman's custom of allowing the loaded equipment to be parked by the drivers near their homes for early morning get-a-ways. All rules were supplemented by verbal instructions, one of which was the instruction that equipment was never to be used for personal use (Tr., p. 63.)

(2) Swoope had the tractor on his own personal use, contrary to orders of his company at the time *of this 6* collision.

(a) It is conceded by stipulation of counsel (Tr., p. 62) that at the time of this collision Swoope had detached the tractor from the trailer; that this was contrary to company rules (Tr. p. 39); that in the company of a girl and another man he was on a party for his own personal enjoyment and that his activity was in no way connected with any business of the company.

From the above summary of testimony it is believed that a fair statement of the *undisputed* evidence is this:

(1) That Swoope and the other drivers were permitted to take the loaded tractor and trailer assigned to the particular driver home *for one purpose and one purpose only, i. e., for parking*, to enable the driver to get a quick start on Monday (or the following) morning. (2) That all drivers, including Swoope, had express instructions *never* to use the equipment for personal use. (3) That the management, through Prillaman, had *never* in a single instance, *ever* authorized *any* driver to use the equipment on personal use and had *never* had knowledge that such equipment was ever so used.

ASSIGNMENT OF ERROR.

There is but a single assignment of error, namely:

The Court erred in holding that there was any evidence whatsoever of permissive use of the tractor by Swoope at the time of the collision and in refusing to hold that the **uncontradicted* 7* evidence was that at the time of collision Swoope was acting against express instructions of the company in (1) having detached the tractor from the trailer, and (2) using the equipment, or any part thereof, for his personal use.

AUTHORITY.

Under the above factual situation, the only basis upon which the Court could hold this use on the particular night in question "permissive," was upon the theory that the act of putting Swoope in charge of the tractor-trailer unit *for parking only* authorized him to use it for *all purposes including uses specifically prohibited by company instructions*.

This is not the law in Virginia.

Fortunately for counsel upon whom devolves the duty of briefing the law for the guidance of the Court, this case can be steered through a channel completely charted by three decisions, *Phoenix Indemnity Company v. Anderson & Powell*, 170 Va. 406, *Sordelett v. Mercer*, 185 Va. 823, and *State Farm Insurance Companies v. William H. Cook*, 186 Va. 658.

The *Phoenix Indemnity Company Case* is strikingly analagous on its facts to the case at bar. There one Johnson was frequently sent by the corporation owning the car from Wake Forest to Raleigh to purchase vegetables and return to Wake Forest. He was permitted to keep the truck each time overnight in Raleigh in order to get an early start back in the morning. (Note the striking similarity as to the purpose of possession to the case at bar.) On one occasion, after reaching Raleigh, he took the truck out for his own *pleasure and wrecked it. The 8* question at issue—just as in the case at bar—was whether this use was *permissive*.

Justice Holt, in rendering the opinion of the Court, states:

"*Accurately speaking, Johnson was not using this truck with permission at all. He was ordered to take it to Raleigh, load it up with produce purchased at the city market there and return to Wake Forest early the next morning. The only permission which he had was permission to do those things which he was instructed to do. He was never given permission to use this truck 'for his own personal business or pleasure,' and his only liberty of action was that he might go to his brother's garage, spend the night with him and return early the next morning; or to go to Raleigh sufficiently early in the morning to enable him to return with the produce to be offered in that day's business. Royall tells us that on the 8th of November 'he told me about his twin brother here, who had a garage; and all he asked me was whether it would be all right for him to come to Raleigh, keep the truck in his brother's garage, and get the vegetables early the next morning and return to Wake Forest'; and that the permission was given 'for the particular purpose of transacting your (the company's) business,' and 'for no other purpose.'*" (Italics supplied.)

Then in holding that the use was *not* permissive under the terms of the policy, the Court concludes:

"We are also told that delivering an automobile by the assured to another with permission to use it for a particular purpose carries with this permission the right of indefinite use. There are cases which so hold. A leading case to that effect is *Stovall v. New York Indemnity Co.*, 157 Tenn., 301, 8 S. W. (2d) 473, 72 A. L. R. 1368. An elaborate discussion of this subject will be found in a note to the *Stovall Case* in 72 A. L. R. 1375, et seq.

9* *Outside of court one would be surprised to learn that permission to drive to Raleigh carried with it permission to drive to El Paso. In the instant case, Johnson drove to Raleigh not under general permission but under an express order to proceed to that city, purchase perishable produce, and to return with it promptly to Wake Forest. *No liberality of construction can turn these directions into a general permit to use the truck for pleasure purposes.*

In *Frederiksen v. Employers' Liability Assur. Corp., Ltd.*, of London England, 26 F. (2d) 76, it was held that one who was given an automobile with permission to attend a funeral had no permission to go thereafter on a joy ride.

In *Trotter v. Union Indemnity Co.*, 35 F. (2d) 104, the doctrine in the *Stovall Case* was expressly disapproved. As was pointed out in the *Frederiksen Case*, liability does attach where the deviation is slight. *In the instant case, we are not dealing with a deviation at all but with an independent venture, unrelated to the assured's business.*

It is, of course, true that in the construction of policies of insurance ambiguous provisions should be construed against the insurance carrier, *but in their construction, as in the construction of all other contracts, the rule of reason must prevail and the better reasoning lies with these Federal decisions.*

This must have been the view of the Supreme Court of North Carolina when it came to consider *Johnson v. New Amsterdam Casualty Co.*, *supra*. In that case Hirst was an employee of his corporation, the insurance carrier. Hirst used a company car in going to and from his business and kept it at his home—that is to say, Hirst had the permission of his employer to use its car. Here T. F. Johnson had the right to use this car, not in trips to and from his home but in trips to and from Raleigh, and his business, so far as the car was concerned, was concluded when he had reached his brother's home and had finished his inspection of the city market stalls. It was said of Hirst that 'he had finished his work for the day' and was on a venture of

his own. It may *be said of T. F. Johnson that 'he had
10* finished his work for the day' and was on a venture of his own.

Without undertaking to restate policy provisions, our conclusions are these: The policy itself limits the use of the truck; if these limitations be held to be representations only, they are material. The use of the truck upon the occasion in judgment was without permission of the named assured and was not merely a casual deviation from the limitations imposed by the master.

The judgment of the trial court should be reversed and final judgment entered for the defendant. It is so ordered.

Reversed."
(Italics supplied.)

It is interesting to note that Justice Hudgins' dissenting opinion does not take issue with the above emphasized principles of law, but is based on his view that since Johnson was Assistant Manager of the company, therefore, his act was the act of the company.

Following closely after this decision came the case of *Sordelett v. Mercer*, 185 Va. 823.

Here Stover was an employee of Worsham Brothers. As night watchman he had access to the keys to all trucks of the company. On this particular occasion he took a truck and went upon a mission of his own during the course of which he had an accident. The evidence was in conflict as to whether he had been given permission to use the truck to go to get his supper, but admittedly he was not on the way to or from supper when the accident occurred. Defendant asked and was given this instruction:

"Instruction C-1 is as follows:

11* *The court instructs the jury that even though you believe from the evidence that Samuel Stover secured permission from Willie Worsham or Bartow Worsham to use the truck to get his supper, nevertheless, if you further believe that the said Stover either did not use the truck to secure his supper, or, having secured it, went off upon a mission or missions of his own, you should find in favor of the defendant'."

Plaintiff objected vigorously to this instruction upon the ground that assuming that Worsham had placed Stover in charge of the car, he would be presumed to have *permissive use* for any purpose.

The Court of Appeals rejected this contention, however, Justice Buchanan stating (page 835):

"Assuming, but not deciding, that this statute which deals with a policy issued 'to the owner of a motor vehicle,' is ap-

plicable to this case, there are two answers to this contention. *The first is that the express or implied permission referred to in the statute means the express or implied permission to use or operate the motor vehicle either in the business of the owner or for any other purpose for which express permission was given or as to which it may be implied that permission was given. Permission to do a specific thing is not permission to do all things.*

The other answer is that the instruction simply told the jury that if Stover had permission to use the truck to get his supper, but was not using it for that purpose, but for a purpose of his own, they should find for the defendant. In the light of the evidence this was simply telling the jury that if Stover was using the truck at the time of the accident to hunt up a girl companion for his fellow-worker, then he was not using it under his permission to get his supper,—an obviously sound proposition, and in complete accord with *Phoenix Indemnity Co. v. Anderson*, 170 Va. 406; 196 S. E. 629, and this observation in that case is pertinent heré: ‘In *Frederiksen v. Employers’ Liability Assur.*

Corp., 26 F: (2d) 76, it was held that one who was given an 12* *automobile with permission to attend a funeral had no permission to go thereafter on a joy ride.’ ” (Italics supplied.)

It is submitted that this language determines the precise issue—and the only issue now before this Court in the case at bar. How could the trial court have held—in the teeth of the *Sordelett Case*—that the act of Prillaman in permitting Swoope to park over night preparatory to getting an early start, constituted implied permission to pick up a girl, take drinks and proceed on a pleasure party?

The next case on this issue, *State Farm Mutual Automobile Ins. Co. v. Cook*, 186 Va. 658, 43 S. E. (2) 863, reaffirms the view of our Court of Appeals as originally expressed.

We invite the Court’s careful attention to the statement of fact in this case which is divided into two parts. In the opening paragraph of the opinion Justice Browning states these facts:

“On the night of February 28, 1946, a collision took place between an automobile, driven by William H. Cook, and a truck owned by E. W. Maynard, driven by David Wallace, who was substituting for John Palmer. Palmer was in general and usual charge of the truck, by express permission of its owner, Mr. Maynard. Palmer and Wallace were employees of Mr. Maynard, who owned and operated a farm near the city of Williamsburg. Palmer lived a mile and a half from the Maynard home. He had been working intermittently for Mr. Maynard for some ten years. One of his duties was to take the truck to Williamsburg every morning and get garbage from William and Mary College and take it to Maynard’s farm to be fed to his hogs. At first Mr. Maynard would take Palmer in his own automobile to his

home at night and go for him the next morning, but this arrangement was inconvenient and unsatisfactory. It was discontinued, and Palmer by Maynard's *direction began taking 13* the truck from the farm to his own home at night where it would be in readiness for his garbage errand in the morning.

On the night of the accident Palmer drove the truck to Williamsburg on a mission of his own. There he met Wallace, whom he invited to ride with him to Crutchfield's Beer Parlor, which is about four miles from Williamsburg in the direction of Richmond. Wallace was employed as a helper on the truck. On the return trip Palmer, who had become intoxicated and was about to fall asleep, asked Wallace to drive for him, and the collision took place soon afterwards."

It will be noted how similar these facts—as far as they go—are to those in the case at bar.

If the Court will follow the *Cook* opinion further, however, it will be observed that when the Court of Appeals comes to the consideration of the question of "permissive use," it realizes that the facts as above stated are not sufficient for a discussion of this issue, whereupon the Court says:

"We come now to a discussion of the second point, which involves the question of whether an employee entrusted with the use of a motor vehicle, who is permitted to take it to his home and not prohibited from using it for his own pleasure, is legally using or operating the same with the permission, express or implied, of the owner, when the motor vehicle is being used for the employer's own pleasure.

In addition to the statement of facts already made, we should say that when Mr. Maynard directed Palmer to take the truck and keep it over nights at his own home, there was no inhibition of the use of it by Palmer for his own pleasure and purposes; that on occasions he used the truck to get groceries for himself; that Mr. Maynard saw him on one occasion making such use of the truck, which he did not forbid; that Palmer had got permission 14 *from Maynard at different times to use the truck for his own purposes, but since he went to work for Maynard the last time, in November, 1945, he had used the truck for his own purposes without asking permission, and Maynard had never told him not to use it for his own purposes; that since the accident he has continued to take the truck to his home, and that the only condition imposed by Mr. Maynard was that if he used it in the future for his own purposes, 'it would be on his own hook.' "* (Italics supplied.)

Thus it is readily seen that this supplemental statement of facts throws the case in an entirely different category from the case at bar on four separate and distinct factual situations:

(1) Maynard had never forbid the use of the car to Palmer for personal use;

(2) Maynard had, previous to the night of the accident, seen Palmer using the car for personal use and had not objected;

(3) Maynard had, previous to the night of the accident, on different times given Palmer permission to use the truck for his own purposes;

(4) Since the accident Maynard still permitted Palmer to take the truck home, the only restriction as to personal use being Maynard's statement that in the future if Palmer used the truck for his own use that "it would be on his own hook."

Compare, as to these issues—which Justice Browning designated as the controlling issues in the case—the undisputed
15* *evidence in the case at bar, that:

(1) Swoope had been expressly forbidden (a) to use the equipment for personal use, and (b) to ever detach the tractor from the trailer for personal use;

(2) Prillaman had never before seen or known of Swoope or any other driver using the equipment for personal use;

(3) Prillaman had never, prior to the collision, granted permission to Swoope, or any other driver, to use any part of the equipment for personal use;

(4) Immediately after the discovery of this instance, both Prillaman and the General Manager of the business reprimanded Swoope severely and warned him that any re-occurrence would result in his discharge.

