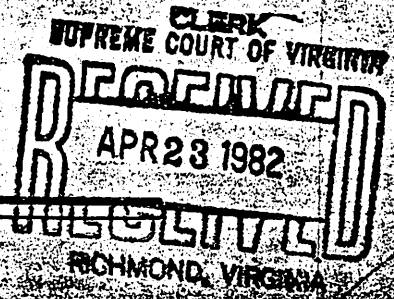


226 VA557



IN THE  
**Supreme Court of Virginia**  
AT RICHMOND

RECORD NO. 81079

RAY L. WRIGHT and  
VIRGINIA REAL ESTATE, Appellants

v.

JAMES P. BRYAN and  
DOROTHY B. BRYAN, Appellees

APPENDIX

WILLIAM T. WILSON, ESQUIRE  
D. THOMAS BLAIR, ESQUIRE  
WILLIAM T. WILSON & ASSOCIATES  
228 N. Maple Avenue  
Covington, Virginia 24426  
Counsel for Appellants

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# WARRANT IN DEBT

COMMONWEALTH OF VIRGINIA }  
COUNTY OF ALLEGHANY } To wit: To the Sheriff of said County

You are hereby commanded to summon Ray L. Wright and Virginia Real Estate

to appear in the General District Court of Alleghany County, Courthouse, Covington  
Virginia, on the 9 day of June 1930 at <sup>11:00</sup>~~2:00~~ A.M., to answer the  
complaint of James P. Bryan and Dorothy S. Bryan

upon a claim for money, to wit: for the sum of \$ 3,550.00, due for refund  
of deposit paid on void sales contract

\_\_\_\_\_ with interest  
from the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_ and \_\_\_\_\_ attorney's fee,  
and then and there make return of this warrant.

This 23 day of May 19 80 . Mary Frances Mays-Davis

**R 4-16-80**

**Clerk**

Deputy

JUDGMENT that the plaintiff recover of the defendant \$

with interest 2 30

from \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_ till paid and \_\_\_\_\_ attorney's  
fee and \$ \_\_\_\_\_ for his costs. Due by \_\_\_\_\_

This \_\_\_\_\_ Day of \_\_\_\_\_ 19\_\_\_\_.

**Judge**

No. Com-515

Revised No. 0753821

James P. Bryan and Dorothy B. Bryan

vs. [ WARRANT IN DEBT

Ray L. Wright

310 E. Beech St., Covington, Va.

& Virginia Real Estate

301 W. Main St., Covington, Va.

To June 9 @ 11:00 A.M. 19 30

Costs

Warrant.....\$       

Trial ..... 3.75

Filing ..... 1.25

Library ..... .50

Sheriff .....       

Witness .....       

Other .....       

Total ..... \$ 5.50

Michael McM. Collina p.g

       p.d

Continuance       

Execution

APPLICATION FOR REMOVAL

TO: THE HONORABLE DUNCAN M. BYRD, JR., JUDGE OF SAID COURT

COME NOW, the Defendants, by Counsel, and filing their Application for Removal of the above styled matter to the Circuit Court of Alleghany County, Virginia, and in support thereof say as follows:

(1) That the amount in controversy exceeds ONE THOUSAND DOLLARS (\$1,000.00), exclusive of interest, attorney's fees and costs.

(2) That the Defendants have filed an Affidavit of Substantial Defense setting forth their grounds of defense.

(3) That the Defendants hereby tender to be paid to the Clerk of the Circuit Court of Alleghany County, Virginia, the writ tax and costs of the Circuit Court of Alleghany County, Virginia, in the amount of TWENTY-ONE DOLLARS (\$21.00).

(4) That the Defendants hereby tender to be paid to the Plaintiffs the sum of FIVE DOLLARS and FIFTY CENTS (\$5.50) for their accrued Court costs herein.

WHEREFORE, your Defendants request the above styled matter be removed to the Circuit Court of Alleghany County, Virginia, in accordance with §16.1-92 of the 1950 Code of Virginia, as amended.

RAY L. WRIGHT AND  
VIRGINIA REAL ESTATE

BY: 

WILLIAM T. WILSON

WILLIAM T. WILSON, ESQUIRE  
WILLIAM T. WILSON & ASSOCIATES

228 N. Maple Avenue

Covington, Virginia 24426

Counsel for Defendant Filed in the Clerk's Office the

6 day of June

1980

Whit Tax \$ 5.00  
Fees 1.50  
Docket 1.00

Total:

*Robert C. Halliday*

57

CERTIFICATE

I, William T. Wilson, Attorney for Defendants, do hereby  
certify that a true copy of the foregoing "Application for Removal"  
was mailed to Michale McHale Collins, Esquire on the 5<sup>th</sup> day of  
*June*  
May, 1980.

*William T. Wilson*  
WILLIAM T. WILSON, ESQUIRE

AFFIDAVIT OF SUBSTANTIAL  
DEFENSE

This day personally appeared before me Susan S. Hutchison, a Notary Public in and for the said State and County, William T. Wilson, Esquire, who gave oath before me in due form of law.

(a) That he is the Attorney for Ray L. Wright and Virginia Real Estate, Defendants in the above styled matter.

(b) That said Defendants have a substantial defense to the Plaintiffs' claim.

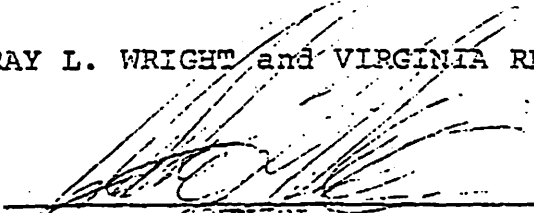
(c) That the grounds for such defense are:

(1) That the Defendants do not owe the Plaintiffs the amount claimed.

(2) That the Plaintiffs are guilty of breach of contract. Plaintiffs entered into a real estate purchase contract dated September 16, 1979, but because Plaintiff, James P. Bryan, lost his job at the Alleghany Regional Hospital, he failed and refused to complete said contract. Accordingly, plaintiffs are responsible for the cash fee of realtor, Virginia Real Estate, and all expenses incurred by Defendants in connection with this transaction.

RAY L. WRIGHT and VIRGINIA REAL ESTATE

BY:

  
COUNSEL



Subscribed and sworn to before me this 5<sup>th</sup> day of

June, 1980.

My commission expires:

July 1, 1983

Rusan S. Hutchins  
NOTARY PUBLIC

CERTIFICATE

I, William T. Wilson, Attorney for Defendants, do hereby certify that a true copy of the foregoing "Affidavit of Substantial Defense" was this 5<sup>th</sup> day of June, 1980, mailed to Michael McHale Collins, Attorney for Plaintiffs.

William T. Wilson  
WILLIAM T. WILSON, ESQUIRE

OPINION

Case No. 1826

This is a suit by the Bryans (sometimes referred to as "the purchasers") against Wright (sometimes referred to as "the seller") to recover the sum of \$3,350.00 which was paid by the purchasers as a down payment deposit at the time they entered into the contract which is the subject of this litigation. The seller denies the Bryans are entitled to recover said sum, and by his counterclaim he alleges the Bryans defaulted under said contract and that he is entitled to resulting damages of \$1,401.50.

The facts are undisputed. The seller and the purchasers executed a written contract whereby Wright agreed to sell and the Bryans agreed to purchase a certain house and lot for the price of \$67,000.00. At the time the contract was executed, the purchasers deposited with the realtor the sum of \$3,350.00, and the contract provided that "such deposit shall be held by realtor in escrow until the date of settlement and then be applied to the purchase price, or returned to the purchaser if the title to the

property is not marketable." The contract further provided that if either party defaults "such defaulting party shall be liable for the cash fee of realtor and any expenses incurred by the non-defaulting party in connection with this transaction." The contract was dated September 16, 1979, and it provided for a closing date of November 19, 1979. The subject real property was owned by Wright and his wife, as tenants by the entireties with the right of survivorship. Mrs. Wright was not a party to the contract. The seller agreed to convey the property with general warranty of title and with the English covenants of title, free and clear of all liens and encumbrances.

Prior to the agreed closing date, the purchasers, due to a change in their circumstances, advised the seller that they desired to be released from the contract. When the seller advised them that he intended to hold them to the contract, the purchasers, on advise of counsel, informed the seller that they were rescinding and canceling the contract because it did not contain the signature of Mrs. Wright.

The purchasers contend that they had the right to rescind the contract and that they should recover the deposit of \$3,350.00 because Wright did not own the subject property when the contract was executed and lacked the capacity to convey good title.

The seller contends that the purchasers had no right to rescind and that they are entitled to enforce the provision in the contract respecting default.

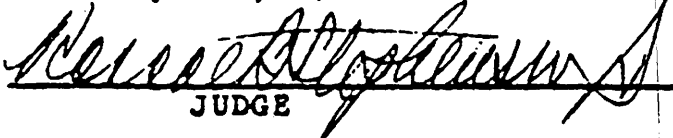
Generally, the fact that a seller in a contract for the sale of land does not have the capacity to convey good title at the time the contract is made does not invalidate the contract or affect the seller's right to damages for breach of contract if the seller acquired the capacity to convey good title at the time fixed for delivery of the deed. Waskey v. Thomas, 218 Va. 109, 235 S.E. 2d 346 (1977); Jennings v. Realty Developers, Inc., 210 Va. 476, 171 S.E. 2d 829 (1970); Mundy v. Garland, 116 Va. 922, 83 S.E. 491 (1914). This rule, however, is subject to certain exceptions. One exception is where the seller "not only had no present capacity to convey but also had no legal power to attain the capacity to convey before the date fixed for delivery of the deed." Waskey v. Thomas, supra, 218 Va. at 113, 235 S.E. 2d at 349.

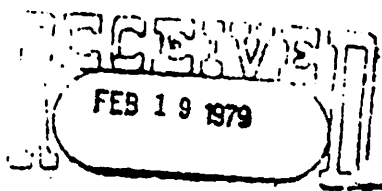
In both Jennings and Mundy the seller had the legal means to acquire the capacity to convey good title at the time of delivery of the deed. In Waskey, as well as in the present case, the seller had no such legal power.

The court is of opinion that the present case is governed by the exception recognized in Waskey rather than by the general rule which applies to a factual situation as found in Jennings and Mundy.

