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CLERK
SUPREME COURT OF VIRGINIA



IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 780907

THE COMMUNITY BANK
Appellant

v.

MARY T. WRIGHT
Appellee

APPENDIX

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Petersburg, Va. 23803

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TABLE OF CONTENTS

APPENDIX
PAGES

1. MOTION FOR JUDGMENT WITH ATTACHED EXHIBIT	1-3
2. EXCERPTS FROM TRANSCRIPT OF HEARING HELD ON JANUARY 26, 1978 BEFORE THE HONORABLE D. W. MURPHEY, JUDGE	
a) Discussion between Court and Counsel ...	4-5
b) Testimony of Nathan Sydney Jones, III ..	5-27
c) Testimony of Susan H. Walk	27-39
d) Testimony of Mary T. Wright	39-70
e) Testimony of Nathan S. Jones, III	70-83
f) Discussion between Court and Counsel ...	83-89
g) Jury Verdict	89-90
h) Discussion between Court and Counsel ..	90
3. PLAINTIFF'S EXHIBIT NUMBER 1	91
4. PLAINTIFF'S EXHIBIT NUMBER 2	92
5. PLAINTIFF'S EXHIBIT NUMBER 3	93
6. DEFENDANT'S EXHIBIT NUMBER 1	94-95
7. ALL JURY INSTRUCTIONS GIVEN AND USED BY COURT .	96-101
8. VERDICT FORM	102
9. MOTION FILED JANUARY 16, 1978	103
10. PLAINTIFF'S MEMORANDUM	104-105
11. DEFENDANT'S REPLY BRIEF TO PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION	106-123
12. LETTER OF MARCH 21, 1978	124
13. ORDER	125
14. ASSIGNMENT OF ERROR	126
15. ASSIGNMENT OF CROSS-ERROR	126-127

MOTION FOR JUDGMENT

TO THE HONORABLE JUDGE OF THE AFORESAID COURT:

Comes now the plaintiff, by counsel, and moves the court for judgment against the defendant in the amount and on the grounds hereinafter set forth:

1. The plaintiff is a Virginia corporation, with its principal place of business located in the City of Petersburg, Virginia, and engages in the banking business.

2. On March 29, 1977 defendant borrowed from plaintiff the sum of Seven Thousand Five Hundred Dollars (\$7,500), which, together with interest thereon at the rate of 8% per annum, she promised to repay on or before June 27, 1977.

3. Said debt is evidenced by a promissory note, signed by the defendant, a photocopy of which is attached hereto and identified as "Exhibit A".

4. Said note waives benefit of the homestead exemption and provides for the payment by plaintiff of all costs of collection, including an attorney's fee of 25% of the amount of said note.

5. Despite demands made by plaintiff upon the defendant, defendant has failed to pay any amount on said note and there is now due and owing to the plaintiff from the defendant the sum of Seven Thousand Five Hundred Dollars (\$7,500), plus interest thereon at the rate of 8% per annum since March 29, 1977. Interest amounted to Two Hundred Forty-nine and 99/100 (\$249.99) as of August 26,

1977, and is accruing at the rate of \$1.666 per day.

WHEREFORE, plaintiff demands judgment against the defendant in the amount of Seven Thousand Five Hundred Dollars (\$7,500), together with interest thereon from March 29, 1977 at the rate of 8% per annum, plus costs in its behalf expended and attorney's fee as provided in the note.

THE COMMUNITY BANK
By Counsel

* * * *

Filed August 29, 1977

Exhibit A



THE COMMUNITY BANK
TIME NOTE

Due 6-27-77
Interest Rate 8% \$ 1500.00
3/29, 1977 Note No. J-468

90 days after date, for value received, the undersigned, jointly and severally, promise(s) to pay to THE COMMUNITY BANK (herein called the Bank) or order, without offset, at any of its banking offices,

SEVEN THOUSAND FIVE HUNDRED AND NO/100 DOLLARS
in lawful money of the United States of America, with interest at the rate of 8 per cent per annum, (8% unless otherwise indicated), and all costs of collection, including an attorney's fee of twenty-five per cent (25%) of the amount hereof, if incurred.

Each person liable hereon in any capacity, (i) waives homestead exemption, presentment, demand, protest and notice of all kinds respecting this note, (ii) agrees that the Bank, at any time or times without notice or further consent, may grant extensions of time, without limit, for the payment hereof, (iii) agrees that in the event of default hereunder, the Bank shall have the right to apply any deposit or any asset it holds belonging to any such person to the payment of this note, and (iv) waives the benefit of any law or rule of law providing for his release or discharge from liability hereon, in whole or in part, on account of any facts or circumstances other than full payment of all amounts due hereunder.

In the event (a) any person liable hereon in any capacity shall die or be or become insolvent or make an assignment for the benefit of creditors, (b) a petition is filed or any other proceeding is commenced under the Federal Bankruptcy Act or any state insolvency statute by or against any person liable hereon, or (c) a receiver is appointed for, or a writ or order of attachment, levy or garnishment is issued against, any person liable hereon or the property, assets or income of any of them, this note shall become immediately due and payable in full, at the option of the Bank, without any notice or demand.

WITNESS the following signatures and seals:

Complete Address:

101 FRIAR LANE
COLONIAL HEIGHTS, VA 23834

I, Mary T. Wright (SEAL)

[TR 1] Transcript of hearing in the above
on January 26, 1978, before Honorable D. W. Murphey,
Judge.

[TR 3] THE COURT: All right, Mr. Andrews,
who is your first witness?

MR. ANDREWS: No one yet, Your Honor, I have
to get the note compared with Mr. Bambacus.

Will you stipulate that this is the correct
note?

MR. BAMBACUS: I don't want to stipulate it,
you can prove it.

MR. ANDREWS: You have admitted that it's a
true copy.

[TR 4] MR. BAMBACUS: Yes, I have admitted
that under the admissions.

MR. ANDREWS: Then it's admissible.

THE COURT: Any objections to placing the
note in evidence?

MR. BAMBACUS: No, sir.

THE COURT: All right.

MR. ANDREWS: Your Honor, we will ask that
that be marked as Plaintiff's Exhibit No. 1.

THE COURT: Plaintiff's Exhibit No. 1.

MR. ANDREWS: The Court will notice in the
grounds of defense that it is admitted that it is
not paid.

THE COURT: Yes. It is in evidence.

MR. ANDREWS: Your Honor, that constitutes a prima facie case on behalf of the plaintiff.

THE COURT: Mr. Bambacus?

MR. BAMBACUS: Your Honor, I would like to call Mr. Jones as an adverse witness.

THE COURT: All right, Mr. Jones, please come up and take the stand. You have already been sworn.

[TR 5] NATHAN SYDNEY JONES, III, an adverse witness called by the attorneys for the defendant, first being duly sworn, testifies and states:

DIRECT EXAMINATION

BY MR. BAMBACUS:

Q. Would you please state your full name, Mr. Jones.

A. Nathan Sydney Jones, III.

Q. And what is your occupation, sir?

A. I'm president of The Community Bank.

Q. Is that in Petersburg?

A. Yes, sir.

Q. How long have you been president of the bank?

A. Approximately 14 months.

Q. Do you know James W. Wright?

A. Yes, sir.

Q. Was he a depositor of your bank?

A. Yes, sir.

Q. Is he now a depositor of your bank?

A. I believe so.

Q. When did he first become a depositor of your bank?

A. I don't have the records in front of me.

[TR 6] I believe it was in August of 1976, but I have no records.

Q. Did he ever become a borrower of your bank?

A. Yes, sir.

Q. When did he become a borrower of your bank?

A. I believe that was October of '76.

Q. And how much was the first loan that was made to him?

A. \$15,000.00

Q. Has that loan been fully repaid?

A. I don't know. He's had two loans, one of which was fully repaid, and one of which was not. I at this time don't know which one was fully repaid.

Q. What was the balance of that loan on March 29th, 1977?

A. \$15,000.00.

Q. And what was the balance of the second

loan, if there was a second loan, on March the 29th, 1977?

A. \$10,000.00

Q. And are you certain that they are the correct balances on that date?

A. Yes, sir.

Q. Didn't you previously testify that it could have been twenty-one or twenty-two or twenty-three or twenty-four or twenty-five thousand dollars, you didn't know?

A. Yes, sir, but after you asked me I went [TR 7] back and verified the correct balance.

Q. Did you bring the records with you?

A. No, sir.

Q. The first loan was fully collateralized, was it not?

A. As best I can recall.

Q. Was the second loan fully collateralized?

A. Yes, sir, as far as I can recall.

Q. And is his current loan fully collateralized?

A. Yes, sir.

Q. What is the amount of the collateral on that loan?

A. It's a car title.

Q. Sir?

A. It's a car title, but at this time I can't remember exactly what the NADA loan value of the car is. It's more than the balance of the loan.

Q. Now, in March of 1977 did Mr. Wright come

to you and attempt to borrow seven and a half thousand dollars?

A. Yes, sir.

Q. Did you lend him the seven and a half thousand dollars?

A. No sir.

Q. Why not?

[TR 8] A. I have a lending authority of \$25,000 which is both secured and unsecured, direct and indirect, and I did not have the lending authority to lend him any additional funds at that time.

Q. What would it have taken to have gotten that authority?

A. I would have had to have called a meeting of the Loan Committee and presented the loan to them for them to make a credit decision on.

Q. I believe you previously testified that there would have been no problem getting authorization from the Loan Committee?

A. I didn't anticipate any problem. I have one vote on it, and I would have voted in favor of it.

Q. And how many members are there on that Loan Committee, or were there at that time?

A. I believe there were four.

Q. And who were they?

[TR 9] A. I supplied them to you. I looked them up and supplied them to you. I would only have to guess, I don't have anything to tell me exactly who they were.

Q. One of them would have been yourself, and would the second have been Mr. Morton B. Spero?

A. I looked them up and supplied them to you, so if that's what I supplied, then yes, sir.

Q. Well, this is what is contained in the letter from Mr. Andrews.

A. Yes, sir.

Q. And in addition to being on the Loan Committee, Mr. Spero is chairman of the board?

A. Yes, sir.

Q. In addition to that, he's general counsel for the bank, isn't he?

A. No, sir.

Q. Who is general counsel for the bank?

A. Lawrence Deihl.

Q. Well, isn't he in the same firm with Mr. Spero?

A. Yes, sir, but Mr. Spero doesn't represent the bank in anything.

Q. His partner does?

A. Yes, sir, Mr. Deihl is the bank's attorney.

[TR 10] Q. Well, Mr. Spero's firm represents the bank, is that correct?

A. Well, Mr. Deihl is a member of the firm, then yes,

sir.

Q. And Mr. Carl B. Keller, Jr. was a member of the Loan Committee, is that right?

A. Okay.

Q. And Mr. Albert Suttle, Jr.?

A. Yes, sir.

Q. Now, how long would it have taken them to come to the bank?

A. At that particular time we didn't have any meeting set up, it would be on a call basis. I would have to call the other three members and find a time when all three of them could attend the meeting.

Q. Have you ever called them and gotten approval of a loan on the telephone?

A. Yes, sir, I have before.

Q. You could've done that in this instance with Mr. Wright, could you not?

A. It's usually a rare occasion. It would be someone that they personally would know when we did it over the phone.

Q. Now, why didn't you do that in the case of Mr. Wright?

[TR 11] A. Just what I said, they were not familiar enough with Mr. Wright, I felt, to have a meeting.

Q. Well, if you didn't call them you wouldn't

have known, would you?

A. No, sir.

Q. So what was your plan then to help Mr. Wright?

A. Mr. Wright and I discussed the length of the time that it would possibly take to get the Loan Committee together, and at some point in the conversation it was discussed that a loan to his wife could be made.

Q. Well, what was the urgency of the loan?

A. As I told you before, I don't really recall. I can't remember anything being urgent about it.

Q. Do you recall his having told you that he had written some checks in Maryland on some cars?

A. No, sir.

Q. You have no recollection of that at all?

A. No, sir.

Q. Well, anyway, you wanted to make a loan to him, and how were you going to do that?

A. I couldn't make a loan to him.

Q. Well, how did you accomplish getting him \$7,500.00?

A. We discussed lending his wife the money, [TR 12] and that she would in effect lend him the money.

Q. All right, sir. And what did you do in furtherance of that discussion or agreement?

A. I informed Mr. Wright that for Mrs. Wright to have a loan at the bank we would have to have a financial statement.

Q. Do you have that financial statement?

A. Yes, sir.

Q. Okay. Would you look at that statement for a moment.

A. Yes, sir.

Q. What assets were listed in that statement?

A. Cash on hand and in banks, \$5,000.00. Real estate owned, \$60,000.00. Furniture, \$10,000.00. Two mink coats, \$10,000.00. Silverware, \$4,000.00.

Q. Now, whose writing is that on the righthand side of the financial statement?

A. In the liabilities section?

A. Yes.

A. I wrote in the \$30,000.00 from the information supplied on the back.

Q. And who wrote her name on the form?

A. At the top?

Q. On the second page where the section provided for description of real estate listed on reverse side [TR 13] is located.

A. I'm not familiar with the handwriting, I can't tell you for sure who wrote it in.

Q. Now, the front part on the assets column says real estate owned, see schedule, is that correct?

A. Yes, sir.

Q. Now, in the schedule you are supposed to identify the real estate owned, isn't that what the schedule is for?

A. Yes. It would be the same, I assume, as the address on the front.

Q. How can you make that assumption?

A. Because that's the way it is usually filled out unless someone owns several pieces of real estate, then they usually would identify them.

* * * *

[TR 14] Q. In any event, you filled out part of the statement yourself?

A. I totaled the asset column. I totaled the net worth. I totaled the liabilities. I wrote in the \$30,000.00 that we have been talking about from the information on the back, and I dated it at the top.

Q. And what date did you put on there?

A. I put the 28th of March 1977.

Q. Who brought this into your bank?

A. I don't recall that anyone brought it in to me. I had given it originally to Mr. Wright, and I had it in my possession when Mrs. Wright came to the bank.

Q. If Mrs. Wright didn't bring it back to you, do you have any idea who else would've brought it back

other than Mr. Wright?

A. I don't know that it ever left the bank.

Q. Well, where was it filled out?

A. As I recall, it was filled out at the bank.

Q. This entire statement was filled out at the bank?

[TR 15] A. As best I can recall.

Q. If she had never been into the bank between the date of the grand opening and March the 29th, how could her handwriting have come on this statement, if you can explain it?

A. I thought that she had entered some information when she came to the bank on the 29th of March when I asked her to verify the correctness of the statement.

Q. You had handed that to her and asked her to verify the correctness of the statement?

A. To look over it and make sure that it was correct.

Q. So you had it when she came into the bank?

A. Yes, I had it in my possession when she came into the bank.

Q. And you had a customer with you when she came into the bank, did you not?

A. I either had a customer or was on the telephone, I can't remember.

Q. Well, is it not a fact that you had a customer at your desk and you turned her over to Mrs. Walk?

A. I got up and spoke to Mrs. Wright when she came in.

Q. And turned her over to Mrs. Walk?

A. After she had looked at the financial state-
[TR 16] ment, yes, sir.

Q. Now, this financial statement contains a section called personal information, and one of the questions is place of employment, which she listed as Mary's, and the position, which she listed as owner, is that correct?

A. Yes, sir.

Q. And you in fact knew that she owns a nice, ladies' dress shop, I believe it's in the Walnut--

A. I knew that she owned it and managed it, yes, sir.

Q. And there is absolutely no information containing the assets or liabilities of that business contained on this statement?

A. As a new business, where the inventory might be owed to the trade creditors, which would be account payables, there might not be any worth to the business.

Q. It might have been \$200,000.00 in debt, couldn't it?

A. If it was, then it should've been on the statement.

Q. Well, you knew she was owner of that business, and there is no information on it whatsoever, is that

correct?