"Permissive use" was unquestionably borne out by the facts in the *Cook Case* and the Court of Appeals' holding, based upon the factual situation, was eminently sound.

While the facts of the *Cook Case* are totally dissimilar to those in the case at bar, yet the doctrine enunciated by our Court of Appeals in the *Cook Case* is vitally important to the determination of the issue in the case at bar. Counsel for plaintiff in the *Cook Case* strenuously urged—just as is being urged by counsel for plaintiff in the case at bar—that since the owner of the car had placed Palmer in control of the truck and allowed him to take it home over night, that this constituted *implied permission* to use the truck for *all purposes. The Court, in refusing
16* to so hold, said:

"This has brought about two schools of judicial thought as to the matter with which we are now concerned. Some courts take the view, broadly stated, that express permission for a given purpose implies permission for all purposes. *Stovall v. New York Indemnity Co.*, 157 Tenn., 301, 8 S. W. 2d 473, 72 A. L. R. 1368, and annotation beginning at page 1375; *Dickin-*

son v. *Maryland Casualty Co.*, 101 Conn. 369, 125 A. 866, 41 A. L. R. 500.

Other courts adhere to a somewhat stricter construction and hold that before the person using the automobile becomes an additional assured under the omnibus clause, permission must be expressly or impliedly given for that use. See cases cited in annotation, supra, 72 A. L. R. at page 1403.

We hold to the latter view in Virginia. In Sordelett v. Mercer, 185 Va. 823, 40 S. E. 2d 289, 294, we said (185 Va. 835) in reference to the meaning of the concluding sentence of section 4326a involved here that 'the express or implied permission referred to in the statute means the express or implied permission to use or operate the motor vehicle either in the business of the owner or for any other purpose for which express permission was given or as to which it may be implied that permission was given. Permission to do a specific thing is not permission to do all things.' To the same effect are *Phoenix Ind. Co. v. Anderson & Powell*, 170 Va. 406, 196 S. E. 629; *Jordan v. Shelby, etc., Casualty Co.*, 4 Cir., 142 F. 2d 52; *Frederiksen v. Employers' Liability Assur. Corp.*, 9 Cir., 26 F. 2d 76." (Italics supplied.)

Messrs. Haw and Parker, counsel for plaintiff herein, urged before the trial court this statement:

"The trend in Virginia is to broaden the coverage of liability insurance policies and it is respectfully submitted that Swoope had implied permission to use the truck and that coverage is afforded in this case."

That this argument was accepted by the trial court is 17* *apparent from the court's opinion (Tr., p. 13.)

This identical argument was advanced in the *Cook Case*, but the Court in rejecting any such broad interpretation says:

"But even so, regard must be had to the words used in the statute to determine the meaning of the statute, and the meaning as determined should be given effect. The permission, 'express or implied,' from the owner, necessary to make the operator of the car an additional assured, must be either an express permission or a permission reasonably to be implied from the circumstances of the case." (Italics supplied.)

The late case of *Liberty Mutual Insurance Company v. Tiller* (Va., June 20, 1949) in no way modifies or enlarges the rule on this question in Virginia as previously laid down. In the *Tiller Case* there was evidence that:

(1) Assured (Bozarth) had placed the truck in the custody of his employee, Baker, *with no strings whatever*. Baker on this point testified:

"Well I kept the truck at all times * * * no one else drove it but me, and I kept it at my house at all times and evenings after working hours, *if I had to go to the store, some place, I used the truck, and if I wanted to go over to Mr. Bozarth's, to see him about—concerning the thing, I used the truck to go over there.*" (Italics ours.)

(2) Bozarth never reprimanded Baker for using the truck without permission.

(3) Mrs. Baker stated that frequently when Mr. Baker drove to Bozarth's home on his own pleasure that Bozarth had come out to the truck and seen her in it.

18* (4) There was testimony that Bozarth had told Baker:

"You take the car and keep it in your possession and use it as if it was your car."

(5) The Court in its opinion says:

"There is considerable other evidence which tends to show that Baker had exclusive control of the truck and used it at will for his own purposes, *and that Mr. Bozarth never instructed him not to do so.*" (Italics ours.)

Obviously with the existence of such evidence in the record the Court of Appeals was absolutely correct in holding that a finding of "permissive use" by the jury was proper.

See a very late and excellent note on this subject in 5 A. L. R. (2d) 600.

IMPLIED CONSENT.

What, then, can be said to constitute this so-called implied consent?

Perhaps the best definition, and certainly one beyond which the Virginia Court of Appeals has refused to go, is found in *Hinton v. Indemnity Ins. Co.*, 175 Va. 205, where the Court says:

"Under the Virginia statute, the permission of an assured in a liability insurance policy, to bind the insurance company, may be either express or implied. To be express, it must be of an affirmative character, directly and distinctly stated, clear and outspoken, and not merely implied or left to inference. On the other hand, the correlative word 'implied,' as defined in Webster's New International Dictionary (2d Ed.,) means 'in-

*ferential or tacitly conceded.' It involves an inference arising from a course of conduct or relationship *between the parties*
19* *in which there is mutual acquiescence or lack of objection under circumstances signifying assent. An implied permission is not, therefore, confined alone to affirmative action."* (Italics supplied.)

There is not one scintilla of evidence in the case at bar that Swoope had any authority to do other than *park* the tractor and trailer for an early morning take-off.

At what point in the transcript can one word of denial be found to the testimony of both Prillaman and Swoope that personal use of the equipment *was expressly forbidden*?

The record in this case is, on the contrary, chock full of statement after statement that personal use was *expressly* forbidden. Upon what evidence can the Court disregard this positive evidence? Surely not upon the statement of Swoope that he had on eight or ten occasions—over a five or six months period—used the tractor for his own use—and *had concealed such use from Prillaman* (Tr., p. 43)! Or that during a period of three years Swoope had on one or two occasions—by chance—run into Prillaman in a confectionery and had a bottle of beer with him!

EVIDENCE UNCONTRADICTED.

Upon the issue of whether (a) Prillaman had issued instructions prohibiting personal use, and (b) whether Prillaman knew of the violations, the evidence is uncontradicted. Yet counsel for plaintiff is urging the Court to disregard this testimony! *The rule, in this State at least, is that the uncontradicted evidence of a witness cannot be *disregarded by either the jury or the*
20* *Court if it is not inherently improbable. Worsham v. Commonwealth, 184 Va. 192.*

SWOOPES TESTIMONY.

Perhaps the strongest single consideration is favor of the defendant in this case is the testimony of Swoope himself. Practically every sentence of his testimony is contrary to his personal interest. He certainly knew that if he had had permissive use of this tractor that the judgment now saddled upon his back would be transferred to his employer's insurer. He is no longer in the employ of this company. There is not the slightest inducement—other than that of any honorable man to tell the truth—for him to have assumed this responsibility which he could so easily have avoided by testifying falsely. *This evidence is entitled to the highest consideration.* 20 Am. Jur. p. 1032.

OPINION OF THE TRIAL COURT.

Frankly, counsel for defendant considered the case as so lawlocked after the evidence was concluded and were so shocked at the decision of the trial court in the teeth of the *uncontradicted* evidence, that we have read and re-read the Court's opinion in an effort to discover some legal basis for the Court's decision which we might have overlooked. We find none.

The trial court, for some reason, lays great stress upon the fact that the company rules concerning personal use were not in writing. We fail to see the materiality of this. *This 21* written rule related only to *parking*, and while Mr. Prillaman did say that he thought the written rules carried such prohibition, he *emphatically stated that he had given all drivers—including Swoope—express verbal instructions never to use the equipment for personal use.*

More important still is the fact that Swoope—contrary to his own interests—admits that he had been given such instructions and wilfully violated same without knowledge of the company representative.

BURDEN OF PROOF.

The trial court, at Transcript, p. 19, makes a pivotal statement in which it is guilty of the most flagrant error and misconception of the law. The court says:

"Because of this it is the opinion of the Court that the defendants have not established by any satisfactory proof, or by proof that can be relied on, to show that there was any express prohibition against the use of the tractor by Swoope for his own purposes." (Italics ours.)

This plainly states the court's view to be that the burden is on *Defendant* to show that the use was Non Permissive!

THE UNANIMOUS AUTHORITIES ARE TO THE CONTRARY.

In the late note found in 5 A. L. R. (2d), at page 666, the annotation gives the universal rule and supporting authorities thus:

"Burden of Proof.

It appears to well settled that the plaintiff bears the 22* burden of proof to *show that permission actually existed under the facts and circumstances of the case.

United States.—*Fredericksen v. Employers' Liability Assur. Corp.* (1928; CCA 9th Cal.) 26 F 2d 76; *United States Fidelity & G. Co. v. Mann* (1934; CCA 4th SC) 73 F 2d 465.

Connecticut.—*Mycek v. Hartford Acci. & Indem. Corp.* (1941) 128 Conn. 140, 20 A2d 735.

Illinois.—*Soukup v. Halmel* (1934) 357 Ill. 576, 192 NE 557.

Iowa.—*Mitchell v. Automobile Underwriters* (1938) 225 Iowa 906, 281 NW 832.

Louisiana.—*Stephenson v. List Laundry & Dry Cleaners* (1936; La. App.) 168 So 317.

New Hampshire.—*Sauriolle v. O'Gorman* (1932) 86 NH 39, 163 A 717; *Travelers Ins. Co. v. Greenough* (1937) 88 NH 391, 190 A 129, 109 ALR 1096; *Liberty Mut. Ins. Co. v. Martel* (1937) 88 NH 479, 192 A 152; *Laporte v. Houle* (1939) 90 NH 50, 4 A2d 649.

Ohio.—*Kazdan v. Stein* (1927) 26 Ohio App 455, 160 NE 506 (affd (1928) 118 Ohio St 217 160 NE 704.)

Virginia.—*Union Indem. Co. v. Small* (1930) 154 Va. 458, 153 SE 658, 29 N. C. CA 176.

Washington.—*Collins v. Northwest Casualty Co.* (1935) 180 Wash 347, 39 P2d 986, 97 ALR 1235.

Wisconsin.—*Bro v. Standard Acci. Ins. Co.* (1927) 194 Wis. 293, 215 NW 431."

This question of the burden of proof is very important. The fact, standing alone, that a driver, in the employ of the vehicle owner is at the wheel at the time of an accident creates the presumption that he has authority to drive the truck generally—**BUT DOES NOT CREATE ANY PRESUMPTION THAT HE HAS PERMISSION TO DRIVE THE VEHICLE**
23* **FOR BUSINESS OR PLEASURE OF *HIS OWN!**

This is emphatically brought out in the case of *Liberty Mutual Ins. Co. v. Martel*, 88 N. H. 479, 192 A. 152. Here the Court says:

" * * * The trial court submitted the issue as to whether the employee had express or implied permission to use the truck to the jury, *after ruling that the burden of proof as to noncoverage rested upon the insurer.* The jury found for the injured party but the court held that the ruling of the trial court on the burden of proof was erroneous and that there was no evidence to sustain the verdict, since the only other evidence in the case besides that of the insured and the employee was that of a neighbor of the insured who testified that once or twice a week during the year previous to the accident he had seen the employee operating the insured's truck, and that the latter evidence was not sufficient to sustain the verdict. The court said in regard to this evidence: '*It is sufficient to support the inference that (the*

employee) had authority to drive his employer's truck, but neither it nor any other evidence in the case tends to indicate he had permission, either express or implied, to use the truck in the way in which the uncontradicted evidence establishes that he was using it at the time of the accident, that is upon business or affairs of his own.' " (Italics ours.)

Even this question would appear academic however, in view of the fact that defendant has established— *by uncontradicted evidence*—that the vehicle was being used contrary to instructions and against the permission of the company at the time of loss.

SITUATION AS TO TRACTOR-TRAILER.

While any further consideration would seem unnecessary it occurs to us that the very nature of the equipment here
24* involved would run contrary to any concept of "permissive use for personal pleasure." This was no passenger car, nor even truck which, in the general course of business could and should be expected to be subject of alternate use for either pleasure or business. The automotive equipment here involved was a huge, commercial type tractor-trailer unit. The only use for which the tractor is calculated to be used is as a propelling force for the trailer. Its lights, brakes and its entire mechanism are geared for a towing process. It is not intended to be separately used and while it *can* be driven separately such use would certainly not be said to be an anticipated one.

CONCLUSION.

To repeat—we challenge opposing counsel to cite *one scintilla of evidence* in the transcript upon which the undisputed testimony of Swoope and Prillaman that the use was *non-permissive* could be put in issue. There is *none*!