Accordingly, the plaintiffs are granted judgment for \$3,350.00 against the defendant, ~~and judgment will be entered for the plaintiffs on the defendant's contract.~~

February 16, 1981.

  
JUDGE



ORDER

Case No. 1826

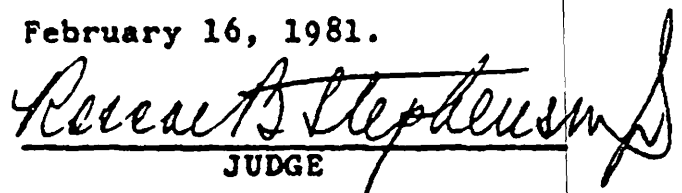
On December 17, 1980, came the plaintiffs in person and by counsel upon their claim and came also the defendant in person and by counsel upon his counterclaim, and issue being joined as to each claim and neither party having demanded a jury, the court proceeded to hear the case without the intervention of a jury.

Having heard all the evidence and the arguments of counsel and not being fully advised as to its decision, the court took under advisement its decision pending the filing of memoranda by counsel for the respective parties. And having received the memoranda and having fully and maturely considered the law and the evidence, the court, for the reasons stated in its opinion of this date, does find for the plaintiffs on their claim against the defendant and fix their damages at \$3,350.00.

It is therefore ADJUDGED and ORDERED that the plaintiffs, James P. Bryan and Dorothy B. Bryan, recover and have judgment against the defendant, Ray L. Wright, in the amount of \$3,350.00, with 8% interest per annum thereon from this date until paid and the costs.

Counsel for the defendant excepts to the rulings of the court.

ENTER: February 16, 1981.

  
JUDGE

ASSIGNMENT OF ERROR

1. THE CIRCUIT COURT ERRED IN ITS RULING THAT WASKEY V. THOMAS, 218 Va. 109 (1977), PERMITS A PURCHASER TO RESCIND A NON-INSTALLMENT SALES CONTRACT TO PURCHASE REAL ESTATE WHERE THE SELLER'S SPOUSE DOES NOT SIGN THE CONTRACT AND TITLE IS HELD AS TENANTS BY THE ENTIRETY WITH RIGHT OF SURVIVORSHIP AS AT COMMON LAW

# VIRGINIA REAL ESTATE

P. O. BOX 325  
301 W. MAIN STREET  
COVINGTON, VA. 2  
PHONE (703) 962-32

## REAL ESTATE PURCHASE CONTRACT

(This is a legally binding contract; if not understood, seek competent advice)

This CONTRACT OF PURCHASE made in triplicate, as of SEPTEMBER 16, 1979  
among JAMES P. & DOROTHY B. BRYAN (herein called "Purcha  
and RAY L. WRIGHT (herein called "Sel  
and VIRGINIA REAL ESTATE (herein called "Realt  
provides that Purchaser agrees to buy, through Realtor, as agent for Seller, and Seller agrees to sell the following desc  
real estate, and all improvements thereon, located in the County or City of ALLEGHANY, Virginia (all h  
called "the property"):

HOUSE AND LOT (SEC. 1, BLOCK 3, L  
1) IN CHEROKEE SUBDIVISION.

, and more commonly known as CHEROKEE  
(street address).

1. The purchase price of the property is SIXTY SEVEN THOUSAND  
Dollars (\$ 67,000.00), and such purchase price shall be paid as follows:  
\$ 3,350.00 DEPOSIT WITH CONTRACT.  
63,650.00 CASH ON DELIVERY OF DEED  
\$ 67,000.00 TOTAL PURCHASE PRICE.

2. If either F.H.A. or V.A. financing is involved in this transaction, one of the paragraphs on the reverse hereof shall be a p  
of this Contract of Purchase if such paragraph has been executed by both Purchaser and Seller. If a loan placement fee is  
quired by any lender, Seller agrees to pay that part of any such fee in excess of one per cent, which Purchaser has agreed  
pay.

3. Purchaser has made a deposit of THREE THOUSAND THREE HUNDRED FIFTY dollars (\$ 3,350.  
with Realtor, receipt of which is hereby acknowledged, and such deposit shall be held by Realtor in escrow until the date  
settlement and then applied to the purchase price; or, returned to Purchaser if the title to the property is not marketable.

4. Seller agrees to convey the property to Purchaser by General Warranty Deed with the usual English covenants of t  
and free and clear from all encumbrances, tenancies, liens (for taxes or otherwise), except as may be otherwise provi  
above, but subject to applicable restrictive covenants of record. Seller further agrees to deliver possession of the property to P  
chaser on the date of settlement and to pay the expense of preparing the deed of bargain and sale and the required rever  
stamps.

5. Settlement shall be made at the offices of Realtor or at ATTORNEY'S OFFICE on or bef  
NOVEMBER 19, 1979, or as soon thereafter as title can be examined and necessary documents prepared, w  
allowance of a reasonable time for Seller to correct any defects reported by the title examiner.

6. All taxes, interest, rent, and F.H.A. or similar escrow deposits, if any, shall be prorated as of the date of settlement.

7. All risk of loss or damage to the property by fire, windstorm, casualty, or other cause is assumed by Seller until the d  
of settlement.

8. Purchaser and seller agree that Realtor was the sole procuring cause of this Contract of Purchase, and Seller agrees  
pay Realtor for services rendered a cash fee of AS AGREED per cent of the purchase price. If either Purchaser or Seller defa  
under such Contract, such defaulting party shall be liable for the cash fee of Realtor and any expenses incurred by the r  
defaulting party in connection with this transaction.

(IT IS AGREED THAT PURCHASER SHALL HAVE EARLY POSSESSION TO DO PA  
ETC.) ON A RENTAL BASIS AT \$400.00 PER MONTH (ADDITIONAL AMOUNT  
CREDITED TOWARD PURCHASE PRICE.

9. Purchaser represents that an inspection satisfactory to Purchaser has been made of the property, and Purchaser agrees to accept the property in its present condition except as may be otherwise provided in the description of the property above.

10. This Contract of Purchase constitutes the entire agreement among the parties and may not be modified or changed by written instrument executed by all of the parties, including Realtor.

11. This Contract of Purchase shall be construed, interpreted, and applied according to the law of the State of Virginia, and shall be binding upon and shall inure to the benefit of the heirs, personal representatives, successors, and assigns of the parties.

WITNESS the following signatures and seals:

Ray Knight

(SEAL)

Seller

(SEAL)

Seller

(SEAL)

Realtor

James D. Bryan

Pu

Pu

Deposit Rec'd \$ <u>3,350.00</u>	
Check # <u>1599</u>	Cash
Sales Agent: <u>Don J. Gross</u>	

Pl. Ex. 1  
RMSA



BOOK 224-237

THIS DEED, Made and entered into this 24th day of June, 1977, by and between WILLIAM J. ELLIS, widower, party of the first part, and RAY L. WRIGHT and LOIS B. WRIGHT, his wife, parties of the second part.

W I T N E S S E T H:

That for and in consideration of the sum of FIVE DOLLARS (\$5.00), cash in hand paid and other good and valuable consideration, the receipt of which is hereby acknowledged, the said party of the first part does hereby BARGAIN, GRANT, SELL and CONVEY unto the said parties of the second part, with GENERAL WARRANTY and ENGLISH COVENANTS OF TITLE, as tenants by the entireties with the right of survivorship as at common law, all that certain lot, piece or parcel of land, situate, lying and being in Alleghany County, Virginia, and being known, designated and described as LOT NUMBER ONE (1), in BLOCK NUMBER THREE (3) as shown on that certain plat entitled "Section No. 1, Cherokee Subdivision", made by James C. Wilkins, Certified Land Surveyor, dated June 24, 1968, and recorded in the Clerk's Office of the Circuit Court of Alleghany County, Virginia, with the Dedication of the Cherokee Subdivision, Section No. 1 on December 17, 1969; and being the same lot, piece or parcel of land conveyed to the party of the first part, by that certain deed dated June 16, 1970, from CHEROKEE, INC., and of record in the aforesaid Clerk's Office in Deed Book 193, at Page 535.

This conveyance is made and accepted subject to all of the covenants, restrictions and conditions as set forth in the said Dedication of Cherokee Subdivision, Section No. 1.

WITNESS the following signature and seal:

William J. Ellis (SEAL)  
WILLIAM J. ELLIS

STATE OF VIRGINIA

COUNTY OF ALLEGHANY, to-wit:

COLLINS, WILSON,  
COLLINS & SINGLETON  
ATTORNEYS AT LAW  
COVINGTON, VIRGINIA  
FARM SPRING, VIRGINIA

The foregoing instrument was acknowledged before me  
this 24 day of June, 1977, by WILLIAM J. ELLIS.

My commission expires:

Pamela A. Hickey  
NOTARY PUBLIC

June 11, 1980  
VIRGINIA: In Alleghany Circuit Court Clerk's Office July 5, 1977

This \_\_\_\_\_ Deed was this day presented in the said office and, with  
the certificate annexed, admitted to record at 4:00 P. M.

Copy Tester

Robert C. Hubbard, Clerk  
Alleghany Circuit Court

791

Teste:

Robert C. Hubbard  
St. Jay \$9.00 C. T. 6.00

Jack D. L. Jones, Deputy

COLLINS & SINGLETON  
ATTORNEYS AT LAW  
275 W. MAIN STREET  
COVINGTON, VIRGINIA 24426

TELEPHONE (703) 962-6181

MICHAEL McHALE COLLINS  
JOHN C. SINGLETON  
JEFFREY A. CRACKEL  
J. GREGORY MOONEY

BATH COUNTY OFFICE  
P. O. BOX 115  
WARM SPRINGS, VIRGINIA 24484  
TELEPHONE (703) 839-5009

CLIFTON FORGE OFFICE  
517 E. RIDGEWAY STREET P. O. DRAWER 54  
CLIFTON FORGE, VIRGINIA 24422  
TELEPHONE (703) 862-4226

November 13, 1979

Mr. Don F. Gross  
Virginia Real Estate  
P.O. Box 525  
Covington, Virginia 24426

Dear Don:

This will confirm our conversation of November 12, 1979, regarding the Ray Wright - Bryan Real Estate Purchase Contract.

I appreciate your bringing me a copy of the contract but must advise you that Mr. and Mrs. Bryan feel the contract is unenforceable against them and, in any event, are unable and unwilling to purchase the subject property.

