

250 Va 97

IN THE
Supreme Court of Virginia

RECORD NO. 941420

RANDOLPH O. REED,

Appellant,

V.

LEWIS S. LIVERMAN, SR.,

Appellee.

APPENDIX

**Breckenridge Ingles
MARTIN, INGLES
& INGLES, LTD.
Court Circle
Post Office Box 708
Gloucester, Virginia 23061
(804) 693-2500**

Counsel for Appellant

**Roger G. Hopper
Attorney at Law
Post Office Box 1215
Saluda, Virginia 23149
(804) 758-4625**

Counsel for Appellee

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Exhibits

Plaintiff's Exhibit No.:

1 - Promissory Note 97

2 - Agreement 99

Defendant's Exhibit No.:

B - Notice of Motion for Judgment 102

C - Order 106

V I R G I N I A:

IN THE CIRCUIT COURT OF MIDDLESEX COUNTY

LEWIS S. LIVERMAN, SR.,

Plaintiff,

v.

Law No. 1894

RANDOLPH O. REED
Route 687
Warner, Virginia 23279,

Defendant.

MOTION FOR JUDGMENT

CLERK'S OFFICE
MIDDLESEX COUNTY
FILED

5-22-92
2:45 pm
Peggy Walton
Clerk

Lewis S. Liverman, Sr. (plaintiff) moves the court for judgment against Randolph O. Reed (defendant) in the sum of \$37,000.00. together with the costs of this proceeding and attorneys fees, by virtue of the following:

1. That on or about March 4, 1991, the defendant, for valuable consideration, made and delivered to plaintiff a certain negotiable promissory note for \$74,000.00, payable to the order of plaintiff on May 1, 1991, or upon resale of certain real property on U.S. Route 17 in Saluda Magisterial District, a copy of said note being annexed hereto as Exhibit "A".
2. That the real estate referred to in the note was sold.

3. That the co-maker of the note, David C. Eanes, Jr., paid plaintiff the sum of \$37,000.00 thereon.

4. That the defendant failed to pay the balance of the note or any part thereof on May 1, 1991, or when the said real estate was sold, and has continued to fail to so pay up to the present.

5. That plaintiff is the holder and owner of the said note and has been forced to retain counsel in an endeavor to effect payment thereof. Accordingly, the defendant now owes the plaintiff by virtue of said note the sum of \$37,000.00, together with the costs of this proceeding and attorneys fees.

LEWIS S. LIVERMAN, SR.
By Counsel



_____, p.q.
Roger G. Hopper
Attorney at Law
P. O. Box 1215
Saluda, VA 23149
(804) 758-2358

Exhibit A

PROMISSORY NOTE

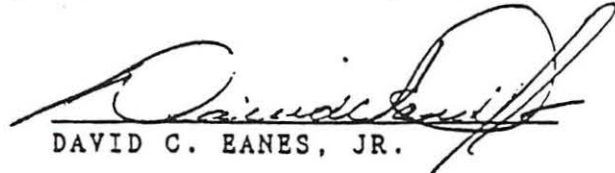
\$74,000.00

SALUDA, VIRGINIA
MARCH 4th, 1991

FOR VALUE recieved, the undersigned, jointly and severally promise to pay to the order of LEWIS S. LIVERMAN, SR., Post Office Box 765, Hayes, Virginia 23072, or at such other place as the holder may designate, the principal sum of SEVENTY FOUR THOUSAND DOLLARS (\$74,000.00) without interest thereon.

The entire indebtedness evidenced by this note is due in full May 1, 1991 or upon resale of that real property on U. S. Route 17, in Saluda Magisterial District, now jointly held by the makers and promisee of this note, whichever occurs first.

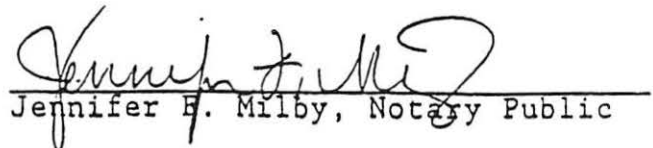
Presentment, protest and notice is hereby waived. The right is reserved to anticipate in whole or in part at any time.


DAVID C. EANES, JR.


RANDOLPH O. REED

State of Virginia
County of Middlesex, to-wit:

Sworn to before me this 4th day of March, 1991, by David C. Eanes, Jr. and Randolph O. Reed.


Jennifer E. Milby, Notary Public

My Commission Expires:
11/21/92

VIRGINIA: IN THE CIRCUIT COURT OF MIDDLESEX COUNTY

LEWIS S. LIVERMAN, SR.,

Plaintiff,

v.

AT LAW NO. 1896

RANDOLPH O. REED,

Defendant.

DEMURRER

COMES NOW the defendant, Randolph O. Reed, by counsel, and states that the Motion for Judgment herein is not sufficient in law, and in support thereof states as follows:

1. Plaintiff, Liverman, previously filed suit to collect the promissory note that is the subject of this suit. The previously filed suit is styled Liverman v. Eanes, et als, Law No. 1854, and that suit names the defendant, Reed, as a party defendant.

2. The previously filed suit is still pending in this Court, the plaintiff having failed to nonsuit or dismiss same.

3. Plaintiff is prohibited from filing two suits to collect the same note naming the same defendant in each.

4. The previous suit was settled by agreement, a copy of which is attached hereto as Exhibit "A". In that agreement plaintiff has acknowledged receipt of all sums due and owing to him pursuant to the said note. Plaintiff is bound by his acknowledgment that he has received all sums due and owing to him.

WHEREFORE, defendant moves the Court to dismiss the Motion for Judgment in this suit.

RANDOLPH O. REED


BY: 

Of Counsel

Breckenridge Ingles
Martin, Hicks & Ingles, Ltd.
P. O. Box 708
Gloucester, Virginia 23061

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Demurrer was mailed, postage prepaid this 23rd day of June, 1992, to Roger G. Hopper, Esquire, P. O. Box 1215, Saluda, Virginia 23149.


Breckenridge Ingles

~~EXHIBIT~~ A

THIS AGREEMENT, made as of the 23rd day of August, 1991 among LEWIS S. LIVERMAN, SR., DAVID C. EANES, JR. and RANDOLPH O. REED, recites and provides that:

WHEREAS, Eanes and Reed signed a certain promissory note dated March 4, 1991 requiring the payment of \$74,000.00 without interest to Liverman on or before May 1, 1991; and

WHEREAS, by agreement dated April 1, 1991 among G. Stephen Ballard, William A. Dail, David C. Eanes, Jr., and Randolph O. Reed, Ballard agreed, among other things, to pay off, in full, the note referred to above; and

WHEREAS, Ballard has failed to pay all or any part of the \$74,000.00 to Mr. Liverman; and

WHEREAS, Mr. Liverman has filed suit against Eanes and Reed in the Circuit Court of Middlesex County, Virginia, at Law No. 1854, asking for judgment on the note against Eanes and Reed; and

WHEREAS, Eanes and Reed have joined G. Stephen Ballard as a third-party defendant in such suit, requesting judgment of indemnification; and

WHEREAS, Eanes and Reed wish to acknowledge that Liverman is entitled to recover on the \$74,000.00 note and wish to make payment to Liverman, but wish to retain their rights to recover from G. Stephen Ballard;

NOW, THEREFORE, the parties agree:

1. Reed shall pay to Liverman the sum of \$37,000.00 in cash upon execution of this agreement in partial curtailment of the \$74,000.00 note, receipt of which by Liverman is hereby acknowledged.

2. Eanes shall allow credit to Liverman in the amount of \$37,000.00 against the purchase prices of two parcels of real property in Middlesex County, Virginia, being purchased by Liverman from Eanes, namely, Lot 8, Section Two, Pipe-In-Tree Subdivision, and 3.24 acres on Route 17.

3. Eanes and Liverman shall close and consummate the purchase and sale of the above two real properties simultaneously with the execution and delivery of this agreement, and Liverman, therefore, hereby acknowledges payment from Eanes in curtailment of the \$74,000.00 note in the amount of \$37,000.00.

4. Immediately upon the request of Eanes and Reed, but not before, Liverman shall take any or all of the following actions as may be requested by Eanes and Reed:

a. Deliver the \$74,000.00 note to Eanes and Reed or their designee;

b. Endorse the \$74,000.00 note, without recourse to Liverman, as may be directed by Eanes and Reed;

c. Execute such assignments and releases of the \$74,000.00 note as may be requested by Eanes and Reed;

d. Move the Court to dismiss the pending claim of Liverman against Eanes and Reed; and

e. Otherwise cooperate with Eanes and Reed in seeking recovery from Ballard in any such other manner as Eanes and Reed may reasonably request.

5. This agreement is made in Virginia and shall be governed by its laws. It shall bind and benefit the parties' respective heirs, personal representatives, successors and assigns.

6. The said Lewis S. Liverman, Sr. shall not be responsible for any costs, fees, expenses or other as a result of this Agreement.

Lewis S. Liverman (SEAL)
Lewis S. Liverman, Sr.

David C. Eanes, Jr. (SEAL)
David C. Eanes, Jr.

Randolph O. Reed (SEAL)
Randolph O. Reed

COMMONWEALTH OF VIRGINIA,
COUNTY/CITY OF Chester, to-wit:

I, the undersigned Notary Public in and for the above jurisdiction, do hereby certify that Lewis S. Liverman, Sr., whose name is signed to the foregoing Agreement dated as of the 23rd day of August, 1991, has acknowledged it before me in my jurisdiction.

Given under my hand this 27 day of August, 19 91.
My commission expires 7/31/94.

[Signature]
Notary Public

COMMONWEALTH OF VIRGINIA,
COUNTY/CITY OF Richmond, to-wit:

I, the undersigned Notary Public in and for the above jurisdiction, do hereby certify that David C. Eanes, Jr., whose name is signed to the foregoing Agreement dated as of the 23rd day of August, 1991, has acknowledged it before me in my jurisdiction.

Given under my hand this 26th day of Aug, 19 91.
My commission expires 11/30/94.

N. R. Roberts
Notary Public

COMMONWEALTH OF VIRGINIA,
COUNTY/CITY OF Richmond, to-wit:

I, the undersigned Notary Public in and for the above jurisdiction, do hereby certify that Randolph O. Reed, whose name is signed to the foregoing Agreement dated as of the 23rd day of August, 1991, has acknowledged it before me in my jurisdiction.

Given under my hand this 26th day of Aug.,
19 91.

My commission expires 11/30/94.

A-R Counts
Notary Public

EANES23

VIRGINIA: IN THE CIRCUIT COURT OF MIDDLESEX COUNTY

LEWIS S. LIVERMAN, SR.,

Plaintiff,

v.

AT LAW NO. 1896

RANDOLPH O. REED,

Defendant.

CLERK'S OFFICE
MIDDLESEX CO., V.
FILED
5-5-93
4:00pm
Leann Walton
Clerk

MEMORANDUM

COMES NOW the defendant, Randolph O. Reed, by counsel, and for his Memorandum in support of his Demurrer and Plea of Res Judicata states as follows:

I. FACTS:

On July 3, 1991 Lewis S. Liverman, Sr. ("Liverman"), plaintiff herein, filed suit against David C. Eanes, Jr. ("Eanes") and Randolph O. Reed ("Reed"), defendant herein. That suit was filed in the Circuit Court of Middlesex County, Virginia and was designated Law File No. 1854. A copy of the Notice of Motion for Judgment, the Motion for Judgment and exhibit attached to the Motion for Judgment, totaling four pages are attached hereto as Exhibit "A".

The suit filed in 1991 ("Suit No. 1") sought judgment against Eanes and Reed jointly and severally in the amount of \$74,000.00 pursuant to a Promissory Note, dated March 4, 1991 in the amount of \$74,000.00 ("the Note"). That suit was dismissed with prejudice by Order of this Court entered March 3, 1993.

Meanwhile, on May 22, 1992 Liverman filed this suit ("Suit No. 2") against Reed only seeking judgment against Reed in the amount of

\$37,000.00 pursuant to the very same Promissory Note, dated March 4, 1991, which Note is attached as an exhibit to the Motion for Judgment in this suit.

Reed filed his Demurrer in a timely fashion asking that this suit be dismissed and that plaintiff be prohibited from maintaining two suits against him at the same time pursuant to the same note.

II. ISSUES:

1. Is Liverman prevented from maintaining two suit against Reed seeking judgment pursuant to the same promissory note?

2. Is Liverman now barred from maintaining this suit as a result of the dismissal with prejudice of Suit No. 1?

III. ANALYSIS:

When Reed's Demurrer was filed both suits were pending before the Court. Each named Liverman as a plaintiff. Each named Reed as a defendant, Suit No. 1 naming Reed as one of two defendants, Suit No. 2 naming Reed as the sole defendant. Each suit sought judgment against Reed based on the very same promissory note.

Court's will not allow two suits to be filed involving the same parties and the same subject matter.

If a person has two or more separate and distinct causes of action against another he may, in the absence of a controlling statute or rule of practice, bring separate actions, even if joinder of the separate causes in one action is permissible, subject to the power of the Court to order consolidation. But if he has only a single

claim or cause of action, he is not permitted to split up that cause of action and maintain successive suits for different parts; this does not mean that one who has a claim against another may not take a part in the satisfaction of the whole, or maintain an action for a part only, of that claim, although there is some authority to the effect that a part of a demand cannot be waived for the purpose of giving an inferior Court jurisdiction. What is does mean is that one who brings suit for a part of a single claim and recovers therefore is thereafter barred from bringing another suit for another part of the claim. 1 Am. Jur. 2d "Actions" §127.

After the Demurrer was filed in the pending suit, Law No. 1896, Liverman dismissed with prejudice Suit No. 1, Law No. 1854. Under the principals of res judicata Liverman is now barred from prosecuting Suit No. 2. All of the requisites of res judicata have been met in this matter. The Court had jurisdiction of Suit No. 1, the judgment was on the merits, and it is a final judgment order.

For a judgment to be res judicata, it must have been rendered in a cause of which the Court had jurisdiction. Ivey v. Lewis, 133 Va. 122, 112 S.E. 712 (1922).

A judgment is not res judicata if it does not go to the merits of the case. To constitute a bar, it must appear either upon the face of the record or be shown by extrinsic evidence that the previous question was raised and determined in the former suit, and that the former suit was determined on its merits.

But a judgment upon the merits is not meant "on the merits" in the moral sense of those words. It is sufficient that the status of the suit was such that the parties might have had their suit disposed of on its merits they had presented all their evidence, and the Court had properly understood the facts, and correctly applied the law to the facts. It is therefore sufficient if the merits are actually or constructively

determined. 8B Michie's Jurisprudence "Former Adjudication or Res Judicata" §12.