With all due deference to the able Judge of the trial court, it is perfectly apparent, throughout the entire record, that he was determined to unearth any possible evidence upon which a holding of "permissive use" could be justified. He examined defendants' witnesses exhaustively upon this issue by personal interrogation. We do not criticize this action. The true and full facts should always be developed upon any issue upon which the Court is in doubt. The important point is, that in spite of this is not one bit of evidence of anything other than "non-permissive" use.

25* *At Transcript, p. 19, the Court sums up the facts upon which its reasoning is based. A careful analysis of these

facts leads to the inescapable conclusion that the trial court's decision is *predicated upon the concept that delivery of a vehicle to a driver for one purpose (here admittedly parking) carries the permission to use it for all other purposes!*

There is such a concept of law—but it is not followed in Virginia. May we once again refer to the language of Justice Browning in the *Cook Case*, *supra*:

“This has brought about two schools of judicial thought as to the matter with which we are concerned. Some courts take the view, broadly stated, that express permission for a given purpose implies permission for all purpose. * * * * *

Other courts adhere to a somewhat stricter construction and hold that before the person using the automobile becomes an additional assured under the omnibus clause, permission must be expressly or impliedly given for *THAT* use. * * * ”
(Italics ours.)

WE HOLD TO THE LATTER VIEW IN VIRGINIA

The unquestioned evidence in the case further establishes that *this use was directly against instructions*. Whether such were verbal or written is of no significance. Under such circumstances the general rule is thus stated in annotation found in 5 A. L. R. (2d) 651, citing numerous authorities:

“Where the employer has expressly forbidden his employee to use the employer's automobile for his own personal purposes, such use of the automobile by the employee in violation of orders is not deemed to be one with the permission of *the em-
26* ployer within the meaning of the omnibus clause of the liability insurance policy.”

In consideration whereof it is respectfully submitted that the judgment of the lower court should be reversed and final judgment entered for the defendant, and it is accordingly prayed that a writ of error and *supersedeas* be awarded toward this end.

The defendant requests that this petition be adopted as its opening brief and that it be allowed to state orally by counsel the reasons why its petition should be granted.

Defendant avers that on the 29 day of August, 1949, immediately prior to the filing of this petition with the Clerk of this Court, at Richmond, Virginia, a typewritten copy of the same was mailed, postage prepaid, to Messrs. George E. Haw and Byron Parker, counsel for plaintiff, at their offices in the

Travelers Building and the State-Planters Bank Building, respectively, Richmond, Virginia.

Respectfully,

THE FIDELITY AND CASUALTY COMPANY
OF NEW YORK.

By Counsel.

ALEX. H. SANDS, JR.,
Sands, Marks & Sands,
American Building,
Richmond, Virginia.

27* *I, Alex. H. Sands, Jr., an attorney practicing in the Supreme Court of Appeals of Virginia, do certify that in my opinion there is sufficient error in the record accompanying this petition that the judgment complained of should be reviewed and reversed.

ALEX. H. SANDS, JR.,
615 American Building,
Richmond, Virginia.

Received August 29, 1949.

M. B. WATTS, Clerk.

Oct. 4, 1949—writ of error and *supersedeas* awarded by the court. Bond \$3,500.

M. B. W.

RECORD

> VIRGINIA:

In the Circuit Court for Hanover County.

Pleas before the Circuit Court in and for the Circuit Court in and for the County of Hanover.

February 3, 1948.

Be it remembered heretofore, to-wit: July 3rd, 1947, there was filed in the Clerk's Office of the Circuit Court of Hanover County by Richard Harlow, Notice of Motion for judgment against Tidewater Express Lines, Incorporated and Edward Swoope.

Which notice together with the Sheriff's return thereon is in the words and figures following, to-wit:

NOTICE OF MOTION.

To: Tidewater Express Lines, Incorporated
And Edward Swoope.

Take Notice that I, Richard Harlow, hereinafter referred to as the plaintiff, will on the 19th day of July, 1947, at 10:00 A. M. or so soon thereafter as I shall be heard move the Circuit Court of Hanover County, Virginia for a judgment against you, the Tidewater Express Lines, Incorporated, and Edward Swoope, hereinafter referred to as the defendants, for a judgment in the amount of Fifteen Thousand Dollars (\$15,000.00) for damages for this, to-wit:

That heretofore on December 15, 1946, about 1:25 A. M. the plaintiff was riding as a passenger and guest with Vivian F. West, who was lawfully operating his automobile northwardly along Virginia State Highway No. 1. in the County of Han-
page 2 { over, Virginia, and was approaching to the intersection of said highway with the public road leading westwardly therefrom to Elmont (called the Elmont Road) when said West desiring to turn left on said Elmont Road had given the hand signal for a left turn and having ascertained that said turn could be made in safety had pulled over to the north bound passing lane as required by law and there was forced to stop by the south bound traffic, when a motor tractor truck of the defendant, the Tidewater Express Lines, Incorporated, operated and driven by the defendant, Edward Swoope, the employee and driver of the said Tidewater Express Lines, Incorporated, approached from the rear travelling northwardly along said highway No. 1, when it became and was the duty of said defendants to operate said truck at a lawful and reasonable speed under the then existing road, time and weather conditions, to have proper and legal lights on said tractor truck, to keep same under control, to operate same along and upon the north bound travel lane on said highway and to keep a look out for and not to run into, against or upon any other vehicle lawfully using said highway, yet withstanding their duties in such respect, but in utter disregard thereof, the said defendants negligently and carelessly ran and operated said tractor truck northwardly along said highway No. 1 at an unreasonable rate of speed under the then existing conditions, failed to maintain proper and legal lights on the same, failed to keep said tractor truck under control, failed to operate same along their proper north bound travel lane, failed to keep a lookout for vehicles lawfully on said highway, especially the automobile in which the plaintiff was riding, and negligently and carelessly ran and operated said tractor truck along and upon the north bound passing lane on

said highway and into upon and against the automobile in which the plaintiff was riding and which was lawfully attempting a left turn on said highway, so that the plaintiff and his
 page 3 } automobile were violently struck and thrown on said highway, causing the plaintiff to receive serious and painful bodily injuries, a severe cerebral concussion and other injuries from which he was sick and suffering for a long time, causing loss of time from his work, expenditure of large sums in doctor's bills, hospital bills and other expenses by reason whereof he is permanently injured and incapacitated, all of which was caused through no fault or negligence of the plaintiff, but was the proximate result of the negligence of the defendants as aforesaid.

By reason whereof, the plaintiff will demand damages in the sum of Fifteen Thousand Dollars (\$15,000.00) in conformity with the above notice.

RICHARD HARLOW
 By Geo. E. Haw of Haw and Haw.
 His Counsel.

(SHERIFF'S RETURN.)

Not finding Edward Swoope, or any member of his family upon whom legal process could be served at his usual place of abode. Executed in the City of Richmond, Va. July 2, 1947, by leaving a copy of within Notice of Motion Posted on the front door of his residence 3125 West Cary Street, that being his usual place of abode,

And Further

Executed this 2 day of July, 1947, in the City of Richmond, Va. by delivering a copy of the within Notice of Motion to Bernard Frank a Director of Tidewater Express Lines, Incorporated, place of business of said Frank being in said City.

J. HERBERT MERCER,
 Sheriff of the City of Richmond, Va.
 By A. J. WINGFIELD, Deputy Sheriff.

Fee \$1.50 Paid.

page 4 } And upon another day, to-wit: October 12, 1947.

Richard Harlow

v.

Tidewater Express Lines, Incorporated and Edward Swoope.

AFFIDAVIT OF THE DEFENDANT FILED IN THE
CLERK'S OFFICE.

State of Maryland,
City of Baltimore, to-wit:

This day personally appeared before me a Notary Public in the City and State aforesaid, H. R. Wilson, who being by me first duly sworn made oath that he is Secretary of the Tidewater Express Lines, Incorporated; that at the date and hour of a certain collision between an International Tractor owned by defendant company and operated by Edward Swoope and a vehicle operated by Vivian F. West, to-wit: December 15, 1946, at 1:25 O'Clock A. M., said Edward Swoope was not acting as the agent, servant or employee of Tidewater Express Lines, Incorporated, but was in custody of the Tractor being operated by him for his own uses and purposes and free from any control on the part of the owner thereof.

TIDEWATER EXPRESS LINES,
INCORPORATED

By H. R. WILSON, Secretary.

(Corporate Seal)

Subscribed and sworn to before me this 6th day of October, 1947.

HOWARD B. DAVIS,
Notary Public.

(Seal)

page 5 } And upon another day, to-wit: February 3, 1948.

Richard Harlow, Plaintiff

v.

Tidewater Express Lines, Incorporated and Edward Swoope
Defendants.

UPON A NOTICE OF MOTION FOR JUDGMENT.

On motion of the plaintiff, Richard Harlow, by his Attorney, the defendant, the Tidewater Express Lines, Incorporated, is dismissed as a defendant in this matter.

Thereupon, the defendant, Edward Swoope plead not guilty and puts himself upon the country and the plaintiff doth the like, thereupon, came a jury, to-wit: B. G. Fearnow, E. G. Wade, Jr., Ashton Vaughan, W. B. Layton, Robert R. Jeter, R. J. Isbell and Arthur A. Dugdale, who being sworn the truth upon the premises to speak, having fully heard the evidence, being

See the original action

instructed by the Court, and having heard argument of counsel, retired to their room and after some time returned into Court and returned the following verdict, to-wit: We, the Jury, on the issue joined fine for the plaintiff and fix his damages at Twenty-Five Hundred Dollars (2500.00.)” Signed B. G. Fearnow, Foreman.

And the jury being discharged, the defendant, Edward Swoope, by his Attorney, moved the Court to set aside the verdict of the Jury as being contrary to the law and the evidence, for misdirection of the Court by refusing to give Instruction No. 2 for the defendant; which motion of the defendant, the Court overruled, to which ruling of the Court the defendant excepted.

Whereupon, it is the judgment of the Court that the page 6 } Plaintiff. Richard Harlow recover of the defendant, Edward Swoope, the sum of Twenty-Five Hundred Dollars (\$2500.) and his cost by him about his suit in this behalf expended.

LEON M. BAZILE, Judge.

And upon another day, to-wit: February 17, 1948.

THE COMMONWEALTH OF VIRGINIA,

To The Sheriff of the City of Richmond—Greeting:

WHEREAS, On the 17th day of February, 1948, a writ of *fiery facias* was sued out of the Clerk's Office of the Circuit Court of the County of Hanover, by Richard Harlow, to the Sheriff of the City of Richmond, directed, returnable to the 3rd, Monday in April, 1948, in favor of the said Richard Harlow against Edward Swoope—for \$2500.00, with legal interest thereon from the 3rd. day of February, 1948, till paid, and \$20.90 costs; and a suggestion having been filed in the Clerk's Office aforesaid, by the said Richard Harlow, that by reason of the lien of—said writ of *fiery facias* there is a liability on Fidelity and Casualty Company of New York.

THEREFORE, We command you that you summon the said Fidelity and Casualty Company of New York to appear before the Judge of our Circuit Court of the County of Hanover at the Courthouse thereof, on the first day of the next regular term of our said Court (being the 15th day of March, 1948 next,) to answer the said suggestion. And have then there this writ.

Witness, C. W. Taylor, Clerk of our said Court, at the Courthouse, this 17th day of February, 1948 and in the 172nd. year of the Commonwealth.

C. W. TAYLOR, Clerk.

page 7 {

(SHERIFF'S RETURN)

Executed in the City of Richmond, Virginia, February 19, 1948, by delivering in duplicate (With a Fee of \$2.50) a copy of within Garnishee Summons to Thelma Y. Gordon, Secretary of the Commonwealth of Virginia and the person in charge of said office, and as such the Statutory Agent for Fidelity and Casualty Company of New York.

J. HERBERT MERCER,

Sheriff of the City of Richmond, Va.

By A. J. WINGFIELD, Deputy Sheriff.

Fee \$1.50 Paid.

Not finding Edward Swoope or any member of his family upon whom legal process could be served at his usual place of abode. Executed in the City of Richmond, Va. March 8, 1948 by leaving a copy of within Garnishee Posted on the Front Door of his Residence 406 North Lombardy Street, that being his usual place of abode.

J. HERBERT MERCER,

Sheriff of the City of Richmond, Va.

By A. J. WINGFIELD, Deputy Sheriff.

And upon another day, to-wit: March 15, 1948.

Richard Harlow Plaintiff

v.

Edward Swoope and Fidelity and Casualty Company of New York Defendants.

AFFIDAVIT DENYING AGENCY, OPERATION AND CONTROL.

This day personally appeared before me, Emma E. Gerhardt, a Notary Public in and for the City of Richmond, State of Virginia, Alex. H. Sands, Jr., who, after being first duly sworn, deposes and says:

page 8 { I am Attorney and Agent for the Fidelity and Casualty Company of New York and Tidewater Express Lines, Incorporated, for the purpose of making this Affidavit.

From the investigation which has been made, it appears that Edward Swoope was not at the time complained of acting as the Agent, employee or servant of Tidewater Express Lines,

Incorporated, nor was the Tractor being driven by the said Edward Swoope, either operated, controlled or directed by Tidewater Express Lines, Incorporated, at the time.