A. That's correct.

Q. If somebody had walked in off the street [TR 17] who had never had an account with your bank and about whom you had no information except what is contained on that piece of paper, would you make a \$7,500.00 loan?

A. I felt I had some other information.

Q. What information did you have?

A. Part of making a credit decision involves-- I brought a book to show you, if you would like. There are three basic factors: There is character, capital, and capacity. I was under the impression that I knew something about Mrs. Wright's character. I had a financial statement that I took to be 100 percent accurate that said something about her capacity and her capital.

Q. Well, in fact you knew that this statement was not accurate because it doesn't tell you anything about the assets or liabilities of her business?

A. Mr. Bambacus, I don't know. I didn't know then and I do not know now that this is an inaccurate financial statement.

Q. Well, you know it shows nothing regarding her business operations.

A. I tried to explain that.

Q. What did you know about her character?

[TR 18] A. I knew who she was, I knew a little bit about her family.

Q. Didn't you, Mr. Jones, testify on January the 12th of this year pursuant to my question--

THE COURT: What page, Mr. Bambacus?

MR. BAMBACUS: Page 49, Your Honor, starting at Line 13 through Line 18.

THE COURT: All right, sir.

Q. Did you testify purusant to my question, "And when did you fill it out? After she signed it?," and [TR 19] your answer was, "No, sir, it was filled out before she signed it. I got the information from Mr. Wright"--

MR. ANDREWS: Finish it.

THE COURT: Keep on reading, Mr. Bambacus.

Q. --"I believe, but it was not completely filled in. There have been no changes in it since she signed it."

A. Yes, sir.

Q. Did you get the information from Mr. Wright when he brought the statement back to you?

A. I don't recall that he brought the statement back to me. I recall--

Q. When did you get the information from Mr. Wright?

A. Can I finish?

Q. Yes.

A. Thank you. I recall getting up from whatever I was doing, talking to Mrs. Wright, asking her to please verify the statement, and I can only assume at that time that she made some entries. I admit we--

* * * *

[TR 20] Q. Were you going to finish your sentence?

A. No, I have finished.

Q. In addition to the two loans which you have made to Mr. Wright, did you attempt to make other loans to him?

A. Did I attempt to make other loans to him?

Q. Or did you make loans to him or renew a loan?

A. Renewal of the loans that you have discussed.

Q. And didn't you on one previous occasion prior to March 29th give him a note to take home to his wife to endorse for him?

A. I would not have given him the note. He would've gotten the note in the mail with a note notice for a renewal.

Q. And he brought it to you, did he not?

[TR 21] A. Yes, sir, brought it to the bank to either me or the note teller.

Q. And he had his signature on it and what purported to be his wife's signature on it, did it not?

A. Not at the time of a renewal.

Q. On one occasion he brought you a note which had his signature and what purported to be his wife's signature?

A. Yes, sir.

Q. Did you use that note?

A. No, sir, it wasn't apparent--

Q. Why not?

A. On his original note it was made jointly by Mr. and Mrs. Wright. When the note became due, a new note was either brought to the bank or mailed to the bank. The note teller processed the note, and mailed the old note back. The new note did not have Mrs. Wright's signature on it.

The note teller found a mistake, and I called Mr. Wright and told him of the mistake. And at a later time after that he brought me a note back that you are talking about, but I had already processed another note, and that particular note that you are talking about was never processed.

[TR 22] Q. Mr. Jones, I am talking about a note, and in order to save time I will find it if you want me to, where you suspected that Mrs. Wright's name was forged on it.

A. When I looked at the note the word Wright in both cases looked very similar. I do not know now or

did I knew then whether she had signed it.

Q. And didn't you testify in your discovery deposition that because of that you tore it up and made Mr. Wright just sign the note himself?

A. I got the note after the one that I have just told you about had been processed. Since I had already processed it, and since the two last names of Wright looked a lot alike, I did not process this note.

Q. In any event, you knew or suspected that he was trying to utter a note that was a possible forgery, is that correct?

A. I was concerned over the last names looking alike.

Q. Yes, sir. Did you follow that up, or did [TR 23] you just throw the note away, Mr. Jones?

A. It was destroyed later, but not at that time.

Q. Didn't you deem the attempted uttering of a forged instrument to a bank important enough to report to a police agency, federal or state?

MR. ANDREWS: Your Honor, there's absolutely no proof--

THE COURT: Objection sustained, sir.

Q. Did you follow it up, Mr. Jones?

THE COURT: The objection has been sustained, we won't go into that any further.

Q. Now, Mr. Jones, you knew this loan was for Mr.

Wright, didn't you?

A. Yes, sir.

Q. The one that is the subject matter of this case today?

A. I knew the proceeds of the loan would go to his business account.

Q. And you were using Mrs. Wright as the borrower to in effect lend the money to Mr. Wright, is that correct?

A. I was using Mrs. Wright to borrow the money in effect to lend the money to her husband.

Q. And you never contacted Mrs. Wright your-
[TR 24] self, did you?

A. At which time?

Q. Prior to the day that she came into the bank.

A. I talked to her prior to when she came into the bank.

Q. Well, when did you talk to her?

A. I talked to her either the morning of or the day before.

Q. You don't know which?

A. No, sir.

Q. Do you have any contemporaneous memorandum of that conversation?

A. No, sir.

Q. Did you call her?

A. I believe she called me, or if I called her it

would have been returning her phone call.

Q. What did you tell her, Mr. Jones?

A. She asked me to explain what was happening on the transaction--

Q. You discussed the fact--

THE COURT: Excuse me, Mr. Bambacus, but he hasn't finished.

A. I stopped, Mr. Bambacus, because I wasn't sure you were prepared. She asked me to explain the trans-[TR 25] action that was about to take place. She asked me to explain why Jimmy couldn't borrow the money. We talked about a Corvette title that he had originally offered as collateral.

Q. Is that all?

A. Well, I explained why he couldn't be a party to the note, yes, sir, I think that's all.

Q. Well, what was your explanation to her as to why the Corvette could not have been given as collateral?

A. Because the Corvette was owned by Mr. Wright and--

Q. Well, it would have been simple enough--

A. Could I finish?

Q. Excuse me.

A. Thank you. --that for him to put the car up for collateral would have meant he would be endorsing the note, and because of what we talked about earlier with the indirect and direct lending authority that I

had, he could not be a party to the note.

Q. Well, Mr. Jones, he didn't have to be a party to the note in order to take that Corvette as collateral, did he?

A. From a legal standpoint I think you can use something called a hypothecation agreement.

Q. There is a simpler way then, all he had to do was endorse that title of that Corvette to his wife, didn't he?

[TR 26] A. If he had wanted to in effect put the car in her name and pay the sales tax or whatever would have to be done.

Q. And you saw fit to scratch through that 1976 Corvette which would have been collateral for that loan?

A. I think I told you before that I don't know whether I scratched it out or not, but Mr. Wright had told me that his car company owned the car, so therefore it should not have been on Mrs. Wright's financial statement.

Q. If he wanted to put it up as collateral all you had to do was take an assignment of the title, didn't you, to Mrs. Wright?

A. In effect he would've had to have sold the car to her or make it a gift, I assume.

Q. Now, initially in this case Mr. Morton Spero was giving you advice, was he not?

A. No, sir, he doesn't represent the bank, Mr. Deihl does.

[TR27]Q. Mr. Spero is chairman of the board of the bank, is he not?

A. Yes, sir.

Q. Now, do you know that he was also Mr. Wright's lawyer?

A. I knew that Mr. Wright had talked to him, but he didn't accept the case or whatever the term is.

Q. Well, he had a conflict, did he not, he couldn't very well represent Mr. Wright and be chairman of the board, could he?

THE COURT: Well, Mr. Bambacus, you have just finished making a statement that he did represent Mr. Wright.

MR. BAMBACUS: Well, he's talking about in connection with this case here, and I'm talking about he had represented Mr. Wright prior to this note.

THE COURT: Well, that's not what he said.

[TR 28] MR. BAMBACUS: Well, I'm getting to that then, Your Honor.

Q. You knew that Mr. Spero was also Mr. Wright's lawyer, didn't you?

THE COURT: When?

MR. BAMBACUS: During 1977.

THE COURT: But not in connection with this matter?

MR. BAMBACUS: No, sir.

THE COURT: Okay. Did you or did you not know that?

THE WITNESS: I knew that Mr. Wright had been to see Mr. Spero, and Mr. Spero declined to take his case.

THE COURT: In this case?

THE WITNESS: No.

THE COURT: Whatever case it was?

THE WITNESS: Yes, sir.

THE COURT: All right.

THE WITNESS: It had nothing to do with this case.

BY MR. BAMBACUS: (Continuing)

Q. Did you ever discuss with Mrs. Wright the terms of the note or the repayment period?

A. In my conversation with her, I think we [TR 29] discussed how much and for how long, but as far as when she came in the bank, no, Mrs. Walk handled the closing of the loan.

* * * *

[TR 33] Q. Mr. Jones, you knew the money was for Mr. Wright, didn't you.

A. Yes, I knew it was to be credited to his business account.

Q. Do you have anything in writing from Mrs. Wright authorizing you to credit that account, the proceeds of that note to Mr. Wright's account?

A. No, sir.

Q. Did she ever tell you to credit them to Mr. Wright's account?

A. No, sir, she didn't say, here put the money in his account.

Q. Do you know whether any of the proceeds of this loan were used to curtail any indebtedness of Mr. Wright to your bank?

A. It was not.

[TR 34] Q. Do you have any records of the account that would show that with you?

A. Not with me, no, sir.

Q. So that you were going to accommodate Mr. Wright, and the two of you undertook to effectuate the loan to Mr. Wright by getting Mrs. Wright to become the maker of the note, and the bank was going to get its 8 per cent interest and Mr. Wright was going to get the \$7,500.00, is that correct?

[TR 35] A. I do not feel that I went to any effort whatsoever to earn the bank the 8 percent interest on this [TR 36] loan. I undertook nothing to make the loan. Mr. Wright left the bank and obviously had some discussion with his wife. It didn't matter to me whether he got the loan or didn't get the loan.

Q. Well, it mattered enough for you to show him how to get it, didn't you?

A. We discussed that I could not lend him the

money and that it might be possible, pending getting a financial statement, to lend it to her.

MR. BAMBACUS: Your Honor, I would like to end with Mr. Jones at this point, subject to recall after we have discussed some authorities during the first recess that the Court takes.

THE COURT: Mr. Andrews?

[TR 37] MR. ANDREWS: I just wanted to understand if he would be brought back later possibly by him, then I would rather do my examination of him then. Otherwise, if he chooses not to bring him back, I would want to put him back on the stand.

THE COURT: But you don't have any questions at this time?

MR. ANDREWS: Subject to my right to cross-examine later.

[TR 38] SUSAN H. WALK, a witness called by the attorneys for the defendant, first being duly sworn, testifies and states:

DIRECT EXAMINATION

BY MR. BAMBACUS:

Q. State your full name, please, Mrs. Walk.

A. Susan H. Walk.

Q. Where are you employed, Mrs. Walk?

A. The Community Bank, South Crater Road Office.

Q. Is that in Petersburg?

A. Yes.

Q. I invite your attention, Mrs. Walk, to March the 29th of last year, 1977. Do you recall Mrs. Mary Wright coming into the bank?

A. Yes.

Q. What was your position with the bank at that time?

A. I was a loan officer at the downtown office.

Q. Had you ever seen Mrs. Wright in the bank before that day?

A. I don't recall seeing her in the bank before then.

Q. I can't hear you.

[TR 39] A. I don't specifically recall seeing her in the bank before then, but I knew who she was when she came in.

Q. And prior to her coming to the bank you had never had any conversation with her?

A. Not other than in the dress shop.

Q. Not what?

A. Not any other conversation than maybe in the dress shop, nothing about banking relationships or anything like that.

Q. And when she came in, did she tell you that she was there to endorse a note for her husband?

A. She may have said that she was there for that purpose, but it's not uncommon for customers to confuse the terms when they first come in.

Q. And you didn't bother to straighten out that confusion, did you?

A. Not right in the very beginning because it's not uncommon.

Q. Well, did you ever straighten out that confusion?

A. If it had come up later on during the signing of the note, I would have stopped then.

Q. But she came in and told you that she was there to endorse a note, and you never bothered to straighten out that confusion?

[TR 40] MR. ANDREWS: Your Honor, her response was that she may have said that, she did not say that she did.

THE COURT: That's right, she said she may have said it, she did not say she did say it.

Q. Now, I ask you, if she said it, did you ever bother to explain it to her?

A. If she had continued with the word "endorse" during the signing of the note, then I would have stopped.

Q. The fact of the matter is that she was only in the bank a very short period of time, was she not?

A. Right.

Q. She told you that she had to close her shop to come over there, didn't she?

A. That I don't recall.

Q. She told you she was in a hurry, do you recall that?

A. No, I don't.

Q. And when was the note made up, Mrs. Walk?

A. I believe the note was made up before she came to the bank because I knew she was due to come in.

Q. And who made it up?

A. I did.

Q. Pursuant to whose instructions?

A. Mr. Jones'.

[TR 41] Q. So she signed the financial statement at your desk, did she not?

A. I believe that was signed in Mr. Jones' presence.

Q. Wasn't there a customer at Mr. Jones' desk when Mrs. Wright walked in?

A. I remember him having a telephone call at the time.

Q. Do you remember whether there was a customer at his desk?

A. No, I don't remember a customer, I remember a telephone call.

Q. Do you remember whether or not there was one, that's what I am trying to ask you.

A. When Mrs. Wright came in? No, I do not believe

there was a customer.

Q. Are you positive about that?

A. Yes.

Q. In any event, for whatever reason, Mr. Jones was too busy to handle it, so he turned it over to you?

A. Right, he had this telephone call.

Q. And you went over the disclosure statement, which is a form required by the government that discloses to everybody who is a party to a note the interest, the period, and the true interest rate, and whatever; is that correct?

A. Yes, sir.

[TR 42] Q. And she signed the note?

A. Right.

Q. And then she left?

A. I made the deposit into the checking account and gave her the receipt, and then she left.

Q. You did what?

A. Made the deposit into the checking account.

Q. Whose checking account?

A. Crater Road Exchange.

Q. And whose account was that?

A. That was for Mr. Wright.

Q. Mr. James W. Wright?

A. Yes.

Q. Did you get anything from Mrs. Wright in writing authorizing you to deposit the proceeds of that

loan to the Crater Road Exchange account?

A. I received nothing in writing.

Q. And she gave you no instructions to do so, did she?

A. Not herself, no.

Q. And you didn't issue a cashier's check for her endorsement?

A. No, I did not, it was all deposited directly into the account.

Q. Just deposited into Mr. Wright's account?

[TR 43] A. The business account.

Q. And who directed you to do it that way?

A. Mr. Jones.

Q. When did Mr. Jones inform you of that? Before Mrs. Wright came in?

A. Prior to Mrs. Wright coming in.

Q. And you didn't tell Mrs. Wright what you were going to do with this money, did you, the proceeds from this loan?

A. I told her I was depositing it into the account and would bring her the receipt.

Q. You what? I can't hear you, Mrs. Walk, I had a nerve ending damaged during the war.

A. I told her I was depositing the money into the account and that I would bring her the receipt.

Q. Well, you don't have any independent recollection of having given her a receipt, do you?

A. I don't positively remember giving her the receipt, but that is our normal procedure before the customer leaves.

Q. Well, I am not asking you about your normal procedure, I am asking you do you have any independent recollection of having given Mrs. Wright a deposit receipt for that \$7,500.00?

A. No, I don't absolutely remember handing it [TR 44] to her.

Q. Thank you. And that was the sum and substance of the transaction so far as you know, what you just testified to?

A. Correct.

MR. BAMBACUS: I have no further questions, Your Honor.