It is also well settled that the doctrine of res judicata applies only to final judgments, and not to interlocutory judgments or orders, which the rendering court has the power to vacate or modify at any time. 8B Michie's Jurisprudence "Former Adjudication or Res Judicata" §13.

When this matter was heard on the Demurrer on April 30, 1993 the Court recognized that the status of this suit had changed since the filing of the Demurrer, but the Court also recognized the issue of res judicata and asked that that issue be briefed. That issue was argued by the parties although a Plea and Bar had not been filed at that time. A Plea and Bar has been filed contemporaneously with the filing of this Memorandum.

IV. CONCLUSION:

For the foregoing reasons, it is respectfully submitted that this suit, Suit No. 2, Law No. 1896, should be dismissed with prejudice at this time.

RANDOLPH O. REED

BY: 

Of Counsel

Breckenridge Ingles
Martin, Hicks & Ingles, Ltd.
P.O. Box 708
Gloucester, Virginia 23061

IN, HICKS & INGLES, Ltd.
ATTORNEYS AT LAW
GLOUCESTER, VIRGINIA 23061

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Memorandum was mailed, postage prepaid, this 3rd day of May, 1993, to Roger G. Hopper, Esquire, P.O. Box 1215, Saluda, Virginia 23149.



Breckenridge Ingles

VIRGINIA: IN THE CIRCUIT COURT OF MIDDLESEX COUNTY

LEWIS S. LIVERMAN, SR.,

Plaintiff,

v.

AT LAW NO. 1896

RANDOLPH O. REED,

Defendant.

CLERK OF THE
MIDDLESEX CO. V.
FILED
5-5-93 4:00
Lynn, Walter

PLEA OF RES JUDICATA

Defendant, Randolph O. Reed, by counsel, says that plaintiff may not maintain the action against him set forth in the Motion for Judgment filed herein because in an action at law heretofore instituted and conducted in this Court, wherein plaintiff herein was the plaintiff and defendant herein was the defendant, the Court, entered an Order dismissing plaintiff's claim with prejudice. That Order is of record in Law File No. 1854.

WHEREFORE, defendant says that the matters in issue in this suit have already been adjudicated and prays that this action be dismissed.

RANDOLPH O. REED

BY: 


Of Counsel

MARTIN, HICKS & INGLES, Ltd.
ATTORNEYS AT LAW
GLOUCESTER, VIRGINIA 23061

Breckenridge Ingles
Martin, Hicks & Ingles, Ltd.
P.O. Box 708
Gloucester, Virginia 23061

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Plea of Res Judicata was mailed, postage prepaid, this 3rd day of May, 1993, to Roger G. Hopper, Esquire, P.O. Box 1215, Saluda, Virginia 23149.



Breckenridge Ingles

V I R G I N I A:

IN THE CIRCUIT COURT OF MIDDLESEX COUNTY

LEWIS S. LIVERMAN, SR.,

Plaintiff, CLERK'S OFFICE
MIDDLESEX CO., VA.

v.

RANDOLPH O. REED,

Defendant.

Law No. 1896

MEMORANDUM

Now comes the plaintiff, by counsel, and as and for his Memorandum in opposition to defendant's Demurrer and Plea of Res Judicata states as follows:

On July 3, 1991 Lewis S. Liverman, Sr. (Liverman) filed suit ("Suit No. 1") on a \$74,000 promissory note against the makers thereof, David C. Eanes, Jr. (Eanes) and Randolph O. Reed (Reed), who, in turn, joined G. Stephen Ballard (Ballard) as a third-party defendant. Subsequently, Eanes paid Liverman \$37,000 on the note, but the Defendant paid nothing.

On May 22, 1992 Liverman filed the instant suit ("Suit No. 2") against Reed for \$37,000 upon the same note, not realizing Suit No. 1 had not been dismissed.

Reed filed a demurrer stating that Liverman could not maintain two suits on the same note against the same defendant at the same time.

Upon receipt of and in response to the demurrer, the undersigned counsel for Liverman drafted an Order non-suiting without prejudice Suit No. 1 and mailed the same to John J. Dusewicz, Esq., who had represented Liverman in Suit No. 1. Dusewicz endorsed the order and returned it to counsel who then mailed the endorsed order to William R. Curdts, Esq., who had represented Reed in Suit No. 1, copies of the transmittal letters and draft order being annexed hereto as Exhibit 1. Curdts called the undersigned counsel and said he would not endorse the order and did not return it.

Inasmuch as Dusewicz was still counsel of record in Suit No. 1., the undersigned counsel prepared the Order in question, had Liverman endorse it, and the same was, after Notice, presented to and entered by the Court on March 3, 1993. The order states that the action (Suit No. 1) "is dismissed against all parties, with prejudice".

Reed has now filed a Plea Of Res Judicata stating that the entry of the order dismissing Suit No. 1 "with prejudice" was an adjudication of the issues in that suit and the same is res judicata as to Suit No. 2, which he asks to be dismissed.

Law And Argument

There was no determination of the action on its merits in Suit No. 1. Reed owes Liverman \$37,000 upon the note, none of which has been paid. He did, and does not, want Reed to be released from liability simply because his counsel erroneously included the term "with prejudice" in the order.

With regard to "with prejudice" cases constituting res judicata, in 46 AmJur 2d, Judgments, §483 entitled "Erroneous Inclusion Of Term", it is stated that "with prejudice cases held to operate as res judicata are rested on the ground that the judgment was in fact on the merits, rather than on the ground it was entered "with prejudice", and in this respect the expression "with prejudice" in a judgment of dismissal has been held not to be conclusive, and not to enlarge the effect of a judgment as res judicata when the expression is erroneously included therein" (emphasis supplied).

In 8B Michie's Jur., Former Adjudication, §12, it is said that

"A judgment is not res judicata if it does not go to the merits of the case. To constitute a bar, it must appear either on the face of the record or be shown by extrinsic evidence that the previous question was raised and determined in the former suit, and that the former suit was determined on its merits" (emphasis supplied).

In Wilcher v. Robertson, 78 Va. 602 (1884), the Virginia Supreme Court held that "in order that a judgment shall bar another suit, the point in controversy must be the same in both cases, and the first must have been determined on its merits. An order of dismissal is not a determination on its merits, and is no bar to the second suit for the same cause of action."

The court held in City of Richmond v. Sitterding, 101 Va. 354, 43 S.E. 562 (1903) that if the first action was disposed of on any ground that did not go to its merits, the judgment will not conclude the party in the second action.

In Storm v. nationwide Mutual Insurance Company, 199 Va. 130, 134, 97 S.E.2d 759, 761 (1957), the court stated that to constitute res judicata and a bar, the former suit must have been determined on its merits.

And in Hosier v. Hosier, 221 Va. 827, 237 S.E.2d 564 (1981), the court said there must be an adjudication on the merits in the first suit or it is not res judicata, and cited Kelly v. Board of Public Works, 66 Va. (25 Gratt.) 755, 760 (1875), Burke's Pleading And Practice 672 (4th ed. 1952), the AmJur 2d section previously cited herein, and 49 A.L.R. 2d 1036 (1956). Kelly held that the judgment in the former suit must be directly on the point which is in question in the subsequent suit to make it a bar, and if the real merits have not been decided, the first action is no bar.

Suit No. 1 was not determined, adjudicated, or disposed of on its merits, real or otherwise. No hearing of any sort was had upon the matter, no evidence adduced, no determination of any point in question. This is not even debatable. Neither is the law.

Liverman did not draft the order, the undersigned did thinking that since Eanes and Ballard were no longer involved they should be released with prejudice; certainly there was no conscious thought of doing so with Reed--we had just filed suit against him again, and Liverman had no idea whatsoever of releasing Reed from liability.

Not only should he not be caused to lose \$37,000 on account of his counsel's inadvertent mistake, the law clearly holds that he should not.

Respectfully Submitted,



Roger G. Hopper, Counsel for
Lewis S. Liverman, Sr.

Roger G. Hopper
Attorney at Law
P. O. Box 1215
Saluda, VA 23149
(804) 758-2358

CERTIFICATE

I hereby certify that a true copy of the foregoing Memorandum was mailed to Breckenridge Ingles, Esq., Martin, Hicks & Ingles, Ltd., P. O. Box 708, Gloucester, VA 23061, this 13th day of May, 1993.



Roger G. Hopper

LAW OFFICES
ROGER GAYLORD HOPPER
P. O. Box 1215
SALUDA, VIRGINIA 23149
(804) 758-2358
TELECOPIER (804) 758-4625

July 16, 1992

John J. Dusewicz, Esq.
Dusewicz & Soberick
P. O. Box 388
Gloucester Point, Virginia 23062

Re: Liverman v. Eanes, Reed
v.
G. Stephen Ballard
Middlesex Circuit Court, Law No. 1854

Dear John:

As I mentioned to you in court last Monday, Mr. Liverman, whom you kindly sent me and for which I thank you, has filed a suit against Randy Reed for the \$37,000 he owes him and Brecky Ingles filed a demurrer on Reed's behalf saying that the above action was still pending, therefore Liverman could not maintain his current suit.

Liverman needs to non-suit the first action, but cannot do it unilaterally because of the Cross-Bill and third-party defendant, who must agree. Of course, a settlement agreement was reached in that suit so there should be no problem with the non-suit. So what I have done is to prepare a decree non-suiting that action which I need you to endorse and send to Ballard and Curdts for their endorsements. If you would be kind enough to do this, I am sure Mr. Liverman would be most appreciative.

Very truly yours,

Roger G. Hopper

RGH:mhb
Enclosure

bcc: Lewis S. Liverman, Jr. ✓

V I R G I N I A:

IN THE CIRCUIT COURT OF MIDDLESEX COUNTY

LEWIS S. LIVERMAN, SR.,

Plaintiff,

v.

Law No. 1854

DAVID C. EANES, JR., et al,

Defendants.

ORDER

This day came the plaintiff, by counsel, and moved the Court to non-suit the above-styled action.

And it appearing to the Court that all parties have agreed to same, it is ORDERED that this case be non-suited, without prejudice, and removed from the docket.

ENTER - LAW

_____, 1992

_____, Judge

I ask for this:

_____, p.q.
John J. Dusewicz
Dusewicz & Soberick
P. O. Box 388
Gloucester Point, VA 23062

Seen and Agreed:

William R. Curdts
Dunton, Simmons & Dunton
P. O. Box 5
White Stone, VA 22578,
Counsel for the defendants
David C. Eanes, Jr. and
Randolph O. Reed

G. Stephen Ballard
Pro Se
129 Conway Avenue
Norfolk, VA 23505

LAW OFFICES
ROGER GAYLORD HOPPER

P. O. Box 1215

SALUDA, VIRGINIA 23149

(804) 758-2358

TELECOPIER (804) 758-4625

August 11, 1992

William R. Curdts, Esq.
Dunton, Simmons & Dunton
P. O. Box 5
White Stone, Virginia 22578

Re: Liverman, Sr. v. Eanes, Jr., et al
Circuit Court, Middlesex County
Law No. 1854

Dear Bill:

Mr. Liverman wishes to non-suit this case. Accordingly, if you would be kind enough to endorse the enclosed Order non-suiting the case and return it to me, I would be most appreciative.

Very truly yours,

Roger G. Hopper

RGH:mhb
Enclosure

VIRGINIA: IN THE CIRCUIT COURT OF MIDDLESEX COUNTY

LEWIS S. LIVERMAN, SR.,

Plaintiff,

v.

RANDOLPH O. REED,

Defendant.

AT LAW NO. 1896

REPLY MEMORANDUM

COMES NOW the defendant, Randolph O. Reed, by counsel, and for his Reply Memorandum states as follows:

Mr. Hopper asserts in his Memorandum that Law No. 1854 (the first suit) was mistakenly dismissed with prejudice. He cites Am Jur for the proposition that the words "with prejudice" in a dismissal order are not conclusive when the expression is erroneously included therein. There is no evidence before this Court that the words "with prejudice" were erroneously included in the order. Quite to the contrary, the facts indicate that the term "with prejudice" was not included erroneously.

By letter, dated August 11, 1992, a copy of which is attached hereto as Exhibit "A", Mr. Hopper, counsel for Liverman, wrote to William Curdts, counsel for Reed, asking Curdts to endorse a non-suit order. A copy of the proposed order is attached hereto as Exhibit "B". In reply, Curdts wrote Mr. Hopper by letter, dated September 3, 1992 advising that "Mr. Reed does not want me to endorse the order of non-suit which you sent me..." A copy of that letter is attached hereto as Exhibit "C".

Mr. Hopper then indicated by Notice that on March 3, 1993 he would present an order dismissing the suit with prejudice. A copy of that

Notice is attached hereto as Exhibit "D". A copy of the proposed Order is attached hereto as Exhibit "E". After receiving that Notice Mr. Curdts wrote the Clerk of Court on February 25, 1993 and indicated that Reed had no objection to entry of the Order dismissing the suit with prejudice. Twice in that letter Curdts made note that the suit was to be dismissed "with prejudice". A copy of that letter is attached hereto as Exhibit "F". A copy of that letter was mailed to Mr. Hopper.

It is respectfully submitted that the words "with prejudice" that were included in the Dismissal Order were purposely included, that there was no mistake or inadvertence. It is clear that Curdts indicated that he would not endorse a Non-suit Order, but that he had no objection to entry of an Order dismissing the suit with prejudice.

Counsel for plaintiff cites five cases in support of his contention that a case must be adjudicated on its merits before it can constitute res judicata. The language cited from Wilcher v. Robertson, 78 Va. 602 (1894) is a direct quotation from head note number 4. The language quoted has very little to do with the facts of the case or the holding in the case. The holding is set forth in the following language:

Richard Wilcher's survey was made on December 7, 1849. Soon after it was filed in the land office, David I. Wilson, Appellee's vendor, entered a caveat against the issuing of a patent for the land, 187 acres, described in said survey. The caveat was returned to the Circuit Court of Alleghany County for trial, and process was issued on the same on August 31, 1850. This suit was continued on the docket until April 17, 1852, when it was "dismissed agreed". And thereupon a patent for the 187 acres was issued to Richard Wilcher. In a caveat, as in all other suits,

a judgment upon the merits is a final judgment of the controversy. Patrick v. Dryden, 10 W. Va. 412.

It is now settled in Virginia that a dismissal of a suit "agreed" is equivalent to a retraxit. (Citation omitted). It follows, therefore, that the judgment of the Circuit Court of Alleghany in the caveat suit, dismissing said suit "by consent of parties and for reasons appearing to the Court", is a bar to the action of Appellee in the Court below, and said Court should have so instructed the jury. *Id* at 609.

