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# Record No. 2264

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In the  
Supreme Court of Appeals of Virginia  
at Richmond

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**W. S. McDANIEL**

v.

**E. A. HODGES**

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FROM THE CIRCUIT COURT OF ORANGE COUNTY.

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## RULE 14.

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

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M. B. WATTS, Clerk.

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IN THE  
**Supreme Court of Appeals of Virginia**

AT RICHMOND.

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**Record No. 2264**

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W. S. McDANIEL

*versus*

E. A. HODGES.

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PETITION FOR APPEAL.

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

W. S. McDaniel respectfully represents that he is greatly aggrieved by a decree of the Circuit Court of Orange County, Virginia, entered on the 17th day of November, 1939, in a chancery cause pending in said court in which E. A. Hodges was plaintiff and he was defendant.

A transcript of the record accompanies this petition, from which can be seen the errors complained of.

The evidence, by consent of parties, was taken *ore tenus*, reduced to writing and certified by the trial judge.

In the preparation of this petition, the appellant, W. S. McDaniel, will be referred to as McDaniel, while the appellee will be referred to as Hodges.

2\* \*Briefly stated, the facts in the case are:

On or about the 8th day of December, 1937, McDaniel executed a deed whereby he conveyed to Hodges four tracts of land containing in the aggregate 34.45 acres. Cotempo-

raneously with the execution of the deed Hodges executed a deed of trust to secure Six Hundred Dollars (\$600.00), balance of purchase price for the land. Four Hundred Dollars (\$400.00) was paid in cash at the time of the conveyance, and the entire purchase price was One Thousand Dollars (\$1,000.00).

The deed of trust was executed by Hodges and a woman not his wife, Hodges being a married man, and this woman signed her name as Helen Hodges, leading McDaniel to believe that she was his wife. Hodges had a living wife at the time.

After the sale and conveyance, Hodges immediately went in possession of the land and has lived upon it and cultivated it ever since.

On March 28, 1939, Hodges filed his bill in chancery in the circuit court of the county of Orange, asking for a rescission of the contract of sale and return of the \$400.00 he had already paid, assigning as his grounds therefor that representations were made which were untrue in regard to an old well upon the property. Admitted that Hodges before he purchased tested the well by dropping rocks in it, he lived within a few feet of the well, walked by it in the daytime and slept by it in the nighttime, all of the time after his purchase.

in fact he was perfectly satisfied with his purchase and  
3\* with his surroundings, and so \*expressed himself, until about the time the first payment on account of the \$600.00, balance of purchase price, was about to become due. He then became dissatisfied, as the record will show, because in truth he could not raise the money to make any further payments. And he is now occupying the premises and living in the house located on the land in question.

McDaniel demurred to the bill, which demurrer was overruled by the trial court; Hodges then filed an amended bill and McDaniel answered (pages 11, 12, 13, 14 and 15 MS. Record), in which answer he stated his case perfectly. The allegations in the answer should be put in narrative form; but owing to its importance the respondent will request the court to read it. Roy Wheeler, trustee in the deed of trust, filed his brief answer for the purpose of submitting to the jurisdiction of the court; then evidence was taken on behalf of both Hodges and McDaniel, and the trial court entered the decree complained of.

## THE PLEADINGS.

Hodges filed his bill in the Circuit Court of the County of Orange on the 28th of March, 1939 (pages 1, 2 and 3 MS. Record), in which he alleges in substance that on the 8th of December, 1937, McDaniel conveyed to him a boundary of land located in Barbour Magisterial District, Orange County, Virginia, comprised of four different tracts, one containing 20 acres, one containing 12 acres, one containing 3 acres, and the other containing 45/100 of an acre, totalling 34.45 acres of land.

Hodges alleges further that he dealt with McDaniel through his agent, one B. E. Wheeler, a real estate broker located  
4\* at \*Charlottesville, Virginia; that the agent falsely represented there was a good well of water at the house on one of the tracts of land comprising the 34.45 acres; that the agent, Wheeler, after going on the property, and while standing near the well with Hodges, falsely represented again that the well was a good well; that it only needed cleaning out, that he had drunk water from it; then Hodges paid McDaniel the sum of \$400.00, and Hodges at the same time executed a deed of trust to Roy Wheeler, trustee, to secure the balance of purchase money, being \$600.00. Copies of the deed and deed of trust filed as exhibits with the bill, A and B, respectively, are made parts of the bill. Hodges, relying on the representations made by Wheeler and believing them to be true, closed the transaction. But the representations and allegations were untrue. No reflection whatever upon McDaniel. The well turned out to be entirely worthless; it caved in some years prior to the sale and its use as a well was completely destroyed, and that it had been dry ever since the "cave in", and that McDaniel through his agent represented and sold said property as having a good well of water at the house. Then the bill asked that the sale be rescinded and the amount that had been paid by Hodges be returned to him with interest, and that the land be sold at the costs and risks of McDaniel, and that in case of a deficiency a personal decree be entered against McDaniel.

The deed filed as Exhibit A with the bill recites that the balance of \$600.00 is evidenced by six negotiable notes of Hodges for the sum of \$100.00 each, payable to W. S. McDaniel, all of which were executed at the same time.

5\* \*The land in this deed is accurately described.

Exhibit B with the bill represents the deed of trust, and the first paragraph thereof reads as follows:

"This deed made this 8th day of December, 1937, by and

between E. A. Hodges and ..... parties of the first part, and Roy Wheeler, Trustee as hereinafter mentioned, party of the second part."

The deed of trust then purports to secure \$600.00, evidenced by six negotiable notes for \$100.00 each, and is signed by E. A. Hodges and Helen Hodges. Nowhere does the deed of trust show that Helen Hodges was not the wife of E. A. Hodges, but in the preparation of the deed of trust both E. A. Hodges and Helen Hodges were shrewd and clever enough not to recite that she was his wife, and it will be hereinafter shown that she was not his wife, but that he had a living wife at the time.

It may be proper, at this stage of the case, to refer to the acknowledgment in this deed of trust, in which the notary says: "I, etc., do certify that E. A. Hodges and ....., whose names are signed, etc. ....".

McDaniel in his answer says he knew nothing about the condition of the well when the sale was made, but that even conceding that false representations were made about the well to Hodges, and that Hodges relied upon the representations, would that be sufficient to enable Hodges to come into a court of equity and set the entire purchase aside? The answer is full and complete.

The amended bill filed by Hodges, after the demurrer was lodged to the first bill, practically reiterates what was said in the original bill.

6\* \*McDaniel, beginning on page 21, MS. Record, filed his grounds of demurrer to the original bill of complaint and to the amended bill. Notice the 3rd ground of demurrer reads as follows:

"3. How can the complainant obtain the relief asked for in this case? He claims fraud was practiced upon him. At the same time he says in his bill in part, and in the third paragraph thereof: 'That said agent of your respondent falsely represented that there was a good well of water at the house, before taking your complainant to said property, that said agent of your respondent after going on said property and while standing near said well with your complainant, falsely represented again that said well was a good well, that it only needed cleaning out, and that he had drunk water from it.'

"How can the complainant complain of a fraud being practiced upon him when he was there present on the premises and saw the well with his own eyes, or could have seen it had he looked?"

The final decree complained of was entered on the 17th day of November, 1939 (p. 25, MS. Record). In this decree we find the court used the following language:

“Whereupon the court is of the opinion that the complainant has supported and proven all of the allegations set out in his bill and amended bill of complaint. The Court doth adjudge, order and decree that the contract and conveyance between E. A. Hodges, complainant and W. S. McDaniel, respondent, be and the same is hereby rescinded. And the Court doth further adjudge, order and decree that said W. S. McDaniel repay to E. A. Hodges the sum of Four Hundred Dollars (\$400.00), the amount paid on the purchase price of the land conveyed, and that the bonds securing the balance of said purchase price be marked cancelled by said W. S. McDaniel and delivered to E. A. Hodges and that upon said repayment and delivery being made that Burnett Miller and A. P. Beirne, are hereby appointed as Special Commissioners to reconvey with special warranty of title said land to W. S. McDaniel” (p. 25, MS. Record).

7\*

## \*THE EVIDENCE.

The writer, in justice and fairness to this court, would like—if it can be done—to set forth the evidence introduced on behalf of both Hodges and McDaniel in narrative form, but there were so many questions and answers that it will be impossible to show the real facts as they appeared before the trial court, unless the greater part of the evidence is read as it appears in the record.

B. E. Wheeler, one of the witnesses introduced on behalf of McDaniel, was attacked, that is his veracity was questioned by certain people. The writer refers especially to the testimony of James Stringfellow, beginning on page 83, MS. Record; Nettie Lamb, beginning on page 85, MS. Record; and L. D. Douglass, beginning on page 87, MS. Record.

Can it be said that the testimony of any of these witnesses could make any impression whatever on the mind of a court when investigating the truthfulness of Mr. B. E. Wheeler? We say no. All three very wise and knowing persons, but upon investigation they know nothing. Where such came from, or how their testimony was acquired, McDaniel does not know.

All the testimony shown in the stenographic report and properly certified is in the hands of this court; and it makes no material difference whether the testimony of B. E. Wheeler

was successfully attacked or not. The evidence is ample to show that McDaniel is right.

8\* \*CONTENTIONS OF COUNSEL FOR McDANIEL.

A reference to this record will show that the evidence of those three witnesses who testified concerning the reputation of Mr. Wheeler was not convincing. However, that is a matter for court adjudication. But, conceding for the sake of argument, that Mr. Wheeler's evidence is susceptible to assault, the evidence that fell from the lips of other witnesses is so convincing that we can ignore that of Wheeler entirely; that is if the court does not believe him.

The evidence shows conclusively that the property was sold by McDaniel to Hodges on December 8th, the deed was made at the time, and contemporaneously therewith a deed of trust was executed to secure \$600.00, the unpaid purchase price for the land, which was sold to Hodges for \$1,000.00. The deed of trust was signed by E. A. Hodges and Helen Hodges: alleged by McDaniel and admitted by Hodges that Helen was not the wife of Hodges and that Hodges had a lawful wife living out of the state of Virginia.

In April following the conveyance of the property by McDaniel to Hodges, McDaniel and his wife visited the property, talked with the purchaser Hodges, who said he was perfectly satisfied with the property.

The writer concedes that there is testimony, as the stenographic report will show, to the effect that the well was dry. Other witnesses introduced by Hodges testified to the same effect.

See the testimony of Frank Haney, beginning on page 35, MS. Record:

9\* \*"Q. Did you ever live on the property where Mr. E. A. Hodges now lives?

"A. Yes.

"Q. Did you use water from the well on that property the entire time that you lived there?

"A. No.

"Q. When you moved on this property did you clean out that well?

"A. Yes."

Then the witness goes on to testify as to the depth of the well, and about ceasing to use the water because the well was dry. There is no question about the well being dry on the



8th of December, 1937, when the title to the property passed from McDaniel to Hodges.

McDaniel's brother in his lifetime made a loan on this property of \$1,200.00, and after his death when the property was sold under the provisions of a deed of trust that secured the purchase money to the brother, McDaniel bought the property to protect the estate of his brother, and after holding it for a long while sold it to Hodges.

Now, recall according to the uncontradicted testimony, there was never a word of complaint about the well until the latter part of the year 1938. The suit for rescission was not brought until 1939. All this time Hodges had lived upon the property, had been in possession and torn down one of the tenant houses on the property, removed the corn crib, and failed to pay the semi-annual installment of interest; then for the first time, as shown by the evidence, on the 12th of November, 1938, Hodges wrote to McDaniel the letter, original of which is marked Exhibit #2 with Mr. McDaniel's testimony.

10\* \*When the evidence was taken the writer was impressed with that of McDaniel as shown on page 80, MS. Record:

"Q. Was there anything said in your conversation that day about the well?

"A. There was nothing said about the well.

"Q. Did you pass by the well with him?

"A. I did.

"Q. And nothing was said about the well?

"A. No.

"Q. When was it, if at all, that he said to you that he was perfectly satisfied?

"A. That was when we were leaving, getting in the car. He came to the car, he and his wife, and told us good-bye, and he said then the second time that he was pleased with the place, liked it in every way, and I imagined of course, that he did like it."

It must be remembered that Hodges' attention was directed to the condition of the well, and certain tests made by him to ascertain if it contained water, and Hodges had every opportunity then and there of ascertaining what was wrong with the well, and did make his own investigation to determine whether the well would furnish water.

What difference did it make, may I ask, if Wheeler did express his opinion about the condition of the well, if Hodges was right there and made his own investigation? See his testimony, page 42, MS. Record:

## MR. HODGES' TESTIMONY.

"Q. How did you happen to buy this property?

"A. I bought it through Mr. Wheeler. I come to Charlottesville and stopped at his office and talked about the property and he told me about this property, he said \*thirty-  
11\* five acres near Barboursville, mostly clear and level land, fairly good house with some repairs and a good well of water right at the house.

"Q. Did Mr. Wheeler take you to this property?

"A. Yes.

"Q. Will you state who went there with you?

"A. Mr. Wheeler, Harry Wheeler, Helen Dye, the little girl and myself.

"Q. Please tell in your own words what occurred on the property after you got there?

"A. We got out of the car and looked into the house and on back to the well. I picked up a little rock there, dropped it in and didn't hear it hit no water. I said 'Is there any water in this well?' 'All it needs is cleaning out,' he says. 'I have been here and drunk out of it'. He says 'I will show you a spring down here that you can use until you get your well cleaned out'.

"Q. What happened then?

"A. We went down and looked for the spring, never found any spring, went on back, got in the car and went on back to Charlottesville; then he was going to see Mr. McDaniel the next day; I was supposed to go with him, but that night he said I would better not go; he claimed he could make a better deal with me not going. I come to Orange with him and stayed here until he come back."

See further the testimony of Hodges, page 43, MS. Record:

"Q. Did you make any statement to Mr. McDaniel when he came to your place at that time with regard to the well on the property?

"A. No, sir.

"Q. Will you state why you did not?

"A. Well, he wasn't there but a few minutes; he and I looked through the house and walked out to the barn and he pretended to be in an awful hurry to get to Charlottesville. I had done some plowing. He said 'Are you tending this land, or are you going to rent it?' and said the land was a little thin. That was all he said. He went back and got in the car and went on away."

On page 44, MS. Record, the writer notices the following further statement made by Hodges in response to questions:

12\*     \*“Q. Did you make any attempt to have this well cleaned out?

“A. I tried to get several people. White man said he’d come and didn’t and I asked a darkey over at Barboursville and he said his father did that kind of work and I said tell him to come but he never come. I spoke to a couple of white men but they never did come. Another darkey on the ridge said he was going to stop by but he never stopped. Then I asked Sam Johnson and he said no he wouldn’t, couldn’t get none of them.”

Now, the Court propounded the following questions:

“The Court:

“Q. Did they look at the well?

“A. Never come on the place.

“Q. None of them?

“A. None of them.”

The well appears to be a 20-foot well.

Look now at the testimony of Hodges, on page 44, MS. Record:

“Q. Who was the first person that told you of the true condition of that well?

“A. Mr. Frank Haney.

“Q. About what time was that?

“A. It was about the middle of June, along the 10th or 15th.

“Q. What year?

“A. 1938.”

Recall now the transaction between Hodges and McDaniel was closed, all the papers signed and admitted to record on the 8th of December, 1937.

On page 46, MS. Record, we find this same witness, Hodges, testifying, and here he says in response to questions as follows:

“Q. Before buying this property did you have any knowledge of the original depth of this well?

“A. No, sir.

“Q. Have you made any repairs to this property since moving on it?

13\*     \*\*"A. Yes, sir.

      "Q. Have you cleaned up any of the land?

      "A. Yes, sir, cleaned up some of the land.

      "Q. What would your estimate be of the value of the work and materials that you have put into this property?

      "A. Well, I would say around two hundred dollars."

The witness, Hodges, says on page 47, MS. Record, that he was satisfied with the property until he discovered the true condition of the well.

Why, may we ask, did not he exercise his God-given intellect before he bought the property when he says himself he dropped a pebble in the well and heard no water? Then he could have investigated and found out the true condition of the well before he closed the deal and lived upon the property for all these months. It was not the well; it was not Wheeler; it was not McDaniel who was perpetrating a fraud upon this innocent purchaser, Hodges; it was the fact that those one hundred dollar payments were falling due that caused the trouble and brought Mr. McDaniel into this unholy litigation.