The Tractor operated by Edward Swoope was taken by him without permission of any kind from Tidewater Express Lines, Incorporated, and against their express instructions of said Edward Swoope and used by him on a mission or missions of his own.

ALEX. H. SANDS, JR., Affiant.

Subscribed and sworn to before me this 1st. day of March, 1948.

EMMA E. GERHARDT,
Notary Public.

My Commission expires the 22nd. day of March, 1950.

Richard Harlow, Plaintiff,

v.

Edward Swoope and Fidelity and Casualty Company of New York, Defendants.

ANSWER TO GARNISHMENT.

Comes now the garnishee, The Fidelity and Casualty page 9 { Company of New York, and says that there is no liability on the Fidelity and Casualty Company of New York as the debtor of Edward Swoope.

ALEX. H. SANDS, JR.
Counsel.

STATE OF VIRGINIA,
City of Richmond, to-wit:

This day personally appeared before me, EMMA E. GERHARDT, a Notary Public in and for the State of Virginia, City of Richmond, Alex. H. Sands, Jr., who first being duly sworn, deposeth and saith that he is Attorney for the garnishee, The Fidelity and Casualty Company of New York, and as such is its duly authorized agent for the purpose of making this affidavit; that he has read the foregoing answer and statement of the garnishee and is familiar with the statements therein contained, which on information and belief he verily believes to be true.

ALEX. H. SANDS, JR., Affiant.

Sworn to and subscribed before me this 1st. day of March, 1948.

EMMA E. GERHARDT,
Notary Public.

My Commission expires the 22nd. day of March, 1950.

page 10 } And upon another day, to-wit: August 8, 1949.

Richard Harlow, Plaintiff,

v.

Edward *Swope* and Fidelity and Casualty Company of New York, Defendants.

ORDER.

Wherefore there was heretofore rendered in this Court a Verdict in favor of Richard Harlow against Edward *Swope* on February 3, 1948, in the sum of Twenty-Five Hundred (\$2500.00) Dollars, with interest thereon at the rate of Six per centum per annum, and wherefore heretofore a garnishment was brought on said judgment against the Fidelity and Casualty Company of New York; and the Court having heard evidence on the garnishment, and memorandums having been submitted to the Court by the plaintiff and the defendant, through counsel, and now the Court being advised of its judgment, it is considered by the Court that the plaintiff, Richard Harlow, does recover against the defendant, Fidelity and Casualty Company of New York the sum of Twenty-Five Hundred (\$2500.00) Dollars, with interest thereon to be computed at the rate of Six per centum per annum from the 3rd, day of February, 1948, until paid, and his costs by him about his suit in this behalf expended, to which Action of the Court, the defendant, by Counsel, excepted and objected.

And the defendant, Fidelity and Casualty Company of New York, having indicated its intention to apply to the Supreme Court of Appeals for a writ of error from and *supersedeas* to said judgment, upon motion of the said Fidelity and Casualty Company of New York, by Counsel, and upon due and timely notice to the plaintiff, through Counsel, the execution
page 11 } of said judgement is suspended for a period of Sixty (60) days from the date of the entry of this Order, provided that the Fidelity and Casualty Company of New York, or some one for it within 15 days from the date of the entry of this order, shall enter into a bond in the penalty of \$500.00, the security to be approved by the Clerk of this Court, conditioned and payable as the law directs.

It is further ordered that the written opinion of the Court heretofore filed herein on 26th of July, 1949 be and the same is hereby made a part of the record in this cause.

Enter:

LEON M. BAZILE, Judge.
8 August, 1949.

page 12 } Richard Harlow

v.

Edward Swoope and the Fidelity and Casualty Co. of New York.

George E. Haw and F. B. Parker for the plaintiff.

Cliff R. Skinner for the defendant Swoope Alexander H. Sands, Jr., for the defendant Fidelity and Casualty Co. of N. Y.

OPINION OF THE COURT.

The defendant Swoope driving a tractor owned by The Tidewater Express Lines, a freight carrier collided with the rear end of the car in which plaintiff was riding in the northbound passing lane on U. S. Highway No. 1. in Hanover County at the intersection of the Elmont Road. The plaintiff was injured, sued Swoope therefor in this Court and recovered a judgment against him for \$2500.00. Execution was issued on said judgment and returned "no effects found" by the Sheriff of the City of Richmond, the jurisdiction in which Swoope has his legal residence.

The Tidewater Express Lines is a licensed freight carrier engaged in both intrastate and interstate commerce. The truck and trailer in question were insured by the *Fidelity* and Casualty Company of New York, an insurance company licensed to do business in Virginia.

This is a garnishment proceeding against Swoope and said insurance carrier to compel the said insurance carrier to pay the judgment heretofore recovered against Swoope.

The policy in question provided so far as is applicable here "III. Definition of Insured. The unqualified word "insured" wherever used includes not only the named insured, but also, with respect to divisions 1 and 2 of the definition of hazards, any person while using the automobile and any person or organization legally responsible for the use thereof, provided

page 13 } the declared and actual use of the automobile is"
pleasure and business, or "commerical," each as defined herein and provided further the actual use is with the permission of the named insured, and, with respect to division 3 of the definition of hazards, any executive officer of the named insured * * *"

This provision was inserted in the policy under the compulsion of Section 4326A of the Virginia Code of 1946 (Acts 1934, p. 545.) That Section so far as is applicable here provides: "No such policy shall be issued or delivered in this State, to the owner of a motor vehicle, by any corporation or other insurer authorized to do business in this State, unless there shall be contained within such policy a provision insuring such owner against liability for damages for death or injuries to person or property resulting from negligence in the operation of such motor vehicle in the business of such owner or otherwise, by any person legally using or operating the same with the permission express or implied of such owner."

The rule by which this case must be decided is thus stated in *State Farm Mutual Ins. Co. v. Cook*, 186 Va. 658, 666-7, 43 S. E. (2nd.) 863 (1947) a well reasoned opinion written by the late Mr. Justice Browning before his death and which was adopted as the opinion of the Court (186 Va. 661. note): "The trend in Virginia of Legislative Enactment as well as judicial determination and construction has been towards liberalizing and broadening the coverage provisions of liability insurance policies. That this is so is evidenced by the enactment by the State Legislature in 1944 of what is known as the Safety Responsibility Act, Code of Virginia (Michie) Cum. Supp. 1946. Sec. 2154 (a12.)

"(6) No statement made by the insured, or on his behalf, and on violation of the terms of the policy, shall page 14 } operate to defeat or avoid the policy so as to bar recovery within the limits provided in this Act."

"But even so, regard must be had to the words used in the statute to determine the meaning of the statute, and the meaning as determined should be given effect. The permission 'express or implied' from the owner, necessary to make the operator of the car an additional assured, must be either an express permission or a permission reasonably to be implied from the circumstances of the case.

"A case of implied permission is *Hinton v. Indemnity Ins. Co.*, 175 Va. 205, 8 S. E. (2nd.) 279 where it (is) said (pp. 213-14;

"Under the Virginia Statute, the permission of an assured in a liability insurance policy, to bind the insurance company, may be either express or implied. To be express, it must be of an affirmative character, directly and distinctly stated, clear and outspoken, and not merely implied or left to inference. On the other hand, the correlative word "implied" as defined in Webster's New International Dictionary (2nd. Ed.), means inferential or tacitly conceded'. It involves an inference arising from a course of conduct or relationship between the parties, in which there is mutual acquiescence or lack of objection under circumstances signifying assent. An implied permission is not, therefore, confined above to affirmative action.' * * *

“ ‘The word ‘permission’ has a negative rather than an affirmative implication, that is, a permitted act may be one not specifically prohibited as contrasted to an act affirmatively and specifically authorized. That it appears in automobile policies would indicate that any one having permission or color of authority is included within the clause. * * * *Bruner v. Employers’ Liability Assur. Co.* (1935) 318 Pa. 440, 177 A. 826, 829.” (Italics Supplied.)

page 15 } It is clear that there was no express permission given by the named insured to Swoope to operate the Tractor on the occasion in question. Whether or not he had implied permission to operate the same at such time must be determined from a review of the evidence in the light of the statute and the rule above stated.

At the time of the collision which resulted in the judgment against Swoope, he was employed by the Tidewater Express Lines, Inc. although not on duty for the Corporation at the time. He was employed as a Truck driver and had been working for the Corporation since 1 October, 1945, and had been driving for the Corporation continuously from that time until the date of the collision. The date of the collision was 14 December, 1946. During that time he had operated four or five or more tractor trucks for the corporation. He had received the tractor-trailer in question when it had traveled only nine-miles, and at the time of the collision it had been run around 20,000 miles. The truck was operated about 4,000 miles per month.

Swoope lived at 3126 West Cary Street in the City of Richmond. *Prillman*, the freight agent in charge of the corporation’s business in Richmond, lived at 2806 West Cary Street, three blocks from Swoope.

From the time Swoope started working for the Corporation to the time of the accident the custom had been that the truck was in Swoope’s charge “from Saturday night to Monday morning” and he drove the truck to the vicinity of his residence and parked it in a vacant lot near his home.

Swoope and *Prillman* were friendly enough to play golf together, and drink beer together in a confectionary near where they lived.

The printed rules signed by *Prillman* and posted on page 16 } the Bulletin Board of the Tidewater Express Line required all trucks to be parked at the Davis-Palmore Truck Service at 20th and Franklin Streets in the lot adjoining the same and stated that: “Drivers found parking trucks at any other place will be immediately dismissed.”

Prillman testified his drivers drove the trucks in in the afternoon and after loading them were allowed to park them where the drivers wished to park them. On cross examination, he was asked: “Q. They could put it where it was convenient to

them? A. With my permission. Q. With your permission, so you placed the truck in his entire charge from the time he left your place until he came back? A. That is right."

He further testified that he knew that Swoope was parking the truck on the vacant lot near his house.

Swoope testified that the tractor could be *disconnected* from the trailer in about forty-five seconds and that he had on eight to ten previous occasions disconnected the tractor and driven it on various trips. This would be about once every two weeks since he had had this truck under his control for about five months.

On these occasions Swoope frequently took other drivers employed by the Tidewater Express Lines along with him in the disconnected tractor.

Prillman had never been with Swoope on such occasions, but he frequently drove *Prillman* from the office to his (*Prillman's*) home after which he drove the truck to the place where he parked it in the lot near his home.

Swoope testified that he was the custodian of the truck from Saturday afternoon until he started out on Monday morning. Asked where he kept the truck during the week, he said: "Well if I came home in time; if I got back in town before 5 o'clock

I would load it and take it home: If I got back too
page 17 } late to load it I would take it home with me. "He

was then asked: "Q. Then you kept it practically every night whether it was loaded or unloaded, depending on whether you got back in time enough to get it loaded or not?," to which he answered "Yes, Sir."

Both Swoope and *Prillman* testified that he had never been given permission to use the tractor for his, (Swoope's) personal use. Swoope testified that the Company had regulations prohibiting the use of the equipment for personal use of the drivers. He was then asked by the Court what was the form of that instruction to him. To which he answered: "I don't recall for sure, but I believe they had written orders on the bulletin board." *Prillman* testified "Well of course, you have rules set down by your home office, as well as rules you can make of your own. Now, each and every driver that was employed was refreshed on these rules set down by the Company, which would stipulate that the truck would be used expressly for delivering of freight: never to be used for personal use under any circumstances; if they had specific places to park them, if on a week-end we would give permission for them to carry the trucks home in order for them to get an early start Monday morning. Of course I knew where each and every driver lived and it was my privilege to go by and check to see if these trucks were parked at these places. Of course, I had no reason to doubt each one's honesty and integrity, but I have gone by and checked on them a number

of times and found the trucks parked where they were supposed to be parked." He was then asked: "Q. Mr. *Prillman*, these written instructions you referred to, did they have within them any provision as to personal use by the drivers?" To which he answered: "Yes. it was posted on the bulletin page 18 } board and it was in there that they were not to be used for personal use, and also a copy of that went to our Baltimore Office as well as to the Insurance Company." He was then asked whether he had supplemented the written instructions with verbal instructions, to which he answered: "All instructions were more or less along the line of the notice posted on the bulletin board; any telling was just a reminder; and to be sure it was understood they were not to be used for personal use, and if known to be used for personal use that they were subject to immediate dismissal." The Court asked *Prillman* whether he had specified in the written rule that no truck or tractor was to be used for personal use. He answered: "The rule was that no truck was to be used for personal use." The Court then asked him: "Was that what the rule said, that no truck was to be used for personal use? To which he answered: "Yes." He was then called upon to produce for the record a copy of this written rule which he later filed. These instructions read as follows: "Notice to all Drivers: Upon your return to Richmond after completing a trip you are to park your truck at Davis-Palmore Truck Service located at Twentieth and Franklin Streets in the lot adjoining the same. Drivers found parking trucks at any other place will be immediately dismissed.