A fair reading of Wilcher v. Robertson indicates that a Dismissed Agreed Order dismissing a suit with prejudice is considered to be an adjudication upon the merits consistent with the following language previously cited in defendant's Memorandum:

But a judgment upon the merits is not meant "on the merits" in the moral sense of those words. It is sufficient that the status of the suit was such that the parties might have had their suit disposed of on its merits had they presented all their evidence... it is therefore sufficient if the merits are actually or constructively determined. 8B Michie's Jurisprudence "Former Adjudication or Res Judicata" §12.

The case of City of Richmond v. Sitterding, 101 Va. 354 (1903) also cited by plaintiff, is also not on point. In that case Leaker was injured when he fell over a plank that was left on a sidewalk on Leigh Street in the City of Richmond. Leaker sued the City of Richmond and also sued Sitterding for personal injuries received. Sitterding was brought in on an Amended Motion for Judgment after the one year statute of limitations had expired. Sitterding filed the appropriate motion and was dismissed from the suit based upon the statute of limitations. A judgment was

entered in plaintiff's favor against the City of Richmond. The City of Richmond then filed suit against Sitterding to recover for monies that it had to pay pursuant to the judgment. Sitterding filed a plea of res judicata indicating that his dismissal from the first suit constituted res judicata as to the second. The Court held that where he was dismissed from the first suit upon a plea of statute of limitations, not on the merits, he could not successfully plea res judicata in the second case.

The general rule is that for a judgment to be evidence against a party in another suit upon a different cause of action, it must be rendered in a proceeding between the same parties or their privies, and the point must be involved in both cases and must have been determined upon its merits. If the first action is disposed of upon any ground that does not go to its merits, the judgment rendered will not conclude the party. (Citation omitted) Id at 357.

Reed was dismissed from the first suit filed by Liverman by a Dismissed Agreed Order that dismissed the case "with prejudice". He was, of course, not dismissed because of a plea of the statute of limitations or other similar plea.

The case of Storm v. Nationwide Mutual Insurance Company, 199 Va. 130 (1957) also cited by plaintiff is also not on point. In that case the plaintiff had obtained judgment against Richard Goodwin for personal injuries sustained. The plaintiff then sued Goodwin's insurance carrier seeking to collect the judgment. Goodwin had previously filed suit against the carrier for an adjudication as to whether he was covered. It was found in that suit that Goodwin "was not an insured under the aforesaid policy at the time of the accident". In the second suit, the

one filed by the injured party against the insurance carrier, the carrier filed a plea of res judicata. The trial court sustained the plea. The Supreme Court held that the trial court should not have sustained the plea because there was no identity of parties.

(Goodwin) and the Company may not litigate and have her (plaintiff's) rights against the Company, which had their inception at the time of her injury, determined in an action to which she is not a party. Id at 764.

Counsel also cites Hosier v. Hosier, 221 Va. 827 (1981). That case is a divorce case. Again, in that case the first suit was dismissed because the court did not have jurisdiction. When the second suit was filed a plea of res judicata was filed. The Supreme Court held that the dismissal of the first suit, which occurred because of lack of jurisdiction and not because of a finding upon the merits, did not constitute res judicata as to the second suit.

The problem with all of the cases cited by plaintiff is that none of them have similar fact situations to case at hand. In none of the cases cited was the first suit dismissed "with prejudice" as in this case. That, of course, is the crux of this case. Plaintiff has cited Am Jur in support of the proposition that the dismissal of the first suit was not res judicata because it was not an adjudication on the merits. Plaintiff should have at least alerted the court to the following language found in Am Jur that is clear, unequivocal and directly on point.

The term "with prejudice", expressed in a judgment of dismissal, has a well recognized legal import; it is, of course, the converse of "without prejudice" and indicates an adjudication of the merits, operating as res judicata, concluding the rights of

the parties, terminating the right of action, and precluding subsequent litigation of the same cause of action, to the same extent as if the action had been prosecuted to a final adjudication adverse to plaintiff. Accordingly, a judgment so rendered operates, in a subsequent action on the same cause of action, so as to conclusively settle not only all matters litigated in the earlier proceeding, but all matters which might have been litigated therein. (Emphasis Added) 46 Am Jur 2d "Judgments" §482.

In Virginia Concrete Co. v. Board of Supervisors, 197 Va. 821, 91 S.E. 2d 415 (1956) the Court discussed at length the significance of the language "with prejudice" included within an order dismissing a suit. The Court cited with approval the following language of Mongeon v. Burkebile, 79 N.D. 234, 55 N.W. 2d 445, 447:

The dismissal of an action or proceeding "with prejudice" commonly implies not only the termination of the particular action or proceeding then before the Court but also the right of action upon which it is based. (Citing numerous cases and texts) From these authorities we conclude that where an order is entered at the request of the plaintiff, understandingly made, dismissing his action "with prejudice", the dismissal goes to the cause of action and becomes res judicata with respect to the issues brought before the Court by the action. The words "with prejudice" appearing in a motion or order for dismissal are not always conclusive against the plaintiff. "Their effect is determined by the conditions under which they are used".

The Court in Virginia Concrete went on to cite with approval language at 149 A.L.R. at page 553.

In a comprehensive note in 149 A.L.R. at page 553 on the effect of the words "without prejudice" and "with prejudice" in a judgment with respect to its operation as res judicata, it is set at page 625 that as a

general proposition a judgment of dismissal which expressly provides that it is "with prejudice" operates as res judicata and is as conclusive of the rights of the parties as if suit had been prosecuted to a final disposition adverse to plaintiff. *Id* at 418.

The holding in the case was as follows:

An order "dismissed agreed" not only puts an end to the pending suit, but is a bar to any subsequent suit on the same cause of action by the same parties "as fully as a retraxit would be". Bardach Iron and Steel Co. v. Tenenbaum, 136 Va. 116, 171. *Id* at 419.

In conclusion, the authorities cited make it abundantly clear that dismissal "with prejudice" constitutes an adjudication of the merits, is treated as an adjudication of the merits, and has the same force and effect as if the case had been heard fully on its merits. Thus, the Order entered by this Court on March 3, 1993 dismissing Law No. 1854 with prejudice is res judicata as to the pending action, Law No. 1896.

RANDOLPH O. REED

BY: 


Of Counsel

Breckenridge Ingles
Martin, Hicks & Ingles, Ltd.
P.O. Box 708
Gloucester, Virginia 23061

MARTIN, HICKS & INGLES, Ltd.
ATTORNEYS AT LAW
GLOUCESTER, VIRGINIA 23061

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Reply Memorandum was mailed, postage prepaid this 25th day of May, 1993, to Roger G. Hopper, Esquire, P.O. Box 1215, Saluda, Virginia 23149.



Breckenridge Ingles

EXHIBIT "A"

LAW OFFICES

ROGER GAYLORD HOPPER

P. O. Box 1215

SALUDA, VIRGINIA 23149

(804) 758-2358

TELECOPIER (804) 758-4625

August 11, 1992

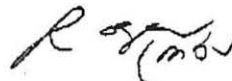
William R. Curdts, Esq.
Dunton, Simmons & Dunton
P. O. Box 5
White Stone, Virginia 22578

Re: Liverman, Sr. v. Eanes, Jr., et al
Circuit Court, Middlesex County
Law No. 1854

Dear Bill:

Mr. Liverman wishes to non-suit this case. Accordingly, if you would be kind enough to endorse the enclosed Order non-suiting the case and return it to me, I would be most appreciative.

Very truly yours,



Roger G. Hopper

RGH:mhb
Enclosure

RECEIVED AUG 6 87

EXHIBIT "B"

VIRGINIA:

IN THE CIRCUIT COURT OF MIDDLESEX COUNTY

LEWIS S. LIVERMAN, SR.,

Plaintiff,

v.

Law No. 1854

DAVID C. EANES, JR., et al,

Defendants.

ORDER

This day came the plaintiff, by counsel, and moved the Court to non-suit the above-styled action.

And it appearing to the Court that all parties have agreed to same, it is ORDERED that this case be non-suited, without prejudice, and removed from the docket.

ENTER - LAW

_____, 1992

_____, Judge

I ask for this:

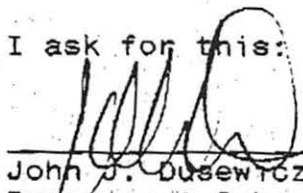

_____. P.q.
John J. Dusewicz
Dusewicz & Soberick
P. O. Box 388
Gloucester Point, VA 23062

EXHIBIT "C"

LAW OFFICES
DUNTON, SIMMONS & DUNTON
Post Office Box 5
WHITE STONE, VIRGINIA 22578

AMMON G. DUNTON
C. JACKSON SIMMONS
AMMON G. DUNTON, JR.
CRAIG H. SMITH
WILLIAM R. CURDTS
JOHN S. MARTIN
J. RAWLEIGH SIMMONS
M. M. SHELTON

TELEPHONE
(804) 435-1611
453-4571
776-6871

TELECOPIER
(804) 435-1614

September 3, 1992

Roger G. Hopper, Esquire
Attorney at Law
P. O. Box 1215
Saluda, Virginia 23149

Re: Liverman, Sr. v. Eanes, Jr., et al., Circuit Court of
Middlesex County, Law No. 1854

Dear Roger:

I apologize for the delay in responding to your letter of August 11, 1992.

Breck Ingles, who is now representing Randy Reed in your related suit, has advised me that Mr. Reed does not want me to endorse the order of nonsuit which you sent me, and I will not be able to do so voluntarily. I trust you will understand the position I am in.

With best regards.

Sincerely,



William R. Curdts

WRC/ccw

cc: Mr. David C. Eanes, Jr.
Breckinridge Ingles, Esquire

EANES2

EXHIBIT "D"

VIRGINIA:

IN THE CIRCUIT COURT OF MIDDLESEX COUNTY

LEWIS S. LIVERMAN, SR.,

Plaintiff,

v.

Law No. 1854

DAVID C. EANES, JR. and
RANDOLPH O. REED,

Defendants and
Third-Party Plaintiffs,

v.

G. STEPHEN BALLARD,

Third-Party Defendant.

NOTICE

TO: David C. Eanes, Jr. and
Randolph O. Reed
c/o William R. Curdts, Esq.
Dunton, Simmons & Dunton
P. O. Box 5
White Stone, VA 22578

G. Stephen Ballard
129 Conway Avenue
Norfolk, VA 23505

John J. Dusewicz, Esq.
Dusewicz & Soberick
P. O. Box 388
Gloucester point, VA 23062

PLEASE TAKE NOTICE that on the 3rd day of March, 1993, at

9:00 o'clock a. m., or as soon thereafter as counsel may be

heard, in the Circuit Court courtroom of the above court, sitting at Saluda, Virginia, I will present the attached Order for entry.

Lewis S. Liverman Sr.
Lewis S. Liverman, Sr.

CERTIFICATE

I hereby certify that I mailed a true copy of the foregoing Notice, with attached Order, to William R. Curdts, Esq., Dunton, Simmons, and Dunton, P. O. Box 5, White Stone, VA 22578, G. Stephen Ballard, 129 Conway Avenue, Norfolk, VA 23505, and to John J. Dusewicz, Esq., Dusewicz & Soberick, P. O. Box 388, Gloucester Point, VA 23062, this 19th day of February, 1993.

Lewis S. Liverman Sr.
Lewis S. Liverman, Sr.

EXHIBIT "E"

V I R G I N I A:

IN THE CIRCUIT COURT OF MIDDLESEX COUNTY

LEWIS S. LIVERMAN, SR.,

Plaintiff,

v.

Law No. 1854

DAVID C. EANES, JR. and
RANDOLPH O. REED,

Defendants and
Third-Party Plaintiffs,

v.

G. STEPHEN BALLARD,

Third-Party Defendant.

ORDER

This day came the plaintiff, in proper person, after having given all parties notice pursuant to the Rules Of Court, and moved the Court to dismiss this action, with prejudice.

Upon Consideration whereof, this action is dismissed against all parties, with prejudice.

ENTER - LAW

_____, 1993

_____, Judge

EXHIBIT "F"
LAW OFFICES
DUNTON, SIMMONS & DUNTON
Post Office Box 5
White Stone, Virginia 22578

AMMON G. DUNTON
C. JACKSON SIMMONS
AMMON G. DUNTON, JR.
CRAIG H. SMITH
WILLIAM R. CURDTS
JOHN S. MARTIN
J. RAWLEIGH SIMMONS
M. M. SHELTON

TELEPHONE
(804) 435-1611
453-4571
776-6071
TELECOPIER
(804) 435-1614

February 25, 1993

The Honorable Peggy W. Walton, Clerk
Circuit Court of Middlesex County
P. O. Box 158
Saluda, Virginia 23149

Re: Liverman v. Eanes, et al., Law 1854

Dear Peggy:

I have received a notice signed by Lewis Liverman and filed by Roger Hopper in the above action that Mr. Liverman will move to dismiss with prejudice on March 3, 1993.

Kindly inform the court that my clients David C. Eanes, Jr. and Randolph O. Reed have no objection to the entry of the order of dismissal with prejudice, which was attached to the Notice. Accordingly, we do not plan to appear on March 3.

With kind regards, I am

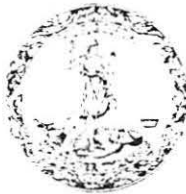
Sincerely,


William R. Curdts

WRC/ccw

cc: Mr. David C. Eanes, Jr.
Mr. Randolph O. Reed
Breckinridge Ingles, Esquire (w/enc.)
Roger G. Hopper, Esquire
John J. Dusewicz, Esquire
Mr. G. Stephen Ballard

EANES2



JUDGES

G. DUANE HOLLOWAY
P.O. BOX 371
YORKTOWN, VA 23690
(804) 898-0073

WILLIAM L. PERSON, JR.
P.O. BOX 385
WILLIAMSBURG, VA 23187
(804) 229-4711

JOHN M. FOLKES
P.O. BOX 282
GLOUCESTER, VA 23061
(804) 693-1358

COMMONWEALTH OF VIRGINIA

NINTH JUDICIAL CIRCUIT

COURTS

CHARLES CITY COUNTY	MATHEWS COUNTY
GLOUCESTER COUNTY	MIDDLESEX COUNTY
JAMES CITY COUNTY	NEW KENT COUNTY
KING AND QUEEN COUNTY	YORK COUNTY
KING WILLIAM COUNTY	CITY OF POQUOSON
	CITY OF WILLIAMSBURG

JUDGES/RETIRED

ROBERT T. ARMISTEAD
DUKE OF GLOUCESTER ST.
WILLIAMSBURG, VA 23185

RUSSELL M. CARNEAL
226 THOMAS NELSON LANE
WILLIAMSBURG, VA 23185
(804) 229-4392

JOHN E. DeHARDIT
P.O. BOX 291
GLOUCESTER, VA 23061
(804) 693-2781

July 20, 1993

VIRGINIA: IN THE CIRCUIT COURT OF MIDDLESEX COUNTY

LEWIS S. LIVERMAN, SR.,

PLAINTIFF,

v.