Mr. and Mrs. Bryan would hope that the property could be sold to some other third party so that a legal contest over the validity of the sales contract would not be necessary. At this time, however, I would suggest that you hold the deposit of \$3,350.00 in escrow for your protection.

Mr. Bryan has confirmed to me that the rent of \$400.00 was for his occupancy of the residence and he has no claim to that money.

I will be back in touch with you.

Very truly yours,

  
Michael McHale Collins

MMC:js

COLLINS & SINGLETON

ATTORNEYS AT LAW

276 W. MAIN STREET

COVINGTON, VIRGINIA 24426

TELEPHONE (703) 962-6181

BATH COUNTY OFFICE  
P. O. BOX 116  
WARM SPRINGS, VIRGINIA 24484

TELEPHONE (703) 839-5009

CLIFTON FORGE OFFICE  
517 E. RIDGEWAY STREET P. O. DRAWER 54  
CLIFTON FORGE, VIRGINIA 24422

TELEPHONE (703) 862-4226

November 27, 1979

MICHAEL McHALE COLLINS  
JOHN C. SINGLETON  
JEFFREY A. CRACKEL  
J. GREGORY MOONEY

Mr. Don F. Gross  
Virginia Real Estate  
P.O. Box 525  
Covington, Virginia 24426

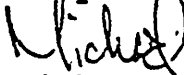
RE: James P. and Dorothy B. Bryan

Dear Don:

As you will recall, I talked with you earlier this month regarding the real estate contract entered into between Ray L. Wright and James P. and Dorothy B. Bryan, on September 16, 1979. Mr. and Mrs. Bryan have retained our firm to advise them on the enforceability of the above mentioned contract and it is our opinion that the contract is unenforceable. Accordingly, the Bryan's have asked that I make a demand on you for a refund of the money held in escrow at your earliest convenience on or before December 10, 1979.

I hope that circumstances have developed which will keep this from being a hardship on Mr. Wright but in any event, I must make this request. Your prompt attention to this matter will be appreciated.

Very truly yours,



Michael McHale Collins

MMC:js

DEFENDANT'S EXH. 2

310 East Beech Street  
Covington, Virginia  
December 3, 1979

Mr. Michael Collins  
275 West Main Street  
Covington, Virginia

Dear Mr. Collins:

I believe I should have received copies of the two letters written by you to Don Gross, in regards to the contract between myself and James P. and Dorothy B. Bryan, dated September 16, 1979. Mr. Collins you told Mr. Gross yourself, he had earned his commission which is 6% or \$4,020.00.

I know Mr. Bryan occupied the property more than one month. The agreeded monthly rent was \$400.00 per month. Mr. Bryan only paid one months rent. This leaves him in the arrears of the second months rent in the amount of \$400.00 Mr. Gross's commission is \$4,020.00 plus \$400.00 additional rent a total of \$4,420.00 due Mr. Gross and myself. Mr. Bryan still owes a balance of \$1,070.00 to us, since Mr. Gross only has \$3,350.00 in escrow.

Mr. Bryan tried to sell this property to another party the night before he left town. The Bryan's may save these expenses if they have a sale for the property before the 15th. of December as I will hold my part of the contract open until that date.

Sincerely,

*Ray L. Wright*

Ray. L. Wright

DEFENDANT'S EXH. 3

(This is a legally binding contract; if not understood, seek competent advice)

WITNESSES that Purchaser agrees to buy through Realtor, as agent for Seller, and Seller agrees to sell the following described estate, and all improvements thereon, located in the County or City of SPOTSYLDEN, Virginia (all herein called "the property"): HOUSE #121 LOT 1 REC. 1 1966 S. 1 1966

500.00	1st Pr. 2nd Floor	100.00
50.300.00	1st Pr. 2nd Floor	100.00
37.600.00	1st Pr. 2nd Floor	100.00
68.000.00	1st Pr. 2nd Floor	100.00

1. Purchaser has made a deposit of FIVE HUNDRED Dollars (\$ 500.00 )

Settlement shall be made at the offices of Realtor or at 211 W. 10th St. S. Minneapolis, Minn. on or before Nov. 21, 1930, or as soon thereafter as title can be examined and necessary documents prepared, with  
 variance of a reasonable time for Seller to correct any defects reported by the title examiner.

2. All risk of loss or damage to the property by fire, windstorm, casualty, or other cause is assumed by Seller until the date of settlement.

1. Purchaser and seller agree that Realtor was the sole procuring cause of this Contract of Purchase, and Seller agrees to pay Realtor for services rendered a cash fee of 6.00 per cent of the purchase price. If either Purchaser or Seller defaults on such Contract, such defaulting party shall be liable for the cash fee of Realtor and any expenses incurred by the non-defaulting party in connection with this transaction.

ALL OTHERS IN THE HOUSE WILL BE TAKEN DOWN IMMEDIATELY. (2) ALL OTHERS  
WILL BE TAKEN DOWN IMMEDIATELY. (3) ALL OTHERS WILL BE TAKEN DOWN IMMEDIATELY.  
ALL OTHERS WILL BE TAKEN DOWN IMMEDIATELY. (4) ALL OTHERS WILL BE TAKEN DOWN IMMEDIATELY.  
ALL OTHERS WILL BE TAKEN DOWN IMMEDIATELY. (5) ALL OTHERS WILL BE TAKEN DOWN IMMEDIATELY.

9. Purchaser represents that an inspection satisfactory to Purchaser has been made of the property, and Purchaser agrees to accept the property in its present condition except as may be otherwise provided in the description of the property above.  
10. This Contract of Purchase constitutes the entire agreement among the parties and may not be modified or changed except by written instrument executed by all of the parties, including Realtor.  
11. This Contract of Purchase shall be construed, interpreted, and applied according to the law of the State of Virginia and shall be binding upon and shall inure to the benefit of the heirs, personal representatives, successors, and assigns of the parties.

WITNESS the following signatures and seals:

<u>[Signature]</u>	(SEAL)	<u>[Signature]</u>	(SEAL)
Seller		Purchaser	
(SEAL)		(SEAL)	
Seller		Purchaser	
(SEAL)			
Realtor			

Don S. Priest

Deposit Rec'd \$ <u>500.00</u>	
Check <u>200</u>	Cash
Sales Agent: <u>[Signature]</u>	

Ref Ex. #  
RBSH.


THIS DEED, Made and entered into this 12th day of November, 1980, by and between RAY L. WRIGHT and LOIS B. WRIGHT, His Wife, parties of the first part, and GAINES LLOYD VanDEVENDER and VERA M. VanDEVENDER, His Wife, parties of the second part.

\* WITNESSETH \*

That for and in consideration of the sum of Five Dollars (\$5.00), cash in hand paid and other good and valuable consideration, the receipt of which is hereby acknowledged, the said parties of the first part do hereby GRANT, BARGAIN, SELL and CONVEY, with GENERAL WARRANTY and the ENGLISH COVENANTS OF TITLE, unto the said parties of the second part, as tenants by the entireties, with right of survivorship, as at Common Law, all of that certain lot, piece or parcel of land, situate, lying and being in Alleghany County, Virginia, and being known, designated and described as LOT NUMBER ONE (1), in BLOCK NUMBER THREE (3) as shown on that certain plat entitled "SECTION NO. 1, CHEROKEE SUBDIVISION", made by James C. Wilkins, Certified Land Surveyor, dated June 24, 1968, and recorded in the Clerk's Office of the Circuit Court of Alleghany County, Virginia with the Dedication of the Cherokee Subdivision, Section No. 1 on December 17, 1969; and being the same property which was conveyed to the parties of the first part by William J. Ellis, Widower, by deed dated June 24, 1977, and of record in the aforesaid Clerk's Office in Deed Book 224, at Page 237, reference to which is hereby made for a more particular description of the property herein conveyed.

This conveyance is made and accepted subject to all of the covenants, restrictions and conditions as set forth in the said Dedication of Cherokee Subdivision, Section No. 1.

WITNESS the following signatures and seals.

  
RAY L. WRIGHT (SEAL)



242 792

Lois B. Wright (SEAL)  
LOIS B. WRIGHT

STATE OF VIRGINIA

State at Large -  
CITY OF COVINGTON, to-wit:

The foregoing instrument was acknowledged before me this the  
17 day of November, 1980, by Ray L. Wright and Lois B. Wright, His  
Wife.

My commission expires October 15, 1984.

Phadia P. Hill  
NOTARY PUBLIC.

VIRGINIA: In Alleghany Circuit Court Clerk's Office Nov 18, 1980  
This \_\_\_\_\_ Deed was this day presented in the said office and, with  
the certificate annexed, \_\_\_\_\_ to record at 3:30 P. M.

Teste:

1217

Robert C. Hubbard Clerk  
It. Tax \$102.00 C.T. \$68.00

Copy Teste:

Robert C. Hubbard, Clerk  
Alleghany Circuit Court

Sally L. Loomis, Deputy

V I R G I N I A :

IN THE CIRCUIT COURT OF ALLEGHANY COUNTY

JAMES P. BRYAN, et als

Plaintiff

vs.

RAY L. WRIGHT, et als

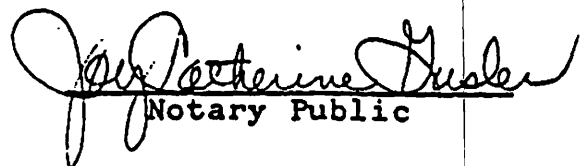
Defendants

: T R I A L :

I, Joy Catherine Gusler, Notary Public in  
and for the State of Virginia, Alleghany County, do here-  
by certify that the foregoing is a true and accurate tran-  
script of the proceedings had and the evidence introduced  
before The Honorable R. B. Stephenson, Jr., Judge of the  
Circuit Court of Alleghany County at Covington, Virginia,  
commencing on December 17, 1980 at 9:30 A. M.

APPEARANCES: Michael McHale Collins and  
Gregory Mooney, counsel for the plaintiff.

William T. Wilson and Thomas Blair, counsel  
for the defendants.

  
Notary Public

THE COURT:

Tell me something about this case.