CROSS-EXAMINATION

BY MR. ANDREWS:

Q. Mrs. Walk, you have testified regarding the disclosure statement. I show you a paper and ask you whether or not this is the disclosure statement which was filled out and signed by Mary T. Wright on that date?

A. Yes, it is.

Q. Who filled it out?

A. I filled it out.

Q. Was it filled out prior to the time she came in?

A. Yes.

Q. Whose signature is this here?

A. That is Mrs. Wright's signature at the bottom.

MR. ANDREWS: I would offer this in evidence as Plaintiff's Exhibit No. 2.

[TR 45] THE COURT: Plaintiff's Exhibit No. 2.

Q. At the top it says that the loan is to Mary T. Wright, and she signed it as borrower, is that right?

A. Right.

Q. Now, you indicated that you handled the actual closing of the loan?

A. Yes.

Q. Did you do this before or after she spoke with Mr. Jones?

A. This was after she spoke to Mr. Jones.

Q. And tell the jury what you did as far as going over the papers, what order you went over this, and so forth.

A. I go over the disclosure statement first, giving the name of the borrower, the date, the terms of the loan, and in this case it was 90 days. Then the disclosure statement also has the amount being borrowed, the interest rate, the total of the principal plus the interest, and the annual percentage rate.

After the customer signs this part, then on the note it has the same information: the date, the amount being borrowed, the interest rate, the customer's

address, and then the customer signs this on the bottom also.

Q. With reference to the disclosure statement, did you point out to her at that time the provisions of that [TR 46] disclosure statement form, the things you have just pointed out?

A. Yes, the terms, the amount, the interest, and the annual percentage rate.

Q. And all these were specifically pointed out to her?

A. Right.

Q. And you got her to sign the note after she signed that?

A. Yes.

Q. And did you go over the note?

A. The note briefly because it does contain the same information.

Q. And that's when she signed the note?

A. Yes.

Q. At any time during this conversation, your closing of this loan, did she make any statement to you regarding endorsing a note?

A. No, she did not.

Q. Did she make any statement to you to indicate that her husband was going to come in and sign the note?

A. No, she did not.

Q. You indicated that she may have said to you when she came in the bank that she was there to endorse a note for Jimmy Wright?

[TR 47] A. Right.

Q. When would this have been with reference to her talking to Mr. Jones and then your subsequently completing the forms? Would it have been before, or during?

A. When she just moved from his desk to my desk.

Q. But when would it have been that you said she may have said this? If she may have said it, when would it have been?

A. In the beginning before she sat down to complete the loan transaction.

Q. Would it have been before or after she talked to Mr. Jones, do you recall?

A. I would say probably after because the first time I had talked to her was after she had talked to Mr. Jones.

Q. But at no time while you were going over this and explaining and showing it to her did she make any statement to you indicating either that she was endorsing the note or guaranteeing it or to be a secondary party at all?

A. No, she didn't.

Q. Did she make any statement about cosigning?

A. No.

Q. Do you recall how long your part of the transaction took?

[TR 48] A. About ten or fifteen minutes.
* * * *

REDIRECT EXAMINATION

BY MR. BAMBACUS:

Q. You went over that disclosure form only for the purpose of apprising her of the interest rate, the true interest rate, and the period of the loan, isn't that correct?

MR. ANDREWS: Objection, Your Honor, the purpose for which she went over it is irrelevant.

THE COURT: It is completely irrelevant.
The manner that she went over it, what she told her, that is quite relevant, but her reason for so doing is completely irrelevant. It's required by law, that's why.

Q. Let me come back to it a little differently, You didn't specifically tell Mrs. Wright, Mrs. Wright you are the borrower and the maker on this loan, did you?

A. At the top of the disclosure statement it starts out that the loan is made to, and then they have the person's name.

[TR 49] Q. I understand that, but you didn't at any time tell her she was the borrower and the maker of the note, you just put an X mark on that note and said to sign here, didn't you?

A. I explained the disclosure statement to her and told her she was to sign at the bottom of it.

Q. That's right, but you never told her she was the borrower, endorser, comaker, or anything else, did you?

A. I did not feel there was a need to because it was stated on the disclosure statement.

Q. I understand that, and you handed the note to her and put an X mark on it and said for her to sign it, didn't you?

A. After we covered the items that were filled in on the note.

Q. And you put the X mark and said sign here, didn't you?

MR. ANDREWS: She said after she had gone over the other things she did.

Q. Well, what was there to explain to her about the note? It was a note for \$7,500.00, wasn't it?

A. Right. The same information that's on the disclosure statement is also on the note: the terms, the amount being borrowed, the date of the loan, the borrower's [TR 50] address, and then I pointed out where she ought to sign.

MR. BAMBACUS: I have no further questions.

RE CROSS-EXAMINATION

BY MR. ANDREWS:

Q. Mrs. Walk, where was this disclosure statement

while you were going over it?

A. The customer gets a copy and the bank keeps a copy. So, after the disclosure statements are both signed, I take my copy back.

Q. No, I mean while the loan closing was going on. Do you sit there reading it, or did you show a copy to her, or did you lay it on a desk and point out what was on it, or what?

A. I turn it towards the customer and then go over the items that are on the disclosure statement.

Q. Pointing out the items, or whatever?

A. Right.

Q. And did you give her a copy?

A. Yes.

* * * *

[TR 52] MARY T. WRIGHT, the defendant herein, called in her own behalf, first being duly sworn, testifies and states:

DIRECT EXAMINATION

BY MR. BAMBACUS:

Q. State your full name, please, Mrs. Wright.

A. May Tedesco Wright.

Q. Where do you live, Mrs. Wright?

A. 101 Friar Lane, Colonial Heights.

Q. And you operate a business?

A. Yes, sir.

Q. And is that business called Mary's?

A. Yes, sir.

Q. Is that a dress shop?

A. Yes, ladies' apparel.

Q. And when did you commence operating that business?

A. September of last year.

Q. 1977?

A. '76, that's what it would be.

Q. '76?

A. Yes, sir.

Q. And up until that time you had been a housewife?

A. Yes, sir. Well, two years prior to that [TR
53] I had been.

Q. Two what?

A. Two years prior to that I was a housewife,
yes, sir. When I was single I used to work.

Q. What kind of work did you do?

A. I was an assistant buyer for Montaldo's in
Richmond.

Q. Now, in March of 1977 did you have a conversation
with your husband, James W. Wright, concerning the loan
which is in question here?

A. Yes, sir, I did.

Q. What was the first conversation you had with
him?

A. Jimmy came home and told me that he had written
some bad checks in Maryland to purchase some automobiles,

and that he didn't have the money in his bank account to cover the checks, and that he needed to borrow some money from the bank, and that he had talked to Mr. Jones about making him a loan but that Mr. Jones had refused unless I would endorse the note for him because he had reached his credit limit.

Q. Did you immediately agree to endorse any note for him?

A. Not immediately. We fought about it for a while, and he told me that if I would do it this one time he [TR 54] would never ask me again.

Q. Had he ever asked you to endorse a note previously?

A. Yes, sir. Every week or two he was always bringing home something for me to sign.

Q. Had you ever had a conversation with Mr. Jones prior to that about signing notes or signing guarantee agreements with Mr. Wright?

A. Yes, sir, we did. I don't remember the exact time, but I do know it was prior to March. We had sort of a little heated conversation because he wanted me to endorse a note for Jimmy, and I refused to do it, and he told me that his wife had to sign loans for him so I should agree to do it for Jimmy.

Q. Did you tell him why you didn't want to endorse any notes or guarantee agreements for Mr. Wright?

A. I told him I didn't trust him.

Q. Did you finally agree to endorse the note for

Mr. Wright.

A. Yes, sir, in March I did, for the \$7,500.00.

Q. And where did this conversation take place?

A. At home.

Q. Was that on the day or the day before the note was signed?

A. Possibly the day before. I don't remember.

[TR 55] I know it wasn't the day of the loan. It might have been the day before, or maybe even Sunday afternoon that he approached me with it.

Q. Did Mr. Wright bring you any papers from the bank?

A. A financial statement.

THE COURT: It was never put in evidence.

MR. BAMBACUS: Well, I would like to put it in evidence, Your Honor. For all intents and purposes it is, I suppose.

THE COURT: I will be glad to put it in if you would like.

MR. BAMBACUS: Yes, sir.

THE COURT: Defendant's Exhibit No. 1.

Q. Is that what Mr. Wright brought to you?

A. Yes, sir.

Q. Whose writing is that at the top on the front page?

A. The name and address?

Q. Yes.

A. It looks to be Jimmy Wright's handwriting.

Q. Would you go over there in front of the jury, maybe they can watch it and follow us because they don't know what we are talking about. Just go over there while I ask you two or three questions, Mrs. Wright.

[TR 56] Turn the paper so they can follow it. Now, over here where it says assets, whose writing is that?

A. Part of it is my writing and part of it I don't know whose writing it is.

Q. On the left-hand side?

A. Yes, sir, under assets.

Q. Which part is your writing?

A. The personal listings: furniture, mink coat, silverware; that's mine.

Q. How about the real estate, whose writing is that?

A. I don't know, sir.

Q. How about cash on hand, \$5,000.00, whose writing is that?

A. I don't know, sir, whose that is.

Q. Now, you heard Mr. Jones say that the writing on the liabilities side is his, is that correct?

A. Yes, sir.

Q. Now, do you know below where it says personal information, Mary's, position, owner, is that your writing?

A. Yes, sir, that's my writing.

Q. Now, turn it over on the back. Where it says description of real estate listed on reverse side, there is no description of the real estate, is there?

[TR 57] A. No, sir, there is not.

Q. Now, is that your writing, Mary Tedesco Wright?

A. No, sir, that's not my writing.

Q. How about the numbers in there?

A. Yes, sir, and the Virginia Mutual is my writing.

Q. And is that your signature at the bottom?

A. Yes, sir, it is.

Q. Do you recognize the handwriting on the back side that is not yours?

A. No, sir, I do not.

Q. All right, thank you, you may go back and be seated in the witness chair. Now, did you take that financial statement, which is marked Defendant's Exhibit No. 1, to the bank?

A. No, sir, I didn't.

Q. Who did take it to the bank?

A. James Wright. To my knowledge, James Wright took it there.

Q. Well, anyway, he took it from you?

A. Yes, he took it from me.

Q. And it was back at the bank when you get there on March the 29th?

A. Yes, sir, it was.

[TR 58] Q. Did you at any time call Mr. Jones or any other person at The Community Bank in Petersburg before going there on March the 29th?

A. No, sir, I didn't call Mr. Jones, nor would I have because of the way our conversation ended the last time I had talked to him. I would not have called him, definitely.

Q. Did you call anyone at the bank?

A. No, sir.

Q. Did you go there on March the 29th?

A. Yes, sir, I did.

Q. Did you have a conversation with Mr. Wright early that morning?

A. Before he left for Maryland, yes, sir, I did.

Q. What was that conversation?

A. He told me to be sure that I got to the bank before 2:00 o'clock.

Q. To do what?

A. To endorse the note for him, and that he would be back by later to sign it and take care of the details with Nat.

Q. And what time did you get to the bank, if you recall?

A. It was after lunch. I was very reluctant [TR 59] to leave the store because I was the only person there, so I had to lock it up. It was sometime in the early afternoon. I didn't have much time to get to the

bank, I remember that.

Q. Who was the person you spoke to when you went into the bank?

A. The first person I spoke to, I suppose I just stood in the middle of the floor, and Mr. Jones had a customer at his desk, and he was on the telephone also, and I said to Mrs. Walk, I am Mary Wright, Jimmy Wright's wife, and I am here to endorse a note for him that he spoke to Nat about.

Q. And what did she tell you?

A. She told me to have a seat, and I sat down.

Q. Did you have a conversation with Mr. Jones?

A. After he got off the telephone he stood up and he took something out of a folder, which was the financial statement, and he leaned across the desk, I was sitting at Mrs. Walk's desk, they are side by side, and he leaned across and told me to look over it and if it was correct to sign it.

Q. Was it correct?

A. Yes, sir.

Q. Did it show any of the assets or liabilities of your business?

A. No, sir, it didn't.

Q. It was correct as far as it was, but was it [TR 60] complete?

A. No, sir.

Q. Had you ever asked the bank to borrow any

money previously?

A. No, sir.

Q. Had you ever done business with The Community Bank other than when you had joint signature authority on a savings account that your husband opened?

A. No, sir.

Q. Do you recall ever having signed a note for the bank previously?

A. I don't actually recall any other note from the bank. I have been told there was one, but I do not recall it myself.

Q. Do you believe that you might have signed that initial note for \$15,000.00 that was fully collateralized?

A. If I could see the note I could tell you if I signed it. I don't know.

Q. I realize that you indicated that you probably signed it.

A. Yes, sir.

Q. When you told the lady, Mrs. Walk, that you were there to endorse a note for James Wright, did she tell you anything to the contrary?

A. No, sir, she just said to have a seat.

[TR 61] Q. Did Mr. Jones tell you anything to the contrary?

A. No, sir.

Q. What was your conversation, if any, with Mr. Jones?

A. Mr. Jones apologized for not being able to help me, that he had a customer at his desk, and he said that Mrs. Walk would handle the transaction, and that the reason he wanted me to look over the financial statement was that he didn't trust Jimmy, and that I was required to endorse this note because Jimmy had reached his credit limit with the bank.

Q. Did he use the word "endorse"?

A. Yes, sir.

Q. Did you at any time believe or understand that you were anything other than an endorser or party secondarily liable on this note?

A. No, sir, I didn't. If I had, I would have never signed it because my husband and I were having marital problems then and I definitely would not have loaned Jimmy \$7,500.00.

Q. Did you at any time authorize the bank to put the money into Mr. Wright's account without his signature?

A. No, sir.

Q. Were you given any kind of deposit slip?

A. No, sir.

[TR 62] Q. There has been introduced in evidence, Mrs. Wright, Plaintiff's Exhibit No. 2, which is nothing but a disclosure statement pursuant to the federal Truth-in-Lending Act, and do you recall Mrs. Walk going over that with you?

A. Yes, sir, I do.

Q. What did she tell you about that?

A. The main thing I remember was the interest rate and for how long the note would be.

Q. And did she tell you why you had to sign that?

A. That it was a federal regulation, everybody had to sign it.

Q. And was the note already prepared when you got there, or did she make it out at her desk?

A. Everything was ready.

Q. And what did she do with respect to the note?

A. Just handed it to me and told me to sign where she had marked the X.

Q. And her testimony that she went over the terms of the note with you, did you hear her testify to that?

A. Yes, sir.

Q. Did she have any discussion with you about the note other than to tell you to sign it?

A. No, sir, just \$7,500.00 for 90 days.

Q. And she put an X mark on it and told you [TR 63] to sign it?

A. Yes, sir.

Q. And what did you tell her when you signed it, after you signed it?

A. I told her that my husband would be back by later on to sign the note, that he was in Maryland, and I asked her if I could leave because I had locked up the store.

Q. How long were you in the bank, Mrs. Wright?

A. Well, my girlfriend dropped me off and was circling the block, so I don't know, five or six minutes at the outside.

Q. Did Mr. Jones in any way indicate to you that you were going to be the sole party liable on this note?

A. No, sir. The only conversation I had with Mr. Jones is what I have testified to today.

Q. When did you first find out that you were the only person liable on the note?

A. It was sometime in the early part of the summer. Mr. Jones called the store and told me that he had just spoken with my husband, and that the note was almost 30 days past due.

Q. Did you get any notice of default or due date prior to the note maturing for payment?

A. No, sir, I didn't personally myself get it or know of one that came.

[TR 64] Q. Who picked up the mail? What was the date that you and your husband were separated?

A. June the 24th.

Q. Who picked up the mail every day prior to your separation?

A. My husband.

Q. Did you subsequently call Mr. Jones?

A. Yes, sir.

Q. What did you tell him?

A. I called Mr. Jones on two or three occasions after that, and I told him that Jimmy was liquidating his stock in cars and that he should try to do what he could to collect the money. I told him he was moving to California, and I sort of reiterated the conversation every time I called Mr. Jones.