RANDOLPH O. REED,

DEFENDANT.

CLERK'S OFFICE
MIDDLESEX CO., VA

FILED

7-21-93

Peggy Walton
Clerk

LAW NO. 1896

O P I N I O N

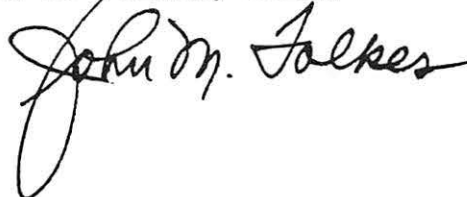
Plaintiff, Lewis S. Liverman, Sr., (hereinafter called "Liverman"), on May 22, 1992, filed a Motion for Judgment against Defendant, Randolph O. Reed, (hereinafter called "Reed"), seeking judgment in the sum of THIRTY-SEVEN THOUSAND DOLLARS (\$37,000.00) plus costs and attorney's fees alleging default upon a promissory note. (Law No. 1896 - Suit No. 2) Reed filed a Demurrer asserting, inter alia, that a suit (Law No. 1854 - Suit No. 1) had previously been filed by Liverman which named Reed and Eanes, a co-maker on the same note, as party defendants and that Liverman is prohibited from filing two (2) suits to collect the same note against the same defendant. The Demurrer to Suit No. 2 was never ruled upon since Suit No. 1 was dismissed " . . . against all parties with prejudice" by order entered March 9, 1993. Suit No. 2 by Liverman against Reed was filed and pending before entry of the Order dismissing Suit No. 1. A Plea and Bar of Res Judicata has since been filed by Reed urging that the language "with prejudice" recited in the Order dismissing Suit No. 1 supra controls disposition of the subsequent action (Suit No. 2) filed against him, i.e., Reed, in effect, argues that issues raised in Suit No. 2 have been previously adjudicated in Suit No. 1.

Liverman v. Reed - Law No. 1896
Opinion
Page Two
July 20, 1993

The Court has considered Memoranda of Law filed by both counsel as previously ordered. While the Court agrees with Reed's position that Liverman cannot maintain two (2) suits against the same Defendant upon the same note, the Court is unable to conclude that dismissal of Suit No. 1 bars the prosecution of Suit No. 2 under principles of res judicata. The Court is not cognizant of any facts either on the face of the record or shown by extrinsic evidence which support a finding that Suit No. 1 was determined on its merits. To apply the res judicata doctrine, it must be clearly shown that the issues in Suit No. 2 were previously adjudicated in Suit No. 1. The record in Suit No. 1 does not reveal any evidentiary hearing, dispositive motions, orders, etc., i.e., which touch upon the issues raised by the pleadings. Liverman's obvious reason for moving for the dismissal of Suit No. 1 was the filing of the Demurrer to Suit No. 2 on the ground of two suits pending on the same promissory note. If, for example, Suit No. 1 had been dismissed with prejudice before the filing of Suit No. 2, Reed's res judicata argument would be, in the Court's opinion, considerably strengthened. In the present case, however, to bar Liverman's patently unadjudicated claim, upon the ground advanced by Reed would incorrectly extend the doctrine of res judicata to a rigid, unjust extreme. The Court finds that, standing alone, the phrase, "with prejudice", does not terminate Liverman's right to have his day in court upon the merits of his case.

Accordingly, the Plea and Bar is dismissed and counsel for the Plaintiff is directed to prepare and forward a sketch order for entry by the Court.

JOHN M. FOLKES, JUDGE

A handwritten signature in cursive script, reading "John M. Folkles". The signature is written in dark ink and is positioned below the printed name of the judge.



JUDGES

G. DUANE HOLLOWAY
P.O. BOX 371
YORKTOWN, VA 23690
(804) 898-0073

WILLIAM L. PERSON, JR.
P.O. BOX 385
WILLIAMSBURG, VA 23187
(804) 229-4711

JOHN M. FOLKES
P.O. BOX 282
GLOUCESTER, VA 23061
(804) 693-1358

COMMONWEALTH OF VIRGINIA

NINTH JUDICIAL CIRCUIT

COURTS

CHARLES CITY COUNTY	MATHEWS COUNTY
GLOUCESTER COUNTY	MIDDLESEX COUNTY
JAMES CITY COUNTY	NEW KENT COUNTY
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	CITY OF WILLIAMSBURG

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ROBERT T. ARMISTEAD
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WILLIAMSBURG, VA 23185

RUSSELL M. CARNEAL
226 THOMAS NELSON LANE
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JOHN E. DeHARDIT
P.O. BOX 291
GLOUCESTER, VA 23061
(804) 693-2781

July 27, 1993



Breckenridge Ingles, Esquire
Martin, Hicks & Ingles, Ltd.
P. O. Box 708
Gloucester, VA 23061

Re: Lewis S. Liverman, Sr. v. Randolph O. Reed - Law No. 1896
Circuit Court of Middlesex County

Dear Mr. Ingles:

In reference to the above captioned case, the Court had the benefit of your Reply Memorandum. The files in all cases taken under advisement are carefully examined.

The cases to which you refer are distinguishable in that neither involved two suits pending contemporaneously as in the instant case. The Court has ruled in its Opinion of July 20, 1993, and will not further consider the res judicata issue.

Very truly yours,

John M. Folkes

JMF:lm

CC: Roger G. Hopper, Esquire

VIRGINIA: IN THE CIRCUIT COURT OF MIDDLESEX COUNTY

LEWIS S. LIVERMAN, SR.,

Plaintiff,

v.

LAW NO. 1896

RANDOLPH O. REED,

Defendant.

ORDER

CAME on this day this matter to be heard upon defendant's Demurrer and Plea of Res Judicata, and the matter was argued by counsel.

UPON CONSIDERATION WHEREOF, and the court having reviewed defendant's Memorandum, plaintiff's Memorandum and defendant's Reply Memorandum, and for reasons set forth in this court's Opinion of July 20, 1993 and this court's letter of July 27, 1993, which are incorporated in this Order by reference, it is ORDERED that defendant's Demurrer is overruled and dismissed and defendant's Plea of Res Judicata is dismissed.

ENTER:

John M. Jones
Judge

DATE:

September 13, 1993

I ask for this:

R. J. Harper

_____, p.q.

Seen and objected to for reasons set forth in defendant's Memorandum and defendant's Reply Memorandum:

[Signature]

_____, p.q.

17-261
Copies mailed
9-28-93 45

VIRGINIA: IN THE CIRCUIT COURT OF MIDDLESEX COUNTY

LEWIS S. LIVERMAN, SR.,

Plaintiff,

v.

RANDOLPH O. REED,

Defendant.

LAW NO. 1896

12-1-93
Peggy Walker
GROUNDS OF DEFENSE

COMES NOW the defendant, Randolph O. Reed, by counsel, and for his Grounds of Defense to the Motion for Judgment exhibited against him herein states as follows:

1. The defendant is not indebted to plaintiff in any amount for any cause whatsoever.

2. The defendant admits that he signed a Promissory Note that is the subject of this suit. Plaintiff filed suit on that very same Promissory Note in this court on July 3, 1991. The case was styled Lewis S. Liverman, Sr. v. David C. Eanes, Jr. and Randolph O. Reed, Law No. 1854. That suit was settled by agreement dated August 23, 1991 wherein Reed was to pay \$37,000.00 to Liverman and Liverman acknowledged payment in full of that money. That suit was thereafter dismissed with prejudice.

3. Any allegations of the Motion for Judgment not specifically admitted are hereby denied.

AFFIRMATIVE DEFENSES

PLEA OF ACCORD AND SATISFACTION

4. The agreement of August 23, 1991 constitutes an accord and satisfaction between plaintiff and defendant such that any debt that was owed to plaintiff has now been extinguished.

PLEA OF PAYMENT

5. Plaintiff has been paid in full any and all sums owed to him as evidenced by the contract of August 23, 1991, which contract cannot be varied by parol evidence, said contract not being ambiguous and said contract standing on the same footing as all other written contracts.

PLEA OF RES JUDICATA

6. Plaintiff's previous suit against defendant, Law No. 1854, was dismissed with prejudice at plaintiff's request and is now res judicata as to this suit, both suits involving the same parties and the same Promissory Note.

WHEREFORE, plaintiff moves the court to dismiss the Motion for Judgment herein and award him his costs in this behalf expended.

RANDOLPH O. REED


By: 

Of Counsel

Breckenridge Ingles
Martin, Hicks & Ingles, Ltd.
P. O. Box 708
Gloucester, Virginia 23061
(804) 693-2500

CERTIFICATE

I certify that a true copy of the foregoing Grounds of Defense was mailed by first class mail, postage prepaid, this 30th day of November, 1993, to Roger G. Hopper, Esquire, P. O. Box 1215, Saluda, Virginia 23149.



Breckenridge Ingles

VIRGINIA: IN THE CIRCUIT COURT OF MIDDLESEX COUNTY

LEWIS S. LIVERMAN, SR.,

Plaintiff,

v.

LAW NO. 1896

RANDOLPH O. REED,

Defendant.

ORDER

CAME on this day this matter to be heard upon defendant's motion for leave to file his Grounds of Defense.

UPON CONSIDERATION WHEREOF and it appearing unto the court appropriate to do so; it is therefore

ADJUDGED, ORDERED and DECREED that defendant's Grounds of Defense, previously filed herein, shall be deemed timely filed.

ENTER:

John M. Jace
Judge

DATE:

January 4, 1994

I ask for this:

[Signature], p.d.

Seen:

RT Hopper, p.q.

*17-450
Copies mailed
2.18.94*

941420

CLERK
SUPREME COURT OF VIRGINIA

RECEIVED
SEP - 9 1994
RICHMOND, VIRGINIA

VIRGINIA
IN THE CIRCUIT COURT FOR THE COUNTY OF MIDDLESEX

LEWIS S. LIVERMAN, SR.,
Plaintiff,

vs.

LAW NO. 1896

RANDOLPH O. REED,
Defendant.

CLERK'S OFFICE
MIDDLESEX CO., VA
FILED
7-20-94 2:00pm
L. Walton
Clerk

TRIAL

BEFORE: The Honorable John M. Folkes, Judge
DATE: June 24, 1994

APPEARANCES: ROGER G. HOPPER, ESQ.
P. O. Box 1215
Saluda, Virginia 23149
Counsel for the Plaintiff

BRECKENRIDGE INGLES, ESQ.
P. O. Box 708
Gloucester, Virginia 23061
Counsel for the Defendant

Reported by: Cynthia D. Knapp

I N D E X

<u>WITNESS</u>	<u>PAGE</u>
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Direct Examination by Mr. Hopper	9
Cross-Examination by Mr. Ingles	16
Redirect Examination by Mr. Hopper	20
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Direct Examination by Mr. Ingles	27
Cross-Examination by Mr. Hopper	55
LEWIS S. LIVERMAN, SR. (Recalled)	
Direct Examination by Mr. Hopper	60
Cross-Examination by Mr. Ingles	61

<u>EXHIBITS</u>	<u>MARKED</u>	<u>ADMITTED</u>
Plaintiff's Exhibit No. 1	12	12
Plaintiff's Exhibit No. 2	13	13
Defendant's Exhibit "A"	20	20
Defendant's Exhibit "B"	28	28
Defendant's Exhibit "C"	30	30
Defendant's Exhibit "D"	37	37
Defendant's Exhibit "E"	39	39
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Defendant's Exhibit "H"	41	41
Defendant's Exhibit "I"	44	44
Defendant's Exhibit "J"	45	45
Defendant's Exhibit "K"	46	46
Defendant's Exhibit "L"	46	46
Defendant's Exhibit "M"	53	53

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(The court reporter was sworn.)

THE COURT: All right. This is the case of Lewis S. Liverman against Randolph Reed. Would you call the subpoenaed witnesses? Are there any witnesses?

MR. INGLES: There are none.

THE COURT: All right. Now, you gentlemen -- I assume someone is going to testify. If you are, you may just stand where you are. Would you swear them, please, madam, clerk?

(The witnesses were sworn.)

THE COURT: All right. Mr. Hopper, you brought this suit. Do you wish to make an opening statement?

MR. HOPPER: Yes, Your Honor. I represent the Plaintiff. The note has been made part of the pleadings. Our position is that nothing has been paid on the note.

THE COURT: All right. Let me clear one thing up. Let's be sure I understand this note. You've asked for attorneys' fees. There are no attorneys' fees recited. They're not a part of the note, and there is no -- the note does not bear interest; is that correct?

MR. HOPPER: That's correct.

THE COURT: Okay.

MR. HOPPER: I think we've set out our

1 position adequately in the trial --

2 THE COURT: Since you asked for attorneys'
3 fees, I don't think that I can enlarge -- assuming you prove
4 your case, I cannot enlarge, you know, more than the parties
5 have contracted for. Mr. Ingles, do you wish to be heard?

6 MR. INGLES: I do, Your Honor. Judge, we
7 would renew at this time the motion to dismiss based on the
8 plea of res judicata for all the reasons set forth in the
9 Defendant's memorandum, which is already part of the file,
10 and Defendant's reply memorandum, which also is part of the
11 file. And then I would ask to address the Court after the
12 Court rules on that renewed motion.

13 THE COURT: All right. The Court will
14 renew its previous disposition and deny that motion for
15 reasons stated in the Court's letter of opinion. You wish
16 to be heard further, you said?

17 MR. INGLES: Yes, sir.

18 THE COURT: All right.

19 MR. INGLES: Judge, I have received by hand
20 two days ago a trial memorandum of fact and law, and I
21 believe the Court has also received that; is that correct?

22 THE COURT: That's correct.

23 MR. INGLES: It became apparent to me upon
24 a review of that memorandum that the Plaintiff, having sued
25 on the note, intends to collect a judgment based on

1 something other than the note. And I would ask the Court to
2 restrict the Plaintiff to suit as filed in the motion for
3 judgment. What I'm referring to, Judge, is that there is
4 referenced in that trial memorandum a promissory note of
5 March the 4th of 1991, and that is what the Plaintiff has
6 sued upon. The memorandum goes on to address an agreement
7 of August the 23rd, 1991, which is a separate contract or
8 agreement between the parties. They had a promissory note
9 between the parties. That was one agreement. Apparently,
10 it is now alleged they had an agreement of August 23rd,
11 1991, which is an entirely separate agreement. It involved
12 different parties and separate and distinct obligations.