Wheeler, it is contended, must not be believed because Jim Stringfellow, Nettie Lamb and L. D. Douglass don't admire him and would not believe him. Yet, Hodges comes into court a truthful, reliable, prominent citizen whose veracity has never been questioned and whose integrity is beyond reproach. What does he say, as shown on page 99, MS. Record:

      "Q. Have you a living wife, Mr. Hodges?

      "A. Yes.

      "Q. Helen Hodges, who signed that paper, is not your wife?

14\*     \*\*"A. No.

      "Q. Who is your wife?

      "A. Ella Hodges.

      "Q. Where does she live?

      "A. Michigan."

Here we have this gentleman Hodges coming into a court of equity as he claims with clean hands, yet the very first paper that is signed he has a woman to sign the deed of trust along with him as his lawful wife, when in fact he has a living wife in the far state of Michigan from whom he was not divorced.

Miss Helen Dye testified in this case. See her evidence on page 97, MS. Record:

"Q. What is your name?

"A. Helen Dye.

"Q. You signed your name to that deed of trust as Helen Hodges, didn't you?

"A. No, I don't never sign my name that way. They took me for that, took me to be that, I have never told my name. My name is Helen Dye.

"The Court:

"Q. You did sign as Helen Hodges in the deed of trust, didn't you?

"A. I did sign it that way, but my name is Helen Dye. That is not my name to that."

"Q. Did you sign that?

"A. Yes, I signed it.

"Q. Signed it as Helen Hodges and you were not Helen Hodges?

"A. It is not my name. My name is Helen Dye.

"Q. What made you sign it Helen Hodges?

"A. They wanted me to sign it that way at that time. My name is Helen Dye."

15\* \*Mr. McDaniel, as honorable and as high class man as can be found anywhere, a man of means, and a man who performs any contract he makes, has testified in this case. An examination of the record will disclose that no one has questioned his honor and his integrity; in fact he is conceded to be a gentleman of the highest type. See what he says on page 79, MS. Record. He is speaking now of the time he visited the premises in April following the date of the sale:

"Q. What did he say while you were going over the premises about being pleased or not pleased with the property?"

(Mr. McDaniel is here speaking of what Mr. Hodges said to him.)

"A. He told me he was very much pleased with it and didn't think there would be any question about being able to meet the payments.

"Q. He knew you were the owner of the notes that secured the debt, did he?

"A. Yes."

"Q. Was there anything said in your conversation that day about the well?

"A. There was nothing said about the well.

"Q. Did you pass by the well with him?

"A. I did.

"Q. And nothing was said about the well?

"A. No.

"Q. When was it, if at all, that he said to you that he was perfectly satisfied?

"A. That was when we were leaving, getting in the car. He came to the car, he and his wife, and told us good-bye, and he said then the second time that he was pleased with the place, liked it in every way, and I imagined of course, that he did like it."

16\*     \*The woman, Hodges was leading McDaniel to believe to be his wife, could not have been his wife because he says the real wife was in Michigan.

It looks to the writer as though a man who would act as Hodges had acted in the signing of that deed of trust securing unpaid purchase money for the land he bought, and in having another woman to sign the deed of trust pretending to be his wife, would be willing to swear the seal off his own obligation.

The well question, we submit, was an afterthought, that is when Hodges discovered that he could not meet his obligations as contracted, he fell back on the well, and contended that the condition of the well would give him an excuse for a rescission of his contract; and in fact, enable him to recover for the work he had done in improving the property, which was never improved, but allowed to depreciate.

### FRAUD AND DECEIT.

Could there have been any fraud or deceit practiced in this case on Hodges who had the same means of ascertaining and finding out the truth as did McDaniel? The latter is the one imposed upon in this case.

In the case of *Beale v. Seiveley and others*, reported in 8th Leigh, page 658, Judge Tucker, President of the Court, says (p. 672):

"He has bought with his eyes open, and has taken a special warranty, which amounts to a negation of liability on the part of the vendor for any defect whatever. These principles prevail in equity as well as at law, with the single exception that where there is a fraudulent misrepresentation or

a *fraudulent concealment*, on the part of the vendor, of a fact which the *vendee had no means of knowing*, the vendee may have relief, either at law by action for the deceit, or by bill in equity." Citing cases.

17\* \*In the case mentioned the vendee appeared to have been in possession of the land under a general warranty deed and the title had not been questioned by suit or threatened. The vendee was held to have had no relief against the payment of purchase money unless he could show such a defect of title respecting which the vendor was guilty of fraudulent representation or concealment, and which the vendee had at the time no means of discovery.

Before referring the court to the decisions of the courts on the question here involved, permit the writer to say that in reading the evidence in the case at bar he is unable to find where Wheeler (the gentleman attacked) made any representations that were false and fraudulent. He says, page 60, MS. Record:

"We found there was no water in the well. We threw two or three rocks into the well. If you drop a rock in a well if there is any water there, any water in that well, you will hear a splash. We did that. Mr. Hodges remarked 'There's no water in there'. We discussed it. He said if he bought the property how was he going to get along for water until they could get the well fixed."

Then both Hodges and Wheeler went into the hollow and found a spring, which appears to have been described by witnesses on both sides, as being a spring with briers and shrubbery growing around it.

Hodges went in possession of this property in December, 1937. He has been living there ever since, and is still there, and no one has heard of him, or any of his family, perishing for water. They must have gotten water from some source, and from whatever source they got it they were evidently satisfied with it, or complaints would have been made long ere they were made.

18\* \*After the sale, and Hodges took possession, he appears to have ignored this spring, but got water from another source. Hodges says, page 42, MS. Record:

"We got out of the car and looked into the house and on back to the well. I picked up a little rock there, dropped it in and didn't hear it hit no water. I said 'Is there any water in this well?' 'All it needs is cleaning out' he says. 'I have

been here and drunk out of it'. He says 'I will show you a spring down here that you can use until you get your well cleaned out'."

Mr. Wheeler was doing nothing more nor less than giving his opinion about a matter that Hodges was just as capable of knowing as Wheeler. Wheeler told Hodges he drank water out of the well about five years ago, and this is not disputed; in fact, one of Hodges' own witnesses says he had drunk water out of the well, and his evidence is not disputed.

McDaniel says, and he was introduced by counsel for Hodges as an adverse witness, that he thought some years ago he had drunk water out of the well. See page 32, MS. Record:

"Q. Have you ever taken a drink of water on this property?

"A. I think so, some years ago.

"Q. Where did you get the water from that you drank?

"A. I say I know there was water in the well at one time, but so far as my drinking it I can't say for certain."

All, we submit, that Mr. Wheeler says was that he had drunk water out of the well five years ago, or approximately five years ago, and that the well had fallen or caved in; all of which is absolutely true and not denied. Mr. Wheeler never said to what extent the well had fallen in, but showed it to Mr. Hodges and they both investigated together, and

Hodges was satisfied, therefore Hodges representing 19\* himself, and Wheeler representing \*Mr. McDaniel, stood at arm's length in the culmination of this transaction; in fact from inception to culmination.

Accept the statement of Hodges and ignore that of Wheeler, and there is not an iota of evidence anywhere justifying the rescission.

Assuming all that is contended was said by Wheeler, did not Hodges make his own investigation, and is he not bound by it? How can he claim misrepresentations misled him when he examined for himself before his purchase?

Mrs. Hensley, as the record will disclose, a resident of Barboursville, Orange County, Virginia, introduced by Hodges, stated that when she lived on the property water was used from the well. (Page 34, MS. Record.)

"Q. Did you ever use water from the well?

"A. We did I guess for about two months.

"Q. Why did you stop using water from the well?



“A. It caved in and went dry.”

All that Mr. Wheeler said was that the well caved in, which was nothing more than his opinion, and Hodges could see himself that it caved in.

In the case of *Lake v. Tyree*, reported in 90 Virginia, 722, which was decided in the trial court by Judge Grimsley of Culpeper, and affirmed by the Supreme Court; Judge L. L. Lewis, President of the Court, delivered the opinion, and in part, says:

“The general rule in regard to misrepresentations in the sale of property which will support an action of deceit or a suit in equity for rescission, is that the representation 20\* must be in regard to a material fact, \*constituting an inducement to the contract, on which the complainant had a right to rely, and did rely, and by which he was actually misled to his injury. *Lowe v. Trundle*, 78 Va. 65. The mere expression of an opinion, however, even in strong and positive language, is no fraud, though it be false. Such statements are not fraudulent in law, because, as was said by Judge Staples in *Grim v. Byrd*, 32 Gratt. 293, they do not, ordinarily, deceive or mislead, but are considered, as the Supreme Court of the United States expressed it in a recent case, as ‘trade talk’, which is allowable. *Southern Development Co. v. Silva*, 125 U. S. 247.

“In the early case of *Bayly v. Merrel*, Cro. Jac. 386, it was adjudged that ‘the law gives no remedy for voluntary negligence’, and so the law is at the present day. Hence, generally speaking, if the parties have equal means of information, so that, with ordinary prudence or diligence, either may rely on his own judgment, they are presumed to have done so; or, if they have not done so, they must abide the consequences of their own folly or carelessness.

“Upon this subject Judge Cooley says: ‘Where ordinary care and prudence are sufficient for full protection, it is the duty of the party to make use of them. Therefore, if false representations are made regarding matters of fact, and the means of knowledge are at hand and equally available to both parties, and the party, instead of resorting to them, sees fit to trust himself in the hands of one whose interest it is to mislead him, the law, in general, will leave him where he has been placed by his own imprudent confidence.’ ‘It is for this reason,’ he adds, ‘that redress is often refused where fraud is alleged in the sale of property which was at hand, and might have been inspected, and where the alleged defect

was one which ordinary prudence would have disclosed.' Citing Cooley, Torts, 487.

"It was on this principle that *Parker v. Moulton*, 114 Mass. 99, was decided. There it was held that false representations by the vendor to the vendee concerning the value of the land sold, its condition, or adaptation to particular use, will not entitle the vendee to relief, unless he is fraudulently induced to forbear inquiries or examination which he would otherwise have made; and that if fraud of the latter description is relied on, it must be specifically set forth in the pleadings." (*Lake v. Tyree*, 90 Va. 722-724.)

The real meaning of the decision is that where representations are made and are nothing more than expressions of opinion with no intent to defraud, or no artifice to prevent the purchaser from making inquiries or examinations of the property, and when the property with reference to which the representations are made is at hand and accessible for such examination, there is no fraud, and fraud can not be relied upon in such a case to justify rescission.

The late case has been considered by other courts, and especially the Supreme Court of West Virginia. In the case of *Jones v. McComas*, reported in 115 S. E. Reporter 456, Judge Miller appears to have handed down the opinion and says:

"Two well established legal principles applicable to the main facts in the case, it seems to us, would bar plaintiff from relief by rescission and cancellation. The first is, that though one may rely on the particular representations of the seller, yet if he undertakes to inform himself from other sources, as by matter of personal investigation, and the seller has done nothing to prevent full inquiry, he will be deemed to have relied upon his own investigation rather than upon the representation of the seller. Citing 20 Cyc. 32, 33; 39 Cyc. 1293; 13 C. J. 391, 392; *Cork v. Cook*, *supra*; *Southern Development Co. v. Silva*, *supra*; *Farrar v. Churchill*, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246. Jones made no contract nor took any steps to conclude his purchase of the stock until he had made his own investigation of the property, and he expressed himself satisfied.

"The other principle is that where the parties have equal means of information, so that with ordinary diligence or prudence either may rely on his own judgment, they are presumed to have done so, or if they have not done so, they must abide the consequences of their own folly or carelessness. (Citing) *Lake v. Tyree*, 90 Va. 719, 19 S. E. 787; *Ludington v. Renick*, 7 W. Va. 273; *Camida v. Iafolla*, 89 W. Va. 422,

109 S. E. 335. What advantage or means of information did McComas have over Jones? Jones undertook to investigate and inspect the property, and to verify any representations made to him by McComas. He saw the mine in operation, saw the seam of coal, its thickness, its partings, examined them, saw the lay of the land, and because of his greater experience as an operator was really better able to judge than McComas. Such being the case, he cannot be decreed the relief prayed for." (*Jones v. McComas*, 115 S. E. R. 461.)

22\*      \*In the case of *Rouzie v. Daingerfield*, reported in 97 Virginia 708, Judge Riely appears to have delivered the opinion, and on page 711 thereof says:

"Misrepresentation and fraud, as before stated, constitute the sole foundation for the relief sought; and while the bill does not in terms ask for a rescission of the contract, it is, under the pleadings, only through rescission that the desired relief could be obtained. There is no other ground upon which the complainant could ask that his bonds be cancelled and the deed of trust annulled. Cancellation would follow as an incident or rescission. By his failure to repudiate promptly the contract upon the discovery of the fraud, if indeed there were any fraud, and his election, to be inferred from his acts, to treat the contract as still subsisting and binding, he has precluded himself from rescission and the relief he now seeks." (*Rouzie v. Daingerfield*, 97 Va. 711.)

In the case of *Campbell v. Eastern Building & Loan Association, et als.*, reported in 98 Virginia, page 743, Judge Harrison, in delivering the opinion, says:

"A misrepresentation, the falsity of which will afford a ground of action for damages, or a bill for the rescission of a contract, must be as to an existing fact. It must be an affirmative statement of some fact, in contradistinction to a mere expression of opinion, which is ordinarily not presumed to deceive or mislead. *Watkins v. Wytheville &c. Co.*, 92 Va. 1; *Max Meadows &c. Co. v. Brady, Id.*, 71."

In the case of *Hawkins & Buford, et als., v. Edwards, et als.*, reported in 117 Va., beginning on page 311, Judge Harrison, in delivering the opinion on page 316, quoting from the case of *West End Co. v. Claiborne*, reported in 97 Va. 734, says:

"If after a representation of fact, however positive, the party to whom it was made institutes an inquiry for himself, has recourse to the proper means of obtaining information, and actually learns the real facts, he cannot claim to have relief upon the misrepresentation and to have been misled by it; such claim would simply be untrue."

(*Hawkins & Buford v. Edwards, et als.*, 117 Va. 316.)

23\* \*In the case of *Houghton v. Graybill*, reported in 82 Va. 573, Judge Fauntleroy, delivering the opinion, on page 586, quoting Kerr on Fraud, says:

"Mere general assertions of a vendor of property, as to its value or the price he has been offered for it, &c., &c., are assumed to be so commonly made by persons having property for sale, that a purchaser cannot safely place confidence in them. Affirmations of the sort are always understood as affording to a purchaser no ground for neglecting to examine for himself. They are, strictly speaking, *gratis dicta*. A man who relies on such affirmations, made by a person whose interest might so readily prompt him to invest the property with exaggerated value, does so at his peril, and must take the consequences of his own imprudence. If a man to whom a representation has been made, knows at the time, or discovers before entering into a transaction, that the representation is false, or resorts to other means of knowledge open to him, and chooses to judge for himself in the matter, he cannot avail himself of the fact that there have been misrepresentations, or say he has acted on the faith of the representation." Kerr on Fraud, 75. "The allegation of misrepresentation may be effectually met by proof, that the party complaining was well aware and cognizant of the real facts of the case, but the proof of the knowledge must be clear and conclusive." Kerr on Fraud, 78."

In the case of *Manieri v. Seaboard Air Line Railway Company*, reported in 147 Virginia, beginning on page 414, Chief Justice Campbell in delivering the opinion on page 423, says:

"Unless the fraud relied on consists of misrepresentation of facts, or in the concealment of facts by which one is misled, and the party injured had no other means of knowing, then no recovery may be had." Citing *Max Meadows, etc., Co. v. Brady*, 92 Va. 83.

(*Manieri v. Seaboard Air Line Ry. Co.*, 147 Va. 414.)