Q. Well, he hasn't in fact moved to California, has he?

A. Not to my knowledge. I believe he lives somewhere in Richmond.

Q. What did Mr. Jones tell you?

A. He told me not to worry about it because he didn't think there would be a court hassle, that Jimmy told him that he didn't want any court hassle or anything like that, and that he thought it could be resolved on common ground without going to court.

[TR 65] Q. Did he tell you whether or not he was going to go down to the used car lot?

MR. ANDREWS: Your Honor, I think we have gotten far enough afield, I have been letting it go for a little while, but I don't see the relevance of any of this talk about the fact that the note was past due, conversations that had reference--

THE COURT: What is the relevancy, Mr. Bambacus?

MR. BAMBACUS: I am trying to show that the

bank always considered Mr. Wright as the borrower of the money, and that Mrs. Wright was merely the vehicle, Your Honor.

THE COURT: I am going to sustain the objection.

MR. BAMBACUS: All right, sir.

MR. ANDREWS: Thank you, Your Honor.

BY MR. BAMBACUS: (Continuing)

Q. Did you get a copy of that disclosure statement that Mrs. Walk said she went over with with you?

A. No, sir.

Q. Did you get any paper at all when you left the bank on that date?

A. No, sir.

MR. BAMBACUS: You may inquire, Mr. Andrews.

[TR 66] CROSS-EXAMINATION

BY MR. ANDREWS:

Q. You did know that the money was for your husband's business account, that was the purpose in your going there to sign the note, correct?

A. Yes, sir, I knew that it was to cover bad checks that he had written.

Q. Which meant that you knew the money was going to be put into that account, and that's why you went there to sign the note?

A. No, sir, I did not know it was going to be put in that account.

Q. Well, how was he going to cover the checks?

A. Because he could take a cashier's check to the people that he had written the bad checks to.

Q. But he told you he was trying to beat the checks to the bank, didn't he?

A. He said that Nat would return the checks if they had gotten to the bank. But, he had written bad checks before, and my husband had always taken a cashier's check to the people.

Q. But in this particular case you understood that it was for his business account, it didn't really make any difference to you one way or the other whether Jimmy got a check for it separately or whether it was put directly into [TR 67] his account, did it?

A. I didn't think about it one way or the other.

Q. That's what I am saying, it didn't mean anything to you one way or the other?

A. Well, it would have meant something to me if I would've known that I was the sole obligator and they were going to give it to Jimmy, yes.

THE COURT: The question is, did you know what they were going to do with the money, and did it make any difference to you.

THE WITNESS: I didn't know what they were going to do with the money, I really didn't know.

Q. When you say you did not know, you mean you didn't know actually how they were going to specifically handle it, whether they were going to do it by check to

him, or by deposit to his account?

A. I assumed by check to both of us.

Q. You assumed it was going to be a check to you to cover checks that had been drawn on his business account, Mrs. Wright?

A. Well, why would I go--

Q. Mrs. Wright, is that what you are telling me?

A. Please repeat the question.

Q. I am asking you if you are telling me that [TR 68] you assumed that this was going to be handled by check to you and to Mr. Wright when the proceeds of the check were to be used to cover these checks that he had written?

A. He said to catch the bad checks. Now, I did not know if that meant to deposit it into that account, or what was going on.

Q. But point of fact, you didn't expect to get the money yourself, that's the truth of the matter, isn't it?

A. Yes, sir. I didn't know I was borrowing the money myself.

Q. When you went down there to sign that note, you knew that you were incurring liability on that note, didn't you?

A. Secondarily, if my husband defaulted in payment.

Q. As far as that goes, anybody could come in and pay off the note, correct?

A. Yes, sir.

Q. But you realized that you were in fact bringing upon yourself a potential liability?

A. Yes, sir.

Q. And you intended to sign the note?

A. Endorse the note.

Q. Now, you said that Mr. Jones used the term "endorse"?

[TR 69] A. Yes, sir.

Q. In fact, you aren't positive that he used the word "endorse," are you?

A. Yes, sir. If he had said anything else, I think I would've walked out of the bank.

THE COURT: Ma'am, that wasn't his question. The question is, are you positive he used the word "endorse."

THE WITNESS: Yes, sir, I am.

MR. BAMBACUS: She said yes, Your Honor.

MR. ANDREWS: Then she qualified it.

MR. BAMBACUS: No, she didn't qualify it, she told him why.

THE COURT: Mr. Bambacus, she said if he had said anything else, that was a qualification, and I am just trying to straighten it out.

THE WITNESS: I am 99 percent sure he said endorse.

Q. Now, you have said previously that you and Mr.

Jones had had a conversation about your endorsing a note?

A. Yes, sir.

Q. This would've been after the original note which you signed for the \$15,000.00?

A. After the original note I signed for \$15,000.00? I'm not sure I signed an original note for [TR 70] \$15,000.00. I have been told I did.

Q. But I am just trying to find out when it was that you and Mr. Jones had this conversation.

A. It was in the fall.

Q. Of 1976?

A. Yes, sir.

Q. When did you fill out the financial statement? Did you do it when Mr. Wright brought it home to you?

A. Yes, sir, he made me sit down at the table and do it.

Q. So, in fact, the financial statement which is in evidence had left the premises of the bank and then was taken back after you had filled out the entries, right?

A. Yes, sir.

Q. Now, did you state that you did not print in Mary Tedesco Wright?

A. Yes, sir, I don't think I printed that in.

Q. You don't think you did?

A. Well, it's not my handwriting.

Q. But, you did put in the other things?

A. Yes, sir, the Virginia Mutual, and the amount.

Q. And at the time Mr. Jones asked you to go over this statement to see if it was accurate, you looked at it and told him it was, and then you signed it?

[TR 71] A. Yes, sir, I glanced at it and told him--

Q. That it was accurate, and you then signed it?

A. That it looked all right.

Q. Indicating that you had a net worth of about \$59,000.00 at that time?

A. Yes, sir.

Q. You did know that the money was in fact put into Mr. Wright's account though, you did learn that?

A. I know now.

Q. Into his business account?

A. Yes, sir.

Q. And you know also that the money had been used up, is that correct?

A. I am sure it has.

Q. Now, you indicated that after you had finished with your procedures there with Mrs. Walk, you told her that your husband would be by later to sign it?

A. This was during the procedure when I sat at Mrs. Walk's desk. I don't know if it was when I was on my way out the door, or when it was.

Q. Mrs. Wright, I call your attention to January 12th, you do recall under oath giving a deposition in

my office with reference to this matter, do you not?

A. Yes, sir.

[TR 72] Q. And at that time you made statement to the effect that your husband would be in later to sign the note, did you?

A. On January the 12th, I didn't make a statement, is that what you are saying?

Q. When I was questioning you about this transaction you did not at that time make the statement that you told the people at the bank that he would be in later to sign, did you?

MR. BAMBACUS: Let's be more specific, Your Honor, as to the question and the answer.

MR. ANDREWS: I will take time to find it in just a minute.

THE COURT: I understood it, but go ahead and ask it again.

MR. BAMBACUS: If he is saying--

THE COURT: He is saying, did you at any time in that testimony make the statement that you had told the people at the bank that your husband was going to be in later to sign it.

MR. BAMBACUS: Well, if the question was never asked, she may never have made it.

THE COURT: He is just asking her if she made the statement.

THE WITNESS: Mr. Andrews, I don't remember,

[TR 73] really, if it's in there.

MR. BAMBACUS, Page 13, Mr. Andrews.

Q. To bring you up to the point of the question I am going to ask you, on Page 8 of your deposition it is indicated that you walked up to her and told her that you were Mary Wright and that you were there to take care of a note that your husband had arranged with Mr. Jones.

Now, subsequently I asked you the question: What discussion did you have with the lady beyond what you have already said. Answer: I walked in, I told her I was Mary Wright, Jimmy Wright's wife.

Question: What you had beyond that.

Answer: That I was here to endorse a note and could she help me. She said, yes. Then she went over and interrupted Mr. Jones with his customer, and Mr. Jones stood up and he said he was sorry he didn't have time to help me, he said something about the credit limit, and to look over the financial statement because he did not trust Jimmy. That was the extent of it. I also told her, I said, I am in a hurry now because I have closed up my shop so I would like to endorse the note and get out of here as quickly as possible, and my husband will be by later on today to take care of the details.

A. Yes.

Q. Question: Did she have any further discussion

regarding the transaction at all with you? Answer:

Not [TR 74] that I can remember.

Now, I ask you if you made the responses that I have just read to you?

A. Yes, sir.

Q. And you say now, however, that you told her that he would be in later to sign the note?

A. Yes, sir. When I said details, that's what I meant, because before we had gone over this in the deposition, and I believe that I had stated that I expected my husband to come back by and sign the note.

Q. But, you indicated, you told her that he would be by later to take care of the details, but what you are telling me is that what those details were were in your head, that is that he was supposed to come by and sign it, is that correct?

A. No, sir, details, you knew what I meant by details.

Q. Mrs. Wright, you were telling me what you had told the lady, is that not correct?

A. Yes, sir.

Q. And you said, my husband will be by later on today to take care of the details.

A. I explained to Mrs. Walk that he was in Maryland and that he would come back by--

Q. Now you are telling me that what you said on [TR 75] that date is wrong, is that what you are telling

me?

A. No, sir, I am trying to be a little more explicit.

THE COURT: Well, let me see if I can understand it because I think you are being a little evasive.

THE WITNESS: I am not trying to be.

THE COURT: You said one of two things to this lady. You either said, my husband will come by later to sign the note; or, my husband will come by later to take care of the details. Which one did you say?

THE WITNESS: I explained, Your Honor--

THE COURT: No, I don't want you to explain it to me, I am asking you now to tell me what you said.

THE WITNESS: To sign the note.

THE COURT: Now, that's what you said this day in the bank, that your husband was going to come by later to sign the note?

THE WITNESS: Yes, sir.

THE COURT: You didn't say, he will come by later to take care of the details?

THE WITNESS: No, sir.

THE COURT: All right, maybe that clears it up.

[TR 76] MR. BAMBACUS: Your Honor, that is consistent with her answer.

THE COURT: I don't think you are under oath yet, Mr. Bambacus. I will let you testify, if you want.

MR. BAMBACUS: Well, what she meant--

THE COURT: She has made it perfectly clear what she meant. I think we all understand it now if we didn't before.

BY MR. ANDREWS: (Continuing)

Q. Mrs. Wright, I call your attention to interrogatories under the date of November 1st, 1977, Question No. 9. Question: Did you inform any employee of The Community Bank that your husband was also to sign the note? Who, and when? Answer: No, but it is apparent-- And you went on to make some statements that are argumentative.

You do recall signing that answer to interrogatories under oath, do you not?

A. I recall signing some interrogatories, yes.

Q. Maybe I had better get the file, Your Honor, and show her specifically which one.

THE COURT: All right.

Q. I show you from the Court's file the particular interrogatories that I am referring to.

According to the certificate, that was sworn [TR 77] to on November 1st, 1977.

A. Yes, sir, I understand that.

Q. And that is your signature?

A. Yes, sir, that is my signature.

Q. And I ask you about Question No. 9.

A. Yes, sir. I was in the office with Mr. Bambaçus a total of ten minutes, and he was asking me questions,

and I really didn't stop and search my brain and think about it that much.

Q. But, you did answer that, no, you hadn't told anybody; isn't that correct?

A. I was in Mr.--

Q. You were in Mr. Bambacus' office ten minutes?

A. At the outside.

Q. At the outside, ten minutes?

A. Yes, sir, and he was just asking me questions.

Q. Do you know how many interrogatories there were, Mrs. Wright? Do you know how many interrogatories you answered in ten minutes?

A. He was just asking me questions, and I didn't realize that I was answering interrogatories, or whatever they are, I was just trying to answer Mr. Bambacus' questions.

Q. Referring to the same set of interrogatories, do you see how many there are? The final number is 18, is it [TR 78] not?

A. Yes, sir, that's correct.

Q. And there were four pages, right?

A. Yes, sir.

Q. And some of them had several parts to them, correct?

A. Yes, sir.

Q. And at the same time, did you not sign responses to requests for admissions that we had filed?

A. You will have to show me, I don't recall requests for admissions.

Q. I will show you a copy, I can get the Court file if necessary.

A. Yes, that's my signature.

Q. And this is to a paper entitled "Defendant's Replies to Plaintiff's Requests for Admissions?"

A. All right.

Q. And there are 12 of those, correct?

A. Yes, sir.

Q. And this was done in that ten minutes, too, is that correct?

A. He asked me the questions in about a total of ten minutes or so.

Q. And you--

A. I answered the questions Mr. Bambacus asked [TR 79] me in about a matter of ten minutes, yes, sir.

Q. Well, how about when you signed them, you read them, didn't you?

A. No, sir, I don't know if I read them or not.

Q. But, you admit--

A. I did sign them. I don't know if I read them.

Q. Now, let me ask you this, did you tell anybody at the bank that you would sign as an endorser but not as a maker of the note?

A. Excuse me, I didn't understand your question.

Q. Did you tell anybody at the bank that you

would sign as an endorser but not as a maker?

A. The word "maker" never even came into the picture.

Q. So, you didn't tell anybody that, and yet you signed that note on the front of it, your name is down at the bottom, you admit signing the note?

A. Yes, sir, I signed the note where it was X'd.

Q. And you signed the disclosure statement where it shows: Loan to Mary T. Wright. It has got a line down there: Borrower. And you signed that?

A. Yes, sir, that's my signature on the dis-
[TR 80] closure statement.

Q. You indicated that your husband, you think, is in Richmond, as far as you know he is still around, you said?

A. He's supposed to live in Richmond.

Q. He still has some business, or whatever?

A. I don't know, sir, if he has a business or not.

Q. With reference to this particular account, Crater Road Exchange, this was his account which was used in his regular occupation, is that correct?

A. Yes, sir. I didn't know that he had changed it to Crater Road Exchange, I thought he was still operating under the name of D & H Motors.

Q. But, this is the business account for his occupation?

A. Yes, sir.

Q. And it was through his business that income was brought home, and so forth, is that not correct?

A. He never brought any income home.

Q. Never gave you any money for any purpose?

A. Only to pay his children's bills, that lived with us.

Q. And some household expenses, too?

A. There were expenses, but I paid the majority [TR 81] of them.

Q. But, he did pay some?

A. For his children, yes, sir.

Q. And he paid some for other things, too, that were around the house; is that not correct?

A. His telephone calls, his business calls.

Q. Now, you claim that it was some 30 days after the note was due, which would be on June 27th of 1977, or approximately then, that you found out that you were the only person on the note?

A. Yes, sir.

Q. So, you didn't ask your husband after March 29th if he had gone in to sign the note, did you?

A. Did I ask him?

Q. Yes, ma'am.

A. Yes, I did ask Mr. Wright that.

Q. And what did he say?

A. He did, and that he took care of the checks.

Q. And did you check to find out, to verify that he had done what he had told you he was going to do?

A. No, sir, I didn't call the bank to check on him.

Q. You accepted his word for the fact that he said he had done it, is that correct?

A. Yes, sir. My main concern was the bad [TR 82] checks because he said he would go to jail.

Q. You mean you weren't concerned with whether or not he signed it?

A. Yes, sir, I was, but he said he did, but I wanted to be sure that those checks were taken care of.

Q. But, you didn't distrust him enough then to call the bank to verify it?

A. Well, even if I did distrust him, I would never have called the bank to check on my husband.

Q. When you received the past-due notice on that note shortly after the 27th of June, 1977, what did you do?

A. I got in touch with my husband.

Q. You and he had separated by that time?

A. Yes, sir, but he was still in Petersburg at that time.

Q. And you got in touch with him and told him that the note was past due?

A. I told him, I said, Jimmy, this note is past-due and it's in my name, what is this all about; and he

told me.