MR. COLLINS:

I guess I'll make an opening statement and a motion at the same time and we can go on from there. Your Honor, Ray L. Wright and James P. Bryan entered into a real estate contract September 16, 1979. Subsequently, Don Gross of Virginia Real Estate was the agent and a certain amount of money, \$3,350.00 was paid in escrow to Mr. Gross pending closing. Prior to closing, I think it was after the date closing was set in the contract, it was set for November 19, prior to the closing, Mr. Bryan retained our firm to advise him on the legality of the contract and we determined that the contract was unenforceable due to lack of mutuality which I'll go into later and we wrote a letter to Mr. Gross six days before the closing was set advising him of that fact and then we said we suggested that he hold the deposit until further review and about ten days later, on November 27, we wrote Mr. Gross and demanded that he return the \$3,350.00 as it was our opinion that the contract was void and after the money was not returned, I don't think I have a copy of it here, but you can look at the General District Court Warrant. After the money was not returned, sometime shortly thereafter, and it might be significant if you check that form you would see what the court papers show, suit was filed in General District Court. I believe, I

don't know, it should have been around January, but I --

THE COURT:

Looks like it was around June --

MR. COLLINS:

Was it that long?

THE COURT:

May 23.

MR. COLLINS:

Nothing was done then between January and May and in May, suit was filed in General District Court and it was removed then by, apparently, both defendants, represented by Mr. Wilson, removed to Circuit Court, the defendants being Ray L. Wright, and Virginia Real Estate and/or Don Gross. About, the case was set, up the way at the July docket calling for trial this morning and has been pending on your docket since.

THE COURT:

That's not long.

MR. COLLINS:

No sir. I don't have that for some reason either, but... Okay, on December 12, which was five days ago, there was a counterclaim against James P. Bryan and Dorothy P. Bryan filed in this Court. Rules of Court provide that a party to a law suit may, within twenty one days after service, file a counterclaim. This is six months after service is the first date that the counterclaim was filed. The rules also provide

that the party served with the counterclaim has twenty one days in which to file an answer to the counterclaim or otherwise, plead, and of course, as of today, we still, that just simply has not matured. I would ask that the Court not permit the counterclaim to be filed but I recognize that in your discretion that you can extend the time for filing any pleas, and if the Court feels like it is appropriate to file a counterclaim, to allow a counterclaim to be filed, then I have no real strong objection to your extending the time even though it is right much of an extension. I also point out that there was not even a motion filed with the Court requesting an extension to file a counterclaim, so I don't think that in any event this counterclaim has been properly filed but, be that as it may, even if the Court would accept some sort of oral motion at this point to allow a counterclaim, the defendants would have another fifteen days, sixteen days, in which to plead, and right on the face of the counterclaim, you can see that Mrs. Dorothy P. Bryan would demur to it because she is not a party to the contract, she has not signed the contract in any event, and I don't know what defenses James P. Bryan may have to the counterclaim. There is a charge for something for rent, there is a charge for attorney fees, and some sort of costs and so forth, and these are defenses in which I would have to contact my client and I'm just simply not prepared to go forward on the counterclaim today. Now, the case as I said has been set for six months. It has been

determined by the plaintiff, who now lives in South Carolina, that the plaintiff's position in this case can adequately be shown by the documents of record and it is not necessary that the plaintiff testify. The plaintiff is not here and I am not able to be in contact with him this morning to, even at the last minute, to prepare myself to argue a counterclaim, so I would ask that the Court either dismiss the counterclaim as being filed late and without leave of Court, or in the alternative, that if the Court refuses to do that, that the Court continue the matter as alleged in the counterclaim until some date beyond which this suit has matured and allow me to file an answer and other pleadings that I desire and then we will hear the counterclaim at a later date. I would prefer that the Court would dismiss it, but --

THE COURT:

Let's see what Mr. Wilson says about the counterclaim before we go --

MR. COLLINS:

Okay.

THE COURT:

What do you have to say about this late counterclaim?

MR. WILSON:

Judge, I think it's entirely a matter within your discretion as to whether or not you want to hear it today. I

see no reason why the counterclaim ought to present any great surprise to the plaintiff in this case. We simply ask for attorney's fees and the balance of the realtor's fee and costs under the terms of the lease and that is simply a mathematical computation as far as I am concerned and you know I don't know that we --

THE COURT:

I don't believe that I could force him though to a counterclaim today.

MR. WILSON:

If you aren't pleased, I wouldn't insist on it if you think, in your discretion, that it takes the plaintiff by surprise, I think we could set it another date. The rules on filing these things after removal are not as clear as they might be anyway, but if you think it's better not heard today, then I think that's a matter in your discretion, but I really don't see as a practical matter why it should make any difference or should be any kind of surprise to the plaintiff.

THE COURT:

Well, I'll -- Any issues involved in this kind of thing, be continued, I guess I can permit the filing of the counterclaim with that understanding or else, he could go to the District Court and file suit, a separate suit on it I guess.

Mr. Collins:

From the practical point of view, it would be to

the decided advantage of the plaintiff if the Court would dismiss the counterclaim because they are residents of South Carolina and are not otherwise served with this counterclaim and so I would have to ask the Court to dismiss it, but I wouldn't do that without telling you why because it would be a difficult matter for the defendant to go to Court and refile this. It certainly would be in their best interest if this were dismissed and that's what they had to do.

THE COURT:

They are before this Court on this very contract and it would be proper to permit a late filing of the counterclaim with the understanding that we won't take up the matters raised by the counterclaim at this time and afford you the opportunity to defend them.

MR. COLLINS:

Alright sir. I think there's one further thing. In looking over these pleadings, it appears only that Mr. Bryan is actually party to this contract and I think it was sort of inadvertent that the plaintiffs were styled in this case, James P. and Dorothy B. Bryan and particular in light of the Court's ruling on the counterclaim I would like to take a non-suit against, I mean on behalf of Dorothy B. Bryan and proceed in this case, then the Case of James Bryan vs. Ray Wright and Don Gross.



THE COURT:

She wasn't a party to the contract?

MR. COLLINS:

No sir. Her name is on and I think I was a little sloppy in looking at it, but in the top of the contract her name is on there, but she has not signed the contract and is not a party to execution, and I don't really feel like she is a proper party plaintiff. I don't think it makes a whole lot of difference, but by virtue that she would have a sustainable demurrer to the counterclaim anyway, but just to protect her, I think the suit should proceed just James Bryan against Mr. Wright and Mr. Gross. I think when there is a counterclaim file, I can't do that without the Court's consent.

MR. WILSON:

I certainly have no control of his taking a non-suit, Judge, at least I don't think I do but certainly it should not effect our counterclaim as far as service on the co-plaintiff is concerned. I understand that the suit was filed in the name of James P. Bryan and Dorothy B. Bryan and we filed a counterclaim against both of them, so if he takes a non-suit, that's, I guess that's beyond our control, but it certainly ought not to effect the service of the counterclaim on the co-defendant.

THE COURT:

In other words you are saying that at this time

your counterclaim runs against both of them.

MR. WILSON:

Yes Sir.

MR. COLLINS:

Of course if you would rule that, I wouldn't bother to non-suit it. That is the whole purpose of taking the non-suit.

THE COURT:

Well, I'm not going to rule on that at all now. I'll wait like to see what the evidence - maybe it goes out on strike or something, I don't know - you can't prove that it's part of the contract - I don't know where it should be, but I don't think I can dismiss it on just a plea. But we'll leave it in for the time being.

MR. COLLINS:

Alright.

THE COURT:

Now, where are we?

MR. COLLINS:

Well, the only --

THE COURT:

Something about this case.

MR. COLLINS:

Alright.

THE COURT:

As I understand it, the issue is, you say that

the contract is void.

MR. COLLINS:

Yes sir.

THE COURT:

Void or voidable.

MR. COLLINS:

I think this contract is void --

THE COURT:

Void, ab initio.

MR. COLLINS:

-- Argument but I think it would be unless we could stipulate a couple of documents in which case I could make it without putting on any testimony, I might try to do that.

THE COURT:

Do you have a copy of the contract that can be read?

MR. COLLINS:

Yes sir.

THE COURT:

There is one filed here but I couldn't possibly read it.

MR. COLLINS:

I have a good copy, it is one of the actual original copies. Maybe if I we can stipulate --(unintelligible).

THE COURT:

The contract will be plaintiff's exhibit number one if there is no objection.

MR. COLLINS:

Admissibility of that deed-contract have been stipulated and that was the reason we were going to call any witnesses.

THE COURT:

The deed will be plaintiff's exhibit two. Now you going to tell about --

Mr. COLLINS:

Alright. Your Honor, it is position of the plaintiff, I said that Mr. Bryan entered into a purchase contract with Mr. Wright on September 19, 1979. The contract was signed by Ray Wright and by James Bryan and it was not signed by, well, yes it was signed by the agent who simply acknowledged receipt of \$3,350.00, that is Don F. Gross. The contract provided that there was a deposit with the contract and that the balance would be paid upon delivery of the deed, total purchase price \$67,000.00. It was to closed on or before November 19, 1979. As I indicated, the plaintiff, James P. Bryan retained our firm to advise him prior to the date of closing, as to the validity of the contract. I think the facts would indicate that due to changes in circumstances

the plaintiff no longer wish to go through with this contract and was anxious to determine if he were legally bound. It was the position of our firm and we so advised Don Gross and the plaintiff, that he was not legally bound by this contract, and I have a motion that I would prefer Mr. Mooney argue on that point, but I'll just simply state it simply. It was our position that he was not legally bound due to a lack of mutuality which is, I think, we have a little memorandum which will explain that in more detail, but the facts simply are that the property as shown on that deed was held in the name of Mr. and Mrs. Wright, as husband and wife, as tenants by entirety with right of survivorship and the contract, the sales contract was executed only by Ray Wright, and I think the law in Virginia is clear that one tenant by the entirety cannot contract to convey real estate held by that tenant with his co-tenant. And there are cases on point that says that the Court cannot require specific performance and if the Court cannot --

THE COURT:

There have been a couple of cases recently touching up on that subject.

MR. COLLINS:

Yes, there was a very recent case we have cited and for that reason, we felt that if the plaintiff could not demand performance on the part of the defendant, then by the same token

the defendant, seller, could not demand performance on the part of the plaintiff and we so advised the agent that that was our position and ask for a refund of the purchase money. The money has not be refunded and it is the position of the plaintiff that the only authority by which the defendant hold the plaintiff's money, is that it is entitled to it under thi contract and if the contract fails, then of course, the defen whoever has the money between the two of them, should refund to the plaintiff all the money. I would, you know, 'I don't ti at this point I think we can rest our case in effect because the only thing we plan to put on evidence was the deed to the property and the contract itself and if we could rest at that point, I'd like for Mr. Mooney to present the memorandum and acquaint the Court with the cases, and so forth, which we rely on.