In the case of *Max Meadows Land and Improvement Co. v. Brady*, reported in 92 Virginia, beginning on page 71, Judge Keith says on page 83:

"It would appear, then, that the fraud, which will entitle the purchaser to ask for the rescission of his contract in equity, is that which consists in misrepresentation of 24\* facts or in the concealment of \*facts from which the defect of title arises, which facts the vendee had no other means of knowing. 2 Swanst. 287. 'If then,' Judge Tucker says, 'the vendor does not know of the defect, or, knowing it, does not conceal it, or if the vendee does know of it, there is no ground of relief. The vendee must prove three things: first, the defect; second, knowledge and suppression by the vendor; third, ignorance on the part of the vendee. And as to the second matter, the *scienter* is essential.' "

The court will notice that Judge Keith says he has quoted fully from the case of *Beale v. Seiveley*, that we first cited, reported in 8th Leigh, 658.

In the case of *Farrar v. Churchill*, reported in 135 U. S. Reports, beginning on page 609, Mr. Chief Justice Fuller in delivering the opinion of the court on page 615, says:

"The general principles applicable to cases of fraudulent representation are well settled. Fraud is never presumed; and where it is alleged the facts sustaining it must be clearly made out. The representation must be in regard to a material fact, must be false and must be acted upon by the other party in ignorance of its falsity and with a reasonable belief that it was true. It must be the very ground on which the transaction took place, although it is not necessary that it should have been the sole cause, if it were proximate, immediate and material. If the purchaser investigates for himself and nothing is done to prevent his investigation from being as full as he chooses, he cannot say that he relied on the vendor's representations. Citing *Southern Development Company v. Silva*, 125 U. S. 247. 'If the party to whom the representations were made,' remarked Lord Langdale, in *Clapham v. Shillito*, 7 Bevan, 146, 149, 'himself resorted to the proper means of verification, before he entered into the contract, it may appear that he relied on the result of his own investigation and inquiry, and not upon the representations made to him by the other party; or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such, as to make it in-

cumbent on a court of justice to impute to him a knowledge of the result, which, upon due inquiry, he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded.' ”

25\*     \*The meaning of the decision is that if a purchaser of real estate to whom representations are made by the vendor visits the property itself before the sale and makes a personal examination of it he will be bound by his own examination and cannot rely upon the representations of the vendor in the absence of fraud or concealment when the vendor is simply expressing his opinion.

Such being true, would not the same principle apply to an agent representing the vendor?

In the case of *Hicks v. Wynn*, 137 Va. 186, Judge Burks, in delivering the opinion, says:

“An expression of a mere opinion is not sufficient to avoid a contract, especially an opinion upon the interpretation of a written instrument which was equally accessible to both parties, and even the positive misrepresentation of a fact is not sufficient, if it appears that it was not relied on, and that the party alleged to have been defrauded thereby made an independent investigation of his own in order to ascertain the facts.”

In the case of *Farnsworth v. Duffner*, reported in 142 U. S. Reports, page 47, Mr. Justice Brewer, in delivering the opinion, says:

“This is a suit for the rescission of a contract of purchase, and to recover the moneys paid thereon, on the ground that it was induced by the false and fraudulent representations of the vendors. In respect to such an action it has been laid down by many authorities that, where the means of knowledge respecting the matters falsely represented are equally open to purchaser and vendor, the former is charged with knowledge of all that by the use of such means he could have ascertained. In *Slaughters' Administrator v. Gerson*, 13 Wall. 379, 383, this court said: ‘Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to fa-

26\* vorable consideration when he complains that \*he has suffered from his own voluntary blindness, and been misled by overconfidence in the statements of another. And the same rule obtains when the complaining party does not rely upon the misrepresentations, but seeks from other quarters means of verification of the statements made, and acts upon the information thus obtained.' See also *Southern Development Co. v. Silva*, 125 U. S. 247; *Farrar v. Churchill*, 135 U. S. 609. In *Ludington v. Renick*, 7 West Va. 273, it was held that 'a party seeking the rescission of a contract, on the ground of misrepresentations, must establish the same by clear and irrefragable evidence, and if it appears that he has resorted to the proper means of verification, so as to show that he in fact relied upon his own inquiries, or if the means of investigation and verification were at hand, and his attention drawn to them, relief will be denied.' In the case of *Attwood v. Small*, decided by the House of Lords, and reported in 6 Cl. and Finn. 232, 233, it is held that 'if a purchaser, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him or to his agents, he cannot be heard to say he was deceived by the vendor's representations'. And in Pomeroy's Equity Jurisprudence, section 892, it is declared that a party is not justified in relying upon representations made to him—

"1. When, before entering into the contract or other transaction, he actually resorts to the proper means of ascertaining the truth and verifying the statement.

"2. When, having the opportunity of making such examination, he is charged with the knowledge which he necessarily would have obtained if he had prosecuted it with diligence.

"3. When the representation is concerning generalities equally within the knowledge or the means of acquiring knowledge possessed by both parties."

"But if the neglect to make reasonable examinations would preclude a party from rescinding a contract on the ground of false and fraudulent representations, *a fortiori* is he precluded when it appears that he did make such examination, and relied on the evidences furnished by such examination, and not upon the representations."

The cases of *Slaughters' Administrator v. Gerson*, 13 Wall. 379, and *Southern Development Company v. Silva*, 125 U. S. 247, are in point.

There are numerous cases; in fact thousands cited in the textbooks and in the reports, State and Federal, to the effect

that the vendee of property, real or personal, when he  
27\* makes the \*examination himself, or has the means and  
opportunity of making it, and declines to do so, it cannot be successfully contended that he relied upon the representations of the vendor, or even someone acting for him. No suit was brought for cancellation of the contract until March, 1939; in fact, no complaint was lodged, if a complaint it may be, until November 12, 1938; during all of this time Hodges treated the property as his own, cultivated the land, knew or ought to have known the condition of the well, made changes in regard to the house satisfactory to him without consulting McDaniel; tore down one of the tenant houses and used the lumber for other purposes; and now comes into a court of equity, and says to the Court: "I want my money back that I have paid and to be relieved from my contract and obligation to pay the balance of purchase price in accordance with the contract of purchase." Hodges says in effect: "My whole trouble is the well has caved in," which is exactly what Mr. Wheeler told him, and what he knew when he bought the property.

For the foregoing reasons, it is respectfully hereby submitted that the decree of the trial court entered on the 17th of November, 1939, is erroneous, and should be reviewed and reversed, and that the relief asked for by Hodges, the appellee, in his bill of complaint, should be denied, and the contract and conveyance as made upheld, and that McDaniel be permitted to enforce his lien against the property.

Therefore, petitioner, W. S. McDaniel, prays that an appeal and *supersedeas* be granted him by the Supreme Court of Appeals of Virginia from the decree complained of,  
28\* and that the said decree should be \*annulled and set aside, and the relief asked by Hodges in the trial court be denied him; and that the deed from McDaniel to Hodges and the deed of trust to secure purchase money to McDaniel be declared valid and binding, and that this court will enter such decree as the law and the facts justify.

A copy of this petition was mailed to A. Plunket Beirne, counsel of record for appellee, E. A. Hodges, on the 11th day of January, 1940, at his post office address, Orange, Virginia.

Notice is hereby given that counsel for McDaniel desires to state orally the reasons for reviewing the decree complained of in the foregoing petition, and that he will adopt the said petition as his opening brief on behalf of the appellant at the hearing of this case before the Supreme Court of Appeals of Virginia in event an appeal is granted.

The petition and record in this case will be presented to As-



sociate Justice George L. Browning at his address, Orange, Virginia, on the 13th day of January, 1940.

Respectfully submitted,

W. S. McDANIEL,  
W. S. McDANIEL, Petitioner,  
By Counsel.

BURNETT MILLER, SR.,  
BURNETT MILLER, SR.,  
Culpeper, Virginia,  
Counsel for Appellant.

29\*      \*I, Burnett Miller, Sr., whose address is Culpeper, Virginia, and duly qualified to practice in the Supreme Court of Appeals of Virginia, do hereby certify that in my opinion the decree complained of ought to be reviewed by the Appellate Court.

Jan. 11, 1940.

BURNETT MILLER, SR.,  
BURNETT MILLER, SR.,  
Culpeper, Va.

Rec'd 1-13-40.

G. L. B.

Appeal granted and *supersedeas* awarded. Bond \$750.00.

GEORGE L. BROWNING.

2-1-40.

Original exhibits inclosed with the record.

G. L. B.

Received February 3, 1940.

M. B. WATTS, Clerk.

## RECORD

## VIRGINIA:

In the Circuit Court of Orange County.

E. A. Hodges

v.

W. S. McDaniel.

## RECORD.

BE IT REMEMBERED that on the 28th day of March, 1939, the plaintiff, E. A. Hodges, appeared and filed his bill in the following language:

“To the Honorable Alexander T. Browning Judge.

Your Complainant, E. A. Hodges, complaining sheweth unto the Court:

That on or about the 8th day of December, 1937, the respondent deeded to Your complainant a boundary of land, located in Barbour Magisterial District of Orange County, Virginia, comprised of four (4) different parcels; one containing twenty (20) acres; one containing twelve (12) acres; one containing three (3) acres; and one containing forty-five one-hundredths of an acre, totaling thirty-four and forty-five one-hundredths (34.45) acres of land.

That your complainant dealt with your respondent through the agent of your respondent, one B. E. Wheeler, a real estate broker, that your respondent was taken to the property and showed it by said agent of said respondent;

page 2 } That said agent of your respondent falsely represented that there was a good well of water at the house, before taking your complainant to said property, that said agent of your respondent after going on said property and while standing near said well with your complainant, falsely represented again that said well was a good well, that it only needed cleaning out, and that he had drunk water from it;

That your complainant paid the sum of Four Hundred Dollars (\$400.00) to said respondent or his agent and after having received a deed from said respondent for said land, he executed a deed of trust on said land, securing to said respondent an additional Six Hundred Dollars (\$600.00) as the balance of the purchase price of said land, all of which will more fully appear by reference to said Deed and Deed of

Trust, copies of which are herewith filed marked "Exhibit A" and "Exhibit B", respectively, and made a part of this bill;

Your complainant further sheweth unto the Court that he relied upon said representations and statements of the agent of your respondent, and did purchase and pay for said farm at the prices above specified, relying on said representations and allegations and believing them to be true, that said representations and allegations were material, but your complainant avers that the said representations and allegations were and are untrue, that said well is entirely worthless, that it caved in some years prior to said sale, and that its use as a well was completely destroyed, that it has been dry ever since said "cave in"; that your respondent through his agent represented and sold said property as having a good well of water at the house.

page 3 } In consideration of the premises and forasmuch as your complainant is without remedy save in a court of equity where matters of this kind are properly cognizable your complainant prays;

That W. S. McDaniel be made a party defendant to this bill and required to answer the same, but not on oath, the oath being waived; that proper process issue; that your respondent be ordered to receive and accept Special Warranty deed to said property and to mark satisfied and cancelled the bonds and deed of trust executed by your complainant to secure the balance of the purchase price of said land; that your respondent be required to pay in cash to your complainant the said \$400.00 paid as part of purchase price on said land, with interest from December 8, 1937; that in case of your respondent's default in the payment of said \$400.00 with said interest due your complainant, that said land be sold at the cost and risk of your respondent and the proceeds of said sale, after the payment of proper costs, be applied on the amount due your complainant, and in case any deficiency shall result after said sale and application of the proceeds thereof, a personal decree may be entered against your respondent for such deficiency.

That all such other things be ordered and done as may be necessary for the complete disposition of this cause; and for such other relief both general and special, as to equity may seem meet and the nature of the case may require.

And your complainant will ever pray, etc.

E. A. HODGES,  
By Counsel.

A. PLUNKET BEIRNE, Counsel.

page 4 } "EXHIBIT A" WITH THE BILL.

"This deed, made this 8th day of December, 1937, by and between W. S. McDaniel and Louise McDaniel, his wife, parties of the first part, and E. A. Hodges, party of the second part:

WITNESSETH: That for and in consideration of the sum of Five (\$5.00) Dollars, cash in hand paid and other valuable considerations, by the party of the second part to the parties of the first part and the receipt of which is hereby acknowledged. The balance of Six Hundred (\$600.00) Dollars, to be evidenced by six (6) negotiable notes of the party of the second part, for the sum of One Hundred (100.00) Dollars each, payable to W. S. McDaniel and executed contemporaneous herewith and as a part of the same transaction and to be secured by a Deed of trust on the property hereinafter described. The said parties of the first part does hereby grant, bargain, sell and convey with GENERAL WARRANTY OF TITLE, unto the said party of the second part, the following described property with the house and other improvements thereon, which property consist of four certain tracts or parcels of land adjacent to each other, in the County of Orange, Virginia, and more particularly described as follows:

FIRST: A tract of twelve (12) acres, more or less, about two and one-half ( $2\frac{1}{2}$ ) miles Northwest of Barboursville on the North side of the Standardsville Pike, adjoining Faulconer, Luther Boston and others, in the Barbour District of Orange County, Virginia.

SECOND: A tract of twenty (20) acres, more or less, and two small tracts, one of  $45/100$  (.45) of an acre and  
page 5 } the other of three (3) acres, more or less, which three tracts are also about two and one-half ( $2\frac{1}{2}$ ) miles Northwest of Barboursville, adjoining the lands of Garland J. Clark, Jones and Faulconer, in the Barbour District of Orange County, Virginia.

All of the above described property is in the Barbour District of Orange County, Virginia, and in all respects the property conveyed to the said W. S. McDaniel by Gus E. Kardos, and unmarried man, by deed dated January 3, 1935, and recorded in the Clerk's Office of the Circuit Court of Orange County, Virginia, in Deed Book 107 at Page 73.

The aforesaid grantors covenant that they have the right to convey the said land to the aforesaid grantee; that the

said grantee shall have quiet possession of the said land, free from all encumbrances; that they have done no act to encumber the said land; and that they will execute such further assurances of said land as may be requisite.

WITNESS the following signatures and seals.

W. S. McDANIEL (Seal)  
LOUISE McDANIEL (Seal)

U. S. Stamps \$1.00  
Tax 1.20

State of Virginia

County of Culpeper, to-wit:

I, Celeste W. Hite, a Notary Public in and for the County and State aforesaid, do certify that W. S. McDaniel and Louise McDaniel, whose names are signed to the foregoing writing, bearing date on the 8th day of December, 1937, have and each has acknowledged the same before me in my County aforesaid.

My commission expires the 5th day of Nov., 1939.

Given under my hand this 10th day of Dec., 1937.

CELESTE W. HITE,  
Notary Public.

page 6 } In The Orange Circuit Court Clerk's Office, Virginia, Dec. 13, 1937.

This deed dated Dec. 8, 1937, was this day received in this office aforesaid, filed together with the certificate thereon written, admitted to record at 1:45 P. M.

Teste:

PAUL H. SCOTT, Clerk.

“EXHIBIT B” WITH THE BILL.

“This deed made this 8th day of December, 1937, by and between E. A. Hodges and ..... parties of the first part, and Roy Wheeler, Trustee, as hereinafter mentioned, party of the second part.

WITNESSETH: That for and in consideration of the provisions of this deed and of Five Dollars cash in hand paid by

said Trustee unto said parties of the first part, receipt whereof is hereby acknowledged, the said parties of the first part hereby grant, bargain, sell and convey unto said party of the second part, Trustee, with GENERAL WARRANTY OF TITLE, the following described property with the house and other improvements thereon, which property consist of four certain tracts or parcels of land adjacent to each other, in the County of Orange, Virginia, and more particularly described as follows:

FIRST: A tract of twelve (12) acres, more or less, about two and one-half ( $2\frac{1}{2}$ ) miles Northwest of Barboursville on the North side of the Standardsville Pike, adjoining Faulconer, Luther Boston and others, in the Barbour District of Orange County, Virginia.

SECOND: A tract of twenty (20) acres, more or less, and two small tracts, one of  $45/100$  (.45) of an acre and the other of three (3) acres, more or less, which three tracts page 7 } are also about two and one-half ( $2\frac{1}{2}$ ) miles Northwest of Barboursville, adjoining the lands of Garland J. Clark, Jones and Faulconer, in the Barbour District of Orange County, Virginia.

All of the above described property is in the Barbour District of Orange County, Virginia and in all respects the same property conveyed to the said E. A. Hodges by W. S. McDaniel and Louise McDaniel, by deed of even date with this Trust Deed and executed contemporaneously herewith and as a part of the same transaction.

To have and to hold said property, with all and singular the appurtenances thereunto pertaining unto said Trustee, successors and assigns forever.