Q. You did tell him that it was in your name, didn't you?

A. Yes, sir, I had the note slip. I said, it's Mary T. Wright, how come they didn't address it to you.

[TR 83] Q. As a matter of fact, it showed on the notice that the note maker was Mary T. Wright, didn't it?

A. It just had Mary T. Wright, and I think it was something about being past due.

Q. I show you this, and is that it?

A. Yes, sir, it was one like this.

* * * *

MR. ANDREWS: I would offer that as Plaintiff's No. 3, Your Honor.

THE COURT: All right, Plaintiff's Exhibit No. 3.

Q. So, your statement that the first time you found out about your being on there was when you talked to Mr. Jones, that's incorrect?

[TR 84] A. No, that's correct, sir.

Q. It's correct?

A. Yes, sir. I talked to Mr. Jones before I ever remember receiving a notice like that.

Q. But, you said the first time you talked to Mr. Jones about it it was already almost 30 days past due.

A. That's what Mr. Jones said to me on the telephone. He said that it would be shortly 30 days past due, and I

was just going by what he said.

Q. On the 29th of March, 1977, if you had gotten the check, if Mrs. Walk had given you a cashier's check right then, what would you have done with it?

A. What would I have done with the check?

Q. Yes.

A. Depending on who it was made out to.

Q. Assuming it was made out to you, you would have deposited it to his account to cover those checks, is that not true?

A. No, I wouldn't have.

Q. You were going to pay those checks walking around with that note in your pocket?

A. No. If I would've been lent the money myself, I would've put the money in my own account and gotten him to sign a note to me.

Q. Did either Mrs. Walk or Mr. Jones themselves [TR 85] say anything to you about your husband signing the note?

A. Just what was said when I first--

Q. Just what you said?

A. Just when I went in the bank Mr. Jones said that I was required to endorse the note because he had reached his credit limit.

Q. So, neither one of them said anything about the fact that Jimmy was to come in and sign it?

A. No, sir, they didn't say that.

REDIRECT EXAMINATION

BY MR. BAMBACUS:

* * * *

[TR 88] Q. Did you inform any employee of The Community Bank that you would sign as an endorser when you went in there?

[TR 89] A. Yes, sir.

Q. Who did you inform?

A. Mrs. Walk.

Q. And in your discussion with Mr. Jones that same day, what did he tell you precisely?

A. He said that they would require me now to endorse this note for Jimmy because he had reached his credit limit.

Q. And is that the truth, the whole truth, and nothing but the truth so help you God?

A. Yes, sir, it is.

* * * *

[TR 97] NATHAN SYDNEY JONES, III, having previously been sworn, testifies and states:

CROSS-EXAMINATION

BY MR. ANDREWS:

Q. Mr. Jones, calling your attention to Plaintiff's Exhibit No. 3, the past-due notice which has been introduced into evidence, when was that mailed to Mrs. Wright?

A. On June 28th, the day after the note was due.

Q. Now, in response to Mr. Bambacus' questions, you

made reference to the loan authority which you had and the direct and indirect loans being considered within that authority. What do you mean by those two terms, and how is it used and applied to your authority limitations?

A. Well, direct would mean a loan to an individual as the maker of a note. For instance, if a man had a corporation, company of some sort, and I was lending to him in his name, that would be direct. But, if he in some way signed on his company's notes, that would be indirect.

[TR 98] Q. Such as a guarantor or something like that?

A. Yes, sir.

Q. So, that was your reason for saying that Jim Wright's name could not appear on the note at all?

A. Right, since indirectly his indebtedness at that time was \$25,000 he could not have endorsed the note of his wife because that would have been indirect indebtedness and would have been beyond my lending authority.

Q. When you discussed that with Mr. Wright, did you explain to him that he could not appear on the note at all?

A. Yes, sir.

Q. Mrs. Wright made a statement to the effect that after the loan was past due she spoke with you by telephone and that you told her not to worry about it.

Did you make any such statement to her?

A. I did discuss it with her on the phone, but I did not say not to worry about it. In my opinion, a past-due note is serious.

MR. BAMBACUS: I object to his opinion.

MR. ANDREWS: He's explaining his answer.

THE COURT: Mr. Andrews is correct.

THE WITNESS: I would not tell anyone not to worry about a past-due notice.

Q. When did you first learn of her claim that [TR 99] her husband was supposed to have been on the note with her?

A. Not until the motion was filed and she answered the motion.

Q. The suit papers?

A. Yes, sir.

Q. What happened to the money which was put into Mr. Wright's account?

A. On the note in question?

Q. Yes.

A. The money was deposited to his account, and by the mid part of April all the money had been used.

* * * *

Q. Did you receive any indication that Mary Wright thought that James Wright was also to be on that note?

A. No, sir, none.

Q. You indicated that Mr. Wright still owed you some money for this account, and do you know how much that [TR 100] would be?

A. It was approximately \$3100 on one note, but I'm not sure which one.

Q. And you indicated that Mr. and Mrs. Wright had signed a \$15,000 note back in October of '76, and what happened to the proceeds from that loan?

A. They were deposited into his business account.

Q. Directly, or as a result of a check?

A. Directly.

MR. ANDREWS: I don't have any further questions, Your Honor.

THE COURT: Mr. Bambacus?

MR. BAMBACUS: Yes, sir, I have a few more questions.

REDIRECT EXAMINATION

BY MR. BAMBACUS:

Q. Mr. Jones, did you personally mail the past-due notice to Mrs. Wright?

A. No, sir, the note teller mails the past-due notices.

Q. Do you have positive direct knowledge of who mailed it and when they mailed it?

A. I know who mailed it, the note teller mailed [TR 101] it and--

Q. But, you don't know when it was mailed, all

you know is the date that appears on it?

A. The date would've probably been the date that it went out.

Q. I didn't ask you probably, I asked you did you know when it was mailed. You either do or you don't know.

A. It would have been mailed the next working day.

Q. Do you know of your own knowledge when it was mailed?

A. It wasn't mailed by myself.

THE COURT: Why don't you just answer the question.

Q. You don't know when it was mailed?

A. No, sir, I don't.

Q. And you can't even swear that it was mailed, is that correct?

A. It is no longer at the bank, it would've been mailed.

Q. I asked you one question. You can't say under oath that it was mailed, can you?

A. Okay, no, since I didn't do it myself.

Q. That's right. Now, you said Mr. Wright, for whatever reasons, your bank's policy, rules, could not [TR 102] have endorsed the note; is that correct, sir?

A. Yes, sir.

Q. Why couldn't you have gotten Mr. Wright to

sign a guaranty agreement to Mrs. Wright?

MR. ANDREWS: Your Honor, I think that we are getting into a matter that is irrelevant.

THE COURT: He said either direct or indirect liability, and a guaranty agreement is indirect liability.

MR. BAMBACUS: I am saying a guaranty agreement from Mr. Wright to Mrs. Wright, not to the bank, Judge.

THE COURT: He has nothing to do with that, does he?

MR. BAMBACUS: He could have.

THE COURT: I am going to sustain the objection. There is no obligation on the part of this man to protect Mrs. Wright's interest on the part of her and her husband, and he shouldn't be questioned on it.

Q. Now, you said the account had been drawn out by the middle of April?

A. I said the proceeds of the loan.

Q. Okay. And on what do you base that statement?

A. I reviewed his checking account records prior [TR103] to coming here, and I saw where the money was deposited into the account and that over the course of approximately 15 days that money, along with other monies deposited in his normal course of business, had been withdrawn.

MR. BAMBACUS: I submit, again, Your Honor, that evidence is inadmissible.

THE COURT: Well, you asked the question, and

he answered your question. We will strike out the question and the answer.

MR. BAMBACUS: I am talking about the question from Mr. Andrews as well, Your Honor. I objected to it then.

THE COURT: Overruled.

Q. Do you know who was a recipient of these funds?

A. No, sir, I don't.

Q. Could you have checked the records to find out who the recipients of these funds were?

A. I could have, to answer your question, yes, sir.

Q. You didn't bother to do that either, did you?

A. No, sir.

Q. Now, on the note of October '76, do you have that note with Mrs. Wright's signature on it?

A. No, sir.

[TR 104] Q. So, again, you are merely speculating that she may have signed that note, are you not?

A. I saw the note when it was made, and it had both signatures on it, but I am not a handwriting expert.

Q. Well, you were expert enough to notice that one of the notes was suspicious, isn't that correct?

A. I no longer had the first note with her signature on it. I looked at it, and to me they looked similar,

and then I had another employee later look at it who did not agree with me.

Q. You had one note that was given to you by Mr. Wright that was suspicious?

MR. ANDREWS: Your Honor, I would ask you to recall the fact that he examined the witness at great length on--

THE COURT: Thoroughly on this point before. You are going right back over the same ground, Mr. Bambacus.

Q. Do you have a record of Mr. Wright's account balance with the bank now?

A. I do not know his balance right now, but the bank would have a record and I could get it.

Q. You reviewed his account just before coming to court, did you not?

A. I looked at an enlargement of microfilm of [TR 105] the transactions that took place in March of '76 and April of '76 so that I would be familiar with them, but I did not carry that forward month after month to get to what his balance is now.

Q. Well, the only extent of your familiarity with his account by reviewing those records was that he disposed of \$7,500 by April 16th, 1977, is that correct?

A. That those funds plus other ones had been written out of the account by mid-April.

Q. Is he still a depositor of your bank?

A. I believe so.

Q. And you have several numbers where you can reach him whenever you like?

MR. ANDREWS: Your Honor, I feel that--

THE COURT: Mr. Bambacus, is there any relevancy whatsoever in any of this line of questioning?

MR. BAMBACUS: Yes, sir, I think it is.

THE COURT: And what does the matter of whether he is still banking with this bank have to do with the question at issue here today?

MR. BAMBACUS: Your Honor, we are trying to explore the relationship between the bank and Mr. Wright, and the relationship--

THE COURT: Concerning this particular [TR 106] transaction?

MR. BAMBACUS: This particular transaction, yes, sir.

THE COURT: Not whether or not he is still banking with this bank today. I rule that that is totally irrelevant to this issue, and you will not pursue that line of questioning. He has told you that he does bank, so it's in, but don't let's pursue it any further.

Q. Did you ever talk to Mr. Wright about Mrs. Wright's disinclination to pay the note?

MR. ANDREWS: Your Honor--

THE COURT: That's proper.

MR. ANDREWS: Your Honor, may I make a statement?

THE COURT: Yes.

MR. ANDREWS: I want to object to the question because he has previously examined him, and it has nothing to do with what was brought out on my cross-examination.

THE COURT: Go ahead, it is overruled.

Q. Did you discuss with Mr. Wright Mrs. Wright's disinclination to pay the note?

A. Yes, I discussed with both of them the fact that I had talked to the other one.

[TR 107] Q. And you told Mr. Wright that she was not inclined to pay the note?

A. Yes.

Q. And did he not tell you, well, don't worry about it, he would take care of it?

A. I don't remember him, you know, well--

Q. Well, did he reassure you that he would take care of it in whatever form?

A. They both told me that they would discuss it with each other.

Q. I am asking you a specific question, Mr. Jones. Did Mr. Wright in any way indicate to you not to worry, that he would take care of it in one way or another?

A. He told me it would be taken care of.

Q. And he hasn't taken care of it, has he?

A. He didn't say who was going to take care of it.

THE COURT: The question is, has he taken care of it?

THE WITNESS: No, he has not taken care of it.

Q. Isn't it a fact, Mr. Jones, that Mr. Wright at this time, that is in March of '77, was a questionable borrower?

MR. ANDREWS: Your Honor--

[TR 108] THE COURT: Mr. Bambacus, he had exceeded his own limit. Doesn't that answer your question? It's been testified to here all day that that's why this transaction went across, because he had already run out his credit, his credit was no longer good with the bank.

MR. BAMBACUS: That's not what his testimony is, Your Honor, and I will direct one question to him. He had exceeded his loan authority.

THE COURT: Yes, sir.

MR. BAMBACUS: Not that his credit was bad with the bank.

THE COURT: Yes, sir, we understand that, Mr. Bambacus, everyone in this courtroom, I am sure. If you want to ask the question one more time, I will allow it.

Q. He exceeded your lending authority, but his credit was not bad with the bank, was it?

A. No, sir, his credit was not bad with the bank.

Q. Now, I ask you one question, and I want you to listen to it carefully, Mr. Jones. How would a pledge of collateral belonging to Mr. Wright make him either directly or indirectly liable to the bank as a maker, endorser, guarantor, or any other kind of obligator?

[TR 109] MR. ANDREWS: Your Honor, he--

THE COURT: Mr. Andrews, he has answered it at least five times, let him answer it one more time.

A. I was under the impression, and I still am, that for Mr. Wright to have pledged property that he owned to cover the loan of anyone else, that he should be a party to the note.

Q. Well, where did you get that impression?

A. In my training. If I am wrong, maybe I will learn something, but that's the way I was trained.

Q. And you still don't know any differently?

A. I was told that they either had to be a party to it, or that there was some other form that I think I mentioned earlier that could be filled out.

Q. Suppose Mrs. Wright had come in with that title signed in blank?

A. In whose name?

Q. Mrs. Wright.

A. If she had come in with it?

Q. With that title signed in blank.

A. In her name?

Q. Signed in blank by Mr. Wright.

A. Still in his name?

Q. Signed in blank, he had transferred his interest in blank. Do you understand me?

[TR 110] A. No, sir, I am not sure I do. I would not have taken a title unless the tile read on the face of it that it was owned by Mrs. Wright.

Q. If Mr. Wright had given her the title, or you the title, whichever way you want to put it, and he had transferred his interest in blank or transferred it to Mrs. Wright--

THE COURT: Now, which, signed it in blank or transferred it to her?

MR. BAMBACUS: Either one, Judge.

THE COURT: Well, he has said if it was transferred to her he would have accepted it.

Q. If it was transferred.

A. If it was in her name and I could have sent it to the Division of Motor Vehicles and recorded a valid lien on the title--

Q. Well, what--

A. If the lien was recorded, I don't think the Division of Motor Vehicles will take a lien for a title signed in blank.

Q. All right, sir. Why didn't you tell Mr. Wright

that he could've pledged that Corvette by merely signing the title over to Mrs. Wright?

THE COURT: I have ruled on that point several times already. We are not going into what [TR 111] other methods the bank might have used to make a loan when they didn't see fit to do it that way.

* * * *

[TR 115] JURY OUT

MR. ANDREWS: Your Honor, on behalf of the plaintiff, the plaintiff's motion is to strike the defendant's evidence and direct the verdict for the plaintiff in this case as a matter of law, there being not sufficient evidence under the law upon which a verdict in favor of the defendant could be had in this case. There are several reasons for this. I think that some of them have been touched upon during the course of this trial many times.

In the first place, insofar as fraud is concerned, we are arguing that there is no clear and convincing evidence of fraud, and whatever was said to her by her husband is not the responsibility of the bank.

Insofar as her liability is concerned, she argues that she was to be secondarily liable only. The fact of the matter is that even if there were fraud in this case it's not material because it wouldn't have made one whit of difference as to

where she is now. If he had signed it or not signed it, if she got sued on the note, if it's not material it won't make any difference.

Now, she cannot deny her position as the [TR 116] maker in this case. Under the Uniform Commercial Code, when somebody signs in an ambiguous capacity it is deemed that they are an endorser. However, if we look at the official comments to 8.3-402 of the Code, it says as follows, and the basic point of it is that you look to the instrument itself, you find out the capacity that is thereon, and you cannot by parol evidence vary it.

That is, here she signed in a place that [TR 117] is clearly a maker's position, and you can't change her liability to that of an endorser simply by that. The only thing then that she can complain about is his not having signed the note, that's all she can complain about.