THE COURT: Alright - any objection to that?

MR. WILSON:

Well, Judge, I don't know procedurally what we are doing. It sounded like we made an opening statement and rested rested all at the same time. So, is that what we have done?

THE COURT:

He is introducing Mr. Mooney. I take it the only evidence he is offering is these two exhibits.

MR. COLLINS:

I was going to just simply call witnesses to get those into evidence and that was it. So I'm rested.

THE COURT:

Alright.

MR. WILSON:

Well, if he has rested, I'm going to move to strike but I have no objection to Mr. Mooney going ahead with whatever he has to say, but I'll just have it understood that there's a motion to strike on the floor-on the table right now, if that is alright.

THE COURT:

Alright, the Court is going to end up with two motions for summary judgment.

MR. WILSON:

Oh, we're going to put on some evidence, Judge, if, you know, if you will overrule that motion to strike.

THE COURT:

Alright, Mr. Mooney, since he has no objection and you've been properly introduced by Mr. Collins, you may go ahead.

MR. MOONEY:

Now that I have been introduced, I really, I don't have too much to add at this point. Mr. Collins has

summarized our position and it's relatively straight forward position. As he said the contract was signed only by Mr. Wright and he does not have the authority to sell the land. The Supreme Court dealt with the nature of a tenancy by the entirety in Vasilion vs. Vasilion, 1951 case, and in that case I believe there was a challenge to the continued existance of tenancy by the entirety in Virginia. The Court made it clear at that point that it still exists although there is a presumption against it. The Court then went on to discuss the nature of it, the nature of the relationship between the tenants, and held that neither spouse can convey or dispose of any part of the property so as to effect the severance of the tenancy. Now in a recent case which was Ingram vs. Lunsford, a 1976 case, the Court had occasion to consider the application of the law as stated in Vasilion to a situation which is similar to this one. In Vasilion, excuse me, in Ingram, the seller had signed a contract for the sale of property in which he had a interest as a tenant by the entirety. When he refused to go through with the contract, the purchaser sought to sue him for damages, breach of contract and in Ingram, the Court said that the contract so far as it purports to effect the husband or wife's title to the property, that is the seller's title to the property was void. In other



words, in the instant case, Mr. Wright's action in signing a contract for the sale of the land, is not a action that merely falls short of an action that he and his wife would take together in signing a contract, it is simply void. That contract is something you can just set aside, no effect to that act. Now in that contract, the contract provides for the payment of I believe the sum of \$3,350.00 as a down payment of deposit, such fund to be applied to the purchase price when the transaction goes through. In this particular case, there is, that is the only justification for the retaining of the sum by the escrow agent to be applied to the purchase price. Once you remove the contract, as you must do with this void contract, there is simply no other justification. Now the reason it is void as to the deposit, as to the whole transaction for the purchase and sale of the property, is that leaves Mr. Wright, should it not void in a rather enviable position. It would leave him in a position of being able to say at any time to Mr. Bryan, "I want you to perform", I'm going to compell you to perform". Mr. Bryan, on the other hand, is left without any option at all other than simply treating it as a void contract, which of course has the right to do. If Mr. Bryan were to seek, had he sought to compell Mr. Wright to perform, Mr. Wright would have a perfect out. He would simply be able to say, "Well I can't, I don't own the property myself". Mr. Bryan would then be faced with having to bring an action in Court to compell specific per-

formance and in Ingram, the Supreme Court has stated rather clearly that he just couldn't do it. So what you have is a totally one-sided contract. It purports to bind Bryan to purchase should Mr. Wright decide to sell, but on the other hand, what Mr. Bryan wants to do is of no consequence to Mr. Wright under this contract, were it not void, he would have the option of saying, well, I'll bring in my wife anytime and have her sign and then it is a good contract, or if I chose, as long as I want to, I'll just keep her off the contract and then in that case you can't make me do anything. You don't have me locked into this contract at all and that is why it is void by nature, a binding contract has to have some element of mutuality. I would say that this contract as it is, void contract, that doesn't even have any consideration because Mr. Wright is not, in one sense, at least as far as the words of the contract he promised, but as far as making a binding promise, a promise that Mr. Bryan could compel him to carry out, he hasn't made any promise at all and there's absolutely no consideration. Now the contract, the extent to which it speaks to the decree, not the decree, but the payment of the deposit, it says that should any party default, then that party is liable for the realtor's commission and for certain other expenses and our position as far as that would be, and this might touch in part on the counterclaim, but I'm going to deal with it a little bit because I do want

to point out that the contract had no other bearing on the deposit. It says that the defaulting party is responsible. THE COURT:

Where is that found at?

MR. MOONEY:

It is down around paragraph eight I think, I don't even know if they are numbered but it is down in that direction.

THE COURT:

Yeah, it's eight.

MR. MOONEY:

Is it eight? But in our position, again, it might go to the counterclaim, would be what Mr. Bryan has done is not in any sense of breach or default, he has simply recognized that this is a void contract and has chosen to act accordingly, which is to notify the defendants that he is going to treat it as a void contract and consider himself not obligated under it and that as far as analogizing I would say that it is close to the notion of rescission and therefore, the proper outcome would be to have the parties back in the positions that occupied prior to the signing of the contract. One other thing I would like to bring up again, this touches partly on the counterclaim but partly on the voidness of the contract. In Ingram, the Court recognized that it was void as to the, as to any effect on

the husband, the seller's decision to sell the property. It was void as to the purchase and sell. They did say that it was valid to the extent that it enabled the plaintiff to sue the defendant for damages for breach of contract, but that's a very different case from this one. In that case, the seller was refusing to perform and the Court held that the buyer could sue him for damages because he was the one who had initiated this contract, initiated this void contract, who had gone ahead and obligated himself personally to convey land that he knew or should have known he could not convey, so it is a very different situation, again it goes to the counterclaim but I think any element to the validity to the contract would not enable the right to sue Mr. Bryan. That's really all I have to say. We have a written motion and I have not filed it because I don't have the copies for the defendant with me right now but that will cite you to Vasilion and Ingram and also to --- authority.

THE COURT:

Are you going to file?

MR. MOONEY:

I'll file it Judge. Thank you.

THE COURT:

Alright, Mr. Blair.

MR. BLAIR:

Your Honor, I'm on short notice, but respond to the Ingram Case, that 216 Virginia 785. On the Ingram

Case, you had a husband who contracted to sell a piece of real estate which was held as tenants by the entirety. No where in that contract did it mention his wife's name and the Court went on <sup>to</sup> the talk about the fact that the fact that the general rule in Virginia is that you may contract to sell that which you do not own at the time of contracting and you are answerable in-for damages if you cannot deliver on the date of closing. That's the essence of the case. They were considering a contract entered into whereby the seller promises to convey land that he owned by tenants by entirety with his wife. The Court decided in that case that the contract is valid. It was not a breach of any -- he did not make any warranty that he owned it -- sold it. The contract didn't say owner and therefore, there were no implied warranties on the part of the husband that he was the sole owner. The Court went on to uphold the validity of that contract and it stated on the last page of the decision - it said even though the plaintiff is precluded from obtaining specific performance of the contract, this does not prevent him from maintaining an action to recover damages for its breach.

THE COURT:

In this contract, paragraph four, it says the seller agrees to convey the property purchased by general warranty deed with the usual English Covenants of Title and free and clear from all incumbrances, tenancies, liens, etc.

MR. BLAIR:

That's right, but he was not obligated to do so until the date of closing. He was saying in that contract, Mr. Wright was saying in that contract as of the date of closing I will deliver. Now he did not warrant to the Bryans on the date of contracting that he was the sole owner and Mr. Wilson will get into the facts of that, I'm merely responding to Mr. Mooney's argument. I would also bring to your attention your Honor, the case of C. Ray Waskey vs. Leon H. Thomas, that is 218 Virginia 109, a 1977 case, the very same issue arose in that case again. However, this one had a different twist to it and that twist was that the Court had before it consideration of whether or not the contract it was reviewing was an installment contract and that case, the Court restated the general rule and that is you can contract to sell what you don't own so long as you make any warranties at the time of contracting, that you do own something that in fact you don't. As long as you don't make the warranties, you can contract to sell it. What the Court noted different in that case, as I point out although I don't think it is relevant to this case, is that the general rule hasn't at least one exception and that exception is in the case of installment contracts whereby if the purchaser makes installments and the deed is not deliverable until the last installment is made, then the contract would be rescinded by the purchaser because there you don't have a situation where the purchaser is going to have a legal right to demand upon the seller that the deed

be delivered on the day of closing. His only right would be after he's paid in all his money he would demand that the deed be presented to him. The Court says that <sup>the</sup> installment sales contract is an exception to that general rule and therefore, the purchaser can rescind because in that case, you have a purchaser who paid in all of his money but he has no legal way to force the spouse of the seller to sign the deed and deliver it to him when he makes his last payment, so I only bring that case to the attention that it does support Ingram and that it does make that one distinction, which I don't think is the case that we have before us today. So, I would argue that Mr. Wright, under these cases, was obligated to deliver on the date of closing, and I believe the contract sets forth November 19, November 19. By counsel's own admission on his behalf prior to the date of closing, he said I'm not going to close, it is a void contract. I contend that Mr. Bryan's position was incorrect. It was not a void contract on it's face; it was a good contract and therefore, under clause eight of the contract, Mr. Wright is entitled to damages and any expenses that he has incurred due to Mr. Bryan defaulting under this contract. I would now offer these two cases into evidence. Thank you your Honor.

THE COURT:

Would you mind, just in letter form or writing, about what you have said here today that set forth your position what your contention is, what these cases mean --

MR. BLAIR:

Yes your Honor.

THE COURT:

Do you mind doing that?

MR. BLAIR:

Okay.

THE COURT:

I don't mean a brief, I know you have a lot of work on you but, just a little letter covering what you have said here.

MR. BLAIR:

Okay. Thank you.

MR. WILSON:

Would we be responding to whatever they filed here?