(Signed) P. P. *PRILLMAN*, Agent."

It is manifest that both *Prillman* and Swoope testified falsely as to the contents of the written rule or notice which was posted on the bulletin board. If they testified falsely as to this—as they manifestly did—what credence can be put in their testimony that the prohibition against the use of the truck for personal purposes was given also by verbal instructions?

The contents of the written rule were of the greatest materiality.
page 19 } If it had contained what *Prillman* and Swoope testified it did there could be no doubt about the fact that no recovery could be had against the defendant insurance company.

The written rule when produced in Court shows that it contained no such provision as that which *Prillman* and Swoope said was in the rule.

Because of this it is the opinion of the Court that the defendants have not established by any satisfactory proof, or by

proof that can be relied on, to show that there was any express prohibition against the use of the tractor by Swoope for his own purposes. This is strengthened by the fact that there was no prohibition against such use in the written rule posted on the bulletin board; and that after the accident for which the judgment was recovered against Swoope instead of "immediately dismissing" him, *Prillman* called the Baltimore Office and got permission to keep Swoope in the employment of the Tidewater Express Lines, Inc.

When we consider all of the facts and circumstances connected with this case; the fact that the tractor truck was entrusted to the care of Swoope every night in the week, and the keys left in his possession; that the tractor could be disconnected from the trailer in less than one minute; that the tendency of the average person having the keys to a motor vehicle is to operate the same just as Swoope had been operating the tractor in question eight or ten times for his own purposes over a period of several months before the accident occurred: that *Prillman* lived within three blocks of where the truck was parked in a thickly settled community where he would be likely to hear of Swoope's expeditions with the trailer and when he had positive proof of the fact that

Swoope had been using the tractor for personal trips page 20 } instead of promptly dismissing, he obtained authority to keep Swoope in the employment of the Company for which *Prillman* was the Richmond manager, it is the conclusion of the Court that Swoope had implied permission to operate the tractor as he did.

As was said by the Court in *State Farm Mutual Ins. Co. v. Cook* 186 Va. 658, 667, 43 S. E. (2nd.) 863; and in *Hinton v. Indemnity Ins. Co.*, 175 Va. 205, 215, 8 S. E. (2nd.) 279:

* * * The Correlative word 'implied' as defined in Webster's New International Dictionary (2nd. Ed.) means 'inferential or tacitly conceded.' It involves as inference arising from a course of conduct or relationship between the parties, in which there is mutual acquiescence or lack of objection under circumstances signifying assent. An implied permission is not, therefore, confined to affirmative action.

"The word 'permission' has a negative rather than an affirmative implication: That is, a permitted act may be one not specifically prohibited as contrasted to an act affirmatively and specifically authorized. That it appears in automobile policies would indicate that any one having permission or color of authority is included within the clause * * *"

"Certainly one who is entrusted with the keys to a motor vehicle and the custody of that vehicle has the color of authority to use the same, especially where that person is in the employment of the owner and employed to drive that vehicle.

It is, therefore, the opinion of the Court that the Plaintiff is entitled to recover against the defendant Insurance Company. Counsel will prepare the order carrying this opinion into effect.

page 21 } Index.

page 22 } I, Leon M. Bazile, Judge of the Circuit Court of Hanover County, Virginia, after notice in writing to all parties in the above entitled cause, do hereby certify that the following testimony, evidence, proceedings and rulings of the Court as hereinafter denoted in a stenographic report herein included, containing 42 pages, with the initials of the Trial Judge "L. M. B." written on the first and last pages thereof together with the exhibits thereto attached, to-wit:

2 Exhibit "A." Execution on said Judgment returned "No Effects."

The original of which are to be transmitted to the Supreme Court without being copied. are all of the testimony, evidence, exhibits, proceedings and rulings of the Court that were introduced orally before me on the hearing of this cause before the Court on the 24th day of March, 1948.

And I further certify that said stenographic report clearly shows all of the testimony, evidence, rulings, objections and exceptions with the grounds thereon made on the hearing of said cause before the Court, and clearly shows all of the other incidents on said hearing.

LEON M. BAZILE, Judge of
the Circuit Court of Hanover
County, Virginia.

page 23 } Virginia:

In the Circuit Court of Hanover County.

Richard Harlow, Plaintiff,

v.

Edward Swoope and The Fidelity and Casualty Company of
New York, Defendants.

Transcript of evidence taken before the Honorable Leon Bazile, Judge of said Court at Hanover Court House, Virginia, March 24, 1948.

Appearances: George Haw, Esq., and F. B. Parker, Esq., counsel for the Plaintiff; Cliff R. Skinner, Esq., counsel for the defendant, Edward Swoope; Alexander H. Sands, Sr., Esq., and

Alexander H. Sands, Jr., counsel for the defendant The Fidelity and Casualty Company of New York.

The Court: All right gentlemen what are you offering in evidence?

Mr. Haw: We would like to first stipulate that the execution was issued in this case—

The Court: And returned no effects.

Mr. Haw: And although it has not yet been returned to the Clerk's by the Sheriff that the return on the execution, which is to be made a part of the record will show that there are no effects.

Mrs. Sands, Jr.: We will accept Mr. Haw's statement. The execution will be made a part of the record and will speak for itself.

The Court: Who has that execution now?

page 24 } Mr. Haw: The Sheriff of Richmond has never returned it. Also the policy is introduced as part of the record.

The Court: What Company is the policy issued by?

Mr. Haw: The policy was issued by the Fidelity and Casualty Company of New York and expired January 1, 1948, insuring the Tidewater Express Lines, Inc.,

The Court: What is the number of the policy?

Mr. Haw: The policy is Number SA 11025 and the policy is date—was issued on January 2, 1947.

The Court: What is the penalty of it?

Mr. Haw: The penalty of the policy is—Mr. Sands I expect you are a little more familiar with this than I am, what is the penalty?

Mr. Sands, Jr.: Bodily injury \$25,000 for each person and \$50,000 for an accident.

The Court: The stenographer will marked that received in evidence as Exhibit 1.

Mr. Sands: We would like the usual permission to file a photo-static copy and withdraw the original if the Court please?

The Court: That will be permissible. The pertinent portions of this policy read as follows:

“III DEFINITION OF “INSURED.” The unqualified word “insured” wherever used includes not only the named insured but also, with respect to divisions 1 and 2 of the Definition of Hazards, any person while using the automobile and any person or organization legally responsible for the use thereof, provided the declared and actual use of the automobile is
page 25 } “pleasure and business” or “commercial,” each as defined herein, and provided further the actual use is with the permission of the named insured and, with respect to

divisions 3 of the Definition of Hazards, any executive officer of the named insured. The provisions of this paragraph do not apply:

(a) to any person or organization with respect to bodily injury to or death of any person who is a named insured;

(b) to any person or organization with respect to any trailer while used with any automobile not covered by like insurance in the company;

(c) to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station, or public parking place, with respect to any accident arising out of the operation thereof;

(d) to any employee of any insured with respect to any action brought against said employee because of bodily injury to or death of another employee of the same insured injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such insured;

(e) under division 2 of the Definition of Hazards, to the owner of the automobile or any employee of such owner;

(f) under division 3 of the Definition of Hazards, to any executive officer with respect to any automobile owned in full or in part by him or a member of his household."

page 26 } Mr. Haw: Are there any other factual matters we can agree on?

The Court: When did this accident happen? Can we agree on that?

Mr. Haw: December 14, 1946; that is the wrong policy, this accident happened in 1946. What is the date of the policy?

Mr. Sands, Jr.: If that is true this is an extension of that policy. Your Honor, Mr. Prillaman tells me, and I know that is correct, that these policies have to be renewed as of January 1 of each year, as I understand. I requested that they furnish me the policy in force and effect at the time of this accident and this is what was given me.

The Court: Do you vouch that as being the policy in force at the time of this accident?

Mr. Sands, Jr.: Yes, sir.

The Court: And that is so stipulated?

Mr. Sands, Jr.: That is correct. We will stipulate this policy was in force covering this equipment at the time of this accident.

Mr. Haw: And was renewed as of January 1, 1947?

Mr. Sands, Jr.: Yes, sir.

MR. EDWARD SWOOPE,
the first witness, called by the plaintiff, being first duly sworn,
testified as follows:

DIRECT EXAMINATION.

By Mr. Haw:

Q. Is your name Edward Swoope?

A. Yes sir.

page 27 } Q. Mr. Swoope were you the driver of a tractor of
the Tidewater Express Lines, Inc., which on the morn-
ing of December 14, 1946 ran into an automobile driven by Mr.
West and in which Richard Harlow was riding as a passenger?

A. You mean I was the driver?

Q. Yes.

A. Yes.

By the Court: That is the accident that happened at the
intersection of the Elmont Road?

A. Yes sir.

By Mr. Haw:

Q. That is the same accident that resulted in a judgment
against you in favor of Richard Harlow heretofore entered in
this Court, is it not?

A. Yes sir.

Q. And that judgment was rendered—what day was it—
have you got the papers there?

The Court: The Court will take judicial notice of its *on* records.
The case was tried February 3, 1948, I suppose the judgment
was entered that day.

Mr. Haw: February 3, 1948, for \$2500.00. It is understood,
your Honor, that we are calling Mr. Swoope as an adverse
witness?

The Court: Yes I understand that.

By Mr. Haw:

Q. On that judgment there was issued from the Clerk's Office
of the Circuit Court of Hanover County on February
page 28 } 17, 1948, an execution and garnishment against you,
was there not.

Mr. Sands, Jr.: I want to object to that question; I want to
object to him calling him as an adverse witness. I submit that
his interest is not adverse in this case, this is a garnishment
proceeding on a judgment obtained against this witness. If

Mr. Edward Swoope.

anything he is testifying against his own interest. I submit that Mr. Haw has not summoned him as an adverse witness.

Mr. Haw: I had him summoned but it was not executed.

The Court: I will reserve decision on that question until later, I will determine that question later.

Mr. Sands, Jr.: I object to the examining of him as an adverse witness I object to Mr. Haw's examining him as an adverse witness and asking him leading questions.

The Court: I think he should proceed to examine him in the regular manner.

Mr. Haw: Then it is understood I am calling him as an adverse witness, and the question of whether or not he is an adverse witness is a matter for the Court to determine at a later date.

The Court: You will proceed to examine him as if he were your witness until the Court rules.

At this point the last preceding question was read to the witness by the reporter.

The Court: That has already been admitted, that the execution was issued and that the execution is going to be returned "No effects found."

Mr. Haw: I just wanted to hook them up.

page 29 } The Court: And he admits that he is the gentleman the judgment was rendered against.

By Mr. Haw:

Q. Were you an employee of the Tidewater Express Lines, Inc., on the 15th day of December 1946, at the time of this accident?

A. I was working for them, but I was not on duty at that time.

Q. I understand that, I am simply trying to get your employment. How long had you been working for Tidewater?

A. I went to work on October 1, 1945.

Q. In what capacity?

A. As a truck driver.

Q. And had you driven trucks for them constantly since October 1945, up to the date of this accident?

A. Yes.

Q. How many different trucks had you operated for them?

A. I don't recall, it has been four or five, possibly more.

Q. This particular unit you were driving on that date, how long had you been operating that for them?

A. I don't remember exactly how long. It had 9 miles on it when I started operating it.

Q. And how many miles did it have on it at that time?

Mr. Edward Swoope.

A. Right around 20,000.

Q. About how many thousand miles a month did you drive in that tractor?

A. Well I don't recall, I guess it would be about page 30 } approximately 4,000, I guess.

By the Court: Where did you operate it to?

A. From Richmond to Fredericksburg, sometimes Quantico, Belvoir, Alexandria, and Washington and once in a while to Baltimore.

By Mr. Haw:

Q. You had been driving this truck, as I understand, approximately five months on the basis of 4,000 miles a month, is that right?

A. I don't know, I haven't figured it up, I don't even know whether the truck was five months old.

Q. It would be something around that wouldn't it?

A. It had around 20,000 miles on it.

Q. Where do you live?

A. 406 Stuart Circle.

Q. In Richmond, Va?

A. Yes.

By the Court: Where did you live at that time?

A. 3125 W. Cary, St., Richmond.

By Mr. Haw:

Q. Did you come home on week-ends?

A. Yes.

Q. And when did you leave on your trips on the following week?

A. It depends on where my first stop would be.

Q. Did you leave on Monday morning?

A. Yes I left home Monday morning, the time would depend on where my first stop was.

page 31 } Q. When you came home on week ends did you come in the truck?

A. Yes.

Q. And where was the truck kept on week ends while you were at home?

A. I had been keeping it in a field next to the house and they started fencing that off to start building a furniture store, and at that time I kept it across the street behind a Sunoco Service Station.

Mr. Edward Swoope.

Q. From the time you brought the truck home on week ends until you left Richmond on Monday morning, in whose charge was the truck?