IN TRUST NEVERTHELESS, to secure a certain debt of the said E. A. Hodges in the sum of \$600.00, evidenced by six negotiable notes of \$100 each bearing even date with this deed, made by E. A. Hodges and payable to W. S. McDaniel as follows: Note Number One payable on or before one year after date, Note Number Two payable on or before two years after date, Note Number Three payable on or before three years after date, Note Number Four payable on or before four years after date, Note Number Five payable on or before five years after date, and Note Number Six payable on or before six years after date, which notes bear interest at the rate of six per centum per annum, payable semi-annually from date until paid and containing waiver of homestead

exemption, which said notes represent deferred purchase money.

The said parties of the first part covenant and agree to pay all taxes, levies, and assessments upon said property hereby conveyed, so long as the said debt hereby secured or any part thereof, remains unpaid, and to keep all improvements upon said property, whether now or subsequently erected, constantly insured in some good and responsible insurance company, either for the full and insurable value thereof, or *to the amount of* the amount of the debt hereby secured, for the benefit of the holder or holders of said notes hereby secured as above stated, and agree upon failure so to do that any holder or holders of said notes may, as they see fit, effect such insurance in such sums, not exceeding the insurable value thereof, as such holder may deem desirable for the security of the debt hereby secured. But it shall not be incumbent upon any holder or holders of said notes to effect or renew any insurance upon said improvements, or to pay any taxes, levies, or assessments paid therefor, if any, with 6% interest from the time of payment, which forthwith become payable by said obligor and which constitute a lien under this deed on the property hereby conveyed, and in the event of sale shall be treated as a part of the cost of executing this Trust.

If default be made in the payment of the notes herein secured, or of any installment of interest thereon, when due, or in case of the failure of the parties of the second part to pay any of said taxes, levies, and assessments, or to take out or maintain insurance as herein provided, then at the option of the holder or holders of the notes herein secured, the whole debt represented by said notes shall at once become due and payable, regardless of the maturity thereof, and sale may be had under this deed, after advertisement of the time, place and terms thereof for four successive weeks by handbills, posted as the Trustee may see fit, and by such other advertisement as may be deemed proper by said Trustee and failure on the part of the holder or holders of said notes to exercise

this option in one such case of default shall not  
page 9 } preclude its exercise as to any subsequent default,

but said option shall continue, unless sooner exercised, until the whole debt herein secured shall have been fully paid and upon the following terms, to-wit: for cash as to so much of the proceeds as may be necessary to defray the expense of executing this Trust, including a Trustee's commission of five per centum on the gross proceeds, and to discharge the amount of the debt hereby secured then unpaid,

which is to be then paid whether due at that time or not, and if there be any residue of said purchase money, the same shall be made payable at such time and secured in such manner as the said holder or holders, heirs, or assigns shall in writing prior to advertisement prescribe and direct, or in case of failure so to give such direction at such time and in such manner as the said Trustee shall think *ift*.

Except as herein otherwise provided said Trustee shall be governed in the execution of this Trust, and this deed shall be construed in accordance with the provisions of Section 5167 of the Code of Virginia of 1919, as amended by subsequent Acts.

If the debt secured by this deed of trust is fully paid without resort to the security afforded hereby, then the holder or holders of said notes will execute a good and sufficient release at the cost of the said parties of the first part.

WITNESS the following signatures and seals.

E. A. HODGES (Seal)  
HELEN HODGES (Seal)

Tax .72

page 10 } State of Virginia  
County of Albemarle, to-wit:

I, Harry W. Wheeler, a Notary Public in and for the County and State aforesaid, to certify that E. A. Hodges and ..... whose names are signed to the foregoing writing bearing date on the 8th day of December, 1937, have and each has acknowledged the same before me in my County aforesaid.

My commission expires the 4th day of January, 1941.

Given under my hand this .... day of December, 1937.

HARRY W. WHEELER,  
Notary Public.

In Orange Circuit Court Clerk's Office, Virginia Dec. 13th,  
1937.

This Deed of Trust dated Dec. 8, 1937, was this day received in the office aforesaid, filed and together with the certificate thereon written, admitted to record at 1:45 o'clock P. M.

Teste:

PAUL H. SCOTT, Clerk.



page 11 } And on the 5th day of May, 1939, the defendant appeared and filed his *demurrer* and *answer* in the following language:

“Respondent, W. S. McDaniel, demurs to the bill of complaint exhibited against him in the Circuit Court of Orange County, Virginia, by E. A. Hodges, and for cause of demurrer says the said bill is insufficient in equity, and without in any way waiving his said demurrer he proceeds now to answer the said bill, or so much thereof as is material and necessary for him to answer:

And in answering says: that it is true as alleged, on or about the 8th day of December, 1937, he executed a deed whereby he conveyed to complainant four tracts or parcels of land located in Orange County, Virginia, one of which contains twelve (12) acres more or less, located about two and one-half miles northwest of Barboursville on the north side of the Standardsville pike, adjoining the lands of Faulkner, Boston and others, in Barbour Magisterial District; another of which contains twenty (20) acres more or less, and two small tracts, one of which contains forty-five hundredths (0.45) of an acre, the other three (3) acres more or less, which last mentioned three tracts are also located about two and one-half miles northwest of Barboursville, adjoining the lands of Clark, Jones and Faulkner, in Barbour Magisterial District; and which tracts together total thirty-four and forty-five hundredths acres (34.45 Acres). The deed by which the tracts were conveyed is recorded in deed book 111, page 347 of the clerk's office of the Circuit Court of Orange County, Virginia, a certified copy of which deed is filed with the bill as “Exhibit A” and asked to be read as a part thereof.

And on the same day the deed was executed the  
page 12 } property described therein was conveyed by the said E. A. Hodges and Helen Hodges, his wife, to Roy Wheeler, Trustee, to secure the sum of \$600.00, balance of purchase price for said property. The amount of \$600.00 is evidenced by six negotiable notes of \$100.00 each, bearing even date with the deed, signed by E. A. Hodges, and payable to W. S. McDaniel, as shown in the deed of trust, and which said deed of trust is recorded in deed book 111, page 348 of the clerk's office of the circuit court of Orange County, Virginia, a certified copy of which is filed with the bill marked “Exhibit B” and asked to be read as a part thereof.

The entire purchase price for the tracts of land was One

Thousand Dollars (\$1,000.00), Four Hundred Dollars (\$400.00) of which amount was paid in cash; the balance evidenced by notes secured by deed of trust as aforementioned.

Respondent further answering says, that he denies with indignation that he authorized the agent, B. E. Wheeler and Company, who negotiated the sale to make any false representations concerning well or anything else.

The complainant purchased the property with his eyes open, after inspecting the same personally. At the time he inspected the property he knew the true condition of the well, and in fact, as respondent is advised and believes, at that very time he called the attention of the agent to the condition of the well and wanted to know what he could do for water until he could fix the well, and the agent told him that he had heard there was a spring on the property near the house; and complainant went with the agent to the spring, examined it and expressed himself as being perfectly satisfied, and the deal was closed and the deed and deed of trust aforementioned were executed.

While the allegations in the bill are to the effect that the agent of respondent falsely represented that there was a good well of water at the house before taking complainant upon the property, but the purchaser (complainant) went upon the property, examined the well, and well-knowing its condition purchased the property back in 1937, and has owned the property from that time and no complaint, as this respondent is advised, was made until on or about November 12, 1938, when complainant wrote respondent complaining about the well.

Complainant defaulted in his payments of unpaid purchase money notes and was threatened by the respondent with foreclosure proceedings under the provisions of the trust deed referred to as "Exhibit B" with the bill, after which this suit was brought. And after all this lapse of time respondent is now dragged into this unholy litigation simply because, as he believes and is advised, that complainant is either unable or declines, if able, to pay his purchase money notes. The truth is, he has become dissatisfied with the property. But why should he have slept upon his imaginary rights all of this time before lodging a complaint with the respondent?

The respondent, through B. E. Wheeler and Company, a reputable real estate firm with offices located in the city of Charlottesville, Virginia, got in communication with the complainant, and the agent negotiated the sale; respondent was not

present and does not know what representations were made by the agent, but he is informed and believes that no such representations as are alleged were made by the page 14 } agents, or any of them; the agents have informed the respondent that no such representations were made as are alleged in the bill.

How now, respondent says, can it be successfully contended after all this lapse of time that the complainant can come into a court of equity and say to the court: "I have bought the property in the bill mentioned and have lived upon it and owned it since the 8th day of December, 1937, saw the condition of the well at the time I made my purchase, but now I am dissatisfied and want this court to make the respondent pay me in cash the \$400.00 paid as part of the purchase money for the land with interest from December 8, 1937, and that in case of default in the payment of the \$400.00 with interest that the land be sold at the risk and cost of respondent and proceeds of sale, after payment of proper cost, be applied on the amount due the complainant, and in case any deficiency shall result from said sale and application of the proceeds thereof a personal decree may be entered against the respondent for the deficiency".

Will equity *meet* out such relief; does the nature of the case require it? Respondent says not. The deal has been closed, and no representations of a false nature were made by respondent, or as he believes and charges by his said agent. Complainant bought with his eyes open after a personal inspection, and now comes into court and asks for help to which he is not entitled.

If the complainant is entitled to the relief he asks for in a court of equity, can any deal between man and man be closed with any assurance that there will not be future trouble?

page 15 } Respondent further says that even if the representations alleged to have been made were made, could not the complainant have seen for himself that they were untrue? It is admitted by him in his bill that he was there on the ground, saw the well and talked about it.

Respondent knows nothing about the condition of the well at the present time; but even conceding that false representations were made about the well to complainant and complainant relied upon the false representations, would that be sufficient to enable complainant to come into a court of equity and set the entire transaction aside? Respondent says no.

And now having fully answered, respondent prays to be dismissed with his cost in this behalf expended.

W. S. McDANIEL,  
Respondent.

BURNETT MILLER,  
Counsel for Respondent.

page 16 } And on the 24th of May, 1939, the Plaintiff appeared and filed his *Amended Bill*, which reads as follows:

“Your Complainant, E. A. Hodges, respectfully represents:

That on the 28th day of March, 1939, he exhibited in this Court his original Bill of Complaint against W. S. McDaniel wherein he set forth:

That on or about the 8th day of December, 1937, the respondent deeded to your complainant a boundary of land, located in Barbour Magisterial District of Orange County, Virginia, comprised of four (4) different parcels; one containing twenty (20) acres; one containing (12) acres; one containing three (3) acres; and one containing forty-five one-hundredths of an acre, totaling thirty-four and forty-five one-hundredths (34.45) acres of land;

That your complainant dealt with your respondent through the agent of your respondent, one B. E. Wheeler, a real estate broker, that your respondent was taken to the property and showed it by said agent of said respondent;

That said agent of your respondent falsely represented that there was a good well of water at the house, before taking your complainant to said property, that said agent of your respondent after going on said property and while standing near said well with your complainant, falsely represented again that said well was a good well, that it only needed cleaning out, and that he had drunk water from it;

That your complainant paid the sum of Four Hundred Dollars (\$400.00) to said respondent or his agent and after having received a deed from said respondent for said land,  
page 17 } he executed a deed of trust on said land, securing to said respondent an additional Six Hundred Dollars (\$600.00) as the balance of the purchase price of said land, all of which will more fully appear by reference to said Deed and Deed of Trust, copies of which are herewith filed

marked "Exhibit A" and "Exhibit B", respectively, and made a part of this bill;

Your complainant further sheweth unto the Court that he relied upon said representations and statements of the agent of your respondent, and did purchase and pay for said farm at the prices above specified, relying on said representations and allegations and believing them to be true, that said representations and allegations were material, but your complainant avers that the said representations and allegations were and are untrue, that said well is entirely worthless, that it caved in some years prior to said sale, and that its use as a well was completely destroyed, that it has been dry ever since said "cave in"; that your respondent through his agent represented and sold said property as having a good well of water at the house.

But your complainant respectfully represents by way of amendment:

That Roy Wheeler, Trustee, mentioned and set forth in "Exhibit B" of the above mentioned Deed of Trust is the holder of the legal title to the land, the subject of these proceedings, and is therefore a necessary party to this suit;

That the complainant dealt with your respondent through the duly authorized agent of your respondent, one B. E. Wheeler, a real estate broker, that your complainant was taken to the property and showed it by said agent of said respondent;

page 18 } That said agent of your respondent knowingly, falsely, and fraudulently represented that there was a good well of water at the house before taking your complainant to said property, that said agent of your respondent after going on said property and while standing near said well with your complainant, knowingly, falsely, and fraudulently represented again that said well was a good well, that it only needed cleaning out and that he had drunk water from it;

That your complainant relied upon said representations and statements of the agent of your respondent, and did purchase and pay for said farm at the price above specified, relying on said representations and allegations believing them to be true; that said representations and allegations were and are false; that said well is entirely worthless; that it caved in sometime prior to said sale, of which fact the agent of your respondent had knowledge; that a prior tenant had moved away from said property due to the fact the well was worthless and unrepairable; that from time to time after

moving on said property your complainant attempted to obtain the services of someone to clean out this well, but after being put off from time to time he was finally advised as to the true status of said well; that he is unable to get anyone to go down into said well due to the dangerous condition of the earth about it; that shortly after discovering the true condition of said well your complainant went to Charlottesville and advised B. E. Wheeler, the agent of your respondent of his discovery as to the worthless condition of said well; that B. E. Wheeler, agent of your respondent, promised to come to property and see about the well, but he never came; page 19 } that later your complainant wrote to said B. E.

Wheeler about said well and did not receive any reply; that on November 11, 1938, your complainant went again to Charlottesville to see said agent, B. E. Wheeler, about said well and at that time said B. E. Wheeler promised to write to W. S. McDaniel about it and said that something ought to be done; that your complainant never got any response from any of these complaints; that on December 6, 1938, your complainant, through his attorney, wrote to said W. S. McDaniel and it was then and only then that there was any response forthcoming with regard to said well; that the fact that the well was worthless was not apparent to observation; that your complainant would not have purchased said property if he had known the true conditions of said well; that he has suffered an irremediable damage; that said representations and allegations were material, that the use of said well was completely destroyed; that it has been dry ever since said "cave in"; that your respondent through his agent, B. E. Wheeler, represented and sold said property as having a good well of water at the house.

In consideration of the premises and forasmuch as your complainant is without remedy save in a court of equity where matters of this kind are properly cognizable your complainant prays:

That W. S. McDaniel and Roy Wheeler, Trustee, be made parties defendant to this amended bill; that they be required to answer the same but not on oath, the oath being hereby expressly waived; that the said Roy Wheeler, Trustee, be required to answer both the original bill filed in this cause as well as this amended bill; that said sale be rescinded and that your respondent be ordered to receive and accept Special Warrantv deed to said property and to mark sat- page 20 } isfied and cancelled the bonds and deed of trust executed by your complainant to secure the balance of the purchase price of said land; that your respondent be required to pay in cash to your complainant the said

\$400.00 paid as part of purchase price on said land, with interest from December 8, 1937; that in case of your respondent's default in the payment of said \$400.00 with said interest due your complainant, that said land be sold at the cost and risk of your respondent and the proceeds of said sale, after the payment of proper costs, be applied on the amount due your complainant, and in case any deficiency shall result after said sale and application of the proceeds thereof, a personal decree may be entered against your respondent for such deficiency;

That all such other things be ordered and done as may be necessary for the complete disposition of this cause; and for such other relief both general and special, as to equity may seem meet and the nature of the case may require.

And your complainant will ever pray, etc.

E. A. HODGES,  
By Counsel.

A. PLUNKET BEIRNE,  
Counsel.

page 21 } And on the 16th day of May, 1939, the defendant, W. S. McDaniel, filed his grounds of demurrer to the bill of complaint, and to the amended bill, which reads as follows:

"1. The trustee in the deed of trust in the bill mentioned is not a party defendant to the bill when he should have been because the legal title to the property is in his name.

2. No equity in the bill. If the complainant has a case it should be in the law court and not in the equity court.

3. How can the complainant obtain the relief asked for in this case? He claims fraud was practiced upon him. At the same time he says in his bill in part, and in the third paragraph thereof: "That said agent of your respondent falsely represented that there was a good well of water at the house, before taking your complainant to said property, that said agent of your respondent after going on said property and while standing near said well with your complainant, falsely represented again that said well was a good well, that it only needed cleaning out, and that he had drunk water from it".