THE COURT:

Yeah, that would be alright. I'm not trying to make work for you all, I mean, I know --

MR. WILSON:

I understand.

THE COURT:

I just know there have been some recent cases touching upon this problem generally. I thought there were suits for specific performance. Wasn't there a suit for a specific performance?

MR. COLLINS:



The one Mr. Mooney cited was a suit initially I think for specific performance and maybe damages in the alternative.

THE COURT:

Yes, I've read these cases.

MR. COLLINS:

I would like to respond to a couple of points in Mr. Blair's argument. You have both of those cases in front of you but the first point that Mr. Blair makes is the crux of the doctrine of mutuality. Mr. Blair says that admittedly, Mr. Wright was not bound on the date the contract was entered into. Mr. Bryan, according to their contention, was bound but Mr. Wright was not, but he says that if by the date of closing as for in the contract, that all he contracted to do was to have the deed on the table on the 19th of November and if by some way he was able to accomplish what he had contracted to do, that was fine and the fact that he did not have the present ability to perform the date it was signed, is of no moment. Well, that's the very concept -- that's the reason you have the doctrine of mutuality. It is not so that the purchaser has to wait until the date of closing and find out whether he is buying a house or buying a law suit for damages. The purchaser, if he is to be bound to perform and if specific performance lies against the purchaser, then the purchaser has got to know that the seller is likewise bound at the moment the contract is entered into and when the seller can sit back

and have an option, there is no mutuality. Now, when you read this last case, Waskey vs. Thomas, the Supreme Court pointed out that the seller not only had no present capacity to convey at the time of the signing of the contract, but also had no legal power to obtain the capacity to convey before the date fixed delivery of the deed. That's exactly what's here. This contract says as you pointed out in paragraph four, that in effect, he agrees to convey and it says in paragraph eight that the seller, no paragraph eight, excuse me, in paragraph nine, no it is not even nine, I don't know, in paragraph ten, it says the contract of purchase constitutes the entire agreement among the parties and may not be modified or changed except by written instrument, executed by all parties, including the reator. So, there is no stipulation in here that it is subject to Mrs. Wright signing the contract or subject to the him, or that he somehow covenants and warrants that he will undertake to have her sign it. He implies a present ability to convey and contracts to do so and the Supreme Court said that he had no power. He said that it is true that the seller might have been enable by some future eventuality to obtain such capacity. In other words, at the date of closing, Mrs. Wright may have shown up and may have signed the deed subject to her mood at the moment. He says for example, he might have been able to acquire full title by right of survivorship or by deed executed by himself and his wife, this is the seller now. It is possible too, that if the wife,

remained to the same mind as she was on the date of the trial, she might of been willing at the last installments were paid to join in the deed. It is also possible, however that none of these eventualities would have occurred alternately that the husband may have predeceased the wife before the time of closing, in which case she would have title to the property. In such case, the purchasers hold without equitable remedy for specific performance would have been left with no recourse, but an action for damages. So the case here is simply that the only thing the Bryan's, the purchasers have got, by virtue of this contract, is that they have maybe bought a law suit for damages; whereas the sellers, by virtue of having the purchasers signature, have bought the right of specific performance, and you can read that case the Court concluded -- well, the Court in effect, could affirm the decision of the chancellor who had said that after purchaser's notice to the seller of recession, the wife agreed to sign the contract. The Chancellor held the contracts void, nonetheless, unenforceable, and rescinded. The Supreme Court affirmed that. That is exactly what --

THE COURT:

Is that Waskey?

MR. COLLINS:

Yes sir. That is exactly what situation we have here and I point out that the contract not only purports to create the obligation to the people but at the bottom of

the contract there is a receipt from the defendant Don Gross, that he has received the money of the plaintiff, so I think upon that evidence and this law, that the Court should direct the plaintiff's money be refunded and grant judgement for the plaintiff.

MR. WILSON:

If I might make ----- response to ---

THE COURT:

I don't mind if you all go back and forth a little bit, I need all the help I can get.

MR. BLAIR:

Two very brief points in response to Mr. Collins argument. Mr. Collins seems to suggest that somehow Mr. Wright must have, must <sup>had</sup> have to have title or present-ability to secure title to this property on the day of contracting. If we believe that, then we have to ignore the general rule stated in the Ingram, which they originally cited, that you don't even have to own it, you don't even have to have it. You can contract to sell it. I could contract to sell this building on a specific date and I better get title by that date or close it. I think that is what Ingram is saying and if I don't have title by that date, then I might be liable for damages to the purchaser. Now with respect to Waskey, I'd only point out that Waskey simply restated a general rule that was clearly and succinctly

stated in ink and Waskey said however, there is an exception to the general rule and that exception is where we have installment sales contract and there, yes, if this were installment sale contract, the case would be over. We don't have any installment sale contract. If we did, that would be an exception. Waskey clearly states that that is an exception and that the purchaser would win and we don't have this. I think we have to read the two cases together. Thank you, your Honor.

MR. MOONEY:

Judge, I don't know if you want us to continue going back and forth, but in Ingram, when the Court said we have held that one may contract to sell what one does not own, that was only in answer to the seller's contention I believe that the contract was entirely void and wouldn't support an action against him for damages for breach. That doesn't have anything to do with the notion that the buyers don't have any sort of rights based on it - it is still void as to that aspect as to whether they have any sort, have secured any sort of obligation from the seller to sell, that, you got to take that in context.

THE COURT:

Suppose I enter into a contract with Mr. Collins agreeing to sell him a farm that you own, I don't own it. I agree to sell him that farm, and there is a certain -----

(Unintelligible)--- Is that contract valid, and?

MR. COLLINS:

If you couldn't perform, then you would be subject to damages if we could prove damages.

THE COURT:

There wouldn't be any basis for a suit until the date for performance arose, would it?

MR. COLLINS:

Not if you, there wouldn't be any basis for a suit for damages, there wouldn't be any damages unless or until such time as you fail to perform, but that's different, I would also in a case like that be bound by to purchase if you did in fact get title to the property. If you divulge in there that if you acquired or maybe it would be after the fact that you acquired title, you would have to put in the contract that if you or content upon you acquiring title. If you purported that you owned it at the time you contracted, you would run into this same mutuality argument. There are two suits available. There is a suit for example Mr. Wright would have against Mr. Bryan which is sort of alleged in his counterclaim if relying on their purchase whether they have a contract or not, if they moved into his house, if they made some alterations, did some things like that, and then didn't close, he could have a claim for damages against them. There is a suit for damages that they could have against

him if he didn't perform the contract because he could legally unable to perform the contract, and they had suffered damages, like they had let another house go by or whatever their damages might be. Each side could conceivably have a suit for damages against the other if they had changed their position in reliance on the other one's promise and that they had been damaged, but what we are talking about is the contract of sale itself inforceable in any particular and the Courts have ruled that it is void because there is no mutuality and the only way under which he can forfeit the deposit is he can say Mr. Bryan was obligated to buy this house and he didn't buy it, and yet, Mr. Bryan on the other hand, cannot turn around and say Mr. Wright was obligated to sell it because the law is clear, he was not obligated to sell it. And this, I think, these points are right clear, I think either side can have a claim for damages against the other if either side occurred damages, but it would not be the damages called for in the contract, because the contract is void, but if through any oral agreeemnt or anything else if I give someone possession of my property under some sort of promise, and they damage it, then they could be liable or if I promised to do something to someone and they act in accordance with that and damage themselves and I don't perform, then I can be liable. But, I would not be liable under this contract because the Courts have

ruled that that contract is void, ab initio due to lack of mutuality. The Court cannot allow a contract to stand where one side can demand performance and the other side can't.

MR. WILSON:

Your Honor, please, if what Mr. Collins is saying were law, the Ingram Case shouldn't be cited by the plaintiff because in the Ingram Case you had property owned by the seller and his wife as tenants by entirety. That is exactly what you have here. You have almost the exact facts in the Ingram Case as you have here. And in that case, the Court had a perfect opportunity if it wanted to and it believed it to be law, to rule that that contract was void, ab initio on the ground of mutuality or lack of it or whatever it wanted to. It did not. It said the very same thing that the Court intimated in its question to Mr. Collins. And that is can you contract to sell, as long as you don't misrepresent any facts, something you don't own and in that case the Court said the general rule is that you can and that is exactly what Mr. Wright did in this case and if you look at the contract, he does not anywhere in the contract refer to himself as the owner or misrepresent any facts. All he says is as of September 16, 1979, I will sell to you this property in Alleghany County, we will close on November 19, 1979 in the meantime, you will pay \$400.00 a month which is rent and that's all it said it. The facts



are almost identical to those in Ingram and on November 19, our evidence will show eventually that we were ready, willing and able to close and the reason for the defendant backing out of this contract had nothing to do with this legal argument anyway, but that is not before this Court at this point.

THE COURT:

Well, I'm not going to strike the evidence because I think there is a serious issue of law here, but I will, of course, have to get into it again and if you want to present any evidence, you may.

MR. WILSON:

Alright sir. Judge, we would like to call Mr. Wright if we may.

Direct

BY MR. WILSON:

Q. Your Name is Ray L. Wright and where do you live?

A. Ray L. Wright - 310 East Beech Street

Q. And is this your wife seated to Mr. Blair's right?

A. It sure is.

Q. What is her name?

A. Lois B.

Q. Mr. Wright, on September 16, 1979 did you enter into the contract which is before the Court I think?

A. Yes.

MR. WILSON TO THE COURT:

Is that in evidence Judge, I assume it is?

THE COURT:

That's plaintiff's exhibit one.

Q. I'll show you a copy of the contract dated September 16, 1979. Is that a copy of the contract you entered into that the Court has before it as plaintiff's exhibit one?

A. It sure is.

Q. Is that your signature on the left hand side?

A. That is my signature.

Q. Is that Mr. Bryan's signature on the right hand side at the bottom?

A. That is Mr. Bryan's signature.

Q. Is that Mr. Gross's signature on the bottom left hand side?

A. That is Mr. Gross's signature.

Q. Did you represent to Mr. Bryan or to Mr. Gross or to anyone else in this contract or at any other time that you were the owner, sole owner of this property?

A. I never did.

Q. And your name is referred to in the contract as the seller?

A. Right.

Q. And did you purport to close this contract by delivering the deed upon receipt of the purchase money on November 19, 1979?