A. I was allowed to take the truck home.

Q. Were you in charge of it over the week ends?

A. How do you mean?

The Court: Were you responsible for its safe keeping and seeing that nothing happened to it?

A. Yes I kept a look out for it.

Q. Had this been the custom of the company in regard to your having charge of the truck over the week ends from the time you started working for them up until the date of this accident?

A. We usually took it home—

Q. You mean that you took it home?

A. Yes, I can only speak for myself.

Q. As I understand from the time you started working for the Tidewater Express Co., to the time of this accident, the custom had been that the truck was in your charge from Saturday night to Monday morning, and that you parked it on a vacant lot near your home, is that right?

A. Yes.

page 32 } By the Court: Was that truck loaded or unloaded on week ends?

A. We loaded the truck on Saturday morning.

Q. Then you took it home loaded?

A. Yes around Noon Saturday.

Q. What was the truck ordinarily loaded with?

A. Common freight of all kinds, that is anything from stoves to canned foods; anything that the people would buy up the road, we would haul it to them.

Q. How did you keep thieves out of the truck?

A. The truck had locks on them.

By Mr. Haw:

Q. We have been speaking of trucks, as a matter of fact, Mr. Swoope, were you driving a truck or what is known as a tractor and trailer?

A. It was a tractor and trailer.

Q. I understand that a tractor and trailer is a power unit, and this unit has a tractor to which a trailer is hooked by means of a connection and the trailer carries the goods and the tractor merely pulls the trailer is that right?

A. Yes sir.

Mr. Edward Swoope.

Q. You told the Judge as I understand it, that the custom was that you would bring the truck down on Friday night—

A. No Saturday.

The Court: You would bring it in on Saturday morning and the trailer would be loaded and then you would take the trailer and tractor to this vacant lot and park it there until page 33 { you went out on the following Monday morning is that right?

A. That is right.

By Mr. Haw:

Q. On the occasion of this accident were you operating this tractor and trailer—

A. No just the tractor.

By the Court: The tractor can be taken apart from the trailer after it is loaded?

A. Any time, you see this trailer has little dollies that run down that hold it up and you can then pull away from the trailer.

Q. Is that very easily done?

A. Yes it takes about 45 seconds.

By Mr. Haw:

Q. During the time that you had been driving for these people from October 1945, up until the date of this accident, had you on other occasions taken the tractor out and used it during the week ends?

A. Yes.

Q. About how many times had you taken it out?

A. I don't recall exactly, it wasn't so many times.

Q. But you had taken it a good many times, hadn't you?

A. Not a good many a few times—8 or 10 times.

Q. 8 or 10 times?

A. Approximatley that, I wouldn't say for sure.

Q. On this particular night or morning that this accident occurred you were, as I understand it, using it for your—
self?

page 34 { A. Yes.

By the Court: Had you ever taken any employee of the Tidewater Trailways on any of these 8 or 10 trips you made in this tractor?

A. You mean on week ends.

Q. Yes.

A. Yes I had the driver with me at the time of the accident.

Mr. Edward Swoope.

Q. You had a Trailway employee with you at the time of this accident?

A. Yes sir.

Q. What was his name?

A. Helbert Hambrick.

Q. Had you ever taken any other persons connected with Tidewater Trailways out on any of these trips?

A. Yes sir I have taken Garland Moore.

Q. Who was he?

A. He was a driver at the time, he had quit and Hambrick was working.

Q. Had you ever taken any of the office force of the Tidewater Trailways on any of these trips?

A. No the only time they were in the truck was when I took Mr. Prillaman home.

Q. In the tractor?

A. I took him home in the whole thing, I never took him out in just the tractor. You see he lives in the 3100 block West Cary Street, which is three block west of where I live, he lives at the Boulevard and Cary.

Q. Who was Mr. Prillaman?

page 35 { A. He was the agent for the Tidewater Express Company.

By Mr. Haw:

Q. Did you visit Mr. Prillaman?

A. Very seldom that I saw him off duty.

Q. Did he ever visit you?

A. No.

Q. Didn't you and Mr. Prillaman play golf together sometimes?

A. Yes sir.

Q. How often?

Mr. Sands, Jr: I object to any questions as to what the personal relationship was between them, as to playing golf or any other form of entertainment, that evidence is irrelevant unless connected in some way with the use of this truck?

The Court: I can't tell what is relevant and irrelevant until you get the whole thing in, of course, it has to be connected up in some way, or then it goes out.

Mr. Sands, Jr.: We note an exception for the reasons stated.

By Mr. Haw:

Q. Did you and Mr. Prillaman go around otherwise than to play golf?

Mr. Edward Swoope.

A. No once or twice I had met him in the drug store across the street, by chance, not the drug store either, by the confectionery, and we might have drank a beer or two.

Q. How far were you living from where Prillaman lives?

The Court: He said three blocks.

Q. Did Mr. Prillaman know where the tractor and
page 36 } trailer were kept over week ends?

A. Yes sir. Do you mean did he know where it was supposed to be parked?

Q. Yes.

A. Yes.

Q. How frequently did you see him during week ends?

A. I don't know I would go three or four months and not see him on week ends.

Q. Had it been your custom to use this tractor or use the tractor in your charge on occasions from the time you commenced working for the company until this accident happened?

Mr. Sands, Jr.: If your Honor please, I have refrained from from objecting to the form of these questions, but all of them are leading.

The Court: Yes, you can't lead him Mr. Haw. When did you first use the tractor on your own business?

A. I don't know.

Q. Or your own pleasure?

A. I don't know.

Q. How long would you say it was before this accident?

A. I don't recall.

Q. Would you say as much as six months?

A. I really don't remember, it might have been a month before or might have been six months, I couldn't say.

By Mr. Haw:

Q. Had you ever used the other tractors you drove
page 37 } before this one for your own purposes on week ends?

A. I don't recall whether I ever used one of them before or not, I couldn't say for sure.

Q. But you had used this tractor some 8 or 10 times?

A. Yes I used that one.

Q. Within the 5 months you had it?

A. If it was five months.

Q. This vacant lot that you parked it on, who did that belong to?

A. I don't know.

Mr. Edward Swoope.

Q. You picked the place out yourself to park the tractor?

A. Yes sir.

Q. You didn't have any arrangement with the owner of the lot?

A. No sir, most anyone that wanted to park an automobile in there or whatever they had and nothing was ever said about it.

Q. It was just a vacant lot, nobody had in charge and as a matter of convenience to you you parked the tractor there?

A. It was not being used.

Q. I say as a matter of convenience you parked the tractor there?

A. Yes.

Questions by the Court:

Q. Now from Saturday morning when that truck was delivered to you, until you started out on your trip the following Monday morning you were the sole person in charge of it, were you not?

A. Mr. Prillaman if he wanted could have come up and taken it from me, there were two sets of keys.

page 38 } Q. Did he ever come up and take it from you?

A. No.

Q. They always let you be custodian from Saturday until you started out on Monday morning?

A. Yes.

By Mr. Haw:

Q. During the week where did you keep that truck?

A. Well if I came home in time, if I got back in Town before 5 o'clock I would load it and take it home, if I got back too late to load, I would take it home with me.

Q. Then you kept it practically every night whether it was loaded or unloaded, depending on whether you got back in time enough to get it loaded or not?

A. Yes sir.

Mr. Haw: We rest your Honor.

Mr. Sands: If your Honor please I submit that I am entitled to examine this witness as an adverse witness; this is cross examination.

Mr. Haw: If he is adverse to me, I don't know whether he is adverse to them, he is their employee.

The Court: I don't see that he is an adverse witness to Mr. Sands, I think you can proceed the usual way, the witness has not shown any disposition to falsify or anything else.

Mr. Sands: I can examine him under the rules of cross examination.

Mr. Edward Swoope.

Mr. Haw: Then he will be asking him leading questions.

The Court: I suppose you are entitled to cross
page 39 { examine him on any subject covered by Mr. Haw.
You can object, Mr. Haw, if it is improper.

CROSS EXAMINATION.

By Mr. Sands, Jr.:

Q. Mr. Swoope this lot where you parked the car was very close to your home was it not?

A. Yes sir, one house in between.

Q. That lot was selected, as I understand it by you?

A. Yes sir.

Q. Now, Mr. Swoope, isn't it a fact that the company had certain regulations concerning the use of these trucks—these tractor trailers—

Mr. Haw: I object, I didn't bring out any question about regulations.

The Court: Yes sir that is entirely new matter.

By Mr. Sands:

Q. Mr. Swoope, did the company have regulations which they imparted to the drivers concerning the use of the tractors and trailers?

A. Yes.

Q. What were those regulations with respect to using the tractor and trailer for personal use by drivers?

A. We were not supposed to use the equipment for personal use.

Q. Were there any regulations governing the drivers with reference to detaching the tractor from the trailers?

A. We could detach the tractor from the trailers, but not for personal use.

Q. Did you have instructions not to do so?

A. Yes.

page 40 { Q. Had you ever been given permission by Mr. Prillaman, the manager, to use that tractor for your personal use?

A. No, I had never asked him.

Q. You never asked him and as far as you knew that was against the rules of the company is that right?

A. That is right.

Mr. Haw: I asked the Court to strike out so much of that answer as is responsive to a leading question.

Mr. Edward Swoope.

Mr. Sands: That was specifically covered by Mr. Haw in his examination, he asked about the authorization for the use and also whether Mr. Prillaman had been with him on certain occasions.

The Court: Well it doesn't make any difference go ahead.

Mr. Sands: That is all.

Questions by the Court:

Q. Mr. Swoope, Mr. Prillaman was the general manager of of the Company, was he not?

A. No he was agent in Richmond, H. R. Wilson in Baltimore was general manager.

Q. He was in charge of company affairs in Richmond?

A. Yes sir.

Q. Did he know this tractor could be separated from that trailer in about 45 seconds, as you say?

A. Yes he knew it could be.

Q. And he knew that you had this trailer every night and on week ends?

page 41 } A. Yes.

Q. And it was with his permission and authority that you had it, was it not?

A. Yes.

Q. And he was acting in giving you that permission for the Tidewater Trailways, he was their representative in Richmond and in charge of thier business?

A. Yes.

RE-CROSS EXAMINATION.

By Mr. Sands, Jr.:

Q. And his instructions to you—

Mr. Haw: Wait a minute I object to that, it is still leading.

The Court: I haven't heard the question yet, Mr. Haw, go ahead.

By Mr. Sands, Jr.:

Q. And his instructions to you while that tractor and trailer were in your possession with reference to your use personally, were what?

A. Could you repeat that.

Q. And his instructions to you while that tractor and trailer were in your possession with reference to your use personally, were what?

Mr. Edward Swoope.

A. I was not supposed to use it for my personal use.

Mr. Sands: That is all.

By the Court:

Q. What was the form of that instruction to you?

A. I don't recall for sure, but I believe they had written orders on the bulletin board.

page 42 } Q. You think that they had written orders on the bulletin board?

A. I believe they did.

Q. You never got any personal instructions on that from Mr. Prillaman?

A. Yes, he had told us not to use the tractors for personal use. He always told a new driver just about everything that needed to be told when he hired them.

Q. Did you ever read the instructions on the bulletin board?

A. Certainly.

Q. You didn't pay much attention to them, did you?

A. I don't think I did.

Q. Did anybody else?

A. I couldn't say.

RE-DIRECT EXAMINATION.

By Mr. Haw:

Q. Did the general manager or whoever it was in Baltimore know you had this truck in charge over week ends?

Mr. Sands, Jr.: I submit that is improper that is what the manager knew.

The Court: I think the manager in Richmond was the one man delegated to have charge of that business, it doesn't make any difference what the man in Baltimore knew, it is the one in Richmond that is concerned.

By Mr. Haw:

Q. Who authorized you to take the truck home week ends and keep it in your charge over the week ends?

A. Mr. Prillaman, the agent in Richmond.

page 43 } By the Court: He authorized you to keep it during the week too, didn't he?

A. At nights, yes, if there was a four or five day holiday, I never took it home for that.

Q. Where did it stay on a four or five day holiday?

Mr. Edward Swoope.

A. They had a lot down at 20th and Franklin Street that they used to park them in.

Q. When do we have four or five days holiday, at Christmas time?

A. There is a right good size one at Christmas and at New Year.

RE-DIRECT EXAMINATION.

By Mr. Haw:

Q. Then as I understand, except for Christmas Holiday or any long holiday the truck was in your charge from the time you took it from the beginning of one week to the end of the next week is that right?

A. Just about.

Q. Did you make any effort to hide your use of the truck from Mr. Prillaman?

A. I didn't want him to know it.

Q. Did you make any effort to hide it from him?

A. How do you mean?

Q. Did you sneak around back ways?

A. I didn't go by his house.

Q. You didn't make any effort to hide it from him, outside of that?

Mr. Sands, Sr.: The witness has *has* answered that question twice.

By Mr. Haw:

page 44 } Q. The lot where you parked this truck was open to view of anybody around that section, wasn't it?