How can the complainant complain of a fraud being practiced upon him when he was there present on the premises and saw the well with his own eyes, or could have seen it had he looked.

4. Complainant says that the representations in regard to the well were untrue. This he could have easily ascertained before purchasing the property by examining the well and seeing for himself whether or not the statements made by the agent were false.

page 22 } 5. The agent instrumental in selling the property was not authorized by the defendant to make any representations that were untrue; he was authorized only to sell the property, and as he is advised and believes the agent made no false representations; could not have done so conceding all the allegations of the bill to be true.

6. Complainant says in his bill that the well "caved in" some years prior to the sale, and that its use as a well was completely destroyed; that it has been dry ever since said "cave in", and that the respondent through his agent represented and sold said property as being a good well of water at the house. Suppose such a representation was made, could not the complainant have seen with his eyes open? Certainly enough was said to put him on notice.

7. The deed was made to the complainant in December, 1937, according to the allegations in the bill, yet the bill was not filed until Second April Rules 1939. And if any representations were made that were false and untrue, and relied upon by the complainant, even without knowledge of the falsity he waived all of his rights to proceed against the defendant by waiting so long a time without complaining to complainant.

page 23 } On May 27, 1939, Roy Wheeler, Trustee, filed his answer to the bill as amended in the following language:

"The separate answer of Roy Wheeler, Trustee, to a bill of complaint exhibited against W. S. McDaniel and himself as trustee in the Circuit Court of Orange County by E. A. Hodges, and to the bill as amended;

This respondent in answer to the bill says, that he is named as trustee in a deed of trust bearing date on the 8th of December, 1937, signed by E. A. Hodges and Helen Hodges, referred to in the bill of complaint as "Exhibit #B"; that he (respondent) as trustee is referred to as such in the bill of complaint, as appears from reading the bill. That he is advised and believes the legal title to the property is held by him, and that he is therefore called before the court in this procedure that the court may make a proper disposition of the case by having all necessary parties before it.



Respondent being a necessary party in that he holds the legal title, submits this his answer. And now having answered prays to be dismissed with his cost in this behalf expended.

ROY WHEELER,  
Trustee.

BURNETT MILLER, SR.,  
Attorney for Defendants.

page 24 } Order entered May 24th, 1939, which reads as follows:

“This cause came on this day to be heard on the demurrer of the respondent to the complainant’s bill, and was argued by counsel, and the Court doth find that the said bill is defective in the manner as set out in paragraphs #1 and #2 of the grounds of said demurrer, but that said bill is not defective as set out in paragraphs #3, #4, #5, #6, #7 of the grounds of said demurrer.

It is therefore ordered that the said demurrer be and the same hereby is, sustained as to the grounds set out in said paragraphs #1 and #2 and that the said demurrer be and the same hereby is, overruled as to the grounds set out in said paragraphs #3, #4, #5, #6, and #7. And on motion of the complainant leave is hereby granted him to file his amended bill in accordance with this order.

page 25 } And on the 17th day of November, 1939, final decree was entered, and reads as follows:

This cause came on this day to be heard on the bill of the complainant and exhibits filed therewith, the amended bill of the complainant; the answer of Roy Wheeler, Trustee; the demurrer and answer of W. S. McDaniel; the evidence of the witnesses, taken *ore tenus*, on behalf of E. A. Hodges, complainant and W. S. McDaniel, respondent, and all exhibits filed by both sides, and was argued by counsel.

Whereupon the court is of the opinion that the complainant has supported and proven all of the allegations set out in his bill and amended bill of complaint. The Court doth adjudge, order and decree that the contract and conveyance between E. A. Hodges, complainant and W. S. McDaniel, respondent, be and the same is hereby rescinded. And the Court doth further adjudge, order, and decree that said W.

S. McDaniel repay to E. A. Hodges the sum of Four Hundred Dollars (\$400.00), the amount paid on the purchase price of the land conveyed, and that the bonds securing the balance of said purchase price be marked cancelled by said W. S. McDaniel and delivered to E. A. Hodges and that upon said repayment and delivery being made that Burnett Miller and A. P. Beirne, are hereby appointed as Special Commissioners to reconvey with special warranty of title said land to W. S. McDaniel.

And it is ordered that W. S. McDaniel do pay all of the costs in this proceeding, and leave is given the said complainant to apply to this court for such other relief in the premises as may be necessary.

page 26 } The respondent, W. S. McDaniel, having indicated his intention to appeal from this decision of the court, the operation of this decree is hereby suspended for a period of sixty days, if the said respondent shall within thirty days of this date execute before the Clerk of this Court a proper bond in the penalty of Two Hundred Dollars (\$200.00) with surety approved by said Clerk.

page 27 } CERTIFICATE #1.

The following evidence on behalf of the plaintiff and of the defendant, respectively, as hereinafter denoted, with the agreement in writing between counsel, and exhibits otherwise certified, is all the evidence that was introduced on the trial of this cause; and the following, which is a stenographic report of the proceedings, shows the incidents of the trial throughout:

page 28 } Virginia:

In the Circuit Court of Orange County, before Judge A. T. Browning, Judge of the Circuit Court of Orange County.

June 22nd, 1939.

E. A. Hodges, Plaintiff

v.

W. S. McDaniel, Defendant.

W. S. McDANIEL,

a witness of lawful age, called by the defendant as an adverse witness, testified as follows:

By Mr. Beirne:

Q. Please state your name and residence?

A. W. S. McDaniel, Jeffersonton, Culpeper County, Virginia.

Q. I believe you are the owner of a piece of property, or were the owner, rather, of a piece of property, described in the bill in these proceedings which was sold by you to E. A. Hodges through B. E. Wheeler, a real estate agent, is that true?

A. That is true.

Q. Has Mr. Wheeler ever reported to you any complaint made by Mr. Hodges with reference to the well on this property?

Mr. Miller: Objected to.

The Court: Objection overruled.

A. Well, I don't know that he has. We have talked it over since we heard there was a complaint.

Q. When was the first time that you received word of any complaint?

A. It, was I expect, last November or December. I was in the hospital and quite ill at the time I first knew of it.

Q. When was that?

page 29 } A. Last year, 1938.

Q. Who made this complaint to you?

A. The first complaint was by written notice from Mr. Hodges, by letter.

Q. Before this time had Mr. Wheeler ever told you that Mr. Hodges had complained to him about the well?

A. No, that was the first I knew of it.

Q. When this property was sold did you pay Mr. Wheeler a commission for his services?

A. Yes, Mr. Wheeler received a commission, yes.

Q. Have you been to this property since you visited there in April, 1938?

A. Yes, I have been to it since.

Q. Please state when you were there?

A. Well, I would say it's been about a month since.

Q. Did you see the well and the cover over the well when you were there the last time?

*W. S. McDaniel.*

A. I did.

Q. Was it or was it not in practically the same condition as it was when you were there in April?

A. I think so.

Q. How would you describe the appearance of that well?

A. Well, it was an open well. I could go back a little further if you want and describe it. There was a big opening in the top. I don't think the well was ever walled up, dug some years ago and boards laid across the ground; there's a box built, probably about three feet square.

Q. Didn't that so-called box rise up, from the platform of this well and have a V-shaped roof over it?  
page 30. }

A. It may have, I don't know; the box did rise up from the ground, I do not remember about a roof being over it, however it was several feet above, the box was.

Q. Didn't that box have a top on it?

A. I can't recall.

Q. You can't recall whether it had a top?

A. No.

Q. But you have been there within a month since this suit has been brought about this well, haven't you?

A. I would say around a month.

Q. Did you not receive a letter from Mr. Hodges dated November 12th, 1938, with reference to this well?

A. I can't recall the date. I know it was while I was in the hospital which was in November and December, two months.

Q. In your answer, signed by you—that is your signature, isn't it? (Showing paper to witness).

A. I can't see it well from here, sir.

Q. Isn't that your signature?

A. I think it is, yes.

Q. In your answer, signed by you, you stated that a complaint was made on or about November 12th, 1938. Isn't that true?

A. Possibly so, I can't recall.

Mr. Beirne: We offer this paper marked "Exhibit, Hodges #1."

Q. Is it not a fact that you wrote this letter to Mr. Hodges dated November 21st, 1938, in which you made no response to his letter to you?

A. I suppose that must be true all right, sir.

*W. S. McDaniel.*

The Court:

Q. You wrote that letter to Mr. Hodges?

A. Yes, sir.

page 31 } Q. Was any money due you from Mr. Hodges at this time?

A. Yes.

Q. Please state what money that was?

A. That was interest on \$600.00 from December 8th, six months following December 8th, 1937, I wrote Mr. Hodges several times about it when the interest became due.

The Court:

Q. The interest was payable twice a year?

A. Yes, sir.

Q. On page 2 of your answer you make a statement with regard to a conversation about this property between Mr. Hodges and Mr. Wheeler, your agent; is that a part of your answer?

A. Yes.

Q. When did Mr. Wheeler tell you about this conversation?

A. I can't recall when he told me.

Q. Is this an accurate statement of what he told you or is your answer incorrect?

A. Mr. Wheeler had told me that he went to a spring with Mr. Hodges and showed him the spring and said he could get water there until he could fix the well.

Q. This statement is correct then is it?

A. As to Mr. Wheeler's statement?

Q. Yes.

A. Yes, that part is correct.

Mr. Beirne: We offer this as "Exhibit, Hodges #2.

Q. Did Mr. Wheeler make the last referred to statement to you after this suit was instituted?

A. I don't recall whether he did or not after the suit was instituted; that's been quite a time. I don't recall.

Q. Is it not a fact that you bought this property in 1933?

A. I suppose so.

page 32 } Q. Is it not a fact that you paid \$405.00 for this property?

*W. S. McDaniel.*

A. But in a way I had considerably more money in it; it was sold at auction. I held a deed of trust against the place and it was sold at auction and I bought it in at that low bid.

The Court:

Q. What was the amount of that deed of trust?

A. My brother had loaned \$1,000.00 on that property and that had gone several years without any interest being paid. I figure that I had \$1,200.00 on that place.

Q. Was that the only security you had for that lien?

A. Yes, sir.

Q. Are you thoroughly acquainted with this property?

A. Fairly so, been on it several times.

Q. You have never lived there have you?

A. No.

Q. Have you ever taken a drink of water on this property?

A. I think so, some years ago.

Q. Where did you get the water from that you drank?

A. I say I know there was water in the well at one time, but so far as my drinking it I can't say for certain.

Q. But if you drank any water there it came from the well?

A. There was a spring near the house, it may have come from the spring. I know there was water in the well at one time and would be today if it was cleaned out.

Q. Do you know how deep it was when it was dug?

A. No.

Q. Do you know the depth of it today?

A. No. It isn't deep.

Q. Can you say how deep?

A. No, I cannot. Looking down into a hole that way it is hard to determine.

page 33 } Q. When you looked down into the well did you put any light in it?

A. No, its always open and not hard to see into; its always been caving in.

The Court:

Q. Do you think it was as deep as, say from this ceiling to the floor?

A. Yes, sir.

*Mrs. Eugene Hensley.*

Q. The last time you were there—didn't you just say you couldn't see in it?

A. I don't think I stated I couldn't see in it. We didn't see that anything had been done in regard to it, caved in.

Q. Did you put any light in it?

A. Never did. It was never any trouble to see the bottom and the sides, a big opening in the center, I think from three to four feet in diameter.

Q. Where is this spring on the property that you refer to?

A. Well, I don't know how well I can judge, I think its east of the house, not very far away.

Q. How far?

The Court:

Q. The well had caved in before the property was bought?

A. I think so. No doubt it has been caving in right along.

Q. Has it been cleaned out?

A. It didn't show any signs of it.

Q. It looked the same as when you were there before?

A. It looked the same.

A. —I would like to state about the spring—you asked about it—I know its quite an old homestead. I think the spring was used for water supplies up to some years ago. I don't imagine that well is very old.

page 34 } MRS. EUGENE HENSLEY,  
another witness of lawful age, being duly sworn,  
testified as follows:

By Mr. Beirne:

Q. Please state your name and residence?

A. Mrs. Eugene Hensley, Barboursville, Virginia.

Q. Did you ever live on the property where Mr. E. A. Hodges now lives?

A. Yes.

The Court:

Q. How far is it from Barboursville?

A. I guess two miles.

Q. In what direction?

A. Towards Greene. About two miles southwest on the state highway.

Q. How long ago since you lived on that property?

*Mrs. Eugene Hensley.*

A. Its been something like two years, maybe not quite that long.

Q. When you lived on that property did you use water from the well or from the spring?

A. From the spring.

Q. Did you ever use water from the well?

A. We did I guess for about two months.

Q. Why did you stop using water from the well?

A. It caved in and went dry. I don't know what became of it. We just couldn't get any water, it fell in.

Q. Did you ever have any conversation about that property with Mr. B. E. Wheeler?

A. About the well? Yes.

Q. What was your conversation with Mr. Wheeler about the well?

A. He came there one day and brought some people, I don't know who they were. We looked around and out  
page 35 } to the well. There was a woman and a man and her daughter and after we talked awhile the lady said, she asked me, was there any water on the place and I told her no there wasn't. She asked me "There's a well?" I said "Yes, but it's dry, no water in it", so she said "Do you get water out of the well?"; I said "No, why it's dry."

Q. State what Mr. Wheeler said?

A. We went back in the house and he said to me "Mrs. Hensley, don't—we are trying to sell the place—don't show anyone the well. If they ask you about a well you say there is one, it just needs cleaning out; say the well is all right, it just needs cleaning out. Tell them that.

Q. What did you tell Mr. Wheeler?

A. I said "Mr. Wheeler, I can't do that because people knows about this well". It was all over the town that the bottom had fell out of the well; telling it for a joke.

Q. How long did you live there?

A. Fifteen months at least.

The Court:

Q. Did you move out at the time Mr. Hodges moved in?

A. No, sir. More than a month before, maybe six or eight.



FRANK HANEY,

another witness of lawful age, being duly sworn, testified as follows:

By Mr. Beirne:

Q. Please state your name and residence?

A. Frank Haney, Barboursville, Virginia.

Q. Did you ever live on the property where Mr. E. A. Hodges now lives?

A. Yes.

Q. While living there did you use water out of page 36 } the well on that property?

A. Yes.

Q. Did you use water from the well on that property the entire time that you lived there?

A. No.

Q. When you moved on this property did you clean out that well?

A. Yes.

Q. Will you please state to the Court as near as you can come at it, the depth of that well when you finished cleaning it out?

A. I guess it was about sixty feet deep; it seemed like it or around close to it.

Q. Why did you stop using that well?

A. It went dry.

Q. Will you please state if you know, what happened to the well?

A. Yes. I think the water went out at the bottom. The well went dry when it was an awful wet time, along in March sometime; there was a noise, I heard a noise, I was out a little ways, and I didn't think it was the well, but I told the little girl as a joke that I thought the well was falling; we went in the house, just a joke. I never supposed it was anything, never noticed anything more that day but the water was muddy of course—

Q. You were living there when your daughter Mrs. Hensley lived there?

A. Yes.

Q. You lived there at the same time?

A. Yes, I lived there with her.

Q. Please state the condition of that well two days after you heard that noise?

A. I went to see if the water had cleared up. It had been

*Frank Haney.*

muddy. I let the bucket down and didn't touch any page 37 } water. I drew it up and let it down again and the bucket didn't get wet. Then I made a ball of paper, wadded up, and tied a string around it and soaked it in coal oil and dropped it into the well to see what was wrong. It struck the bottom, laid there and burned up and showed a big light and there wasn't a drop of water in there. There was mud but no water. I made another ball of paper and dropped it in, it struck something and bounced back under the bank and we couldn't see it, we could see the light.

Q. Was that at the bottom of the well?

A. Yes, it went back towards the house from the well and burned under there. We didn't see the paper any more at all.

Q. Did you after that, ever have any conversation with Mr. B. E. Wheeler about that well?

A. I spoke to him once about it. He drove up there in a car. I saw him and spoke about it. I was on the horse riding to the lot and he was in the car, never got out. I told him there was something wrong about the well, told him there wasn't no water in it and it never would be I didn't think, because it went out at the bottom.