13 THE COURT: Well, I expect that agreement
14 was referred to because -- unless I don't comprehend this
15 case, which is always a distinct possibility, the terms of
16 the agreement which you refer to are being inserted as a
17 defense of accord and satisfaction; are they not?

18 MR. INGLES: The agreement itself is the
19 defense, Judge, just as the note -- a promissory note may be
20 discharged by renewal or by some other obligation. That's
21 what has occurred in this case. And that's why this
22 Defendant owes nothing on the note. And we would ask that
23 the testimony in this case be limited to what is owed, if
24 anything, on the note, and not what is owed, if anything,
25 pursuant to any subsequent agreement. I would say due

1 process requires in the pleading that the Plaintiff give
2 notice as to what contractual obligation he's suing upon,
3 and he made it clear in this case that he is suing on the
4 note. No mention is made in the motion for judgment of any
5 agreement of August 23rd, 1991. And the parties to those
6 obligations are separate. The obligation entailed is
7 separate. The note is a joint and several obligation of
8 Liverman -- excuse me, of Reed and Eanes. The agreement
9 separated those obligations. Reed had one obligation.
10 Eanes had a completely separate one. So it's no longer
11 jointly and severally. And the terms of payment, the amount
12 of payment have changed. And the defenses are different,
13 Judge. And when we prepared this case for trial and
14 subpoenaed witnesses or didn't subpoena witnesses, we
15 intended to try the note case and not any case revolving
16 around the subsequent agreement. Thank you.

17 MR. HOPPER: If I might read from
18 Paragraphs 4 and 5 in the grounds of defense filed by
19 Randolph O. Reed by his counsel, Breckenridge Ingles, it
20 says, "No. 4, the agreement of August 23, 1991 constitutes
21 an accord and satisfaction between Plaintiff and Defendant
22 such that any debt that was owed to Plaintiff has now been
23 extinguished." Paragraph 5: "Plaintiff has been paid in
24 full any and all sums owed to him as evidenced by the
25 contract of August 23, 1991, which contract cannot be varied

1 by parol evidence, said contract not being ambiguous and
2 said contract standing on the same footing as all other
3 written contracts." Grounds of defense.

4 MR. INGLES: But they didn't sue on the
5 note, Judge -- or they sued on the note rather, but didn't
6 sue on the agreement. And they're two separate obligations.
7 They're two separate contracts.

8 THE COURT: I might be thick here, but it
9 seems to me, he's suing -- he brought a suit against him for
10 nonpayment of the note of your client's share or -- half of
11 it's been paid by Eanes. Your client was obligated,
12 according to what has been alleged, to pay the other half.
13 It's also alleged that he's failed to pay it. And the suit
14 is on the note. But you have interposed as a defense a
15 subsequent agreement between the parties which recited that
16 payment had been made, receipt of which was hereby
17 acknowledged. And you're claiming that as an accord and
18 satisfaction seems to me that that is inextricably
19 intertwined with the whole case since you're asserting that
20 as a defense for nonpayment of the obligation on the note.

21 MR. INGLES: The fact that the agreement --
22 the fact of the agreement, Judge, discharged the note.

23 THE COURT: Well, I understand that's your
24 position.

25 MR. INGLES: Yes, sir. Well, I think

1 that's the law. All right. We've set forth our position.
2 If the Court is going to get into evidence as to whether
3 Mr. Reed has performed his obligations under the agreement
4 itself in this case, which is the suit on the note, I would
5 respectfully ask the Court to allow us a continuance to
6 subpoena witnesses who have information as to whether Reed
7 performed what was required of him pursuant to the
8 agreement. We are prepared to go forward today on evidence
9 as to whether Reed performed what was required of him
10 pursuant to the note, which was sued on.
11

12 MR. HOPPER: Judge, this case has been on
13 the docket for two years this past May. I find a motion to
14 continue at this time to be absurd. We are suing on the
15 note. Mr. Liverman is going to testify that he's not been
16 paid one red cent by the Defendant, Reed, on the note.

17 THE COURT: All right. The motion for a
18 continuance is denied. It seems to me that he has either
19 paid the note or he hasn't. And if I'm wrong, the case can
20 be appealed. Do you want him to testify?

21 MR. HOPPER: Yes, sir.

22 THE COURT: All right. Come forward,
23 please.

24 MR. INGLES: Judge, would you just note our
25 exception for the reasons stated?

THE COURT: Yes, sir, of course.

1
2 MR. INGLES: Thank you.

3
4 LEWIS S. LIVERMAN, SR.,
5 called as a witness, having been first
6 duly sworn, was examined and testified
7 as follows:

8
9 DIRECT EXAMINATION

10 BY MR. HOPPER:

11 Q. Would you state your name?

12 A. Lewis S. Liverman.

13 Q. Are you also known as Lewis S. Liverman,
14 Sr.?

15 A. Yes, sir.

16 Q. And what is your address?

17 A. P. O. Box 537, Saluda, Virginia.

18 Q. Do you live -- where do you live, sir?

19 A. I live over top of my office building.

20 Q. Where did you live in March of 1991?

21 A. In Gloucester, Dockside Condominiums.

22 Q. Is that in Hayes, Virginia?

23 A. Pardon?

24 Q. Hayes, Virginia?

25 A. Yes.

Lewis S. Liverman, Sr. - Direct

1
2 MR. HOPPER: May I approach the witness,
3 Judge?

4 THE COURT: Yes, sir.

5
6 BY MR. HOPPER:

7 Q. Mr. Liverman, I show you this promissory
8 note dated March 4th, 1991. Have you seen this note before,
9 sir?

10 A. Yeah.

11 Q. Was this note executed by Randolph Reed and
12 David C. Eanes, Jr.?

13 A. Yes, sir.

14 Q. And was it given to you?

15 A. Yes, sir.

16 Q. The note calls for the payment of \$74,000.
17 Has Mr. Reed paid you any amount of money whatsoever on this
18 note?

19 A. No, sir.

20 Q. None?

21 A. None whatsoever, not a penny.

22 MR. INGLES: Judge, I'm going to object to
23 the introduction of that unless that's the original note.

24 MR. HOPPER: Well, I think the best
25 evidence rule is a copy of it. I mean, what's the
difference?

Lewis S. Liverman, Sr. - Direct

1 MR. INGLES: The best evidence rule says if
2 you can explain where the original is and it's not
3 available, you can introduce a copy. There's been no
4 explanation of where the original is and I'd submit that
5 that is relevant to our defense in the case.
6

7 THE COURT: Mr. Hopper?

8 MR. HOPPER: The parol -- I mean, the best
9 evidence rules says a copy of it.
10

11 BY MR. HOPPER:

12 Q. Is this a true copy of the note,
13 Mr. Liverman?

14 A. Yes, sir.

15 Q. Do you have the note?

16 A. Yes, sir.

17 Q. You have the note itself, the first one
18 that was made, the original?

19 A. I have my file down there. I'd have to go
20 through it and see. I'm pretty sure it's in there.

21 Q. You've got copies of it?

22 A. Yeah.

23 Q. You gave me this copy of the note? This is
24 the same copy that was filed with the court pleadings in
25 this suit?

A. Yes, sir.

1 THE COURT: Well, I know that the copy is
2 subject to -- the reason that I'm concerned about a copy
3 being introduced -- I'm sure this is a copy of the original
4 note. But how do we know that this note hasn't -- the
5 original hasn't been assigned to someone else, a holder in
6 due course? That's the problem I have with that,
7 Mr. Hopper. I'm going to admit it, but I'm going to require
8 him to produce that original note, or have some explanation
9 as to its whereabouts.
10

11 (Whereupon, Plaintiff's Exhibit No. 1 was
12 marked and received into evidence.)
13

14 MR. HOPPER: All right, sir. If you'll
15 bear with me just a minute.
16

17 THE COURT: I don't dispute this isn't --
18 this is obviously the note. But it's just like -- I had a
19 case up here a couple of years ago involving \$130,000. A
20 man came down here and got somebody to sign \$130,000 deed of
21 trust, and said, "Well, go on. I know you don't need all my
22 money now, but sign several notes in blank." This is a
23 lender. And the lender went back to Richmond and filled out
24 several of these notes for \$130,000. Everybody thought they
25 had a secured deed of trust, and they were all holders in
due course.

Lewis S. Liverman, Sr. - Direct

1
2 MR. HOPPER: I think I can explain.

3
4 BY MR. HOPPER:

5 Q. Can you identify this agreement dated
6 August 23rd, 1991?

7 A. Yes, sir.

8 Q. Between you and David Eanes and Randolph O.
9 Reed?

10 A. Yes, sir.

11 Q. Is this a true copy of this agreement?

12 A. Yes, sir.

13 MR. HOPPER: Judge, this has been made a
14 previous exhibit through the memorandum of fact of law. I
15 would request to introduce it at this time.

16 THE COURT: All right.

17
18 (Whereupon, Plaintiff's Exhibit No. 2 was
19 marked and received into evidence.)

20
21 BY MR. HOPPER:

22 Q. Now, pursuant to the terms of this
23 agreement, one of the things that it says --

24 MR. INGLES: Judge, I'm going to object to
25 him relating what the agreement says. It speaks for itself.
He's certainly at liberty to ask any questions he'd like.

Lewis S. Liverman, Sr. - Direct

1
2 THE COURT: Sustained.

3
4 BY MR. HOPPER:

5 Q. In Paragraph 4 of this agreement, it says,
6 "Immediately upon the request of Eanes and Reed, but not
7 before, Liverman shall take any or all of the following
8 actions as may be requested by Eanes and Reed; A: Deliver
9 the \$74,000 note to Eanes and Reed or their designee.
10 B: Endorse the \$74,000 note without recourse to Liverman as
11 may be directed by Eanes and Reed." Did you endorse this
12 note?

13 A. Yes, sir.

14 THE COURT: Pardon me? What was the
15 answer?

16 THE WITNESS: Yes, sir.

17
18 BY MR. HOPPER:

19 Q. You endorsed this note to Eanes and Reed or
20 to yourself?

21 A. Well, it's to Eanes to Reed.

22 COURT REPORTER: I'm sorry?

23 THE WITNESS: Yes, sir. I endorsed it.
24 You mean this is made out to me?
25

Lewis S. Liverman, Sr. - Direct

1 BY MR. HOPPER:

2 Q. This is the agreement between you --

3 A. Well, I endorsed it to myself then.

4 Q. You endorsed it to yourself?

5 A. Yeah.

6 Q. When did you do it?

7 A. In August of '91. But I don't know exactly
8 what date it was.

9 Q. All right. Do you recall executing this
10 agreement?

11 A. Yes, I do.

12 Q. Did you endorse the note to them at the
13 very same time?

14 MR. INGLES: Judge, I object to the
15 leading. He's already said he doesn't know when he did it.
16 And Mr. Hopper was pointing to the date at the top of the
17 agreement.

18 MR. HOPPER: He said --

19 THE COURT: All right, gentlemen.

20 MR. HOPPER: He said that he did it in
21 August of '91 and didn't remember the particular date.

22 THE COURT: Don't lead him, Mr. Hopper.
23 Ask him when he did it.
24
25

Lewis S. Liverman, Sr. - Cross

1 BY MR. HOPPER:

2 Q. When did you do it?

3 A. It was in August of '91, 1991.

4 Q. Did you do it -- within what time frame?

5 Did you do it when you signed this agreement or later?

6 A. Which one are you talking about?

7 Q. The endorsing of the note.

8 A. I did it at that time.

9 Q. At that -- at this very time?

10 A. (The witness nodded his head up and down.)

11 Q. All right. Have you been paid any money on
12 this note?

13 A. No, sir.

14 Q. By Mr. Reed?

15 A. No, sir, not a dime.

16 Q. Does he owe you \$37,000 on this note?

17 A. Yes, sir.

18 MR. HOPPER: No more questions.

19
20 CROSS-EXAMINATION

21
22 BY MR. INGLES:

23 Q. Where is the original note?

24 A. It's in my files.

25 Q. You're positive of that; is that correct?

Lewis S. Liverman, Sr. - Cross

1 A. So far as I know it is, yeah. I'd have to
2 look at my files. You know, I don't go through them every
3 day.
4

5 Q. Mr. Liverman, isn't it a fact that you
6 turned over that original note when you endorsed it? You
7 turned it over to Mr. Curdts, Mr. Reed's attorney who
8 practices in White Stone, Virginia?

9 A. Not to my knowledge, I didn't.

10 Q. Isn't it true that as of today, Mr. Curdts
11 has the original note?

12 A. I don't know about that. I really don't
13 know.

14 Q. Now, did you assign the note or not?

15 A. Yeah.

16 Q. And who did you assign it to?

17 A. Mr. Reed and Mr. Eanes.

18 Q. How did you do that?

19 A. What do you mean, "how did I do it"?

20 Q. Did you write something on the note or did
21 you assign it some other way?

22 A. I signed it with the agreement that they
23 were going to pay me \$37,000 apiece.

24 Q. But how did you physically accomplish the
25 assignment? Did you write something on something?

 A. I just signed the note.

Lewis S. Liverman, Sr. - Cross

1 Q. You just signed it?

2 A. Yes, sir.

3 MR. INGLES: Judge, may I approach the
4 witness?

5 THE COURT: Yes, sir.

6
7 BY MR. INGLES:

8 Q. Now, you recognize this as being a copy of
9 the note we're referring to; is that correct?

10 A. (No audible response.)

11 Q. That's the note you sued on, isn't it?

12 A. I sued because he owed me \$37,000,
13 Mr. Ingles. I don't know -- you know, I'm not a legal
14 expert.

15 Q. So you can't tell me whether this is the
16 note that you're suing on or not?

17 A. I'm suing for \$37,000.

18 Q. Yes, sir. Write on this document whatever
19 it was that you say you wrote on the note to assign it to
20 Mr. Eanes and Mr. Reed, please.

21 A. Write on it what?

22 Q. You said you wrote something on the note
23 assigning it --

24 A. No, I didn't. I said I signed it.

25 Q. All right. Well, sign it just as you

Lewis S. Liverman, Sr. - Cross

1 signed it to assign it to Mr. Reed and Mr. Liverman -- I
2 mean, Mr. Eanes.

3 MR. HOPPER: I think that the proper
4 foundation would be was anything typed on the note for him
5 to sign, Judge. And if so, what was it and who do it?
6

7 THE COURT: Mr. Ingles?

8 MR. INGLES: Well, he has testified, Judge,
9 that he -- what he did to assign it was he signed it. And I
10 want to see what he did to assign it.