A. Yes.

Q. Prillaman or anyone else who would be around there could see you drive it away day or night?

A. Possibly they could, possibly they couldn't. I always backed the trailer in the field and you would probably glance at it and see the trailer and not even see the tractor.

Q. I am talking about when you drove the tractor away from the field, it was perfectly open wasn't it?

A. Yes, you could see it then, yes.

RE-CROSS EXAMINATION.

Mr. Sands, Jr.: That is all.

The witness stood aside.

The Court: Is there any further evidence.

Mr. Haw: That is all the evidence we have.

MR. P. R. PRILLAMAN,
a witness called on behalf of the defendant, Fidelity and Casualty
Company of New York, being first duly sworn, testified as
follows:

DIRECT EXAMINATION

Questions by Mr. Sands, Jr.:

Q. Mr. Prillaman what is your employment now sir?

A. I am the freight agent for the Tidewater Express Lines
in Richmond.

page 45 } Q. How long have you been with Tidewater in
that capacity?

A. Since September 1942, approximately 5½ years or a little
better.

Q. Under whose supervision in the City of Richmond comes
the handling of the trucks and the employment and discharge
of personnel in this area?

A. I am. Under my supervision.

Q. Now Mr. Prillaman, I believe, Mr. Swoope was in your
employ for a good while, is that correct?

A. Yes.

Q. Is he in the employ of your company now?

A. No.

Q. You are, of course, familiar with an accident out of which
this suit arose that took place on Highway Number 1?

A. Yes.

Q. Mr. Prillaman you have stated that the employment of
the drivers came under your supervision, will you state what
instructions, if any, were given drivers at the time of their em-
ployment by you in reference to use of the trucks for their personal
use, which were under your custody?

A. Well, of course, you have rules and regulations set down
by your home office, as well as rules you can make of your own.
Now each and every driver that was employed was refreshed
on these rules set down by the company, which would stipulate
that the truck would be used expressly for delivering freight,
never to be used for personal use under any circumstances; if
they had specific places to park them, if on a week-
page 46 } end—we would give permission for them to carry the
trucks home in order for them to get an early start on
Monday morning. Of course, I knew where each and every
driver lived and it was my privilege to go by and check to see if
these trucks were parked at these places, of course I had no
reasons to doubt each ones honesty and integrity, but I have
gone by and checked on them a number of times and found the
trucks parked where they were supposed to be parked.

Mr. P. R. Prillaman.

Q. Mr. Prillaman these written instructions you referred to, did they have within them any provision as to personal use by the drivers?

A. Yes it was posted on the bulletin board and it was in there that they were not to be used for personal use and also a copy of that went to our Baltimore officer as well as to the Insurance Company.

Q. Now Mr. Prillaman will you state whether or not you supplemented those written instructions by any verbal instructions of your own to your drivers and particularly to Mr. Swoope and if so what those verbal instructions were, as given by you?

A. All instructions were more or less along the line of the notice posted on the bulletin board, any telling was just a reminder, and to be sure it was understood, they were not to be used for personal use and if known to be used for personal use that they were subject to immediate dismissal.

Q. Mr. Prillaman were there in the written rules or in your verbal instructions given to your drivers and particularly to Mr. Swoope, any instructions with reference to detaching the tractor from the trailer, and if so what instructions were given?

page 47 } A. Well I think the answer to that would go back right to where the other instructions were, that no trucks were to be used for personal use either singly or together.

By the Court: Did you specify that in the written rules?

A. The rule was that no truck was to be used for personal use.

By the Court: Was that what the rules said that no truck was to be used for personal use?

A. Yes.

By the Court: Where are those written rules?

A. Posted on the bulletin board at 8 South 18th Street.

Q. Don't you have a copy of them with you?

A. No, sir.

Q. Have you stopped giving those instructions?

A. No, sir, that instruction goes yet.

Q. Are you still manager?

A. Yes.

Q. Don't you have a copy of those written rules?

A. I may have one in my file, I don't have any bulletin board at the new address.

Q. You have no instructions at this time?

A. Other than verbal.

Mr. P. R. Prillaman.

By Mr. Sands, Jr.:

Q. At the time Mr. Swoope was employed, however, both written instructions were posted and verbal instructions were given by you?

A. That is true. This goes back to 8 South 18th page 48 } Street, when we were located there.

Q. Where were you located at the time of the accident?

A. At 8 South 18th Street.

Q. And rules were posted at that time?

A. That is correct.

Q. When Mr. Swoope was permitted to take this truck home on Saturday as you state preparatory to making an early start Monday morning, the truck was left in his possession by you and for what specific purpose?

A. To enable them to get a much earlier start, rather than to have the keys locked up in the office and for me to have to go up to the place of business possibly at 8 or 8:30 and get the keys and let them start then, I would let them keep the trucks, if there was a stop say in Alexandria, they could be in Alexandria making their delivery by the time they would be able to get the keys from the office in Richmond.

Q. Your authorization to your drivers and Mr. Swoope on delivery of that tractor and trailer were to take the tractor trailer home and park it until the next trip took place, that was the extent of your instructions, as I understand, is that right?

A. That is right, and occasionally they would come in early during the week, possibly Monday, Tuesday, Wednesday or Thursday, if the driver went to Fredericksburg, he would probably be back in Richmond at 2 or 3 o'clock in the afternoon, then his trailer would be loaded for the next day's trip and he could take the tractor and trailer home in order for an early start the next morning, it wouldn't only be on week ends that he took the truck home and parked it.

page 49 } Q. But on no occasion did you instruct them to take it home except to get an early start?

A. That is right.

Q. Had you at any time up to this accident been asked by any of your drivers or by Mr. Swoope, up to the time of this collision, ask you for permission to use the tractor or tractor and trailer for personal business?

A. None ever asked for it, Mr. Swoope or any of them.

Q. Had you ever had knowledge, Mr. Prillaman, at any time prior to this accident that Mr. Swoope or any of the other drivers ever used one of these tractors or trailers on personal business?

A. No, none whatsoever.

Mr. P. R. Prillaman.

By the Court: Had you ever checked on them?

A. Yes, sir, that was part of my job.

By the Court: What time day or night, did you check?

A. No, any time, in the afternoon, night or morning.

By the Court: Did you ever find the tractor gone on these eight or ten times Swoope was using it?

A. No, sir, never.

Q. Did you ever get any report from the gossips around the neighborhood that he was using it?

A. I am sure if I had I would have let him go.

Q. The question is did you get any such report?

A. No.

By Mr. Sands, Jr.:

page 50 } Q. Had you gotten any such report—

Mr. Haw: I object to what he would have done.

By Mr. Sands, Jr.:

Q. What did you mean by letting him go?

A. I would have dismissed him.

The Court: That answer was not responsive, I asked him if he had gotten any such report—

Mr. Sands, Jr.: And he answered you no.

By Mr. Sands, Jr.:

Q. Mr. Prillaman when you received information of this collision and that Mr. Swoope was in charge of the tractor at that time that was the first instance—

Mr. Haw: I object to that as leading.

Mr. Sands: I beg your pardon that was leading.

Q. Will you state what you did—

Mr. Haw: I object to what he did that has nothing do with the permission.

Mr. Sands: I haven't finished my question yet.

The Court: Go ahead you can finish your question.

Q. Mr. Prillaman when did you first receive notice of this collision?

A. Sometime between, I would say, 10:30 and 11 o'clock on Sunday morning following the accident.

Q. And what, Mr. Prillaman, did you then do with reference to further employment of Mr. Swoope?

Mr. P. R. Prillaman.

Mr. Haw: I object to that, it has got nothing to do with the question here.

The Court: I will let it in, go ahead.

Mr. Haw: I note an exception.

A. Monday Morning I got the general manager in Baltimore—

The Court: Wait a minute don't tell what you told the general manager or what he told you.

A. Isn't that what I am going to answer? How can I answer it?

The Court: No, that is hearsay you cannot tell that, what did you do with reference to Swoope?

Mr. Sands, Jr.: If your Honor please does your Honor rule that he cannot recite—

The Court: Any conversation.

Mr. Sands, Jr.: That he reported it to the manager?

The Court: He can recite what he did, but not the conversation.

By Mr. Sands, Jr.:

Q. All right you reported it to the Manager in Baltimore, what did you do?

A. I reported it to the General Manager for instructions as to what to do.

By the Court: Now you didn't act on your own authority then?

A. No, sir, because it was a case where I was either to let him go or go beyond my authority in order to keep him on the truck.

By the Court: Did you keep him on the truck?

A. Yes, sir.

Mr. Sands, Jr.: Now, if your Honor please, I think page 52 } I am entitled to show that he kept him on the truck by authority of the home office.

The Court: All right the home office gave you authority to keep Mr. Swoope on the truck is that right?

A. Yes, sir, I called the home office and got authority from the General Manager to keep him on the truck.

Q. Did you defend him in police Court?

A. I don't think I defended him, no.

Q. Did you provide for his defense?

A. No, sir.

By Mr. Sands, Jr.:

Q. Will you state what admonition, if any, did you give Mr.

Mr. P. R. Prillaman.

Swoope, as a result of finding out he had used this tractor against company rules on this occasion?

Mr. Haw: I object to that.

The Court: No I think that comes too late, it is what he gave him before that counts.

Mr. Sands, Jr.: If your Honor please, he has testified that he gave Mr. Swoope the instructions, that he never gave him instructions to use the truck for his own personal business or had any knowledge that he was doing so, and he has testified that this is the first time it came to his knowledge that he had ever used the truck for his own personal business. Now in this late case of *State Farm Mutual v. Cooke* the point in that case was that the General Manager or owner of the truck allowed the driver to use it on his own hook after the accident and that was the point the case turned on, and I think I am page 53 } entitled to show what admonition, if any, he gave Mr. Swoope after the collision.

The Court: I will let that stay in.

A. After this accident he was severely reprimanded by the General Manager in Baltimore, as well as myself with the stipulation that if he ever should be known to use the tractor for his own use there would not be any other chance he would be immediately dismissed.

By the Court: Did he use it again?

A. Not to our knowledge.

Q. How did the General Manager in Baltimore reprimand him, did he come down to Richmond?

A. That happened in Baltimore and what he said to him I do not know.

CROSS EXAMINATION.

Questions by Mr. Haw:

Q. Mr. Prillaman, how long have you known Mr. Swoope?

A. Since October 1945.

Q. You employed him?

A. Yes.

Q. Who had he been working for before that?

A. At that time he was working as a helper on a truck for the Great Coastal Express.

Q. Where did you live at that time?

A. 2806 W. Cary Street.

Q. Where was Swoope living?

A. Well when we employed him he gave his address at 3125 W. Cary.

Mr. P. R. Prillaman.

Q. That is where his mother lives and his step father?
 page 54 } A. I don't know, I didn't know his family that well
 Q. After you knew he lived there you knew who he
 lived with, didn't you? You knew his step father was a barber
 didn't you?

A. I knew he ran a barber shop.

Q. And you knew he lived with his step father and mother?

A. I knew of them.

Q. You didn't know at the time you employed him, but you
 did know it later didn't you?

A. That is right.

Q. You live about 3 squares from where he lived?

A. I don't know, it is 28 to 31.

Q. That is three squares isn't it?

A. I don't know, I haven't stepped them off or counted them.

Q. 8 from 11 is three isn't it? Mr. Prillaman after you got to
 know Swoope you and he used to go around together didn't you?

A. The only place I have ever been with him was Laurel Golf
 Course.

Q. You have been out there with him quite a number of times,
 haven't you?

A. No, not more than a half a dozen times.

By the Court: Did you ever go in this trailer?

A. No, sir, that would have been a rather rough ride.

By Mr. Haw:

Q. Is that the only reason?

A. No, we went in an automobile.

Q. I say that is the only reason?

page 55 } A. No, we could have put straw in it and gone for
 a hay ride.

Q. Mr. Prillaman you and Swcope use to take an occasional
 beer together didn't you?

A. I drink beer occasionally, I think he has been in my comp-
 any a few times.

Q. In other words you and Swoope got to be pretty good
 friends, didn't you?

A. No.

Q. As a matter of fact you got to be such good friends that
 when he was caught in an accident joy riding in a truck, you
 didn't discharge him, did you?

A. I think that goes back to where I called the Baltimore
 office to find out whether to or not, it was not my opinion in the
 matter.

Mr. P. R. Prillaman.

Q. Even though he had done, what I assume a good many other drivers have done from time to time, you didn't discharge him?

A. No.

Q. How many drivers do you all have in Richmond?

A. Three.

Q. These trucks were in the drivers charge from the time they brought their trucks to Richmond until they took them away is that right?

A. No.

Q. Why weren't they?

A. I think that is your answer no. You cite me a case and I will give you the answer.

The Court: Don't argue with him, you can answer the question.

page 56 } By Mr. Haw:

Q. Your drivers could drive the trucks in in the afternoon and load it and then put it where they wanted to put it, couldn't they?