Q. Did you move from there soon after that?

A. Yes, didn't stay long after that.

Q. Why did you move?

A. The water was unsatisfactory, couldn't get any water in there, and I bought a little lot and moved there.

Q. Is there any spring on that property, any water there other than the well?

A. There is no spring on the place that ever I found.

Q. Let me ask you this, Mr. Haney, do you remember Mr. Hodges ever asking you if you would go down in that well?

A. Yes.

page 38 } Q. What did you tell him?

Mr. Miller: Objected to.

The Court: Objection is good.

Q. Did you ever acquaint Mr. Hodges with the true condition of this well?

A. Yes.

Q. As near as you can come at it when did you disclose these facts to him, when did you discuss it?

A. Mr. Beirne, as near as I can remember I think it was along some time in June.

*Frank Haney.*

- Q. In what year?  
A. I'll be dogged if I know what year.  
Q. Was it this year?  
A. No.  
Q. Was it last year?  
A. I suppose it was.  
Q. Have you ever dug a well?  
A. Yes.  
Q. Would you be willing to go down into this well?  
A. No, sir.  
Q. Please state why not?  
A. Because I would be afraid.  
Q. Why would you be afraid?  
A. I would be afraid of death, earth or something falling in.  
Q. Is the general appearance of that well, the well platform and well house, substantially the same as it was two years ago?  
A. Yes, except it's rotten.  
Q. Upon looking down into that well at this time are you able to see the bottom of it?  
page 39 } A. No, sir, not without a light, throw a light down in there.

CROSS EXAMINATION.

By Mr. Miller:

- Q. Mr. Haney, it just looks dark down in there?  
A. Yes.  
Q. The lady who testified, Mrs. Hensley, is she a relation of yours?  
A. Yes.  
Q. How is she related?  
A. She is my daughter.  
Q. She lived there with you on the place all the time you lived there?  
A. Yes.  
Q. How long did you live there?  
A. I think about two years.  
Q. You lived there while Mr. McDaniel owned it did you?  
A. Yes, in a way it belonged to him. My son-in-law had bought it in a way.  
Q. Who?  
A. Mr. Hensley, my son-in-law, bought it on the installment plan, pay Mr. McDaniel so much a month.

*Frank Haney.*

Q. And it was sold and Mr. McDaniel bought it?

A. No, he had bought it at that time; he sold it to Hensley.

Q. But Mr. McDaniel owned it at the time you were living there?

A. No, sir, Mr. Hensley was paying for it by the month.

Q. Did he fail to make his payments?

A. I think so.

Q. And didn't Mr. McDaniel have to put you out?

page 40 } A. No, he did not.

The Court:

Q. You say you have dug wells?

A. Yes, sir, not but one.

Q. Was this well walled at all?

A. No, sir.

Q. How long has it been dug?

A. I don't know. I reckon since old man Clagge bought it.

Q. About five or six years?

A. Yes, I have known it that long.

The Court:

Q. And it had no boarding inside at all?

A. No, nothing but dug.

Q. Won't any well cave in in five or six years without boarding?

A. I don't know.

Q. Did you ever hear of a well lasting longer than that before, with no boarding—

A. Yes, sir.

Q. Where?

A. Munroe Davis, six or seven years I would say, about sixty feet deep or more. I have been down in that.

Q. I didn't know they would last that long that way?

A. Yes, sir. Plenty of them.

Q. What diameter, little or big?

A. About four feet in diameter and twenty-four feet around I expect.

Q. Was there any spring on that land at all?

A. No, none that I have ever found.

Q. How did you get water?

A. I went to another man's and got water.

page 41 } Q. How far?

A. Two hundred and fifty yards, something like that.

*E. A. Hodges.*

RE-DIRECT EXAMINATION.

By Mr. Beirne:

Q. What is the apparent depth of that well at this time?

A. I can't tell you. I never have seen down in it since I left except just to go and look in it, you can't see anything down in it.

The Court:

Approximately what does it cost to dig a well in that vicinity of that depth?

A. I don't know.

Q. You have dug one yourself?

A. I dug one for Henry Deane. I think I got three or four cents a foot for digging, I forget, I think it was that.

Q. That wouldn't be but \$1.80 or \$2.00 for digging a sixty foot well?

A. A man couldn't do it for that. I don't know what he paid me. I dug it nineteen feet deep and got plenty of water I don't remember what I dug it for.

Q. If you got four cents a foot it came to seventy-six cents.

A. I got a dollar and something a day.

Q. And you think you are mistaken about that other price?

A. Yes, sir. I couldn't have dug it for four cents a foot.

page 42 } E. A. HODGES,

another witness of lawful age, being duly sworn,  
testified as follows:

By Mr. Beirne:

Q. Please state your name and your residence?

A. E. A. Hodges, I get my mail at Eheart, Virginia.

Q. Are you the complainant in this case?

A. Yes.

Q. Where did you come from before you lived on this property involved in this suit?

A. From West Virginia near Ronceverte.

Q. How did you happen to buy this property?

A. I bought it through Mr. Wheeler. I come to Charlottesville and stopped at his office and talked about the property and he told me about this property, he said thirty-five acres near Barboursville, mostly clear and level land, fairly good house with some repairs and a good well of water right at the house.

Q. Did Mr. Wheeler take you to this property?

*E. A. Hodges.*

A. Yes.

Q. Will you state who went there with you?

A. Mr. Wheeler, Harry Wheeler, Helen Dye, the little girl and myself.

Q. Please tell in your own words what occurred on the property after you got there?

A. We got out of the car and looked into the house and on back to the well. I picked up a little rock there, dropped it in and didn't hear it hit no water. I said "Is there any water in this well?" "All it needs is cleaning out" he says. "I have been here and drunk out of it". He says "I will  
page 43 } show you a spring down here that you can use until you get your well cleaned out".

Q. What happened then?

A. We went down and looked for the spring, never found any spring, went on back, got in the car and went on back to Charlottesville; then he was going to see Mr. McDaniel the next day; I was supposed to go with him, but that night he said I would better not go; he claimed he could make a better deal with me not going. I come to Orange with him and staved here until he come back.

Q. Please state how much you agreed to pay for the property?

A. One thousand dollars.

Q. How much did you pay down?

A. Four hundred dollars.

Q. Who was this money delivered to and who delivered the deed to you?

A. Mr. B. E. Wheeler and Claude Wheeler, his son delivered the deed.

Q. Did you ever see Mr. McDaniel before he came to your place in April?

A. No, sir.

Q. Did you make any statement to Mr. McDaniel when he came to your place at that time with regard to the well on the property?

A. No, sir.

Q. Will you state why you did not?

A. Well, he wasn't there but a few minutes; he and I looked through the house and walked out to the barn and he pretended to be in an awful hurry to get to Charlottesville. I had done some plowing. He said "Are you tending this land, or are you going to rent it?" and said the land was a little

*E. A. Hodges.*

thin. That was all he said. He went back and got in the car and went on away.

Q. Did you know the true condition of this well page 44 } at that time?

A. No, sir.

Q. Did you make any attempt to have this well cleaned out?

A. I tried to get several people. White man said he'd come and didn't and I asked a darkey over at Barboursville and he said his father did that kind of work and I said tell him to come but he never come. I spoke to a couple of white men but they never did come. Another darkey on the ridge said he was going to stop by but he never stopped. Then I asked Sam Johnson and he said no he wouldn't, couldn't get none of them.

The Court:

Q. Did they look at the well?

A. Never come on the place.

Q. None of them?

A. None of them.

Q. Mr. Hodges, would you have bought this property if you had known the condition of that well?

A. No, sir; because he claimed there was a good well of water there. I took his word for that.

Q. What is the depth of that well now?

A. Twenty foot and a half.

Q. Who was the first person that told you of the true condition of that well?

A. Mr. Frank Haney.

Q. About what time was that?

A. It was about the middle of June, along the 10th or 15th.

Q. What year?

A. 1938.

Q. Did you make any complaint to Mr. Wheeler after that time?

A. Yes, I went over to see him.

Q. What did he tell you?

page 45 } A. Said he would come over and look at it.

Q. Did he ever come?

A. No, he never came.

Q. Did you make any further complaint?

A. Yes. I wrote him a letter and he never answered it. I waited until the 11th. of November and went over there and I said "Mr. Wheeler, I think there ought to be something

*E. A. Hodges.*

done about that well. I have got no water". He says "I do too", he says "I will write to Mr. McDaniel" and he says "I will give you his address, maybe you had better write". I wrote him November 12th.

Q. Did you ever receive any response to your letter to Mr. McDaniel until after I had written him on December 6th?

A. No, sir. That letter is the answer to it where he asked for the money. That's where he was supposed to answer my letter, but that's the kind of answer I got from him.

Q. Can you at this time, upon looking down into this well, are you able to see anything of the nature of the bottom of it?

A. No, sir.

Q. Has Mr. Wheeler—

The Court:

Q. About forty feet has caved in, hasn't it, the debris is something like forty feet?

A. Yes, sir.

Q. Please tell the Court whether or not there is any opening in the side of this well at the bottom at this time, or near where the present bottom is?

A. No, but I can show you—

Q. Have you ever dropped a burning paper or rag down this well?

page 46 } A. Yes, sir.

Q. Please state what happens to a burning paper or rag?

A. It will be burnt up and will go back to one side, but you can't see no water.

Q. You mean it goes back into an opening in the side of the well?

A. Yes, sir. Goes back in an opening in the side of the well.

The Court:

Q. I understood the opening was at the bottom of a sixty-foot depth; this can't be the same opening? Is this an opening made by the caving in?

Y. Yes, sir.

Mr. Beirne: We offer this paper as "Exhibit, Hodges, #3.

Q. Before buying this property did you have any knowledge of the original depth of this well?



*E. A. Hodges.*

A. No, sir.

Q. Have you made any repairs to this property since moving on it?

A. Yes, sir.

Q. Have you cleaned up any of the land?

A. Yes, sir, cleaned up some of the land.

Q. What would your estimate be of the value of the work and materials that you have put into this property?

A. Well, I would say around two hundred dollars.

Q. Did Mr. Wheeler tell you that you had improved the property a good deal?

A. Yes, said I had improved the house a hundred per cent.

Q. Has Mr. Wheeler been to see you since last summer at your home?

A. Yes, sir.

Q. Did you have any conversation with him at the time with regard to the well?

page 47 } A. Yes, sir.

Q. Did you tell him what he had told you at the time you bought it?

A. Yes, sir.

Q. Did he deny that to you?

A. No, sir.

Q. Since this suit has been instituted has Mr. Wheeler been to your home?

A. Yes, sir, he has been there a couple of times.

Q. Did he endeavor to get you to make further payments on this property?

A. Yes, sir.

Q. Did he tell you that your standing in court would be hurt if you did not make these payments?

A. Yes, sir.

Q. Were you satisfied with this property until you discovered the true nature of that well?

A. Yes, sir.

CROSS EXAMINATION.

By Mr. Miller:

Q. Mr. Hodges, where were you living before you moved on this property?

A. Greensboro, West Virginia.

Q. How did you get in touch with Mr. Wheeler?

A. First place I wrote a letter and said I was coming over. I went over there—

*E. A. Hodges.*

Q. And then he told you about this tract of land?

A. Yes, sir.

page 48 } Q. How many acres in this tract?

A. Thirty-five acres.

Q. Where is it located?

A. Near Barboursville in Orange County, Virginia.

Q. What buildings are on it?

A. There is a house, two-story house if its finished up it would be a six-room house, but its never been nothing done upstairs.

Q. Never been nothing done upstairs?

A. No, sir, nothing done upstairs.

Q. How much is in wood?

A. Not much there, not more than two acres, small stuff at that.

Q. How far is this well from the dwelling house?

A. About nine feet.

Q. From the kitchen door?

A. Yes.

Q. You said in response to a question by your attorney, Mr. Beirne, that you had done certain work in the way of improvements on the house and estimated the cost of this at approximately \$200.00?

A. No, sir, you are mistaken, it wasn't all for work done on the house.

Q. What did you do to the house?

A. I laid a new floor in the kitchen and painted the kitchen inside. Cleaned up the lower rooms and painted them.

Q. Inside?

A. Yes, sir.

Q. What are the dimensions of the kitchen?

A. About 12 by 18 foot I would say.

page 49 } Q. And you laid a new floor?

A. Yes, sir.

Q. And painted the walls?

A. Yes, sir.

Q. What else?

A. I cleaned up two rooms in the house, painted the stairway, ceiled the hall, made a little closet under the stairway.

Q. What do you suppose would be the cost of that work if you had had someone else do this work and you furnished the material?

A. I couldn't tell you exactly.

Q. Could you tell approximately?

*E. A. Hodges.*

A. A carpenter would want about twenty dollars or twenty-five dollars to do that.

Q. What would be the cost of the materials and paint?

A. Paint costs two dollars a gallon.

Q. How many gallons?

A. Two gallons, Lumber costs \$24.00 a thousand.

Q. How many thousand?

A. I got about a thousand feet.

Q. What did you do in the way of cleaning up the land?

A. I put up some fences. Bushes were grown up in the field all over the field, I cleaned that up.

Q. You did all that yourself?

A. Yes, sir.

Q. All the painting was done by you?

A. Yes, sir, and the work on the house.

Q. The work on the house?

A. Yes, sir.

Q. Have you ever torn down any buildings?

A. No, I moved the corn house.

page 50 } Q. Where?

A. Next to the barn.

Q. That is done now?

A. Yes, sir.

Q. When was this work done on the house and on the land?

A. In the winter before last. I moved in December, 1937, in the spring of 1938 it was done.

Q. You closed this deal December 8th, 1937?

A. Yes, sir. The deed was put on record.

Q. When you went to visit the property the first time, who accompanied you?

A. I, the little girl, Harry Wheeler, Mr. Wheeler.

Q. You went from Charlottesville?

A. Yes, sir.

Q. The well and the cover over it were in very much the same condition as they are now?

A. Yes. Except now its decayed.

Q. Mr. Wheeler visited you since then, you say?

A. Yes.

Q. Did he make any examination of the well?

A. No, sir.

Q. None at all?

A. No, sir.

Q. Was there a spring on the place anywhere?

A. No, sir.

*E. A. Hodges.*

Q. Where did you get your water?

A. Down to Mr. Faulkner's.

Q. How far from the house?

A. Two hundred and fifty-four steps.

Q. Two hundred and fifty-four steps?

A. Yes, sir.

page 51 } Q. During the time you bought this property, you lived in the house; who lived with you?

A. My son and his wife was with me, at first.

Q. How long were they with you?

A. Last May, about the 20th of May.

Q. You had an opportunity every day you were there didn't you to examine this well?

A. Yes, sir.

Q. Did you frequently go and look in it to see if there was any water?

A. Looked in several times to see if there was any water in it.

Q. Then, when, after you went on the premises did you make your first complaint about the well?

A. Along in June.

Q. The June following?

A. Yes, sir.

Q. From December 8th, until June, 1938?

A. You paid, as I understand it, \$1,000.00 for the property, you paid \$400.00 down and gave six notes payable in one, two, three, four, five and six years after date for \$100.00 each, with interest payable semi-annually?

A. Yes, sir.

Q. The interest payable semi-annually, that is twice a year?

A. Yes, sir.

Q. Did you meet any of your semi-annual installments of interest?

A. No, sir.

Q. Never paid any?

A. No, sir.

page 52 } Q. And your first complaint to Mr. McDaniel was about the 12th of November, 1938, when you wrote him a letter?

A. Yes, sir.

Q. When you went there on the premises with Mr. Wheeler, he pointed out the well to you and you went and looked at it, didn't you?

A. Yes, sir, and took his word for it that it was a good well of water.

*E. A. Hodges.*

Q. Didn't you see by looking at it—

A. —No, sir, couldn't see. If there had been four foot of water in it you couldn't have seen it.

Q. How long after you moved on the premises before you consulted someone about the condition of this well?

A. I wasn't there more than a week before I tried to get someone to clean it out. I tried to get different men to clean it out and then one day Mr. Haney told me—

Q. When was that?

A. June.

Q. That was in June—

A. Yes, I asked him about cleaning it out and he said I did not have any well to clean out. It has caved in.

Q. When Mr. Wheeler was with you at the time you bought the property, you were not compelled to buy it were you?

A. No, sir.

Q. And you took chances about the well?

A. Yes, I took his word for that.

Q. But you could see it as well as he could, your eyes are good aren't they?

A. I seen what was there.

Q. And you could see as well as Mr. Wheeler?

A. Yes.

page 53 } Q. Why was it then that you did not say to Mr. Wheeler "Now, Mr. Wheeler, before I close this deal I want to find out something about that well"? You looked at it then, didn't you?