Now, even if she and he both had signed this note, the bank could still have gone against her by herself, alone, even if Jimmy were on that note. There is plenty of Virginia authority on that. One case in particular, Colley vs. Summers, 119 Va. 439, this was the case where there was a maker and several endorsers of a note, and only one of the

endorsers got sued--

THE COURT: I have ruled to that effect this morning, don't you recall?

MR. ANDREWS: Yes, sir, but this is what I want to point out insofar as my motion is concerned. The only difference between the contract of an endorser, 8.3-413, and the contract of the maker, 8.3-414, has to do with the rights which are waived in a note.

Now, the defendant contended in its brief that fraud is material in this case because she would've had substantially different rights. The [TR 118] defendant contends that she would've had a cause of action against James Wright if she had been an endorser, but she does not now because she's a maker. That's absolutely wrong.

* * * *

[TR 120] It is important in this issue because a jury cannot determine whether or not this fraud is material, and this Court couldn't let it go to the jury if it's not material. That's a legal matter. It's up to the Court to determine whether or not legally it's material. If that's the case, if it's immaterial, the case can't go to the jury.

Now, even if it were deemed material as a matter of law, we submit that the defenses of a

holder in due course of good faith without notice and so forth apply.

The evidence. There has to be a great deal of evidence to impute bad faith to somebody and give them notice of what's going on. Mere suspicion is not enough, Your Honor. It's just not enough.

I will be happy to go into details of the cases involving good faith and notice, but there are cases on point where people were dealing with quote shady characters unquote where the Court said that doesn't mean that I can legally impute bad faith to the situation, in other words, dishonesty in his dealings, fraud on their part, I can't impute that (TR 121] to them. The code makes it clear that the fact that somebody lends to somebody else who had been defrauded into signing the note does not affect the payee unless he knows what was going on.

One of the examples under the section on holder in due course, 8.3-302, in the official comment section, in which it is setting forth examples in which a payee can be a holder in due course, is an example exactly like this case, taking the position as indicated by the defendant.

"D. A defrauds the maker into signing an instrument payable to P. P pays A for it in good faith and without notice, and the maker delivers

the instrument directly to P."

That's the situation here. The payee is still a holder in due course.

* * * *

[TR 122] The examples of good faith and notice make it very, very clear that the burden is tough, that you have got to show that the bank did know what was going on, that they had knowledge, that they were dishonest in fact in their dealings here. That's what you have got to do.

The courts have said time and time again that bad faith is not mere carelessness. The Virginia Supreme Court said that not even gross negligence constitutes bad faith. The fact that you deal with people who have been involved in illegal or shady transactions doesn't impute bad faith to anybody. Failure to make inquiry, even negligent failures to make inquiries, doesn't make the situation one of bad faith. It's got to be sufficient that it amounts to fraud on the part of that payer, that taker, that holder. You look to it from the mind of the holder and you find out if he's been dishonest. It has nothing to do with being negligent or should have been put on notice to make certain inquiries.

The limited evidence available here is absolutely not sufficient to support a verdict for the defendant, even if it were material. But, first, [TR 123] we

contend, even if it occurred the way she said,
it is not material.

THE COURT: I will take your motion under
advisement, sir.

* * * *

[TR 125] THE COURT: Gentlemen, I would like for
you all to take this opportunity to dictate to the
reporter your reasons for your objections to the
instructions, and I would specifically request
that while one of you are dictating, the other one
listen so we won't have an argument six months
from now about what was said.

[TR 129] MR. ANDREWS: * * * * [TR 130] The
plaintiff objects to the Court's granting of the
defendant's instruction which begins, The Court
instructs the jury that although you may
find that Community Bank did not engage in active
fraudulent deception of the defendant, still you
may find in favor of the defendant if you find
that the plaintiff participated in a constructive
fraud, and so forth. The instruction is improper.
There was no fiduciary or confidential relationship
shown, and none existed between the plaintiff and
the defendant. There was no obligation upon the
bank by virtue of any such supposed relationship.
It also permits the jury to believe that mere

concealment of certain facts, even though they may not be significant or material or relevant, could constitute the plaintiff as a participant in fraud.

The plaintiff objects to the Court's granting of the instruction which begins, The Court instructs the jury that if you find that James William Wright misrepresented to the defendant that he had arranged for her to endorse the \$7,500 note that is [TR 131] the subject matter of this action when in fact he intended for her to sign the note as maker, and so forth, which instruction was modified manually by the Court. However, our objection is that the instruction permits representations as to matters of law, that is to say her legal obligation in the various capacities, could constitute an element of fraud. Furthermore, the defendant could not attempt to alter the conclusion that she was the maker because of the fact that there was no ambiguity in the capacity in which she signed.

* * * *

JURY IN

THE COURT: Ladies and gentlemen, have you reached a verdict?

THE FOREMAN: Yes.

THE COURT: Sheriff.

We the jury on the issue joined find in favor

of the defendant, Mary T. Wright, signed by Daniel
W. Pizzulo, Foreman.

* * * *

[TR 132] JURY DISCHARGED

MR. ANDREWS: Your Honor, we of course renew our motion previously made at the conclusion of the evidence for the grounds stated therein, that the issue should not have gone to the jury, and we move the Court to set aside the verdict as contrary to the law and the evidence. The jury, of course, did not have the benefit of the materiality issue, for example, and we feel that the verdict should be set aside.

THE COURT: Mr. Andrews, as you know, I took your motion under advisement earlier. Frankly, I would like for you to submit a memorandum on your motion.

* * * *



THE COMMUNITY BANK
TIME NOTE

Due 6-27-77
Interest Rate 8% \$ 7500.00
3/29, 1977 Note No. J-468

90 days after date, for value received, the undersigned, jointly and severally, promise(s) to pay to THE COMMUNITY BANK (herein called the Bank) or order, without offset, at any of its banking offices,

Seven Thousand Five Hundred and no/100 DOLLARS

in lawful money of the United States of America, with interest at the rate of 8 per cent per annum, (8% unless otherwise indicated), and all costs of collection, including an attorney's fee of twenty-five per cent (25%) of the amount hereof, if incurred.

Each person liable hereon in any capacity, (i) waives homestead exemption, presentment, demand, protest and notice of all kinds respecting this note, (ii) agrees that the Bank, at any time or times without notice or further consent, may grant extensions of time, without limit, for the payment hereof, (iii) agrees that in the event of default hereunder, the Bank shall have the right to apply any deposit or any asset it holds belonging to any such person to the payment of this note, and (iv) waives the benefit of any law or rule of law providing for his release or discharge from liability hereon, in whole or in part, on account of any facts or circumstances other than full payment of all amounts due hereunder.

In the event (a) any person liable hereon in any capacity shall die or be or become insolvent or make an assignment for the benefit of creditors, (b) a petition is filed or any other proceeding is commenced under the Federal Bankruptcy Act or any state insolvency statute by or against any person liable hereon, or (c) a receiver is appointed for, or a writ or order of attachment, levy or garnishment is issued against, any person liable hereon or the property, assets or income of any of them, this note shall become immediately due and payable in full, at the option of the Bank, without any notice or demand.

WITNESS the following signatures and seals:

Complete Address:

101 FRIAR LANE
COLONIAL HEIGHTS, VA 23834

I Mary T. Wright (SEAL)

PLAINTIFF'S EXHIBIT #: 1



THE COMMUNITY BANK

DISCLOSURE STATEMENT PURSUANT
TO FEDERAL TRUTH IN LENDING ACT

Loan to MARY T. WRIGHT to be made on
MARCH 29, 1977, payable IN 40 DAYS

secured by (UCC security interest in _____)

(Deed of trust on _____)

(Other (Specify) _____)

Other indebtedness of the customer to The Community Bank is or may be secured by said property.

Proceeds \$ 7500.00

Credit Life Insurance is not required by the creditor in connection with this loan. The Borrower's desire therefore must be indicated by signature below.

Date: _____ Premium \$ _____

Signature: _____

Amount Financed \$ 7500.00

FINANCE CHARGE

Interest \$ 150.00

Fee per Va. Code § 6.1-321 \$ _____

Other (specify) _____ \$ _____

Total \$ 150.00

Total of Payments \$ 7650.00

ANNUAL PERCENTAGE RATE 8 %

In the event of default or late payment, past due amounts bear interest at 8% per annum and customer must pay costs of collection (including 25c per day of delinquency, plus attorney's fees and other costs actually incurred). In the event of partial or full prepayment while not in default, a rebate of the unearned interest portion of the finance charge will be computed under the actuarial method (but a computed amount of less than \$1 may be disregarded).

I acknowledge that I received a copy of this completed statement before I entered into any contractual relation respecting this loan.

Mary T. Wright
Borrower

PLAINTIFF'S EXHIBIT # 1

PAST DUE NOTICE



No 04183-

MAKER	NUMBER	NOTATION	TIME	ENDORSER-COLLATERAL	DATE DUE	AMOUNT
Mary T. Wright 101 Friar Lane Col. Hgts. 23834	468	curtail	90	none	6-27-77	P 7500.00 I 150.00 <u>\$7650.00</u>
\$ CURTAIL DESIRED						

Burroughs
BUSINESS FORMS

PLEASE BRING THIS NOTICE WITH YOU

PLEASE GIVE THIS NOTE YOUR ATTENTION ON OR BEFORE THE DUE DATE.
PROMPTNESS IN MEETING YOUR OBLIGATIONS STRENGTHENS YOUR CREDIT

Pl's Exhibit 3

PLAINTIFFS EXHIBIT # 3

THE COMMUNITY BANK PERSONAL FINANCIAL STATEMENT

Confidential

Please do not leave any questions unanswered.

NAME MARY T WRIGHT
BUSINESS MARY'S

ADDRESS 101 FIMAR LAKE COLONIAL #075
ADDRESS _____

For the purpose of procuring and maintaining credit from time to time in any form whatsoever with Lender for claims and demands against the undersigned, the undersigned submits the following as being a true and accurate statement of its financial condition on the following date, and agrees that if any change occurs that materially reduces the means or ability of the undersigned to pay all claims or demands against it, the undersigned will immediately and without delay notify the said Lender, and unless the Lender is so notified it may continue to rely upon the statement herein given as a true and accurate statement of the financial condition of the undersigned as of the close of business.

(MONTH)

ASSETS				LIABILITIES			
Cash on hand and in Banks		5000	00	Notes payable to Banks—Secured			
U. S. Gov. Securities—see schedule				Notes payable to Bank—Unsecured			
Listed Securities—see schedule				Notes payable to relatives			
Unlisted Securities—see schedule				Notes payable to others			
Cash Value Life Insurance				Loans payable assigned Life Insurance			
Accounts and Notes Receivable Due from relatives and friends				Accounts and bills due			
Accounts and Notes Receivable Due from others—good				Accrued taxes and interest			
Accounts and Notes Receivable Doubtful				Other unpaid taxes			
Real Estate owned—see schedule		* 60,000	00	Mortgages payable on Real Estate—see schedule		30	0000
Real Estate Mortgages owned				Chattel Obligations— Auto, Appliances, etc.			
Machinery and Equipment				Other debts—itemize			
Livestock—see schedule							
Automobiles 1976 Ford		2,000	00				
Other Assets—see schedule							
Furniture		10,000	00				
2 Mink Coats		10,000	00				
Silverware		4,000	00				
				TOTAL LIABILITIES		30	0000
				NET WORTH		59	0000
TOTAL ASSETS		85	000	TOTAL LIAB. & NET WORTH			

CONTINGENT LIABILITIES		PERSONAL INFORMATION	
As endorser, co-maker or guarantor	\$	Place of Employment	Mary's Age
On leases or contracts	\$	Position	Owner
Legal claims	\$	Partner or officer in any other venture	
Provision for Federal Income Taxes	\$	Spouse's Name	James W. Wright
Other special debt	\$	<input type="checkbox"/> Married <input type="checkbox"/> Single No. Children	Not Dependents
		I have executed a will	<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO

SOURCE OF INCOME		GENERAL INFORMATION	
Salary	\$	Are any assets pledged other than indicated above?	
Bonus and commissions	\$	Are you defendant in any suits or	
Dividends	\$	legal actions?	
Real Estate income	\$	Personal bank accounts carried at	
Other income—itemize	\$	Have you ever taken bankruptcy? Explain:	
TOTAL	\$		

(SCHEDULES ON REVERSE SIDE)

94

DEFENDANT'S EXHIBIT #1

At Exhibit # 1

BANK ACCOUNTS

As Asked for on Reverse Side
NAME OF BANK

B e On
Account

Amount Of
Indebtedness

Line Of
Credit

Method of Borrowing

\$	\$	\$	1
\$	\$	\$	1
\$	\$	\$	1
\$	\$	\$	1

LIFE INSURANCE CARRIED: Name of Assured	FACE AMOUNT	CASH VALUE	BENEFICIARY
	\$		

DESCRIPTION OF STOCKS AND BONDS LISTED ON REVERSE SIDE

NAME OF CORPORATION AND DESCRIPTION OF BONDS OR STOCK	REGISTERED IN NAME OF:	NO. BONDS OR NO. SHARES	MARKET VALUE	STATE IF PLEDGED
		\$	\$	
		\$	\$	

DESCRIPTION OF REAL ESTATE LISTED ON REVERSE SIDE

ADDRESS AND TYPE OF IMPROVEMENTS	TITLE IN NAME OF	ESTIMATED VALUE	MORTGAGE OR LIEN	MO. INC.	MORTGAGE PAYMENT	WHO HOLDS Mortgage or Lien	WHEN DUE
	MARY TEDESCO WRIGHT	60,000	30,000		3/11.0	VA. Mutual	

SCHEDULE OF LIVESTOCK

NO. HEAD	DESCRIPTION	UNIT VALUE	TOTAL VALUE

SCHEDULE OF OTHER ASSETS

VALUE

THE UNDERSIGNED, HAVING READ THE FOREGOING STATEMENT, HEREBY CERTIFIES TO THE ACCURACY AND TRUTH OF THE INFORMATION CONTAINED THEREIN.

(SIGN HERE)

Mary Tedesco Wright

DATE SIGNED

3/23/77

INSTRUCTION NO. 1

By introducing the note, The Community Bank is entitled to recover on it unless the defendant establishes a defense. Even if a defense is shown, however, The Community Bank can still recover if it establishes that it is a "Holder in Due Course." In order to establish the fact that it is a Holder in Due Course, The Community Bank has the burden of persuading you that the existence of that fact is more probable than its nonexistence.

* * * *

INSTRUCTION NO. 2

The Community Bank is a "holder in due course" if it took the note in good faith and without notice of any defense which Mary Wright might have had to it.

* * * *

INSTRUCTION NO. 3

That to establish the defense of fraud, the defendant must show by clear and convincing evidence that a misrepresentation was made to her and that misrepresentation induced her to sign the note. Unless the defendant establishes each of these elements by clear and convincing evidence, she has not established the defense of fraud. Even if the defense of fraud is established, it will not prevent The Community Bank from recovering on the note unless the bank acted in bad faith or with knowledge of the fraud.

* * * *

INSTRUCTION NO. 4

To constitute notice to The Community Bank of a possible defense by Mary Wright, The Community Bank must have had actual knowledge of the defense or actual knowledge of such facts that its action in taking the note amounted to bad faith.

* * * *

INSTRUCTION NO. 5

"Good faith" means honesty in fact in the conduct or transaction concerned.

* * * *

INSTRUCTION NO. 6

The term "preponderance of the evidence" means the greater weight of all the evidence. It is that evidence which is most convincing and satisfactory to the minds of the jury.

INSTRUCTION NO. 7

The court instructs the jury that they must consider this case solely upon the evidence before them and the law laid down in the instructions of the court and they must not let any sympathy they may feel influence their verdict. A verdict cannot be based, in whole or in part, upon conjecture, surmise or sympathy but must be based solely upon the evidence in the case and the instructions of the court.