A. If it was loaded.

Q. They could put it where it was convenient to them?

A. With my permission.

Q. With your permission, so you placed the truck in his entire charge from the time he left your place until he came back?

A. That is right.

Q. And he was to take the truck and put it where it was convenient to him, isn't that right?

A. Yes.

Q. You knew that this boy, Swoope, was parking this truck and trailer on this vacant lot right near his house, didn't you?

A. Yes.

Q. Although he says he took it eight or ten times within five months you didn't know he was taking it, you say?

A. That is right, I didn't know it.

Q. How long have you been in this trucking business?

A. Thirteen years.

Q. Did you ever know of a truck driver, who didn't occasionally use the company's truck for his own purposes?

A. No.

Mr. Sands, Jr.: I object to the form of the question, he can ask whether he knew of his trucks, but not a truck.

page 57 } The Court: He is under cross examination, I think that is proper.

Mr. P. R. Prillaman.

Mr. Sands, Jr.: But he asked him about a truck, not his trucks.

The Court: Yes, I think it ought to be limited to his Company.

By Mr. Haw:

Q. You knew your local drivers did occasionally use the trucks for their purposes didn't you?

A. No.

Q. Didn't you just say that you didn't know of one who didn't occasionally use his truck for his own purposes?

A. I say I didn't.

Q. And you have been in the trucking business how long?

A. Thirteen years.

Q. And you never knew of one that used his truck for his own purposes?

Mr. Sands, Jr.: Let's put that question in the form that the Court suggested, that he never knew of one of his company to do that.

By the Court: You never knew of one of your trucks to be used by the driver for his own purposes is that right?

A. Without permission, no.

By the Court: Did you ever given permission for them to use the tractors for their own purposes?

A. No, sir, it was never given.

By Mr. Haw:

Q. What do you do walk around with your eyes shut and ears closed?

Mr. Sands, Sr.: I submit that is an improper question.
page 58 } The Court: No, strike that. Mr. Haw you must examine him right.

By Mr. Haw:

Q. Mr. Prillaman, weren't you with Mr. Swoope on this night that he had this accident, or this morning?

A. No.

Q. Are you sure you weren't?

A. Positive.

Q. Did you know the girl he had with him?

A. No, sir.

Q. Are you a married man?

A. Yes.

Q. Did you know the other man he had with him?

A. Yes, I employed him.

Mr. G. S. Moore.

By the Court: Did you discharge him?

A. No, sir, he quit and went back to the mines.

Q. And is now on strike I suppose?

A. Probably back on strike, he was out on strike at the time he worked for us.

The witness stood aside.

MR. G. S. MOORE,

another witness for the defendants, Fidelity & Casualty Company of New York, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Sands, Jr.:

By the Court: Where do you live?
page 59 } A. 1505 W. Main St., Richmond.

Q. Who are you employed by?

A. W. W. Duncan, Contractors.

By Mr. Sands:

Q. Mr. Moore, were you ever employed by the Tidewater Express Lines in the past?

A. Yes, sir.

Q. What was your job with them?

A. Truck driver.

Q. Where was the office located at that time?

A. 8 S. 18th Street.

Q. Will you state, Mr. Moore whether there were any rules at that time in the form of a written memorandum that the company had for their drivers, concerning the use of their trucks?

A. Yes, sir, they had rules.

Q. Where were those rules kept?

A. They were posted on the bulletin board and also told us.

Mr. Haw: I object to what they told him, because that doesn't have anything to do with Mr. Swoope.

The Court: Yes.

By Mr. Sands, Jr.:

Q. Do you recall what those rules provided as to whether the driver could not use those trucks?

Mr. Haw: If there were rules, the rules themselves are the best evidence and they ought to be filed.

page 60 } The Court: If you raise the objection I will sustain it, they have got to produce the written rules.

Mr. P. R. Prillaman.

Mr. Haw: I assume they are going to produce them, but unless they are going to produce them I object to this evidence.

The Court: All right, I will sustain the objection.

Mr. Sands, Jr.: I would like to ask the Court for permission to produce those rules, if they can be found and file them.

The Court: All right sir. I think they are the best evidence.

Mr. Sands, Jr.: We have no further questions.

Mr. Haw: That is all.

The witness stood aside.

MR. P. R. PRILLAMAN,

recalled as a witness by the Court, testified as follows:

By the Court:

Q. Have you ever driven a truck?

A. Yes, sir.

Q. Do you know whether a tractor can be disconnected from a trailer with ease and if so how long does it take to do that?

A. It depends upon the driver.

Q. If he is a skilled driver.

A. If he is a skilled driver he can drop his landing gear—I think Mr. Swoope exaggerated that a little, he cannot do it quite that fast he said 45 second it would take longer than that.

Q. How long do you say?

page 61 } A. I would say within two minutes any way.

Q. 120 seconds?

A. Yes.

Q. That is from a trailer that is loaded?

A. Either way loaded or empty, you have to run your landing gear down and release the pressure on your trailer or on your fifth wheel, and then you disconnect or release your trailer from the fifth wheel.

Q. That would be by compressed air?

A. No, by manual power.

Q. You let the thing down by a manual lift?

A. You have a crank that runs down your landing gear, then you have to release the pressure on your fifth wheel and pull this pin that connects them, and after you release those two you still have to pull your air hose and light connections.

By Mr. Sands, Sr.:

Q. In other words it was standard equipment, was it not?

A. Yes, sir.

Mr. P. R. Prillaman.

By the Court:

Q. Swoope was an experienced driver, wasn't he?

A. Yes, sir, one of the best.

Q. One of the best you had?

A. Yes, sir.

The witness stood aside.

The defense rests.

The plaintiff rests.

page 62 } Virginia:

In the Circuit Court of Hanover County.

Richard Harlow, Plaintiff,

v.

Edward Swoope and Fidelity and Casualty Company of New York, Defendants.

STIPULATION OF COUNSEL.

It is stipulated and agreed between counsel for the purpose of shortening the record and deleting immaterial matter therefrom, that at the time of the collision out of which this cause of action is alleged to have grown the following facts and circumstances are admittedly true:

1. At the time of collision Edward Swoope was operating a tractor owned by Tidewater Express Lines, Incorporated, and no trailer was attached thereto.

2. That some time prior to the collision on the night of the accident in question, Edward Swoope uncoupled the tractor from his loaded trailer, which was parked in the vicinity of his home, and was, at the time of the collision, in the company of a girl and another man, riding in the tractor with him, upon his own pleasure.

/s/ SANDS, MARKS & SANDS

/t/ SANDS, MARKS & SANDS

Counsel for Fidelity and Casualty Company
of New York.

/s/ F. BYRON PARKER

/s/ GEO. E. HAW

/t/ F. BYRON PARKER and GEO. E. HAW,
Counsel for Richard Harlow.

page 63 }

/s/ CLIFF R. SKINNER

/t/ CLIFF R. SKINNER,

Counsel for Edward Swoope.

The following letter and notice were filed in pursuance of instructions of the Court by the witness P. R. Prillaman:

TIDEWATER EXPRESS LINES
Incorporated

March 24, 1948.

Mr. Alexander H. Sands, Jr.,
Sands, Marks & Sands,
Attorneys at Law,
American Building,
Richmond 19, Virginia.

*Copy to be
destroyed 4/8/49*

Dear Mr. Sands:

Pursuant to the Court's request I enclose herewith copy of notice which was posted on our bulletin board, to which I had reference in my testimony this morning.

As I stated in my testimony this morning, this notice was supplemented by verbal instructions from me, as Richmond Agent in Charge, to all of my drivers that they should at no time ever use the equipment for anything other than company business, and the only exception made to this general parking rule was as I testified to to the effect that the drivers were permitted to take the loaded trucks to their homes and park them preparatory to taking off on a trip for the company.

Yours very truly,

/s/ P. R. PRILLAMAN,
Richmond Agent in
Charge.

page 64 }

NOTICE TO ALL DRIVERS!

Upon your return to Richmond after completing a trip you are to park your truck at Davis-Palmore Truck Service located at Twentieth & Franklin Streets in the lot adjoining same.

Supreme Court of Appeals of Virginia

Drivers found parking trucks at any other place will be immediately dismissed.

/s/ P. R. PRILLAMAN, Agent.

L. M. B.

22 August, 1949.

page 65 { It is ordered that the stenographic report and certificate be, and they are hereby, made a part of the record in this cause, and that this certificate and stenographic report be forthwith transmitted to the Clerk of the Circuit Court of Hanover County, Virginia, at Hanover, Virginia, and that pursuant to Section 6253 of the Code of Virginia I hereby designate and direct Alexander H. Sands, Jr., counsel for the defendant, Fidelity and Causalty Company of New York, to transmit and deliver to C. W. Taylor, Clerk of the Circuit Court of Hanover County, Virginia, at his office, the certificate of exceptions signed by me this 22nd day of August, 1949.

This certificate was received by me on the 22nd day of August, 1949, and signed and sealed by me this 22nd day of August, 1949, at Richmond, Virginia.

LEON M. BAZILE, Judge of
the Circuit Court of Hanover
County, Virginia.

The foregoing is a true and correct copy of the certificate of exceptions and of the stenographic report included in the said certificate.

Given under my hand after notice in writing to all parties in the said cause without objection on the part of any of them, this 22nd day of August, 1949, at Richmond, Virginia.

LEON M. BAZILE, Judge of
the Circuit Court of Hanover
County, Virginia.

page 66 { Virginia:

IN THE CLERK'S OFFICE OF THE CIRCUIT
COURT OF HANOVER COUNTY.

I, C. W. Taylor, Clerk of the Circuit Court of Hanover County, Virginia, do hereby certify that bond in the sum of \$500.00, with approved corporate surety, conditioned in accordance

with law, was duly given before me in my said office on the 18th day of August, 1949, in accordance with the order entered in this cause on the 8th day of August, 1949.

Given under my hand this 23rd. day of August, 1949.

C. W. TAYLOR, Clerk, Circuit
Court of Hanover County,
Virginia.

By F. A. TAYLOR, D. C.

page 67 } Virginia:

IN THE CLERK'S OFFICE OF THE CIRCUIT
COURT OF HANOVER COUNTY.

I, C. W. Taylor, Clerk of the Circuit Court of Hanover County, Virginia, do hereby certify that the foregoing is a true and correct transcript of the Court in the case of Richard Harlow v. Edward Swoope and Fidelity and Casualty Company of New York pending in the Circuit Court of Hanover County, Virginia.

I further certify that the notice required by Section 6349 of the Code of Virginia was duly given in accordance with the provisions of said Section.

I further certify that it appears in writing that notice of the time and place of presenting a certificate of exceptions to the Judge of this Court for signature was duly given.

Given under my hand this 23rd day of August, 1949.

C. W. TAYLOR, Clerk, Circuit
Court of Hanover County,
Virginia.

By F. A. TAYLOR, D. C.

Clerk's fee \$5.00.

page 68 } Virginia:

In the Circuit Court of Hanover County.

Richard Harlow, Plaintiff,

v.

Edward Swoope and Fidelity and Casualty Company of New
York, Defendants.

NOTICE OF APPLICATION FOR TRANSCRIPT
OF RECORD.

TAKE NOTICE, that on August 22, 1949, at 9:30 o'clock, A. M., I shall apply to the Clerk of the Circuit Court of Hanover County, Virginia, for a transcript of the record in the above entitled cause, wherein Richard Harlow was plaintiff and Fidelity and Casualty Company of New York and Edward Swoope were defendants.

Respectfully,

FIDELITY and CASUALTY
COMPANY OF NEW YORK.
By Counsel.

ALEX. H. SANDS, Jr.
Counsel.

Date of Notice
August 20, 1949.

Legal and timely service of the within notice accepted August 20, 1949.

GEO. E. HAW, F. BYRON PARKER,
of Counsel for Plaintiff.

page 69 } Virginia:

In the Circuit Court of Hanover County.

Richard Harlow, Plaintiff,

v.

Edward *Swoope* and Fidelity and Casualty Company of New
York, Defendants.

NOTICE OF APPLICATION FOR CERTIFICATION
OF TESTIMONY AND OTHER INCIDENTS OF THE
TRIAL.

Take Notice, that on August 22, 1949, at 4:00 o'clock, A. M., I shall tender to the Honorable Leon M. Bazile, Judge of the Circuit Court of Hanover County, Virginia, for certification, the transcript of the testimony and other incidents of the trial

of the above cause, consisting of stenographic transcript dated March 24, 1948, made by S. A. Cunningham, Shorthand Reporter, exhibits, pleadings and other incidents of the trial.

Respectfully,

FIDELITY and CASUALTY
COMPANY OF NEW YORK
By Counsel.

ALEX. H. SANDS, JR.
Counsel.

Date of Notice.
August 20, 1949.

Legal and timely service of the within notice accepted August 20, 1949.

GEO. E. HAW, F. BYRON PARKER
of Counsel for Plaintiff.

A Copy—Teste:

M. B. WATTS, C. C.

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