11 THE COURT: Do you know what you did?

12 THE WITNESS: I just signed the note over
13 to them.

14 THE COURT: You signed it --

15 THE WITNESS: -- that they were going to
16 pay me.

17 THE COURT: All right. Will you affix your
18 signature on the note as best you can recall how you did it
19 at the time?

20 THE WITNESS: Yes, sir. Do you want me to
21 sign this like that?

22 THE COURT: Yes, sir.

23 (Document tendered to counsel.)

24 MR. INGLES: Thank you. Judge, we'd move
25 introduction --

MR. HOPPER: May I see the exhibit first?

Lewis S. Liverman, Sr. - Redirect

1 THE COURT: Sure.

2 (Document tendered to counsel.)

3 MR. INGLES: We'd move introduction as
4 Exhibit, Defendant's No. 1.

5 MS. WALTON: "A."

6 MR. INGLES: Excuse me?

7 MS. WALTON: "A."

8 MR. INGLES: "A."

9
10 (Whereupon, Defendant's Exhibit "A" was
11 marked and received into evidence.)
12

13 MR. INGLES: That's all the questions I
14 have of this witness, Your Honor.
15

16 REDIRECT EXAMINATION

17 BY MR. HOPPER:

18 Q. Mr. Liverman, was anything typed on this
19 note when you signed it, a place for you to sign or any
20 typing on it on the back of it or whatever?
21

22 A. For me to sign?

23 Q. Yes.

24 A. It's been so long, I can't remember. I'm
25 going to tell you the truth on that.

Lewis S. Liverman, Sr. - Redirect

1 Q. Could there have been something typed on
2 the note?

3 A. Well, I'm sure it was wherever I signed it
4 at.

5 Q. You didn't type whatever it was on the
6 note, did you?

7 A. No, sir. No, sir. I can't even type.

8 Q. You didn't prepare this note, did you?

9 A. No, sir.

10 Q. Who prepared the note?

11 MR. INGLES: Judge, this does not go to
12 cross-examination and not relevant. It doesn't matter who
13 prepared it.

14 THE COURT: Mr. Hopper?

15 MR. HOPPER: Judge, I think it does. I
16 think that the note is under attack that he doesn't have the
17 original and he assigned it to somebody, and, therefore, he
18 doesn't have a case because he's not the holder of the note.
19 I think it's relevant evidence to find out if -- who
20 prepared the note because it would be against -- construed
21 against whoever prepared it.

22 THE COURT: I'll permit it, Mr. Ingles. Go
23 ahead, Mr. Hopper.

Lewis S. Liverman, Sr. - Redirect

1
2 BY MR. HOPPER:

3 Q. Who prepared that note? Who typed and made
4 the note?

5 A. I don't -- his lawyers, I guess.

6 Q. His lawyers?

7 A. Yes, sir.

8 THE COURT: Who is "his"?

9
10 BY MR. HOPPER:

11 Q. Mr. Reed's lawyer?

12 A. Bill Curdts, I think.

13 Q. Was that Mr. Reed's lawyer?

14 A. Yes, sir, I think so, him and Mr. Eanes.

15 Q. All right. And where were you when you
16 signed that agreement -- the note the first time, the note?

17 A. I think it was down at Mr. Eanes' office.

18 Q. All right. Now, do you recall signing the
19 agreement and endorsing the note?

20 A. Yes, sir.

21 Q. And where were you when you did that?

22 A. Down in Mr. Eanes' office.

23 Q. Who, Eanes' office?

24 A. Yes, sir. Yes, sir.

25 Q. All right. You say that his attorney had
prepared these documents?

Lewis S. Liverman, Sr. - Redirect

1 A. (The witness nodded his head up and down.)

2 MR. HOPPER: All right, sir. No more
3 questions.

4 MR. INGLES: No more questions.

5 THE COURT: All right. Have a seat. Do
6 you wish to put on any evidence, Mr. Ingles?

7 MR. INGLES: Judge, I move to strike. If I
8 may approach the bench, I have authority for the motion that
9 I would like the Court to consider. It's Section 8.3A-309
10 of the Code of Virginia. And, Judge, what that section says
11 is that a person who is not in possession of a promissory
12 note is entitled to enforce the note only if that person was
13 in possession of the note and entitled to enforce it when
14 loss occurred. The loss was not the result of transfer.
15 The person cannot reasonably obtain possession of the note
16 because the note was destroyed or its whereabouts cannot be
17 determined or it is in the wrongful possession of an unknown
18 person or a person who cannot be found or is not amenable to
19 service of process.

20 In this case, Judge, Mr. Liverman says he
21 was in possession of the note, says he thinks the note is in
22 his file. There has been by his own testimony transfer of
23 the note. He says he's assigned it either to Reed and
24 Eanes. And, of course, there is no testimony that the
25 person cannot reasonably obtain possession of the note

1 because it was destroyed. Here the person says he's got it
2 in his file. He said in one case, he's got it in his file,
3 and there is no excuse for not producing it. In the other
4 case, he says that he assigned it and he's not real sure
5 where it is. And the burden is upon him to show according
6 to this statute that these items that are set forth in the
7 statute. And he has not met that burden, Judge.

8 THE COURT: Mr. Hopper?

9 MR. HOPPER: Judge, I don't think it's as
10 simplistic as that. The agreement of August the 23rd, 1991,
11 which is in evidence, in Paragraph 4, which I read, said
12 that if called upon, he would endorse the \$74,000 note
13 without recourse to Liverman as directed by Eanes and Reed.
14 He said he signs the note, whatever he did. He was sure
15 something was typed on it. Whatever it was done, was done
16 contemporaneous with this agreement. This agreement, of
17 course, acknowledges that they owe \$74,000. That Eanes has
18 paid his \$37,000. That Reed shall pay the sum of \$37,000 in
19 partial curtailment of the note. And at the same time, if
20 they request, which, obviously, they did, that he endorse
21 it, then they would -- he endorsed it. He endorsed it
22 pursuant to this agreement at the same time he signed the
23 agreement. The fact remains that the note has not been
24 paid.

25 I don't think that the situation is such

1 that a Defendant can say, "Okay. I agree to pay you
2 \$37,000, but I want you to endorse this note to me because I
3 want to sue somebody else on it." And so, his attorney has
4 prepared the papers and the man signs the agreement and then
5 endorses the note pursuant to the agreement like he's asked.
6 I don't think under those circumstances that the Plaintiff
7 is called upon to produce a note that was made and done
8 pursuant to this agreement, which is in the hands of the
9 attorneys' which is the same thing, of Reed.

10
11 The papers were prepared by Reed, his
12 counsel. They need to be construed strictly against him.
13 The endorsement was made pursuant to this agreement at the
14 very same time.

15 Now, they've got the note and they say,
16 "Ha. Ha. You endorsed it." We don't know to whom because
17 Paragraph B says, "Endorse it without recourse to Liverman."
18 We don't know if he endorsed it to Liverman. We don't know
19 if we endorsed it to Eanes or Reed. But he did it at the
20 request pursuant to this agreement. So now they have the
21 agreement. They have the note. And they come into court
22 and say, "Ha. Ha. You don't have the note. Therefore, you
23 can't recover." I don't think that's the law.

24 THE COURT: I'm going to overrule the
25 motion, Mr. Ingles. Do you wish to put on your client?

MR. INGLES: Judge, may I just speak to

1 that for a minute --

2 THE COURT: Yes.

3 MR. INGLES: -- just to make the record?

4 THE COURT: Yes, sir, of course.

5 MR. INGLES: This gets to the problem that
6 I addressed when we started this case, that now Mr. Hopper
7 is pursuing a suit on an agreement and not on the note. He
8 has changed his suit in midstream and this motion for
9 judgment addresses the note.

10 THE COURT: Well, may I say this?

11 MR. INGLES: Yes, sir.

12 THE COURT: He brought the suit on the
13 note. And the agreement it seems to me is inextricably
14 intertwined with the note since the note was apparently
15 surrendered or transferred in some fashion in exchange for
16 the covenants or promises in the agreement to pay the
17 Plaintiff, in which, according to the admissions, there is
18 no evidence that he's ever been paid by your client. So I
19 don't think it's quite accurate to completely segregate the
20 two.

21 MR. INGLES: They're two separate
22 contracts, Judge. And they've sued on one and not on the
23 other.

24 THE COURT: Well, we just have a honest
25 disagreement on those --

Randolph O. Reed - Direct

1
2 MR. INGLES: Yes, sir, I understand. And
3 I'm just making a record. I'm not expecting to change your
4 mind at the drop of the hat here. I hope to change it
5 eventually before I leave today, though. Mr. Reed, go ahead
6 and take the stand. Judge, may I approach and get the
7 exhibits?

8 THE COURT: Yes.

9 (Off-the-record discussion.)

10
11 RANDOLPH O. REED,
12 called as a witness, having been first
13 duly sworn, was examined and testified
14 as follows:

15
16 DIRECT EXAMINATION

17
18 BY MR. INGLES:

19 Q. State your name, please.

20 A. Randolph O. Reed.

21 Q. Mr. Reed, you're a resident of Middlesex
22 County?

23 A. Yes, sir.

24 Q. And you're the building official for
25 Middlesex County?

A. Yes, sir.

Randolph O. Reed - Direct

1 Q. Did you sign this promissory note dated
2 March 4, 1991, Exhibit "A"?

3 A. Yes, sir.

4 Q. All right. And do you know -- well, let me
5 ask you this, were you sued on that note?

6 A. Yes, sir.

7 Q. Were you sued by Mr. Liverman?

8 A. Yes, sir.

9 Q. And I show you what will be marked as
10 Exhibit "B," and ask you if that's a true copy of the suit
11 papers where you were sued by Liverman?

12 A. Yes, sir.

13 MR. INGLES: Move for introduction as
14 Exhibit "B."

15 THE COURT: Is this the predicate for the
16 res judicata?

17 MR. INGLES: It's the predicate, Judge, for
18 the agreement that followed. That's what I'm leading to.
19 But it is also the predicate for the res judicata, yes, sir.

20 THE COURT: Okay.

21
22 (Whereupon, Defendant's Exhibit "B" was
23 marked and received into evidence.)
24
25

Randolph O. Reed - Direct

1 BY MR. INGLES:

2 Q. And I show you now Exhibit -- Defendant's
3 Exhibit 2 and ask you if that's an agreement that you
4 signed?

5 A. Yes, sir.

6 MR. HOPPER: May I see the agreement?

7 MR. INGLES: This is your -- the agreement
8 that you offered.

9 THE COURT: Is that already in evidence?

10 MR. INGLES: Yes, sir, already as
11 Defendant's 2.

12 MR. HOPPER: Plaintiff's.

13 MS. WALTON: It's Plaintiff's 2.

14 MR. INGLES: Plaintiff's? Am I reading it
15 wrong?

16 THE COURT: No, you read it right. It
17 should be -- change it to "Plaintiff's 2."

18
19 (Whereupon, Defendant's Exhibit No. 2 was
20 remarked as Plaintiff's Exhibit No. 2)

21
22 BY MR. INGLES:

23 Q. Was that agreement, Plaintiff's 2, a part
24 of a settlement of the lawsuit?

25 A. Yes, sir.

Randolph O. Reed - Direct

1 Q. And then was that lawsuit later dismissed?

2 A. Yes, sir.

3 Q. And this order I showed you is the order
4 dismissing that lawsuit?

5 A. Yes, sir.

6 MR. INGLES: Your Honor, we would move the
7 introduction as Defendant's "C."

8
9 (Whereupon, Defendant's Exhibit "C" was
10 marked and received into evidence.)
11

12 BY MR. INGLES:

13 Q. Now, Mr. Reed, did you -- well, let me ask
14 you this, where is the original promissory note of March 4,
15 1991 in the amount of \$74,000 that was signed by you and
16 Mr. Eanes? And I will show you a copy of that, which is
17 Defendant's Exhibit "A." Where is the original of that
18 note?

19 A. It's in Bill Curdts' office. Dutton,
20 Simmons & Dutton in White Stone.

21 Q. Now, Mr. Liverman said it was in his file.
22 How do you know it's not in Mr. Liverman's file?

23 A. I saw the note Tuesday. Cindy, Bill
24 Curdts' secretary, pulled the file and the note is in the
25 file, Bill Curdts' file, the original note.

Randolph O. Reed - Direct

1 Q. Tuesday of when?

2 A. This week.

3 Q. You saw it with your own two eyes?

4 A. Yes, sir.

5 Q. And that's the original note?

6 A. Yes, sir.

7 Q. And what markings, if any, are on that note
8 different from the copy that was introduced to the Court?
9 Now, you've --

10 MR. HOPPER: Objection, Your Honor. He's
11 trying to change the terms of a valid written agreement.

12 MR. INGLES: They said it's been assigned,
13 Judge.

14 MR. HOPPER: You can't offer parol evidence
15 to vary the terms of it. He's hasn't got -- he's got an
16 exhibit in his hand and he's tendered it to the Court. Now
17 he wants him to describe orally what may or may not have
18 been on the note.

19 THE COURT: Well, there's a copy and
20 there's an original. The copy has been introduced and I
21 permitted that to come in, albeit with some concern about
22 this -- the whereabouts of the original note. Since we now
23 know where that is, some of my fear has been allayed.
24 What's the point here? I mean --

25 MR. INGLES: I want to know if the note has

Randolph O. Reed - Direct

1 been assigned.

2 THE COURT: Well, I think the agreement --
3 but go on and question him further.
4

5 BY MR. INGLES:

6 Q. Was the note assigned?

7 A. No, sir.

8 Q. Is it in Mr. Curdts' file --

9 A. Yes, sir.

10 Q. -- without any writing on it?

11 A. It doesn't have any writing on it.
12

13 MR. INGLES: Judge, I would propose to the
14 Court that Mr. Reed be cross-examined on that testimony and
15 that I not have to try my case now on whether he's performed
16 according to the subsequent agreement on which suit was not
17 filed. I can go forward, but with a considerable handicap
18 in that case, and that's what I brought up to the Court when
19 we started. This is a suit on the note and I don't think
20 they can possibly prevail on the suit on the note --

21 THE COURT: And why is that, Mr. Ingles?

22 MR. INGLES: -- given the evidence.

23 Because they have the obligation to produce the original
24 note, or if they can't produce it, to show those things set
25 forth in 8.3A-309. And, of course, Mr. Curdts is certainly
amenable to process. He certainly can be produced to the

1 Court. There's nothing that stopped the note from coming to
2 Court. They simply haven't met the burden in the case.

3 MR. HOPPER: Judge, it seems to me that the
4 testimony so far is that -- from Liverman, that he signed
5 the note. He thinks he endorsed it, but he signed it. He
6 showed what he did there. In any event, he said he gave it
7 to the Defendant. And the Defendant apparently has taken it
8 and given it to his attorney, his attorney who prepared the
9 note, who prepared the agreement. They've got it in their
10 possession. And now the defense is, "Hey, we got the note
11 and you don't, so, therefore, you can't recover."