* * * *

INSTRUCTION NO. 8

If the defendant fails to prove her defense of fraud by clear and convincing evidence, then you shall return your verdict in favor of The Community Bank, in the amount of \$7500, with interest thereon at 8% per annum from March 29, 1977, plus attorney's fees as provided in the note.

-OR-

If the defendant establishes her defense of fraud on the part of her husband by clear and convincing evidence, but you also find that The Community Bank acted in good faith and without notice of said fraud, then you shall return your verdict in favor of The Community Bank, in the amount of \$7500, with interest thereon at 8% per annum from March 29, 1977, plus attorney's fees as provided in the note.

-OR-

If the defendant establishes her defense of fraud by clear and convincing evidence and you find that The Community Bank acted in bad faith or with notice of said fraud, then you shall return your verdict in favor of the defendant.

* * * *

INSTRUCTION NO. 9

The Court instructs the jury that the burden is upon the plaintiff in this case to prove every element of its case by a preponderance of its evidence, and unless it proves each and every element of this case by a preponderance of the evidence, you should find your verdict in favor of the defendant.

* * * *

INSTRUCTION NO. 10

The Court instructs the jury that it is not necessary to prove fraud by direct and positive proof, but it may be shown by circumstances. If the facts and circumstances shown in evidence are such as will lead a reasonable man to the conclusion that fraud exists, that is all the proof thereof that the law requires.

* * * *

INSTRUCTION NO. 11

The Court instructs the jury that although you may find that the Community Bank did not engage in active fraudulent deception of the defendant, still you may find in favor of the defendant if you find that the plaintiff participated in a constructive fraud. Constructive fraud is a breach of a duty owed to another party by reason of a fiduciary or confidential relationship. There is no requirement that there be an actual falsehood or deceit, but merely a concealment of facts which the party ought to have

made known or a participation in an act which, because of its tendency to deceive others, to violate public or private confidences, or to injure public interests, the law declares fraudulent.

* * * *

INSTRUCTION NO. 12

The Court instructs the jury that if you find that James William Wright misrepresented to the defendant that he had arranged for her to endorse the \$7,500 note that is the subject matter of this action when in fact he intended for her to sign the note as a maker, and that the defendant, reasonably relying on the representation of James William Wright, was thereby induced to sign the note; and if you further find that The Community Bank knowingly participated in James William Wright's deception of the defendant then you must return a verdict in favor of the defendant.

* * * *

INSTRUCTION NO. 13

The jury are the sole judges of the weight of the evidence and of the credibility of the witnesses, and the jury has the right to discard or accept the testimony or any part thereof of any witness which the jury regards proper to discard or accept, when considered in connection

with the whole evidence in the case, but the jury has no right arbitrarily to disregard the credible testimony of a witness. And in ascertaining the preponderance of the evidence and the credibility of witnesses, the jury may take into consideration the demeanor of the witness on the witness stand; his apparent candor or fairness; his bias, if any; his intelligence; his interest, or lack of it, in the outcome of the case; his opportunity, or lack of it, for knowing the truth and for having observed the facts to which he testifies; any prior inconsistent statements by the witness if proven by the evidence; and from all these and taking into consideration all the facts and circumstances of the case, the jury are to determine the credibility of the witnesses and the preponderance of the evidence.

* * * *

NOTE: The above asterisks are used to delete only the Judges signature.

VERDICT FORM

We, the jury, on the issue joined, find in favor of the plaintiff, The Community Bank, which shall have judgment against the defendant, Mary T. Wright, in the amount of \$7,500, with interest thereon at the rate of 8% per annum from March 29, 1977, plus attorney's fees as provided in the note, which is a homestead waiver note.

Foreman

-OR-

We, the jury, on the issue joined, find in favor of the defendant, Mary T. Wright.

/s/Daniel W. Pizzullo
Foreman

MOTION

Comes now The Community Bank, by counsel, and moves the court, in the event the jury's verdict is not set aside and judgment rendered for the plaintiff, to grant a new trial on the grounds that instructions proffered by the defendant were improvidently granted, as more specifically set forth in the Plaintiff's Memorandum this day filed.

THE COMMUNITY BANK
By Counsel

* * * *

Filed February 16, 1978

PLAINTIFF'S MEMORANDUM

Comes now the plaintiff, by counsel, and submits this memorandum in support of its motion to strike the defendant's evidence, to set aside the verdict, and, failing the foregoing, to grant a new trial.

Once the plaintiff introduced into evidence the note, it was entitled to recover thereon unless the defendant established a defense. Virginia Code §8.3-307. Although realizing that she could not establish a defense of actual fraud, the defendant attempted to show that there had been a constructive fraud. This concept, your plaintiff contends, is inappropriate to the case at bar, there being no facts to support such a theory. That question aside for the moment, it is submitted that even if a fraud were committed upon Mary Wright by her husband, his failure to sign the note did not result in damage to her.

With all the discussion of fraud, it may be easy to lose sight of the elementary principle that, regardless of the kind of fraud involved, it must be coupled with damage; unless the defrauded party has been injured, it will avail him nothing.

* * * *

(Page 10)

Conceding that there was no actual fraud on the part of The Community Bank, the defendant resorts to the claim that fraud may be nonetheless legally imputed to the bank via the doctrine of constructive fraud. As a basis for the creation of an alleged duty upon the bank, she claims that

a fiduciary or confidential relationship existed between her and the bank. This we deny and respectfully submit to the court that the court erred in granting the modified instruction allowing the jury to find that the bank knowingly participated in Mr. Wright's deception (there being no evidence to support such a conclusion) as well as the following instruction:

The court instructs the jury that although you may find that The Community Bank did not engage in active fraudulent deception of the defendant, still you may find in favor of the defendant if you find that the plaintiff participated in a constructive fraud. ...

* * * *

(Page 24)

We submit that the evidence - all of which was presented by the defendant except for the note - does not substantially support the jury's verdict and that the verdict is plainly wrong. The evidence is contradictory in most instances; it does not show a a fiduciary or confidential relationship between the parties; it does not justify a conclusion that the bank had notice of an alleged fraud or acted in bad faith; it is not "so cogent and obvious" as to place an active burden upon the plaintiff; and it does not support a conclusion that the defendant brought home and made obvious to the plaintiff facts which would have bound the defendant to actively inquire.

* * * *

Filed February 16, 1978

DEFENDANT'S REPLY BRIEF TO PLAINTIFF'S
MEMORANDUM IN SUPPORT OF ITS MOTIONS

The plaintiff has filed a somewhat disjointed, 28 page memorandum in support of its Motion to Strike the Defendant's Evidence, and has seized the opportunity to move further that the Court set aside the verdict of the jury or, failing that, the Court grant a new trial in this matter.

With all the discussion, rehashing, and interpretation of the evidence in which the plaintiff indulges in its memorandum in support of these Motions, it should be remembered that the Virginia Supreme Court has laid down specific guidelines to be followed in ruling on the three motions of the plaintiff.

In Green v. Smith, 153 Va. 675, the Court said:

"A Motion to strike out all the evidence of the adverse party is very far-reaching and should never be entertained where it does not plainly appear that the trial court would be compelled to set aside any verdict for the party whose evidence it is sought to strike out In considering a Motion to strike out all the plaintiff's evidence, the evidence is to be considered very much as on a demurrer to the evidence. All inferences which a jury might fairly draw from plaintiff's evidence must be drawn in his favor, and where there are several inferences which may be drawn from the evidence, though they may differ in degree of probability, the court must adopt those most favorable to the party whose evidence it is sought to have struck out, unless they be strained, forced, or contrary to reason." 153 Va. at 679-80.
(emphasis supplied)

The standard adopted by the Virginia Supreme Court for weighing a motion to set aside a verdict is very similar to that for a motion to strike the evidence, and if anything it provides a stricter standard with which the Community Bank must comply.

First, a verdict for the defendant settles all conflicts in the evidence in favor of the defendant. Temple v. Moses, 175 Va. 320, 325. Thus, any evidence favorable of the Community Bank which conflicted with evidence favorable to Mary Wright must be dismissed. The rationale for holding the moving party to such a standard is that to do otherwise would be an invasion of the province of the jury, as the trier of fact, because the jury, by its verdict, has sanctioned an interpretation of facts and conclusions from the evidence which is exclusively theirs to make. Tignor v. Virginia Electric & Power Company, 166 Va. 286, 291, Cochran v. London Assurance Corp., 93 Va. 553, 562.

Given that all facts, inferences, and conclusions must be drawn in a light most favorable to Mary Wright in ruling on the Motion to Strike and the Motion to Set Aside the Verdict, these motions must be overruled.

Similarly, although the decision whether to grant a new trial is solely within the discretion of the trial court at this stage, Cox v. Commonwealth, 157 Va. 900, 914, the Court has no authority to grant a new trial without legal ground therefor. As the Court stated in Powell v. Commonwealth 133 Va. 741, 758,

"Applications for new trials are addressed to the sound discretion of the court, and are based on the ground that there has not been a fair trial on the merits."

Common grounds for such a motion include after acquired evidence, Powell v. Commonwealth, *infra.*, or perjury by a witness, Powell v. Commonwealth, *infra.* Thus a new trial should not be granted unless, for some unusual reason, the parties have not received a fair trial on the merits.

The defense primarily relied upon by Mary Wright is constructive fraud. The Community Bank argues that constructive fraud is not applicable in this case. However, the fact remains

that if the instruction was properly given to the jury, then the jury's determination that the Community Bank committed a constructive fraud upon Mary Wright is binding and not otherwise attackable.

The Community Bank states on page nine of its memorandum that "the defendant resorts to the claim that fraud may be nonetheless legally imputed to the bank via the doctrine of constructive fraud". This is a misstatement of the theory of constructive fraud and indicates that the Community Bank misunderstands the legal theory upon which the defendant relies. Constructive fraud is not a theory whereby the fraud of one party is imputed to another party, comparable to the imputed negligence that is commonly applied in cases of automobile negligence. This is best illustrated by the case of Jackson v. Seymour, 193 Va. 735, cited by the plaintiff on page eleven of its memorandum.

In Jackson the plaintiff had sold a tract of land to her brother for \$275, and some time later she discovered that some timber which was on the land was valued at \$3200-5000 on the stump. Her brother had sold the timber for profit. The Court found the price of the land to be grossly inadequate, and applied a theory of constructive fraud to allow the plaintiff

to recover the profit from the sale of the timber from her brother. But the defendant brother had no knowledge nor even an inkling of knowledge that there was any timber on the land at all, much less that it was worth such a large amount of money. Thus in Jackson there was no actual fraud, imputed to the defendant in order to allow a recovery by the plaintiff, but instead

" . . . merely a concealment of facts which the party ought to have made known or a participation in an act, which, because of its tendency to deceive others, to violate public or private confidences, or to injure public interest, the law declares [not imputes] fraudulent." (emphasis supplied)
Instruction 11 given by the Court.

On page ten of its memorandum the Community Bank makes the conclusory statement that there is "no evidence of 'a participation in an act'," amounting to a constructive fraud. This conclusory statement flies in the face of the evidence presented by Mary Wright in her defense and runs completely counter to the standards, enumerated in section I of this memorandum, by which plaintiff's Motions are to be reviewed.

Without attempting to summarize all of the evidence favorable to the defendant, it suffices to say that there was evidence that the Community Bank, through its President Nathaniel S. Jones, informed the defendant when she signed the note that he needed her to indorse a note for her husband. The evidence is uncontradicted that Mrs. Wright informed Susan Walk, who handled the transaction, that she intended to indorse a note for her husband. Yet, Mrs. Walk did not explain to the defendant that her signature as a maker and

not as an indorser, was desired by the Community Bank. The plaintiff's evidence is that Mr. Jones sent, through Mrs. Wright's husband, James W. Wright, a financial statement for Mrs. Wright to fill out, the completeness of which was placed in issue for the jury to decide. And finally there was evidence by which a jury could, and for the purposes of these motions it must be concluded that they did - find that Mrs. Wright made no contact with the Community Bank whatsoever concerning the note in question prior to her entering the bank on the day she signed the note. The plaintiff had ample opportunity to argue its interpretations of the evidence in the case to the jury, and it is now bound by the jury's findings of fact. It was the province of the jury to determine how the facts in dispute occurred, not that of the parties to the suit.

From these facts and the other anomalies which the plaintiff failed to explain, it is difficult to understand how the plaintiff can now make the assertion that the defendant presented no evidence either of concealment of facts which the Community Bank should have made known to Mrs. Wright, or of participation in an act which tends to deceive others, to violate public or private confidences or to injure public interests. When the evidence and all inferences therefrom are viewed in a light most favorable to Mrs. Wright,

-4-

it is quite apparent that the defendant has presented evidence which meets all of the standards necessary to satisfy the theory of constructive fraud.

The plaintiff cites Michie's Jurisprudence, "Fraud and

Deceit" Sections 15 and 16 for the proposition that mere silence or failure to disclose will not amount to a fraud except in cases involving real estate where knowledge of a peculiar value affecting the property is withheld from one of the parties to the sale. That proposition is totally inapposite to the case at bar because it deals with cases of actual fraud rather than cases of constructive fraud, as is obvious from the language of Section 16 - "When parties deal at arm's length, and there is no confidential or fiduciary relation between them . . ."

A final argument espoused by the Community Bank in arguing that the Court should not have submitted the instruction on constructive fraud to the jury is that the defendant presented no evidence of a confidential or fiduciary relationship between the Community Bank and Mary Wright. In support of this proposition, the plaintiff cites a series of Virginia cases.

All of these cases are readily distinguishable from this one and can be dismissed as irrelevant. Jackson v. Seymour, 193 Va. 735, involved a relationship between brother and sister and thus was concerned with a family relationship rather than a business relationship. Likewise Malbon v. Davis, 185 Va. 748 dealt with an alleged fraud by a grandson upon his grandfather. As in Jackson v. Seymour, the notion of a confidential or fiduciary relationship as it relates to parties dealing in a business transaction never came into consideration. These cases stand for the proposition that under the circumstances present in Jackson v. Seymour, one relative can stand in a confidential or fiduciary relation to another, while under other circumstances, such as in Malbon v. Davis, such a relationship does not exist.

Hancock v. Anderson, 160 Va. 225, is also easily distinguishable from the case at bar. In Hancock the complaint made by the plaintiff related to advice given her by the defendant, a banker. The Court believed that there is a strong public policy in favor of permitting bankers to advise their customers freely without fear of suit simply because the advice is improvidently given:

"Miss Anderson, on the advice of the bank's vice-president, did business with the bank through its cashier, Hancock, and in that way purchased 'numerous bonds'. . . Such transactions occur every day by unnumbered persons with unnumbered banks. Certainly their advice is not always sound. They themselves make bad investments . . . That customers should be permitted to consult them, and that they should be permitted to advise their customers without peril to themselves is demanded by public policy . . . They are not to be held accountable for errors in judgment but only for betrayals of trust" 160 Va. at 238.

When viewed in this light, the distinction between Hancock and the case at bar is quite obvious. Here we are dealing with a transaction that goes far beyond mere advice. We are not concerned with a simple "error in judgment." There is no strong public policy favoring the Community Bank. While banks should not be unduly strapped with uncertainty when they extend credit to customers, there is no public policy that suggests a bank officer should not apprise a prospective customer that she is about to become the maker of a note when she states that she intends to indorse the same. In fact, public interest dictates the exact opposite. Likewise, there is no public interest in allowing a lending institution to do business with a prospective borrower about whom it knows very little and with whom it has never discussed

the prospective transaction.