A. Yes.

Q. In this agreement it appears that Mr. Bryan was to have paid rent of \$400.00 a month. Did he pay that for the month of between September 16 and October 16?

A. He paid one month's rent.

Q. One month. Did he pay the second month?

A. No.

Q. Did he pay the deposit of \$3,350.00?

A. Yes.

Q.. Okay. What was the real estate commission that you show?

A. 6%.

Q. 6%. So he only paid part of the 6% and that was the \$3,350.00?

A. Right.

Q. Okay. Now, after signing this contract, did Mr. Bryan get in touch with you about either going through with the contract or not going through the contract?

A. Mr. Bryan got in touch with me the night he was fired from his job at Alleghany Regional Hospital. Mr. Bryan stated to me there was no work in this area for him, that he had to go back home for a job, and he wanted to

compromise this contract. I told Mr. Bryan I had a signed contract and as far as I was concerned, I would deliver the deed to him.

Q. Did Mr. Bryan, in that conversation or any other time, up until you were contacted by the lawyer Mr. Collins, raise any question about the legality of the contract?

A. No sir.

Q. And you say he told you that he had been fired from his job and was leaving the area?

A. He left the next morning.

Q. He left the next morning. Now, after that conversation, did Mr. Bryan's lawyer get in touch with you?

A. No sir. He got in touch with my real estate dealor.

Q. Okay. And is this a copy of the letter he sent to your real estate dealor, Don F. Gross?

A. Right.

Q. Dated November 13, 1979?

A. Right.

Q. Okay. We like to offer that as defendant's exhibit one or whatever you want to name it. Okay? Alright, Mr. Wright, did Mr. Collins write again to your realtor on November 27, 1979?

A. Right.

MR. WILSON TO THE COURT:

I offer that Judge as defendant's exhibit two.

THE COURT:

Okay.

Q. Did you write to Mr. Collins on December 3, 1979?

A. I did.

Q. Is that the letter that you wrote to Mr. Collins?

A. That is the letter.

Q. Did you send it to him?

A. Yes sir. Mailed it.

Q. Okay. Would you read that to the Court?

A. I'll read it.

MR. COLLINS INTERRUPTS:

Judge, I think that, if he just wants to testify that is his business, but this is kind of self serving to read stuff he has already wrote before. I object to the letter. If he wants to testify to it's contents, if he thinks it is relevant to these proceedings, I don't object to that.

THE COURT:

Well, I suppose he could show the position he took at that time. I guess that's the purpose of the letter.

MR. WILSON:

That's what we are trying to show here, Judge.

MR. WILSON TO MR. WRIGHT:

Sit down Mr. Wright if you will.

MR. WRIGHT READS LETTER:

"Dear Mr. Collins:

I believed I should have received copies of the two letters written by you to Don Gross in regards to the contract between myself and James P. and Dorothy B. Bryan dated September 16, 1979. Mr. Collins, you told Mr. Gross yourself he had earned his commission"--

MR. COLLINS:

Your Honor, I object to that

MR. WRIGHT CONTINUES WITH LETTER:

"which is 6%"--

MR COLLINS:

I object to that as hearsay.

THE COURT:

Well, I guess that part, well, I'm just considering this letter though not for the truth of anything in it, but just to show what Mr. Wright's position and contention was while this correspondence was taking place and this piece was coming on.

MR. WRIGHT CONTINUES WITH LETTER:

"Mr. Collins you told Mr. Gross yourself he had earned his commission which is 6% or \$4,020.00. I know Mr. Bryan occupied

the property more than one month. The agreed monthly rent was \$400.00 per month. Mr. Bryan only paid one month's rent. This leaves him in the arrears of the second month's rent in the amount of \$400.00. Mr. Gross's commission is \$4,020.00 plus \$400.00 additional rent, a total of \$4,420.00 due Mr. Gross and myself. Mr. Bryan still owes a balance of \$1,070.00 to us since Mr. Gross only has \$3,350.00 in excrow. Mr. Bryan, I tried to sell this property to another property --- Mr. Bryan tried to sell this property to another party the night before he left town. The Bryans may save these expenses if they have a sale for this property before December 15 and I will hold my part of the contract open until that date."

MR. WILSON:

Okay. Read off that as defendant's exhibit three, I think. Alright, Mr. Wright, since Mr. Bryan has backed out on the contract, have you sold this same property to Mr. and Mrs. VanDeveder?

A. On December 12, I believe.

Q. Okay, and do you have a copy of your sales contract and a copy of the deed?

A. You have it in your hands.

Q. Okay. I'll show you a Virginia Real Estate Contract which is, appears to be the same form as the one you used in the contract with Mr. and Mrs. Bryan, is that correct, does that appear to be the same form?

A. That is the same contract.

Q. And you again signed that contract yourself although in that contract it appears your wife's name is on there also as one of the sellers?

A. Right.

Q. Okay and this is a copy of the deed to Mr. and Mrs. VanDeveder which your wife signed, Lois B. Wright.

A. Right.

Q. Is that correct?

MR. WILSON:

Okay Judge, we offer these as defendant's exhibits four and five, I think. Answer some questions Mr. Collins has.

Cross

BY MR. COLLINS:

I object to the relevancy of the deed, maybe some relevancy to the contract, comparison --

THE COURT:

I think they ought to admit them because it involves the same property, doesn't it?



MR. COLLINS:

Yes sir, but I mean so what -- Mr. Wright you said that, first of all, you said that Mr. Bryan signed this contract. You didn't see him sign the contract, did you?

A. Yes I did.

Q. You did? Did you all execute at the same time?

A. Yes sir.

Q. How come I had some copies of this contract that's only been executed by him. Did you make copies of it before you signed it?

A. Yeah.

Q. You mean you sat there together and he signed and you made copies of it and then you signed it?

A. Mr. Gross had a copy of it.

Q. Of course Mr. Gross had a copy of it but you didn't have -- it was signed at different times wasn't it?

A. No sir. It was signed at the same time in Mr. Gross's office.

Q. Well, can you explain why I have a copy of the contract --?

A. No I cannot, cause I didn't give it to you.

Q. Well, your attorney did, I believe. Can you explain any reason that I would have a copy of the contract

that had Mr. Bryan's name apparently on it and yours not, at least that is what I assume.

A. Maybe the copying machine didn't come out.

Q. Well, might be.

A. He has got one over there that don't have Don Gross' name on it either.

Q. Well, maybe so. That is your explanation. Does your copy have this Mr. Wilson?

MR. WILSON:

Yeah, let me show you.

MR. COLLINS:

Okay, well, so we have all signed at the same time?

A. Yes sir.

Q. Okay, Okay. Excuse me. Now you can see that this money was an escrow or a deposit down payment on this house. Is that right?

A. Deposit.

Q. Deposit. And is Mr. Gross holding that money?

A. I have the money.

Q. You have the money?

A. Mr. Gross turned the money over to me minus percentage.

Q. You indicated that in your letter that you said something to the effect that I should have been writing

to you and not to Mr. Gross, but at the time, wasn't Mr. Gross holding the money?

A. Until that contract was dead.

Q. Up until -- Okay. As long as you chose to hold the contract open you said December 15 I think?

A. Right.

Q. Mr. Gross held the money. So at the time of November 13 when I wrote to Mr. Gross and on November 27 when I wrote to Mr. Gross, he had the deposit money?

A. Mr. Gross gave me the money January 7, I believe.

Q. So he had the money when the two letters were written?

A. Right.

Q. Okay. And the letters in effect were asking that he return the money. Isn't that right?

A. That's what the letter stated.

Q. I'm just concerned why you apparently thought that they should have been written to you and not to Mr. Gross. Also, you stated, in a sense you stated by reading your letter, are you advising the Court that the contract, --- the contract simply says that the realtor's commission is "as agreed" and that's all it says. And I gather you are the man that hired the realtor, you are the seller?

A. Right.

Q. And so it is as agreed between you and Mr. Gross, is that right?

A. Right.

Q. Now isn't it a fact that you and Mr. Gross had agreed to a contract to a commission of substantially less than 6%?

A. 6%.

Q. Would you deny that you and Mr. Gross had an agreement that the commission would be 3%?

A. The commission was 3% after Mr. Bryan didn't come with his. That was a settlement agreement.

Q. Did, didn't you initial -- always --  
MR. WILSON INTERRUPTS:

Excuse me Mr. Collins, I don't believe this line of questioning is relevant to the position the plaintiff has taken in this case. The plaintiff has taken position that the contract was void, ab initio for lack of mutuality and wants his money back.

MR. COLLINS:

The Judge has not ruled on our -- I've got to cross examine on all the points that he raises and this is one of them.

THE COURT:

I see nothing wrong with the cross examination.

MR. COLLINS:

Unless, you want -- you've already ruled in

my favor, I wouldn't ask any questions.

MR. WILSON:

Can we just save it for him Judge.

MR. COLLINS CONTINUES:

Q. Before Mr. Bryan ever came in the picture, didn't you and Mr. Gross agree by virtue of sort of being fellow realtors and builders, sellers and so forth, that the commission of this case, if he procured a buyer, would be 3%?

A. Me and Mr. Gross had a verbal contract of 6% and no signed contract whatsoever.

Q. Nothing signed?

A. No signed contract whatsoever.

Q. Do you deny this to be 3%?

A. Do I do?

Q. Do you deny that it was the very beginning to be 3%?

A. Yes I do.

Q. Now, you said that you talked with Mr. Bryan on the telephone and he in effect told you that he didn't want to buy the house and wanted to work out something. Is that right?

A. That was the same night they discharged him at 4:00 about 6:30 that afternoon.

Q. You know what date that was?

A. I do not.

Q. And you said you told him no sir, I have a signed contract. Is that basically your words?

A. I told him I would produce a deed on the on the 19th and I was expecting him to go through with his deed.

Q. You told him you had a signed contract and you were holding him to his end of the bargain?

A. Right.

Q. Did you in this contract in any where, I have read it, but any where did you divulge that you did not own this property or that you did not have the ability to deed it?

MR. WILSON INTERRUPTS:

I think the contract speaks for itself Judge.

THE COURT:

What is your objection?

MR. WILSON:

My objection is that he has ask the witness does the contract divulge and that is a matter for the four corners of the instrument.

THE COURT:

You ask him if he ever represented that he was the sole owner of the property.