A. That is not customary and I put that confidence in him.

Q. And you were perfectly satisfied until you defaulted in the payment of your interest when the first semi-annual installment was due; is not that a fact?

A. No. I never was dissatisfied about the place at all until I found out the well was in the condition it was. I have a son who said he would send me the money. I wrote him to keep it; I said I was going to do something about the well before I met any payments.

Q. And you slept on your rights in regard to the well, if any rights you had, from December 8th until June, six months. Is that right?

The Court: Mr. Hodges, what would it cost to dig a well there?

A. I never had any experience, sir. My experience with wells, whether walled or not, was never in country like this. In my country a well of water is a well of water.

*E. A. Hodges.*

Q. Is it not a fact that Mr. McDaniel along about four months after the deal had been closed came to your place while you were living on the premises and you said to him that you were perfectly satisfied and made no complaint at all about the well?

A. I didn't make any complaint about the well.

Q. That was about how long after the deal was closed?

A. In April.

Q. That's about four months?

A. Yes, sir.

Q. Who came there with him?

A. His wife. And I did say I was perfectly satisfied, but I didn't know the well was in the condition it was. I had been told that all the well needed was cleaning out and I tried hard to get it cleaned out—

Q. —But you had had four months to find out?

A. I had never cleaned out a well myself and wouldn't undertake it and I couldn't get anybody to clean it out—

Q. —But you never complained to Mr. McDaniel in April when he was there, about the well?

A. No, sir.

Q. And you said you were perfectly satisfied with the place?

A. Yes, sir.

Q. If you *have* been financially able to have met your interest and have paid off your first note when it came due, you would never have raised any question, would you?

A. Yes, sir.

Q. You would?

A. Yes, sir.

Q. But, when you had had all this time—

A. I certainly would have raised the question.

Q. You would?

A. Yes, sir. If there had been a well of water there like was recommended to me, there never would have been a word said and he would got his money.

Q. What I would like for you to tell me and tell the Court is, when Mr. McDaniel visited the premises in April and you said you were satisfied with the place, why didn't you say something about the well?

A. Didn't I tell you that I didn't know what the condition of the well was, that I had been told that it only needed cleaning out, and I hadn't been able to get anyone  
page 55 } to do it. I have told you that twice.

Q. And you'll tell me again if the Court says so.

*E. A. Hodges.*

Why did you say to Mr. McDaniel "I am satisfied with this place" and not mention the well?

A. I have told you I did not know that the well was in that condition.

Q. Notwithstanding you had been living there for four months, sleeping there and eating there; is that right?

A. If I had known the conditions I would have done something about it.

Q. You had had four months to find out?

A. I couldn't find out. I couldn't get anybody to clean it out.

Q. Did you make an investigation yourself?

A. No, sir.

Q. Did you do anything yourself with a view to finding out the true condition of the well?

A. I dropped paper and rags lighted down in it; it looked like dirt down in it.

Q. You did that the next day after you bought it?

A. I have done it—

Q. You satisfied your own mind after you dropped papers in the well?

A. There was some dirt in there—

Q. When did you drop this paper, how long after the purchase?

A. I don't know, it may have been soon, it may have been four or five months—

Q. You think it may have been four or five months before you dropped the papers in?  
page 56 } A. Might have been.

Q. If you had bought the property and taken possession, you knew perfectly well you had parted with *your* four hundred dollars of your money and given a deed of trust to secure six hundred dollars more, that you should find out whether Mr. Wheeler had deceived you or not, did you not?

A. I don't think so.

Q. Could you tell the Court approximately when it was that you dropped lighted papers into the well?

A. I couldn't say when. It may have been four or five months. I had been trying to get people all the time, to clean it out.

The Court: Did you try more than once?

A. No, sir.

Q. Do you remember that you made this test more than once?

*E. A. Hodges.*

A. No, sir.

Q. And you can't remember whether that was on the next day or maybe four or five months after?

A. No, I don't know.

Q. That was the only time you made the investigation?

A. Yes, sir.

Q. Tell the Court what you did?

A. I lit a paper and dropped it in the well; it hit on the bank, under the bank like Mr. Haney told you.

Q. You can't tell when this was?

A. I had an expert well man to come and look at it and he said it wasn't no good. He wouldn't work on it, wouldn't drill it.

Q. Who was that man?

A. His name was—I forget.

Q. Where does he live?

A. At Rochelle.

page 57 } The Court:

Q. Is he a white or colored man?

A. White man.

Q. How long after your purchase before you had this expert to come?

A. He was there along in the spring, I can't say just when.

Q. What month?

The Court:

Q. This spring or last?

A. Early part of the spring of 1939.

Q. That was the first time you had had an expert to examine it?

A. Yes, sir.

Q. What examination did he make?

A. He took a measure; he said it was dangerous. He wouldn't go there to work and didn't want his tools there to drill in that old well.

Q. That was in the spring?

A. Yes, sir.

Q. Did you get any estimate of what would be the cost of drilling a new well?

A. He figures three dollars and a half a foot to drill it. without facings.



*E. A. Hodges.*

The Court:

Q. What would it cost with facings?

A. He didn't say, that was without facings.

Q. Didn't Mr. Haney testify that the well at the surface of the ground was around four feet in diameter; is that about right?

A. I guess that is.

Q. What kind of spring was that you got water from?

A. A good spring, where I get water.

Q. How far from your house?

page 58 } A. Two hundred and fifty-four steps, but its on another man's property.

The Court:

Q. You have no right, just sufferance?

A. Old man Jim Faulkner's property, just sufferance.

Q. You never made any complaint when Mr. McDaniel was there about four months ago, about having to walk so far after water, did you?

Mr. Beirne: Objection.

A. I told you Mr. McDaniel wasn't there long enough to ask him anything; he wasn't there over fifteen minutes if that long.

Q. You were with him weren't you?

A. Yes, we walked out to the barn and looked at the fields and came back. Mr. Haney and I made the same round and it was thirteen minutes it took to make it.

Q. A man could say right much in fifteen minutes?

A. There would be a lot he couldn't say.

Q. Do you remember what conversation was about while Mr. McDaniel was there?

A. He come through the house and he said "You have fixed up the house", went to the barn and he said "Are you going to farm this land or rent it?" and I said "farm it". He said "This land is a little thin"; that's about all.

Q. You were satisfied with the purchase price that you paid?

A. Yes, sir.

*B. E. Wheeler.*

RE-DIRECT EXAMINATION.

By Mr. Beirne:

Q. Mr. Hodges, Mr. Miller has asked you two or three times why you made no complaint to Mr. McDaniel on his visit there in April with reference to this well. Is it not a fact page 59 } that you had made numerous attempts to obtain the services of people to clean out this well and that on each occasion you have been vaguely promised or put off?

Mr. Miller: Objected to as leading and because counsel not only asks the question but answers it.

Q. Were you using water from this spring mentioned and have you used water from this spring since your purchase of this property, most of the time?

A. Yes.

Plaintiff rests, with right of rebuttal.

DEFENDANT'S CASE.

B. E. WHEELER,

a witness of lawful age, being first duly sworn, testified as follows:

By Mr. Miller:

Q. You are Mr. B. E. Wheeler are you not?

A. Yes.

Q. How old are you?

A. Old enough to vote lots of times.

Q. What business are you engaged in?

A. Real estate.

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

A. Thirty-one years.

Q. Where are you living at present?

A. #702 Ridge Street, Charlottesville, Virginia.

Q. How long have you been living there?

A. About twenty-five years I think.

Q. Are you acquainted with Mr. Hodges and Mr. McDaniel, the complainant and defendant in this case?

page 60 } A. I am.

Hodges? Q. How did you get acquainted with Mr.

*B. E. Wheeler.*

A. I think Mr. Hodges answered an ad. that we had for a piece of property, I think that was the first way I got acquainted; then he wrote me several times and came to look at some property; that is my impression, I think I had some correspondence with him.

Q. Did you show him any different properties?

A. At the time that I was referring to?

Q. Yes.

A. I am not sure, Mr. Miller, it seems to me—if I could just say this: Mr. Hodges told me that I did show him some at that time but I don't remember it.

Q. Were you instrumental in selling him for Mr. McDaniel, the tract of thirty-five acres, the well on which is in controversy?

A. I was.

Q. Tell the Court the facts about it, that is how you took him to the property and what took place on the ground?

A. We went to look at this property—

Q. —who did?

A. Mr. Hodges, his wife and daughter, I am sure they were along. They looked over the property and came back to the well and when we got back to where the well was we made an examination of the well—

Q. —Who did?

A. Mr. Hodges and myself. We found there was no water in the well. We threw two or three rocks into the well. If you drop a rock in a well if there is any water there, any water in that well, you will hear a splash. We did that. Mr. Hodges remarked, "There's no water in there". We discussed it. He

said if he bought the property how was he going to  
page 61 } get along for water until they could get the well

fixed. Said he had a horse and was going to bring it and they would have to have water too. I told him "I have heard there is a spring on this piece of property". I said "I don't know, I never was down to it", and we went down to this spring and found it, I recollect that very well. There was lots of these high grasses, it was in a hollow and high briars were on both sides of the branch. I got a good many scratches on my hands with the briars. After we found the spring Mr. Hodges said "I can get water from this spring until I have the well cleaned".

Q. What representations, if any, did you make to Mr. Hodges about the well?

*B. E. Wheeler.*

The Court:

Q. Was this spring that you found, on the 35-acre tract or on the Faulkner land?

A. Unless I am mistaken it was on this tract, on the Hodges tract. The spring was in a hollow. My impression is, I have been told the line runs over next to the woods and this would make the spring on the Hodges property.

Q. Describe this spring, please?

A. I don't know that I can hardly do that. There was plenty of water. When we went to the place I was under the impression that the spring was further down in the field than it was. We went down below quite a distance and found water. We followed up the water until we found the spring.

Q. Mr. Hodges was with you at that time?

A. Yes.

Q. And he said that would be satisfactory to furnish ample water until he could get the well cleaned out?

A. Yes. He said that would do.

Q. What representations did you make to him about the water in the well?

A. I said to Mr. Hodges that I had seen water in page 62 } the well and had drank water out of the well, which I had, but there wasn't any water in the well the day we were there and I knew it and he knew it, there was no question about it, not that day, but there has been since. I told him I had drank water out of it. There wasn't any complaint then.

Q. He said it was satisfactory?

A. He says he saw the well, we both saw it and discussed it. Then we went and found the spring. If we hadn't found the well dry we wouldn't have gone to the spring. No water in the well that day.

Q. When was the first complaint from Mr. Hodges that he couldn't do anything with the well, or complaint about the well?

A. I don't know that I hardly know; it seems to me that he bought this property in 1937, late in the year—

Q. December 8th, 1937?

A. I could tell by the contract—this is 1939—it must have been something like twelve months after, though I couldn't say. I know he came in there and mentioned about the well, and what it would cost if it couldn't be fixed or something like that—it was quite a while after he bought the place.

*B. E. Wheeler.*

Q. What did you say to him?

A. I don't recollect that at this time. I know I did tell him, if not then, then that other time, that he knew there wasn't any water in the well when he bought it. I told him before this suit was started and afterwards that he knew there was not any water in the well when he bought the property. I do say that I told him this and he said Mr. McDaniel ought to fix it.

Q. What conversation did you have in regard to this purchase money, was that discussed?

page 63 } A. Yes. I can't tell you exactly, but I told him this: I said—I asked him if he owed Mr. McDaniel any back interest. He said he did but he had the money to pay him. I also asked him if he owed any other notes and he said he did. I said I would take the first—"I think the first thing you ought to do is to go and settle up with Mr. McDaniel before you start any suit". I said "If you did", I said, "it will be necessary for Mr. McDaniel to have a lawyer and the chances are that he is going to bring that in and say that you are suing him about the well because you cannot meet the payment of those notes". I told him last spring, went down to talk to him about it. I think he had already employed Mr. Beirne at that time. I told him, "Mr. Hodges, I come with reference to that suit. I am going to tell you I am not going to do anything contrary to your lawyer, but I believe if this comes to a trial they are going to bring that in, they are going to say its because of the payments on this property. This suit was started on that account, because you have not the money to meet your obligations. You go to see Mr. Beirne and tell him just what I am going to testify to. Tell him and you and Mr. Beirne go and see Mr. McDaniel, pay him his interest and ask him for an extension on that note if you haven't got the money". I talked to him just like I am telling you now. I told him I didn't think he would stand to lose anything that way and I stated to him just what transpired with us, and I told him more than that, that if he owed interest and bonds they could foreclose on default, the only way he could be protected was that he might get out an injunction, and it would only be for a short while and would save considerably in stopping sale. What little law I know, I think you can get most any judge to sign an injunction. I am just quoting what little law I know. I said it will come up before

Judge Browning and whether he sustains the in-  
page 64 } junction or not; if he sustains it you may have a chance of a suit, but if he dismisses it the place

*B. E. Wheeler.*

will be sold under the deed of trust and you won't have anything. I told him that setting in his house.

Q. Have you been to the property, been on the 35-acre tract, since the sale was consummated?

A. Yes, I have been there on the property several times.

Q. Did you have any conversation there with Mr. Hodges?

A. Yes, I drove down there and was in the house and had the conversation I have just related, in his house.

Q. In his house?

A. Yes.

Q. Did you make any false representations as to that well?

A. Positively I did not. More than that, Mr. Hodges knew that well was dry then just as well as he knows it today.

Q. You say he went with you when you made the investigation of the well?

A. Yes.

Q. What investigation did you make?

A. We looked at it and couldn't see any water in the well. You can tell if there's water in a well if you can't see it by throwing rocks in it and it will splash. We threw rocks in it and couldn't hear anything, and we knew then there was no water there.

Q. You and Mr. Hodges?

A. Yes.

Q. A Mrs. Hensley testified this morning—I am going to ask the stenographer to read a part of Mrs. Hensley's testimony; (Testimony of Mrs. Hensley read aloud by the stenographer). Now that you have heard the stenographer read a conversation that Mrs. Hensley said took place between you and herself, what have you to say about the correctness of that statement?

A. In the first place there was no such conversation. I was just thinking whether there was anyone living there when Mr. Hodges went there? I don't think anyone was living there; I am sure the day we showed Mr. Hodges and his wife and daughter this property there was no one there but just my party.

Q. This was before that?

A. I never said anything about it. There was the well. Anybody that buys a piece of property from me knows what it is, I have never sold any property in my life without *people's* knowing it. Anything anybody wants to know about the matter. It is very important not to sell anything under a false impression. They looked at the well and at the spring. I have never showed to Mr. Hodges or anybody else—Mr.

*B. E. Wheeler.*

Hodges knew about the well, knew that it was dry. If I would show it to anybody else I would show it to them and they could go and examine it—

Q. Mr. Wheeler, you are not answering my question. You heard the testimony of Mrs. Hensley read aloud; she was speaking of another time when you brought prospective purchasers to this property, before Mr. Hodges was there. Did you have any conversation with this witness before that time that you took Mr. Hodges there?

A. I did not.

The Court:

Q. Did you ever tell her that if anybody came there to tell them the well was all right, it just needed cleaning out?

(This question wasn't answered because of the next one being immediately asked.)

Q. This lady has testified that you told her you were trying to sell the property and if anybody asked about the well not to say it was dry?

page 66 } A. I did not. I positively did not. I deny it. There's no use trying to make a deal like that. I positively deny every word of it.

Q. Do you recall before selling the property to Mr. Hodges, that you ever had any conversation with her at this place?

A. As far as that goes I wouldn't know her if I would see her. I know someone was living there. I may have discussed the property with reference to possession of things of that sort. I have no recollection of it. But as far as the discovery of the well being dry and advising her to say the well just needed cleaning out and the water was there, it is not true, I did not do it.