In Mann v. Osborne, 153 Va. 190, the defendant had given Broyles his promissory note in return for some goods he had purchased from Broyles. Broyles had agreed not to negotiate the note. However, he breached the agreement by transferring the

-6-

note to the plaintiff, who was a close business associate. The issue was whether the plaintiff had accepted the note in good faith so as to qualify as a holder in due course. The trial court held that the close business relationship between Broyles and the plaintiff was a "badge of fraud," which could be used to demonstrate bad faith on the part of the plaintiff. The language quoted from Mann by plaintiff on page 14 of his brief is thus so completely inapposite to the case at hand as to be totally misleading. The court's statement was intended as a response to the actions of the trial court in allowing the breach of faith of Broyles to be imputed over to the plaintiff, thereby preventing plaintiff's recovery on the note. This has nothing whatsoever to do with confidential or fiduciary relationships which place upon one party affirmative duties going beyond those of the usual arm's length relationship.

The plaintiff's citation to Moore v. Gregory 146 Va. 504, 523, on its face is inapplicable to the case at bar, as it refers to the interposition of equity to provide relief to an

aggrieved party. The case at bar was not brought in a court of equity, and the defense of constructive fraud is not limited to equitable circumstances. The quote which appears on page 17 of plaintiff's brief refers to "badges of fraud" of "incidents of fraud", which deal with circumstantial evidence of fraud, actual or constructive. In the case at bar the defense has relied on direct rather than circumstantial evidence. Moreover, in Moore the Court specifically notes that constructive fraud is a doctrine that may be applied "irrespective of moral guilt of the fraudfeasor . . ." 146 Va. 523.

It is difficult to understand why the plaintiff has cited Mears v. Accomac Banking Co., 160 Va. 311. In that case the plaintiff claimed that the defendant made actual misrepresentations in advising the plaintiff to purchase certain bonds. The

-7-

The plaintiff was an unlettered farmer who had done business with the defendant bank in the past. The Court reversed the trial court, which had sustained a motion to strike the plaintiff's evidence, holding that the case should have been submitted to the jury on a theory of actual fraud. The Court never discussed the principles of constructive fraud or fiduciary relationships.

A fiduciary relationship arises when one party places confidence or trust in another party because of the superior knowledge or position of that second party. Farrow v. Dermott Drainage Dist., 139 F.2d 800, 805 (D. Ark.), Klika v. Albert

Wenzlick Real Estate Co., 150 S.W.2d 18, 23-24 (Mo.), Mico v. Replogle, 53 P.2d 1093, 1095, 175 Okla. 617, Bliss v. Bahr, 87 P. 2d 219, 223, 161 Ore. 79, Peckham v. Johnson, 98 S.W.2d 408, 416 (Tex) The party in whom trust or confidence is reposed owes a higher duty of disclosure to the other because the other has relied upon the superior position of the first party in determining what actions she should take. In re Nelson's Estate, 270 N.E. 2d 65, 70, 132 Ill App. 2d 544. Lincoln Stores v. Grant, 34 N.E.2d 704, 309 Mass. 417, Weisbecker v. Hosiery Patents, 51 A.2d 811, 813, 356 Pa. 244. The most familiar forms of fiduciary relationships include attorney-client, physician-patient, and corporate director-stockholder. However, a fiduciary relationship may arise in any context where trust and confidence are reposed as a result of one party's superior knowledge or position vis-a-vis the other. Austin v. Hallmark Oil Co., 125 P.2d 935, 942 (Cal.) Cranwell v. Oglesby, 12 N.E.2d 81, 299 Mass. 148, Reevis v. Crum, 225 P. 177, 179, 97 Okla. 293.

It is quite clear from the evidence adduced that the Community Bank had entered a fiduciary relationship with Mary Wright, particularly when the evidence is viewed in a light most favorable to the plaintiff, as here it must be. Contrary to the assertions of the plaintiff, Mrs. Wright was not an experienced businesswoman, but had been in business for herself for only a short time and had borrowed money only once in her life. With

her limited knowledge of lending transactions, she entered the Community Bank where she announced to the plaintiff's employee, Mrs. Walk, that she was there to indorse a note for her husband. Relying on Mrs. Walk's superior knowledge concerning lending transactions, Mrs. Wright then followed the procedure that was prescribed to her by Mrs. Walk. By her own admission, Mrs. Walk did not bother to straighten out Mrs. Wright's confusion, even though Mrs. Wright's uncontradicted testimony was that she stated that she intended to indorse a note. Mrs. Walk's reaction at this point is particularly revealing. She states that customers are often confused by the different terms used in lending transactions. Yet while Mrs. Walk was aware that Mrs. Wright was confused by the nature of her obligation on the note which she was about to execute, and that Mrs. Wright was relying upon the superior knowledge of Mrs. Walk concerning lending transactions, Mrs. Walk did not inform Mrs. Wright that she was not an indorser as Mrs. Wright believed she was, but actually the maker of a \$7,500 note. It is submitted that this is precisely the sort of relationship in which a court will apply the theory of constructive fraud. Moreover, Mrs. Wright's right to rely upon the fiduciary relationship existing between the Community Bank and herself is strengthened when one considers that Mrs. Wright testified that Nathan Jones, President of the Community Bank, informed her immediately prior to her signing the note that it had become necessary for her to indorse the note for her husband. In ruling on the Motions which are presently before it, the Court must accept this testimony of Mrs. Wright's as one of the facts proven by the defense.

III

A second argument posed by the plaintiff in its memorandum of February 16, 1978, is that assuming that a fraud actually did occur, no damage was incurred by the defendant as a result thereof. It will be noted that the plaintiff has merely taken this opportunity to restate in a different guise its argument that any fraud committed by the Community Bank was not material. This argument was rejected by the Court on November 21, 1977, when the plaintiff's Motion for Summary Judgment was overruled. That argument has no greater merit upon reconsideration.

The defendant has no quarrel with the plaintiff's abstract statements of law to the effect that fraud must be accompanied by damages in order for it to be actionable. The real question for consideration is whether the defendant has in fact been damaged by the constructive fraud of the plaintiff.

The plaintiff first argues that parol evidence is not admissible for the purpose of showing that the defendant signed the note in any capacity other than as a maker. Section 8.3-402, Code of Virginia of 1950, as amended. Apparently, the plaintiff would have us believe that under Section 8.3-402 of the Code of Virginia, once a party signs a note as a maker she has no defenses whatsoever to an action on the note. What the plaintiff's argument fails to take into account is that the defendant is not claiming that she indorsed the note that is the subject matter of this case, but that she was induced into signing the note as a maker because of the constructive fraud of the defendant. It is a well settled rule of law that the parole evidence rule is not applicable when there is a showing of fraud or mistake in the inducement. Globe

Iron Construction Co. v. First National Bank, 205 Va. 841, Ney v. Wrenn, 117 Va. 85, Towner v. Lucas, 54 Va. (13 Gratt.) 704. Thus the parole evidence rule is not applicable in this case because Mrs. Wright's defense of fraud in the inducement is one that is provable by parole evidence.

The defendant does not argue that she did not ultimately sign the note as the maker thereof. Rather she argues that she was induced to sign the note by the fraud of her husband and the constructive fraud of the plaintiff. Had she known that she was incurring primary liability when signing the note rather than the secondary liability of an indorser, she never would have signed the note. This fact in and of itself is enough to establish the materiality of the fraud, because fraud is material when without it the transaction would not have occurred. Packard Norfolk, Inc. v. Miller, 198 Va. 557, 563, Cerriglio v. Pettit, 113 Va. 533.

It can be demonstrated easily that the fraud complained of by the defendant in this case resulted in a legally cognizable injury to the defendant, sufficient to sustain her defense and the resulting verdict in her favor. In determining what constitutes damage to the defendant, the following language from American Jurisprudence, 2d, "Fraud and Deceit", Section 292, is particularly applicable:

"Although proof of a material injury is essential in an action for deceit, the loss or injury need not be of a specifically pecuniary character. It is sufficient if the fraud has resulted in the loss of a right which the law recognizes as of pecuniary value. . . . Thus, financial damage is not necessary to the existence of fraud . . . It is a general rule that damage need not be subject to accurate measurement in money, but may result from the fact that the defrauded party has been induced to incur legal liabilities or obligations different from those represented or contracted for." (emphasis supplied)

Had Mary Wright indorsed the note that is the subject matter of this case her legal rights would have been substantially different than they are as a result of her being maker of the note, a position which she would not be in were it not for the constructive fraud of the plaintiff.

The plaintiff continually stresses the fact that the note in question waived presentment, demand, protest and notice. It did not, however, waive the indorser's right of reimbursement from the maker. Because the maker, under Section 8.3-412 of the Code

-11-

of Virginia of 1950, as amended, engages that he will pay the instrument, an accommodation indorser is entitled to reimbursement from the maker. Dickenson v. Charles, 173 Va. 393, 400. And as earlier discussed, Section 49-27 of the Code expressly invests that right in the indorser. The plaintiff makes light of this right of the defendant, observing that the defendant still has a cause of action for fraud against James W. Wright. That may be true. However, if she had indorsed the note, the defendant would have been invested with a contract action against the maker of the note. She could have submitted the note in evidence, proven her payment thereon, thereby submitting a prima facie case, and avoiding any possible defenses such as gift. This cause of action has been lost to her as a result of the plaintiff's constructive fraud. This is clearly "the loss of a right which the law recognizes as a pecuniary value." And just as clearly "the de-

frauded party has been induced to incur legal liabilities or obligations different from those . . . contracted for."

Furthermore, if the defendant is forced to pay on the note, it is almost a certainty that she will never obtain a judgment for fraud against James W. Wright. With the contract action which would have been available to her had she indorsed the note, obtaining such a judgment would have been an easy matter. Clearly, the defendant will suffer a pecuniary loss in the future if she is forced to pay on this note. It has been held that when a party has been deprived of a present right with the possibility of future monetary damages, recovery will not be denied to the injured party. R.F.D. v. First National Bank of Cody, 17 F.R.D. 397, 404 (D.C. Wyo.)

IV

The plaintiff goes to great lengths to review its argument that it should be declared a holder in due course. When the case

was tried on its merits the plaintiff submitted the following instructions to the jury for its consideration on the issue of its being a holder in due course:

1.

By introducing the note, The Community Bank is entitled to recover on it unless the defendant establishes a defense. Even if a defense is shown, however, The Community Bank can still recover if it establishes that it is a "Holder in Due Course." In order to establish the fact that it is a Holder in Due Course, The Community Bank has the burden of persuading you that the existence of that fact is more probable than its nonexistence.

2.

The Community Bank is a "holder in due course" if it took the note in good faith and without notice of any defense which Mary Wright might have had to it.

4.

To constitute notice to the Community Bank of a possible defense by Mary Wright, The Community Bank must have had actual knowledge of the defense or actual knowledge of such facts that its action in taking the note amounted to bad faith.

5.

"Good faith" means honesty in fact in the conduct or transaction concerned.

After having instructed the jury on the issue of holder in due course status, the plaintiff now complains because the jury did not believe that The Community Bank was a holder in due course.

The defendant at this time reasserts her objections to the submission of all four instructions to the jury concerning holder in due course status, such objections being made to the Court in chambers when instructions were argued for and later being placed upon the record of the proceedings.

Beginning on the bottom of page seven of its memorandum and continuing over to the middle of page nine, the plaintiff restates the position it took when arguing for status as a holder in due course in chambers with the Court and with counsel for the defendant. At that time, the Court accepted the plaintiff's

interpretation of the law and determined that the plaintiff could be a holder in due course. After so determining, the Court submitted the issue to the jury. Obviously the jury was not satisfied that the plaintiff had proven its holder in due course status as a fact, the existence of which "is more probable than its non-existence." There was ample evidence to justify the jury's determination that the plaintiff was not a holder in due course. It was the uncontradicted testimony of Mrs. Wright that she informed Mrs. Walk that she desired to indorse a note for her husband. Clearly the plaintiff could be said to have been put on notice of a possible defense of Mrs. Wright to the note. Additionally, the defendant testified that Mr. Jones, the Bank's President, informed her that she would be required to indorse a note. It was up to the members of the jury to weigh the evidence presented by the parties, taking the credibility of each witness into account. The Community Bank may not now be heard to complain simply because the jury placed greater emphasis on the defendant's evidence or found the defendant's evidence more credible.

When the plaintiff resumes its discussion of holder in due course status on page 19 of its memorandum it does so in obvious disregard of the evidence before the jury in this case, and with equally obvious disregard for the guidelines that must be observed in ruling upon a motion to strike the evidence of the adverse party and upon a motion to set aside the verdict. When the evidence is viewed in the light most favorable to the

defendant, we find that the defendant entered the Community Bank and informed Mrs. Walk that she was there to indorse a note. At that point Mr. Jones advised the defendant that her indorsement of a note was requested. It is virtually impossible to imagine how the plaintiff could be said to enjoy holder in due course status under these circumstances.

-14-

* * * *

Filed 3/10/78

ERNEST P. GATES
JUDGE

12th Judicial Circuit
County of Chesterfield
City of Colonial Heights
JUDGES CHAMBERS
CHESTERFIELD, VIRGINIA 23832

D. W. MURPHEY
JUDGE

March 21, 1978

Mr. Joseph S. Bambacus
Attorney at Law
418 Mutual Building
Richmond, Virginia 23219

RE: The Community Bank vs. Mary T. Wright

Dear Sir;

After a review of the evidence in the above-styled matter and careful consideration of the memoranda submitted by each party, I have concluded that the motion to set aside the verdict of the jury should be denied.

Please prepare the necessary order.

Yours very truly,


D. W. Murphey

DWM/sbh

cc: James F. Andrews
Attorney at Law
517 Virginia Mutual Building
Petersburg, Virginia 23803

O R D E R

This day came the plaintiff, by counsel, and the defendant, by counsel, pursuant to the plaintiff's motions to set aside the verdict of the jury in favor of the defendant and to strike the defendant's evidence, and failing that, to grant the plaintiff a new trial.

And the Court having carefully considered the memoranda submitted by the parties and the argument of counsel, the Court is of the opinion that the motions of the defendant to set aside the verdict of the jury, to strike the defendant's evidence and to grant the plaintiff a new trial ought to be denied.

It is, accordingly, ORDERED that the plaintiff's motions be, and the same hereby are, overruled.

And it appearing proper so to do, it is ORDERED that judgment for the defendant be, and the same hereby is, entered in favor of the defendant in accordance with the verdict of the jury in favor of the defendant, together with the defendant's taxable costs in this behalf expended, to all of which action of the Court the plaintiff, by counsel, duly objected.

ENTER: 3 / 28 / 78

/s/ D. W. Murphy
Judge

I ask for this:

Joseph S. Bambacus p.d.
Joseph S. Bambacus

Seen:

James F. Andrews p.g.
James F. Andrews

ASSIGNMENT OF ERROR

1. The trial court erred in granting Instruction #11, proffered by the defendant, which would permit the jury to find for the defendant if they concluded that the plaintiff had participated in a constructive fraud, even without falsehood or deceit on its part.

2. The trial court erred in granting Instruction #12, proffered by the defendant, which was not justified under either the evidence or the law.

3. The trial court erred in refusing to grant Instruction #A, proffered by the plaintiff, which defined "good faith" more thoroughly than did Instruction #5, which was granted.

4. The trial court erred in refusing to grant Instruction #G, proffered by the plaintiff, which dealt with the testimony of adverse witnesses.

5. The trial court erred in overruling plaintiff's motions to strike the defendant's evidence, and to set aside the jury's verdict and enter judgment for the plaintiff, or, alternatively, to grant a new trial.

Filed 6/28/78

ASSIGNMENT OF CROSS-ERROR

1. The trial court erred in granting Instructions Nos. 1, 2, 4, and 5 which would have permitted the jury to find for the plaintiff had they found the plaintiff to

be a holder in due course.

2. The trial court erred in not allowing the defendant to introduce evidence of prior dealings between the plaintiff and James W. Wright, of alternative manners in which the plaintiff could have made its loan to James W. Wright, and in denying defendant's request for the production of documents.

Filed 7/12/78