12 MR. INGLES: Judge, may I give the Court
13 additional authority?

14 THE COURT: Yes, sir.

15 MR. INGLES: This is 8.3A-604 that talks
16 about discharge by cancellation and renunciation of the
17 note. Judge, it says in that a person entitled to enforce
18 an instrument, in this case, that would be Mr. Liverman,
19 with or without consideration, either being paid or not
20 being paid, may discharge the obligation of a party to pay
21 the instrument, that's Mr. Reed. He can discharge Reed by
22 an intentional voluntary act, such as surrender of the
23 instrument to the party, or by agreeing not to sue or
24 otherwise renouncing his rights against the party by a
25 signed writing. And I would submit that the evidence before

1 you, unrefuted and unrefutable is that Mr. Liverman has done
2 both of those acts. By an intentional voluntary act, he has
3 surrendered the instrument. He has given it to Mr. Curdts.
4 And No. 2, he has by this agreement of August the 23rd, 1991
5 agreed not to sue or has renounced his rights against
6 Mr. Reed by that writing. It renounced his rights --

7
8 THE COURT: The \$37,000?

9 MR. INGLES: Renounced -- no, sir,
10 renounced his rights under the note. He hasn't renounced
11 his rights, if any, that he's got under the agreement. But
12 he's renounced his rights under the note. And they've sued
13 on the note, not on the agreement. Now, Judge, I'm prepared
14 to go forward with Mr. Reed with a handicap as to the --
15 what performance if any has occurred under the terms of the
16 agreement. But I would certainly have other evidence if I
17 had known we were going to try that case today.

18 THE COURT: Mr. Hopper?

19 MR. HOPPER: Judge, I don't -- I think it's
20 an intentional act. He says that pursuant to the agreement,
21 he endorsed it over to them and -- or signed it. Anyway, he
22 called it an endorsement as was called for in this Paragraph
23 4 of this agreement. That is in conformance with the
24 agreement. It's not an intentional act or dispatchment or
25 surrendering it or mutilating or null and voiding the
situation.

Randolph O. Reed - Direct

1 THE COURT: Please proceed, Mr. Ingles,
2 under the disability you say you've got.

3 MR. INGLES: Yes, sir.

4 THE COURT: I want to proceed.

5 MR. INGLES: All right.

6 THE COURT: I'd like to hear what he's done
7 on the agreement.

8 MR. INGLES: Yes, sir. Judge, to do that,
9 I have to lay a little background on how this all came
10 about.

11 THE COURT: All right.

12
13 BY MR. INGLES:

14 Q. Mr. Reed, I show you a deed of assumption
15 dated October 31, 1990 and ask you if you recognize that?

16 A. Yes, sir.

17 Q. What is that?

18 A. That's when we purchased the property up on
19 Route 17.

20 Q. We, who?

21 A. Mr. Liverman, Mr. Eanes and myself.

22 Q. And what property on 17 did you, Eanes, and
23 Liverman purchase?

24 A. It was the Francis Newton Williams' farm.

25 Q. Is that where the Food Lion is going to be

* * *



1 note was given. It says that Ballard was supposed to pay it
2 off. It says Ballard didn't pay it off. They acknowledged
3 that Liverman is entitled to recover. And they promised to
4 pay him. Eanes to pay him by allowing him credit on two
5 things he's buying from him, which is \$37,000, and the other
6 \$37,000 to be paid by Reed. The evidence is plain and
7 simply, Reed did not pay any amount of money on this note.
8 He has admitted it under oath. He has admitted it in his
9 interrogatories. We ask for judgment.

10 THE COURT: Mr. Ingles?

11 MR. INGLES: Judge, there's not much I'm
12 going to add to what I've already said, but I'm going to
13 renew my motions at this point. I renew the motion to
14 dismiss based upon res judicata for the reasons previously
15 stated in the record.

16 Judge, this Plaintiff has sued on a note,
17 not on a contract of August of '91, but on a promissory
18 note. The note was not produced today. The statute clearly
19 requires him to produce it or indicates that there are
20 exceptions where he does not have to produce it if he
21 satisfies the terms and conditions of that exception. That
22 is under 8.3A-309. He has not satisfied those exceptions.
23 That particular statute says that he must have been in
24 possession and entitled to enforce it when it was lost. The
25 loss of possession was not the result of transfer. Now,

1 he's testified that the loss of possession was the result of
2 transfer when he got around to it. He first testified that
3 he had the original note, which we now know is not true.
4 But he was not in possession of it today because he had
5 transferred it, so he cannot sue on the note.
6

7 And the person who has it is certainly in
8 possession legally, and his whereabouts can be determined,
9 and he's not in wrongful possession, and he is amenable to
10 service of process before this Court. So I say to the Court
11 again that judgment cannot be granted upon this note and it
12 is upon the note that suit was brought. There is no
13 reference to any other document, agreement of any kind
14 whatsoever in the motion for judgment.

15 And due process requires that if a
16 Defendant is going to be called upon to defend a case, that
17 he be given adequate notice of what case it is that he's
18 going to be called upon to defend.

19 In the second place, Judge, we say that the
20 note was discharged pursuant to Section 8.3A-604 of the Code
21 that Mr. Liverman, by his voluntary act, surrendered that
22 note and by the agreement of August of 1991, renounced his
23 rights. So the note has been paid by an agreement. Just as
24 I go to the bank on a 90-day note and renew it by signing
25 another note. No, that note hasn't been paid, but it's been
replaced by another obligation. And it's that other

1 obligation that suit should have been brought on if they
2 expected to collect a judgment based upon that other
3 obligation.
4

5 Now, Judge, in addition to that, the issue
6 of why in that agreement Mr. Liverman indicated that he had
7 received his \$37,000 from Mr. Reed. There was no reason for
8 him to sign an agreement that had that language unless there
9 was something up, unless there was something different from
10 the normal proposition. All the agreement had to say was,
11 "Reed is to pay Liverman \$37,000. Reed is to pay Liverman
12 \$37,000."

13 Now, Liverman signed this agreement, and he
14 didn't just sign it willy-nilly. You'll see on the last --
15 next to last page, Paragraph 6, he read this agreement
16 carefully enough to go ahead and insert in it in his own
17 hand apparently "The said Lewis S. Liverman, Sr. shall not
18 be responsible for any costs, fees, expenses or other as a
19 result of this agreement," and apparently put his initials
20 by that. So he is fully accountable by the terms of this
21 agreement.

22 And that language in the agreement
23 certainly supports what Mr. Reed has told you under oath was
24 the case, that they had a deal between the two of them that
25 they would split their profits essentially equally in this
deal. And Reed had seen no profit. They thought they were

1 going to see money when they got that \$500,000 contract.
2 They thought they were going to make some good money. And
3 that fell through. By the time they transferred it to
4 Ballard, Ballard simply assumed the indebtedness against the
5 property, the \$160,000 to the Farms Credit, the \$70,000 to
6 the land trust that they had bought the property from, and
7 the \$74,000 to Mr. Liverman. And Mr. Reed hadn't seen any
8 money until he sold his one-quarter interest. And at that
9 time, all he got was a noninterest bearing note for \$15,000
10 that he finally had to discount a couple of weeks ago to get
11 \$12,500 out of it.

12 And the fact that there was no attempt to
13 collect for eight months speaks volumes. If one were owed
14 \$37,000 and they thought enough about it to file suit on it,
15 and then the settlement comes and then they're not paid
16 pursuant to the settlement, you would certainly expect them
17 to assert their rights very rapidly. And, of course, that
18 wasn't done in this case, which is more support of
19 Mr. Reed's position.

20 Judge, we ask the Court for the reasons
21 stated to grant judgment to the Defendant in this case.
22 Thank you.

23 MR. HOPPER: If it please the Court, the
24 agreement in the first paragraph on the second page where
25 the parties actually agreed, it says, "He shall pay

1 \$37,000." It's in the future tense. It says, "He shall pay
2 it." Even Mr. Ingles has graciously conceded that the parol
3 evidence rule exception lets in the fact that the payment
4 has not been made because it's merely an acknowledgement or
5 a receipt. And that is an exception to the parol evidence
6 rule.

7 What the defense here today is that, "Yes,
8 I signed the note." And, "Yes, I signed the agreement."
9 And, "Yes, I wanted to cover against Ballard." And,
10 "Yes" -- he has signed it and -- he said he didn't sign
11 anything on the note, but he got the note. His attorney has
12 possession of the note. What we are asked to believe here
13 by this plethora of instruments that Liverman is not a party
14 to is that they had a deal to split profits. And if he made
15 any money, then he would pay the note. I ask you very
16 simply, Your Honor, where in the agreement does it say
17 anything about that? If it was the agreement of the
18 parties, then it should have said so in the note. There is
19 not one shred of written evidence at all to say that there
20 was any deal or this note would be paid otherwise than as
21 set forth on the face of the note itself or in this
22 agreement. This agreement is an acknowledgement that the
23 money is owed. It hasn't been paid. The judgment should be
24 granted.

25 THE COURT: Well, the Court feels as though

1 the note was signed and it hasn't been paid and the -- I see
2 Mr. Ingles distinction on the suit on the note and the suit
3 on the agreement, but it seems to me that the two are
4 inextricably intertwined. The note was assigned or
5 transferred in consideration of the agreement. The genesis
6 of this debt is the note, and that's what was sued on. And
7 I think as I say, in the interest of judicial economy, I
8 think it would be absurd to separate these matters when
9 they're all a part of the same transaction. I might say,
10 Mr. Ingles, if we went back to the agreement, obviously the
11 parties contemplated the costs, fees, expenses and so on, or
12 at least Mr. Liverman did, and I'm not going to award my
13 attorneys' fees on the note because none are provided nor is
14 there any interest provided. I don't think I have any
15 choice but to find -- to overrule the motions that you have
16 renewed, Mr. Ingles, and find for the Plaintiff in the
17 amount sued for.

18 MR. INGLES: Judge, we'd ask an appeal bond
19 be set in this case.

20 THE COURT: All right. Well, I think
21 that's normally the amount of the judgment, is it not?

22 MR. INGLES: Yes, sir.

23 THE COURT: All right. I will set the bond
24 at that amount.

25 MR. INGLES: Yes, sir.

1 MR. HOPPER: Thank you, Your Honor.

2 THE COURT: Very interesting points of law.
3 I thought both of you tried the case very well on behalf of
4 your clients.
5

6 -----o0o-----
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VIRGINIA:

IN THE CIRCUIT COURT OF MIDDLESEX COUNTY

LEWIS S. LIVERMAN, SR.

Plaintiff,

v.

Law No. 1896

RANDOLPH O. REED,

Defendant.

ORDER

On the 24th day of June, 1994, came the parties, by counsel, and in their proper persons, and the above-styled action was heard in open court upon its merits, the parties having waived trial of the issues herein by a jury.

UPON CONSIDERATION of all the evidence, it is hereby **ORDERED** and **ADJUDGED** that the plaintiff, Lewis S. Liverman, Sr., recover of and have judgment against the defendant, Randolph O. Reed, for the sum of Thirty-Seven Thousand Dollars (\$37,000.00) with interest thereon at the legal rate from June 24, 1994 until paid, to which action of the Court in entering judgment as aforesaid, defendant, by counsel, objects.

Upon defendant's motion, by counsel, to set an appeal bond, it is **ORDERED** that such bond is hereby set in the penalty of \$37,000.00, with surety to be approved by this Court, or by letter of credit from a bank incorporated or

authorized to conduct business under the laws of the Commonwealth of Virginia, said letter of credit to be a form acceptable to the Clerk of this court; and it is further **ORDERED** that the transcript of testimony and incidents of trial taken at the hearing before this Court in this matter on June 24, 1994, be made a part of the record of this case, provided that the said transcript be filed in the Clerk's Office of this Court within 60 days from the date of this order.

ENTER - LAW

July 26, 1994
John M. Folkes, Judge

I ask for this:

R. G. Hopper, p.q.
Roger G. Hopper
Attorney at Law
P. O. Box 1215
Saluda, VA 23149
(804) 758-2358

Seen and objected to for the reasons stated upon the record, such reasons being incorporated herein by this reference:

Breckenridge Ingles, p.d.
Breckenridge Ingles, Esq.
Martin, Hicks & Ingles
P. O. Box 708
Gloucester, VA 23061
(804) 693-2500

VIRGINIA: IN THE CIRCUIT COURT OF MIDDLESEX COUNTY

LEWIS S. LIVERMAN, SR., **CLERK'S OFFICE**
Plaintiff, **MIDDLESEX CO., VA.**

v.

RANDOLPH O. REED,
Defendant.

FILED

8-3-94

11:45am

LAW NO. 1896

Peggy W. Martin
Clerk

NOTICE OF APPEAL

The defendant, Randolph O. Reed, hereby gives notice of appeal to the Supreme Court of Virginia from the final judgment order of this court entered July 26, 1994, and further gives notice that the trial transcript covering the testimony and other incidents of trial will be filed, all in compliance with the Rules of Supreme Court of Virginia.

RANDOLPH O. REED

BY: _____
Of Counsel

Breckenridge Ingles
Martin, Hicks & Ingles, Ltd.
P. O. Box 708
Gloucester, Virginia 23061
(804) 693-2500

CERTIFICATE


I, Breckenridge Ingles, counsel of record for Randolph O. Reed, hereby certify that:

1. Appellant is Randolph O. Reed whose address is P. O. Box 868, Urbanna, Virginia 23175.
2. Counsel for appellant is Breckenridge Ingles, Martin, Hicks & Ingles, Ltd., P. O. Box 708, Gloucester, Virginia 23061, (804) 693-2500.
3. Appellee is Lewis S. Liverman, Sr., whose address is P. O. Box 537, Saluda, Virginia 23149.
4. Counsel for appellee is Roger G. Hopper, Esquire, P. O. Box 1215, Saluda, Virginia 23149, (804) 758-2358.

5. A copy of the transcript has been ordered from the court reporter who reported the case.

6. A true copy of the foregoing Notice of Appeal was mailed, postage prepaid, this 2nd day of August, 1994 to Roger G. Hopper, Esquire, counsel for Lewis S. Liverman, Sr., at P. O. Box 1215, Saluda, Virginia 23149, he being the only opposing counsel in this matter.