MR. WILSON:

His question is - Does the contract divulge?  
And I think the contract speaks for itself. He should  
read the contract.

MR. COLLINS:

Well, he can read it too, I would just like  
his opinion, as to what --

THE COURT:

What was the question again?

MR. COLLINS:

Your Honor, I ask him if any where within  
this contract if he acknowledged or divulged that he was  
not the owner of this property and did not have the ability  
to convey it in his own right.

THE COURT:

I suppose on that that the contract would be  
the best evidence and would speak for itself.

MR. COLLINS:

It might be significant if he thinks it is  
in there even if it isn't and the contract does speak for  
itself but I am interested in the intent and opinion of the  
witness.

THE COURT:

I don't believe the question would be proper.

MR. COLLINS:

Okay. You hold this property with your wife with right of survivorship, is that right Mr. Wright?

A. Right.

Q. And, and ---

MR. WILSON:

There is a question, I don't mean to be picky, but you said do you hold?

MR. COLLINS:

At the time of this contract, at the time, you held it as tenants by entirety with right of survivorship?

A. Right.

Q. Do you understand what right of survivorship is?

A. No.

Q. You don't. What would happen to the property if you would die?

A. She would get it I reckon.

Q. She would get it. You understood that much. Okay? And is that what you intended when you had the deed prepared that?

A. Dr. Ellis made that deed and didn't ask me anything whatsoever how to make that deed.

Q.. Alright. Well, --

A. It was made in your office too, and you made



it.

Q. Alright, so I guess you're saying we never discussed it?

A. That's right.

Q. Well, is that not, is that the way you have held title to other property?

A. I have had other titles of other property me, my sole name and I have property in mine and her name.

Q. Okay, but you do understand you didn't know the way this property was titled?

A. Right.

Q. And you do know and did know that say, if for example, you would die, that your wife would inherit it?

A. No.

Q. You didn't know, you just told me that, you just said it would go to her if you died.

A. I assume that.

Q.. You assume, and assuming that then you also knew that your wife had not signed any contract with Mr. Bryan. Is that right?

A. That's right.

Q. So in effect, you were relying on your being able to convince your wife at the proper time to sign the deed.

A. I can do that.

Q. Well, suppose you died in the meantime?

A. Suppose I die in the meantime?

Q. It would be her property, wouldn't it?

A. That's right.

Q. And nobody could make her deed that to Mr. Bryan if she didn't want to, could they?

A. She always makes good my contracts.

Q. Well, she might, I'm saying as a matter of law, you understood ---

MR. WILSON INTERRUPTS:

Judge, this is an academic argument, I mean this is something he might argue to you, unless he is talking about something that is in the contract or something expressly said to Mr. or Mrs. Bryan, that it was somehow misleading, I think it is academic for him to be talking about what the law might impose on this man, and argue with you.

THE COURT:

Perhaps there is more matter of argument than law --

MR. COLLINS:

Your Honor, I think it is evidencery to show that he knew at the time of execution of this that he was not legally binding the sale of the property for

whatever, I don't know if it has any bearing or not, but I think it is proper to put it in the pot. Well, on another point ---

MR. WRIGHT STATES:

On the second contract there, that man you just read, Mike, my wife's name wasn't on it, but she signed the deed.

MR. COLLINS:

Okay.

MR. WRIGHT:

That produced.

MR. COLLINS:

Another point, you said that they called you the first you knew that they were leaving was one night and that you think they left the next day.

A. They did leave the next day. They vacated the house and turned the keys over to Don Gross and he run to your office.

Q. And do you know when that was?

A. Sometime after lunch that day.

Q. Well, I mean the date?

A. I do not know the date.

Q. Well the first letter ---

A. It was ten days prior to to the deed

signing.

Q. The first letter was dated November 13. I got the impression that you said, I know we are not trying any case for claim for rent, but I got the impression that you said they paid you one month's rent but they stayed in the house an additional month or something.

A. He was in there -- it went into the second month, not a full month.

Q. Well, the contract was signed on September 16?

A. Right.

Q. And it was to be closed on November 19 and that is just barely over a month.

A. That's over two months.

Q. Oh, okay, November, October -- Okay. So he paid you September to October?

A. Right.

Q. And then he held over from October say 19 or 16 or whatever, until sometime in November. I see, okay, which would be -- and you say you didn't get paid for the second month's rent?

A. That's right.

Q. So the closing was to be sixty days after the contract was entered into.

Direct

LOIS B. WRIGHT

MR. WILSON:

Q. Is it Lois B. Wright?

A. Lois B.

Q. B. Wright and Ray L. Wright is your husband, is that correct?

A. Yes.

Q. And you have sat here and heard your husband testify, have you not?

A. Yes sir.

Q. Now, Mrs. Wright, were you aware that your husband had entered into a contract with James Bryan and his wife to sell -- I guess, it's house and lots Section 1 Block 3 Lot 1 in Cherokee Subdivision?

A. Yes sir.

Q. And were you aware that there was to have been a closing on November 19, 1979. Tell the Court whether or not you were prepared at that time to sign the deed conveying your interest in the property.

A. Yes sir.

MR. COLLINS INTERRUPTS:

Judge, we object to the relevancy of that --  
her opinion now as to what she might have done on that --  
I don't think is anything the Court should consider to  
determine the legality of the contract.

THE COURT:

I will let her testify to that and pass on that when I pass on the case.

MR. COLLINS:

Well, I just want to object to it.

MR. WILSON CONTINUES:

Q. Mrs. Wright, after November 19, 1979, have you and your husband in fact sold the same property to Mr. and Mrs. VanDeveder as shown on an exhibit which is before -- in a contract which is before the Court?

A. Yes sir.

Q. And did you sign that deed to the VanDeveders'?

A. Yes sir.

Q. Answer the questions from Mr. Collins.

Cross

MR. COLLINS:

Q. Mrs. Wright, have you at any time, apparently, I get the impression that you are saying that you just if your husband would want you to do it, you would do it. Is that right? Did you all particularly talk about this one deal and you agree to do it or do you just say in general?

A. Yes I did. I agreed.

Q. Okay, but in general, if your husband says

I've sold a piece of property you have to sign the deed, would you always sign it or do you have to look at each individual case on its own merits and decided whether or not you sign a deed or not?

A. No, I just signed.

Q. So in other words he has a kind of overall authority, you'll take his advice. Is that a fair statement?

A. Yeah, I do.

Q. Okay, does your husband have any sort of legal authority like a power of attorney or any kind of signed document whereby you'd give him this authority to in effect act in your behalf?

A. No.

Q. Okay.

A. No.

Q. And that's been your opinion apparently through this morning that you would go along with your husband?

A. Yes.

Q. You recognize that if you wanted to you could change your mind at any time and not go along with him?

A. No, I go along with him.

Q. I know, I said do you recognize that you have the right to change your mind?

A. Yes, I recognize that.

Q. You are not under any legal duty on that?

A. No.

Thank you.

MR. WILSON :

Thank you Mrs. Wright. Judge do you have any questions?

THE COURT:

No. Schedule for filing. Is that going to interfere with your legislative duties?

MR. WILSON:

I don't think so Judge, I think Mr. Blair can go ahead and work on this.

THE COURT:

Alright. Suppose you all suggest some dates and then --

MR. COLLINS:

We could file something since we have, more or less, got it ready in seven days.

THE COURT:

This is the seventeenth. You got the holidays coming in there. Do you want to file, say the



end of the year?

MR. COLLINS:

I don't have any problem of filing it in a couple of days. I just as soon move it along and if they want extra time, you could --

THE COURT:

Alright. You file on or before the twenty-fourth of December and you want so many days after they file, don't you?

MR. BLAIR:

Yes your Honor. I'm not going to be able to do anything on this anticipating theirs until after Christmas because we have other cases pending in federal Court so, normally I would be able to anticipate some of their arguments and start to work on them. I would try to get it in sooner, but I would like that much time if I could have it.

THE COURT:

Alright. You would have fourteen days from the time they file and you all want about seven days after with to answer or fourteen or what do want.

MR. COLLINS:

I want seven. I think we both talked about all the cases already that there are. That's the fourteenth, twentyfourth --

THE COURT:

I'd like for you to take all the time you, but

I kind of think it's wise to have a schedule on this because nothing may get filed and then bogged down.

MR. WILSON:

We've got fourteen days after December 24?

MR. COLLINS:

Is that January 7th?

THE COURT:

Are we going to have an order on this or just, I don't guess we will have an order at this time.

MR. BLAIR:

I don't think it is necessary your Honor unless the other side does.

MR. COLLINS:

Alright, that would be January 7 and we would respond by January 14.

THE COURT:

December 24, the defendant -- January 7, is that right and the plaintiff, January 14. Alright. Anything else?

MR. COLLINS:

No sir.

THE COURT:

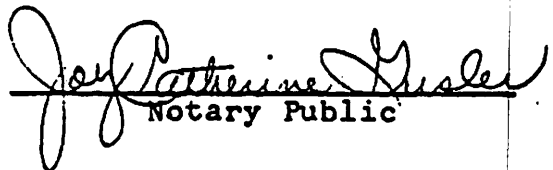
Well, you have a right interesting part of of law here.

CERTIFICATE

STATE OF VIRGINIA,  
COUNTY OF ALLEGHANY, TO-WIT:

I, Joy Catherine Gusler, a Notary Public,  
do hereby certify that I accurately transcribed to the  
best of my ability, and that this transcription is a  
true and correct transcript of the evidence and other  
incidents of the trial recorded on tape by R. C. Hubbard,  
Clerk of the Circuit Court and prepared under his direction  
and supervision in the case of JAMES P. BRYAN versus RAY  
L. WRIGHT, tried in the Circuit Court of Alleghany County  
at Covington, Virginia, on December 17, 1980.

Given under my hand this the 27<sup>th</sup> day of  
March, 1981.

  
Notary Public

My commission expires:  
March 27, 1983

I, Robert Hubbard, Clerk of the Circuit Court  
of Alleghany County, Virginia, hereby certify that the  
foregoing transcript of <sup>trial</sup> ~~motions~~ in the case of JAMES P.  
BRYAN versus RAY L. WRIGHT on the 17th day of December,  
1980, was filed with me as Clerk of said Court on the  
27<sup>th</sup> day of March, 1981.

  
Clerk