7. An appeal bond has been filed by letter of credit dated July 21, 1994 addressed to Mr. Lewis S. Liverman, Sr., c/o Roger G. Hopper, Esquire, P. O. Box 1215, Saluda, Virginia 23149.



Breckenridge Ingles

VIRGINIA: IN THE CIRCUIT COURT OF MIDDLESEX COUNTY

LEWIS S. LIVERMAN, SR., CLERK'S OFFICE
Plaintiff, MIDDLESEX CO., VA.

v.

RANDOLPH O. REED,
Defendant.

FILED

8-3-94

11:47am

LAW NO. 1896

NOTICE OF FILING OF TRANSCRIPT

PLEASE TAKE NOTICE that the transcript for the appeal in the above-styled case was filed in the Clerk's Office of this Court on July 20, 1994.

Given under my hand this 2nd day of August, 1994.

RANDOLPH O. REED

BY: _____

Of Counsel

Breckenridge Ingles
Martin, Hicks & Ingles, Ltd.
P. O. Box 708
Gloucester, Virginia 23061
(804) 693-2500

CERTIFICATE

I certify that a true copy of the foregoing Notice of Filing of Transcript was mailed by first class mail, postage prepaid, this 2nd day of August, 1994, to Roger G. Hopper, Esquire, P. O. Box 1215, Saluda, Virginia 23149.

Breckenridge Ingles

ASSIGNMENTS OF ERROR

1. The Court erred when it failed to sustain defendant's Plea of Res Judicata.
2. The Court erred when it allowed introduction into evidence of a copy of the promissory note.
3. The Court erred when it granted judgment to plaintiff based upon a copy of the promissory note contrary to §8.3A-309.
4. The Court erred when it failed to find that the promissory note had been discharged by transfer pursuant to §8.3-604.
5. The Court erred when it granted judgment based in whole or in part upon an August 23, 1991 agreement to which no reference was made in the Motion for Judgment.

Exhibit A

PROMISSORY NOTE

\$74,000.00

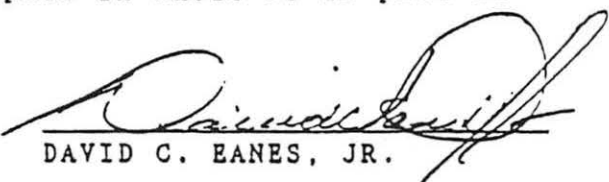
SALUDA, VIRGINIA
MARCH 4th, 1991


FOR VALUE recieved, the undersigned, jointly and severally promise to pay to the order of LEWIS S. LIVERMAN, SR., Post Office Box 765, Hayes, Virginia 23072, or at such other place as the holder may designate, the principal sum of SEVENTY FOUR THOUSAND DOLLARS (\$74,000.00) without interest thereon.

The entire indebtedness evidenced by this note is due in full May 1, 1991 or upon resale of that real property on U. S. Route 17, in Saluda Magisterial District, now jointly held by the makers and promisee of this note, whichever occurs first.

Presentment, protest and notice is hereby waived. The right is reserved to anticipate in whole or in part at any time.

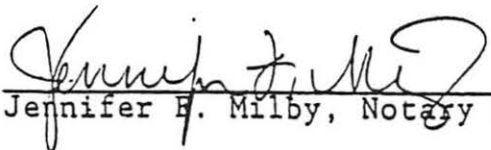
PLAINTIFFS EXHIBIT	
No.	1
Suitcase v. Reed	
Date	6-24-94
Judge	John M. Lee


DAVID C. EANES, JR.


RANDOLPH O. REED

State of Virginia
County of Middlesex, to-wit:

Sworn to before me this 4th day of March, 1991, by David C. Eanes, Jr. and Randolph O. Reed.


Jennifer E. Milby, Notary Public

My Commission Expires:
11/21/92

COMMONWEALTH OF VIRGINIA,
COUNTY/CITY OF Winchester, to-wit:

I, the undersigned Notary Public in and for the above jurisdiction, do hereby certify that Randolph O. Reed, whose name is signed to the foregoing Agreement dated as of the 23rd day of August, 1991, has acknowledged it before me in my jurisdiction.

Given under my hand this 26th day of Aug.,
19 91.

My commission expires 11/30/94.

A-R Counts
Notary Public

EANES23

THIS AGREEMENT, made as of the 23rd day of August, 1991 among LEWIS S. LIVERMAN, SR., DAVID C. EANES, JR. and RANDOLPH O. REED, recites and provides that:

WHEREAS, Eanes and Reed signed a certain promissory note dated March 4, 1991 requiring the payment of \$74,000.00 without interest to Liverman on or before May 1, 1991; and

WHEREAS, by agreement dated April 1, 1991 among G. Stephen Ballard, William A. Dail, David C. Eanes, Jr., and Randolph O. Reed, Ballard agreed, among other things, to pay off, in full, the note referred to above; and

WHEREAS, Ballard has failed to pay all or any part of the \$74,000.00 to Mr. Liverman; and

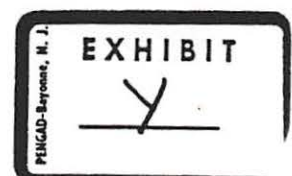
WHEREAS, Mr. Liverman has filed suit against Eanes and Reed in the Circuit Court of Middlesex County, Virginia, at Law No. 1854, asking for judgment on the note against Eanes and Reed; and

WHEREAS, Eanes and Reed have joined G. Stephen Ballard as a third-party defendant in such suit, requesting judgment of idemnification; and

WHEREAS, Eanes and Reed wish to acknowledge that Liverman is entitled to recover on the \$74,000.00 note and wish to make payment to Liverman, but wish to retain their rights to recover from G. Stephen Ballard;

NOW, THEREFORE, the parties agree:

Plaintiff
~~DEFENDANT~~ EXHIBIT
No. 2
David C. Eanes
Date 6-24-94
Judge *John M. Lee*



1. Reed shall pay to Liverman the sum of \$37,000.00 in cash upon execution of this agreement in partial curtailment of the \$74,000.00 note, receipt of which by Liverman is hereby acknowledged.

2. Eanes shall allow credit to Liverman in the amount of \$37,000.00 against the purchase prices of two parcels of real property in Middlesex County, Virginia, being purchased by Liverman from Eanes, namely, Lot 8, Section Two, Pipe-In-Tree Subdivision, and 3.24 acres on Route 17.

3. Eanes and Liverman shall close and consummate the purchase and sale of the above two real properties simultaneously with the execution and delivery of this agreement, and Liverman, therefore, hereby acknowledges payment from Eanes in curtailment of the \$74,000.00 note in the amount of \$37,000.00.

4. Immediately upon the request of Eanes and Reed, but not before, Liverman shall take any or all of the following actions as may be requested by Eanes and Reed:

a. Deliver the \$74,000.00 note to Eanes and Reed or their designee;

b. Endorse the \$74,000.00 note, without recourse to Liverman, as may be directed by Eanes and Reed;

c. Execute such assignments and releases of the \$74,000.00 note as may be requested by Eanes and Reed;

d. Move the Court to dismiss the pending claim of Liverman against Eanes and Reed; and

e. Otherwise cooperate with Eanes and Reed in seeking recovery from Ballard in any such other manner as Eanes and Reed may reasonably request.

5. This agreement is made in Virginia and shall be governed by its laws. It shall bind and benefit the parties' respective heirs, personal representatives, successors and assigns.

6. The said Lewis S. Liverman, Sr. shall not be responsible for any costs, fees, expenses or other as a result of this Agreement.

Lewis S. Liverman (SEAL)
Lewis S. Liverman, Sr.

David C. Eanes, Jr. (SEAL)
David C. Eanes, Jr.

Randolph O. Reed (SEAL)
Randolph O. Reed

COMMONWEALTH OF VIRGINIA,
COUNTY/CITY OF Gloucester, to-wit:

I, the undersigned Notary Public in and for the above jurisdiction, do hereby certify that Lewis S. Liverman, Sr., whose name is signed to the foregoing Agreement dated as of the 23rd day of August, 1991, has acknowledged it before me in my jurisdiction.

Given under my hand this 27 day of August, 1991.
My commission expires 7/31/94.

[Signature]
Notary Public

COMMONWEALTH OF VIRGINIA,
COUNTY/CITY OF Richmond, to-wit:

I, the undersigned Notary Public in and for the above jurisdiction, do hereby certify that David C. Eanes, Jr., whose name is signed to the foregoing Agreement dated as of the 23rd day of August, 1991, has acknowledged it before me in my jurisdiction.

Given under my hand this 26th day of Aug., 1991.
My commission expires 11/30/94.

N. H. Roberts
Notary Public

COMMONWEALTH OF VIRGINIA



DEFENDANTS EXHIBIT	
No.	<u>B</u>
Date	<u>10-24-94</u>
Judge	<u>Paul M. Pace</u>

NOTICE OF MOTION FOR JUDGMENT

Case No. 1854

Middlesex County

Circuit Court

P. O. Box 158, Saluda, VA 23149

ADDRESS

TO: David C. Eanes, Jr.
Rt. 640
Waterview, Virginia 23180

COPIED 7/7

2 1
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2.4

You are hereby notified that unless within twenty-one (21) days after service of the notice of Motion for Judgment on you, response is made by filing in the clerk's office of this court a pleading in writing, in proper legal form, judgment may be entered against you by default.

Done in the name of the Commonwealth of Virginia.

July 3, 1991
DATE

Deona B. Brumley

Clerk

by

DEPUTY CLERK

EXHIBIT 1
PAGE 1 OF 4

VIRGINIA: IN THE CIRCUIT COURT OF MIDDLESEX COUNTY

LEWIS S. LIVERMAN, SR.

Plaintiff

V.

LAW NO: 1854

DAVID C. EANES, JR.

RANDOLPH O. REED

SERVE: David C. Eanes, Jr.

Rt. 640

Water View, Virginia 23180

and

SERVE: Randolph O. Reed

Rt. 687

Warner, Virginia 23179

Defendants

MOTION FOR JUDGMENT

Comes now the plaintiff, by counsel and moves the above named Court for a judgment against you, both jointly and severally, for the sum of SEVENTY-FOUR THOUSAND AND NO/100 DOLLARS (\$74,000.00) together with costs incident to this proceeding, plus attorney's fees. In connection therewith, the plaintiff respectfully represents unto the Court as follows:

1. That on or about the 4th day of March, 1991, the defendants executed a Promissory Note payable to the Plaintiff, in the original amount of \$74,000.00, interest free, payable in full May 1, 1991 or upon resale of that real property on U.S. Route 17, in Saluda Magisterial District, Virginia, a copy of which is attached hereto and marked Exhibit "A".

7-3-91

Deane B. Browdy
Clerk

2. That the property referred to in said promissory note was sold
(and the monies set out therein are due and payable.)

3. That the balance (due and owing) by Defendants to your Plaintiff
is \$74,000.00.

4. That the Defendants have failed and refused to pay the balance
due on this indebtedness after repeated demands for payment were made by your
Plaintiff.

WHEREFORE, your Plaintiff, Lewis S. Liverman, Sr., demands judgment
against the Defendants, David C. Eanes, Jr. and Randolph O. Reed , both
jointly and severally, in the amount of SEVENTY-FOUR THOUSAND & NO/100 DOLLARS
(\$74,000.00), plus attorney's fees, interest, and the costs on his behalf
expended.


LEWIS S. LIVERMAN, SR.

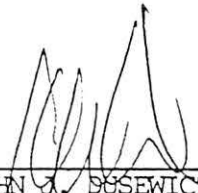

JOHN A. DOSEWICZ
Attorney At Law
P.O. Box 388
Gloucester Point, Virginia 23062

EXHIBIT 1

PAGE 3 OF 4

104

Exhibit A

PROMISSORY NOTE

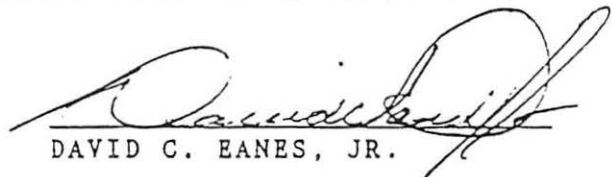
\$74,000.00

SALUDA, VIRGINIA
MARCH 4th, 1991

FOR VALUE recieved, the undersigned, jointly and severally promise to pay to the order of LEWIS S. LIVERMAN, SR., Post Office Box 765, Hayes, Virginia 23072, or at such other place as the holder may designate, the principal sum of SEVENTY FOUR THOUSAND DOLLARS (\$74,000.00) without interest thereon.

The entire indebtedness evidenced by this note is due in full May 1, 1991 or upon resale of that real property on U. S. Route 17, in Saluda Magisterial District, now jointly held by the makers and promisee of this note, whichever occurs first.

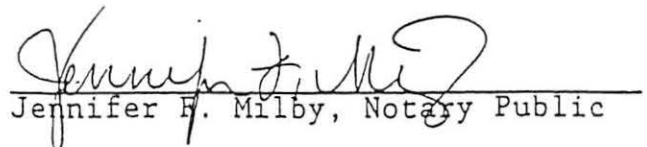
Presentment, protest and notice is hereby waived. The right is reserved to anticipate in whole or in part at any time.


DAVID C. EANES, JR.


RANDOLPH O. REED

State of Virginia
County of Middlesex, to-wit:

Sworn to before me this 4th day of March, 1991, by David C. Eanes, Jr and Randolph O. Reed.


Jennifer F. Milby, Notary Public

My Commission Expires:
11/21/92

VIRGINIA:

RECEIVED DEC 01 1993

IN THE CIRCUIT COURT OF MIDDLESEX COUNTY

LEWIS S. LIVERMAN, SR.,

Plaintiff,

v.

DAVID C. EANES, JR. and
RANDOLPH O. REED,

Defendants and
Third-Party Plaintiffs,

v.

G. STEPHEN BALLARD.

Third-Party Defendant.

ORDER

This day came the plaintiff, in proper person, after having given all parties notice pursuant to the Rules Of Court, and moved the court to dismiss this action, with prejudice.

Upon Consideration Whereof, this action is dismissed against all parties, with prejudice.

ENTER - LAW

3/3

, 1993

John M. Dale, Judge

I ask for this
X Lewis S. Liverman
Plaintiff

106

* Mr. Curd + 2 telephone
his assent 3/8/93 *DM*
16-745
mailed copies
3-10-93

16-745

DEFENDANTS EXHIBIT	
No.	<i>1</i>
<i>Liverman v. Reed</i>	
Date	<i>11-24-93</i>
Judge	<i>John M. Dale</i>

Law NO. 1854

11-29-93
DATE
J. J. Marshall
11-29-93