Q. You deny the statement?

A. I do. In the first place it is useless for an agent to try that. I have been in business for a long time and I know that.

Q. When you went with Mr. Hodges to visit this property with a view to selling it who was with you besides Mr. Hodges?

A. His wife and daughter and my son, and I don't think there was anyone living on the place at the time, I won't be sure, but I don't think there was anyone there but us.

Q. How long do you suppose you were on the premises on that occasion?

A. That's a little hard to say. I would say a couple of

*B. E. Wheeler.*

hours, maybe two or three. We went over the house and the smaller houses on the place, we looked at the well, and then we had to find the spring—

Q. You said you had drank water out of that well?

A. Yes.

Q. When was that?

page 67 { A. I don't know when, but I have known positively that water was in the well, plenty of water.

Q. How long ago?

Q. *How long ago?*

A. It may have been five or ten years ago. I know water was in it, but I couldn't say when it was, now.

Q. What was the occasion of your going there and drinking water out of that well?

A. I know some darkies owned it, I stopped there, before Mr. McDaniel bought it. I stopped there to see them about something, I don't know how long. If I am not mistaken there was water in the well when Mr. McDaniel bought it, I wouldn't be positive. I know I have seen water in the well and have drank out of it. I will say that we were both, Mr. Hodges and myself, convinced, before any contract was made, that the well was dry, from what I don't know, but that was what caused us to go and find the spring.

Q. What did Mr. Hodges say, if anything, to you about having the well fixed? Did you discuss that?

A. He said something about it, but I don't recollect what it was. He may have said something about what it would cost to fix it or something like that. I don't know.

Q. He took a chance?

A. Yes.

Q. Mr. Hodges took a chance?

A. Yes, and wouldn't have bought it if there hadn't been a spring there.

The Court:

Q. He testified that the spring is in the woods and off the land, on Mr. Faulkner's land?

A. I am going to show you what I showed him. (Witness makes drawing for Court and counsel.) The house stands up here. This is the spring I showed him. I don't  
page 68 { know whose land it is on. I'm not saying this drawing is correct, its the best I can do according to my recollection.



*B. E. Wheeler.*

Mr. Beirne: We offer this drawing in evidence as Exhibit 1 with Mr. McDaniel.

CROSS EXAMINATION.

By Mr. Beirne:

Q. Mr. Wheeler are you a real estate agent or a real estate broker?

A. I don't know which you would class it. I will leave that to you.

Q. Let me have your card from the real estate commission?

A. I haven't a card. I have a license from the real estate commission.

Q. As broker or agent?

A. I don't know whether there is any difference. We pay a license to do real estate business and I have my license.

The Court:

Q. What did it cost?

A. Ten dollars I take mine out in January, it lasts one year.

Q. Have you ever had it revoked for improper conduct?

A. No, I have not.

Q. Had anyone ever told you anything about this well before you went there with Mr. Hodges?

A. I don't know, Mr. Beirne, that's hard to say. People living there may have told me, I just can't recall all those things, all of them, what people told me. You put the questions and I might try to answer them.

Q. Did Mr. Frank Haney ever tell you anything about this well?

page 69 } A. I don't remember ever having any conversation with him about it. As far as I can recall, I don't remember it.

Q. Did you ever have any conversation with regard to this well with a woman named Mary Proctor?

A. Yes. She looked at the property and said there wasn't any water in the well.

Q. Didn't she tell you that she wouldn't have the place because the bottom has dropped out of the damned old well?

A. I don't know. I was there with Mr. Kirtley, a prospective customer, I remember her saying something, some conversation of that kind.

Q. Did you tell Mr. Hodges that some one had told you that the bottom had dropped out of that well?

*Harry Wheeler.*

A. I may have told him. I don't recollect, but I may have told him. If she had told me that I probably told him.

Q. When did you first report to Mr. McDaniel the complaint made by Mr. Hodges about this well?

A. I don't recollect. Don't know that I ever did.

Q. You can't say that you did?

A. No, or I wouldn't say I didn't, because I thought it was up to Mr. Hodges.

Q. He testified that you told him you would do something about it?

A. I never told him that. Mr. Beirne, I did not promise him to do anything about it, because I didn't have anything to do with it.

Q. Have you ever showed this property to anyone else?

A. Before that time?

Q. Yes.

A. I expect so, a good many times I reckon. Don't know who to. But I have showed it to other people, I don't know who now.

Q. You say you looked into the well that day?  
page 70 } A. Yes, I say so and I stick to it, and so did Mr. Hodges.

Q. You needn't be so worried—

A. I am not worried. I make that as positive as I can.

Q. Did you drop a rock into the well?

A. I did. I have dropped them into hundreds of wells.

Q. What did Mr. Hodges have to say that day after you had dropped the rock into the well?

A. He said, according to my statement made, that if there was no water in the well what would he do; he had a horse and had to have water. I mentioned that I had heard there was a spring at the foot of the hill and we looked for it and found it.

**HARRY WHEELER,**

another witness of lawful age, being duly sworn, testified as follows:

By Mr. Miller:

Q. Please state your full name?

A. Harry A. Wheeler.

Q. How old are you?

A. Twenty-six.

Q. Where do you live?

*Harry Wheeler.*

A. Charlottesville, Virginia.

Q. You are the son of Mr. B. E. Wheeler who has testified in this case?

A. Yes.

Q. Are you associated with him in business?

A. Yes, in a way.

Q. Located in Charlottesville?

A. Yes.

page 71 } Q. Were you with Mr. Hodges and your father when he sold that tract of land on which a well is located concerning which well there is a controversy here?

A. Yes.

Q. You were?

A. Yes.

Q. In what capacity?

A. At the time I was acting more as chauffeur during the transaction. Dad was doing the selling and I was doing the driving. First, we went into the property, I think we went into the house.

Q. Anyone living on it at that time?

A. No.

Q. Vacant?

A. Yes. After going through the house we went over to the well on the right-hand side of the house between it and Spotswood Trail. The well was in condition, didn't have a pump to it. Mr. Hodges and Dad went over and looked at it and Mr. Hodges asked my Dad was there water in the well and Dad told him he didn't think so. I remember they took several rocks and dropped them in the well and didn't find any water at that time. A few minutes later I was talking to Mrs. Hodges while he was talking to Mr. Hodges, he asked what he would do for water for his stock and for his own use and Dad told him he had heard there was a spring in the bottom, he wasn't certain. I don't think Dad had ever seen the spring in any way, shape or form. They went and hunted for the spring; the little girl and I stayed at the house and Mrs. Hodges stayed. They came back and had found the spring.

Q. Then what took place?

A. I think we probably may have stayed around a few minutes, Mr. Miller, I don't know exactly how long,  
page 72 } its been two or two and a half years ago. We come on back to town. I remember Dad sitting there and wrote a contract in the office at Charlottesville on this piece of property. I remember distinctly that Mr. Hodges didn't

*Harry Wheeler.*

put up any money at that time as a deposit, but said he would send the money, a check, in a few days, which he did. The check came for his deposit on the property and the deal was closed later.

Q. Did you hear Mr. Hodges express himself as to being satisfied with the purchase?

A. I never heard him say he wasn't satisfied.

Q. What, if anything, did you hear either Mr. Hodges or your father say, when they dropped the rocks in the well?

A. According to my recollection when they dropped the rocks in there wasn't any splash of water any way, shape or form to show water. Dad I recollect, I believe he stated, that he had drank water out of the well on the property, but there wasn't any water in the well at that time.

Q. And you are sure that your father and Mr. Hodges went to the well together?

A. Yes. Of them four of us together.

Q. Who dropped the rocks in, your father or Mr. Hodges?

A. I don't recollect. It seems as if my Dad, but I don't recall, it probably may have been two or three, I do know they were dropped in.

#### CROSS EXAMINATION.

By Mr. Beirne:

Q. Then, you say your father and Mr. Hodges went to look at that spring that your father said he had heard about?

A. That's right.

page 73 } Q. Where did you stay while they went?

A. Well they walked to the spring which was down in the bottom back of the house, Mrs. Hodges and I stayed around the house, looking around at the property, on the property somewhere.

Q. You, yourself, didn't go to the spring?

A. No.

Q. You didn't see it?

A. Not at that time.

Q. When did you see it?

A. I saw the spring, I think it was—anyway when Mr. Hodges brought his horse up there, if I am not mistaken I think we watered *watered* the horse at the spring.

Q. Did you go with Mr. Hodges to that spring?

A. I think we did.

Q. How long was that after Mr. Hodges bought the property?

*Harry Wheeler.*

A. I don't recall that, only recollection I have he brought a horse through town and didn't know exactly the way to the property and I got into the truck or whatever it was the horse was in and—don't know what you call it—and went with him.

Q. You went with him to this spring?

A. Yes, that's right.

Q. It was the same spring that your father and Mr. Hodges went to?

A. I couldn't say definitely. I wouldn't say. I didn't go along at the time Mr. Hodges and Dad went. We gave this horse a drink at a spring.

Q. You went in the same direction that your father and Mr. Hodges had gone?

A. I couldn't answer that.

Q. You stated I think that they went out back of the house to look for the spring?

page 74 } A. Yes.

Q. When you went to water the horse what direction did you go?

A. I can't just recall that, Mr. Beirne, I might say right and I might say wrong, be scared to answer. I remember giving the horse water at a spring but couldn't say where it was.

Q. Can you state which way you went?

A. I could not. Where it was I can't say. I know we went to it.

Q. Did you see a man sitting on the porch the day you were both there? The day you went to show Mr. Hodges the property the first time?

A. Seems as if it was a man there but I wouldn't know his name if you'd call it.

Q. But he was there?

A. Seems as if he was.

Q. He stayed around the front of the house, wasn't at the well?

A. No. Seems like he was sitting on the porch when we drove up.

Q. Did you find a rotten egg, or some kind of egg in the house or the yard?

A. I don't know.

Q. Did you find anything of that nature, that you picked up?

A. I don't recall it.

Q. And you are perfectly sure that you were at the well when all this took place?

*Harry Wheeler.*

A. I wasn't what you'd say, right at the well. I was somewhere near, fifteen feet or twelve feet.

Q. Isn't it a fact you were talking to this woman that was along at that time?

A. Yes, I was holding conversation with her on the whole trip.

page 75 } Q. You were paying more attention to her than to what went on at the well, weren't you?

A. I wouldn't say I was.

Q. Did you hear your father say that the well needed cleaning out?

A. I don't think there was a question of that, that showed right away.

Q. Did you hear your father make any suggestion about that well while you were there?

A. Yes, I heard him, Mr. Beirne, and I saw him, I did see him take one rock or it may have been two or three, and drop it in the well. I don't recall which one did it, but there wasn't any water in the well. I heard Mr. Hodges say at this time where was he going to get water for his stock and his own use and my Dad stated that he thought he had heard there was a spring on the property. At this time or probably a few minutes later they started to walk over the property looking for this spring. They come back later and said they found it.

Q. Wasn't the idea expressed there at that time that that spring could be used until that well could be cleaned out?

A. I couldn't answer that.

Q. You don't know?

A. I can't answer that.

Q. How do you explain the fact that you heard part of this conversation and not all of it?

A. I was standing there; some things you don't remember, Mr. Beirne, on any particular occasion and some things you do. Otherwise, you can't remember everything about Mr. Hodges coming there to buy a piece of property.

Q. You admit then that there is a possibility that certain things went on on that occasion of which you have no recollection?

page 76 } A. Yes, sir. That would happen on any occasion.

*B. E. Wheeler. Mrs. W. S. McDaniel.*

B. E. WHEELER, recalled.

Mr. Miller:

Q. Mr. Wheeler, I find an allegation in the bill in this case as follows "That the said agent whom you represented", meaning yourself, "voluntarily represented that there was a good well of water at the house before taking complainant on said property". Was that true?

A. No, sir.

MRS. W. S. McDANIEL,

another witness of lawful age, being duly sworn, testified as follows:

By Mr. Miller:

Q. You are Mrs. W. S. McDaniel, are you not? The wife of defendant in this case?

A. Yes.

Q. And you are the wife of W. S. McDaniel, the defendant in this case?

A. Yes.

Q. Did you at any time according to your recollection visit the property on which the well is located that forms the subject of this controversy?

A. Yes.

Q. When was that?

A. The latter part of April.

Q. What year?

A. 1938.

Q. Who went there with you?

A. Mr. McDaniel.

Q. Who did you find there?

page 77 } A. Mr. Hodges, his wife and little girl.

Q. What did you do while you were there?

A. I was in the kitchen, Mrs. Hodges was in there ironing.

Q. What did Mr. McDaniel do?

A. He and Mr. Hodges walked around and looked over the place.

Q. Was Mrs. Hodges satisfied with the place?

A. She said she liked it, Mrs. Hodges said she was very much pleased with the place, liked it very much.

Q. Did you hear any conversation about the time you were leaving between Mr. Hodges and Mr. McDaniel?

*Mr. McDaniel.*

A. Yes, sir.

Q. What was it?

A. He went with us to the car, I told Mr. Hodges I was glad to have met him and his wife and was glad they liked. He said "We like it very much and as to the payments I think I can meet them all right."

Q. Is there anything else you can testify to in regard to this case?

A. I don't think so.

MR. McDANIEL, recalled.

By Mr. Miller:

Q. Mr. McDaniel, you are the defendant in this case are you not?

A. Yes.

Q. I want you to tell the Court—you have already done it in a way, but your statement is somewhat associated with uncertainty; tell the Court how you came to be the owner of this property.

A. Well, my brother had a deed of trust for a thousand dollars, loaned some years ago. I came into possession of it. He was always right conservative and I think he wanted to make a good loan. He died some years after he made that loan and it was sold at auction and I bought it in. There was several years accrued interest on it when I bought it.

Q. How much was it?

A. A thousand dollars.

The Court:

Q. Do you own the bond?

A. After he died it came into my possession.

Q. And the property was sold and you bought it in to protect your debt?

A. Yes.

Q. What did you pay for it?

A. Between four and five hundred dollars at public auction under the deed of trust.

Q. How did it come around, come to pass, that you sold the property to Mr. Hodges?

A. I placed it in Mr. Wheeler's hands, the real estate agent.

Q. The Mr. Wheeler who testified here today?

A. Yes.



*Mr. McDaniel.*

Q. Were you on the ground at the time the property was sold?

A. No, not at the time it was sold.

Q. Did you see Mr. Hodges until after he bought the property?

A. I had never seen him.

Q. Until after he bought it?

A. Yes.

Q. At the time the property was bought by Mr. Hodges it was bought at the price of \$1,000.00, four hundred dollars cash and six notes of \$100.00 each with interest payable semi-annually, was it not?

page 79 } A. Yes.

Q. Who now owns those notes?

A. I own them.

Q. This property was sold the latter part of December, 1937, as I understand?

A. Yes.

Q. How long after the sale and Mr. Hodges had taken charge, before you visited the property?

A. I think somewhere close to nearly five months. It was sold in December, the 8th, 1937, and I visited it the latter part of April, 1938.

Q. Who was with you?

A. My wife.

Q. Where did she stay while you went over the property?

A. In the house with Mrs. Hodges.

Q. Who went over the property with you?

A. Mr. Hodges.

Q. Where did you go?

A. We walked over it, to the barn, the outbuildings, the land; I suppose we were on the place one or two hours.

Q. Did he show you where the lines were?

A. Yes.

Q. Did he carry you to that spring?

A. No.

Q. He did not carry you to the spring?

A. No.

Q. What did he say while you were going over the premises about being pleased or not pleased with the property?

A. He told me he was very much pleased with it and didn't think there would be any question about being able to meet the payments.

*Mr. McDaniel.*

Q. He knew you were the owner of the notes that page 80 } secured the debt, did he?

A. Yes.

Q. Was there anything said in your conversation that day about the well?

A. There was nothing said about the well.

Q. Did you pass by the well with him?

A. I did.

Q. And nothing was said about the well?

A. No.

Q. When was it, if at all, that he said to you that he was perfectly satisfied?

A. That was when we were leaving, getting in the car. He came to the car, he and his wife, and told us good-bye, and he said then the second time that he was pleased with the place, liked it in every way, and I imagined of course, that he did like it.

Q. When was the first notification that he was dissatisfied?

A. I think I have stated that before; I was in the hospital probably two months, during November and December—

Q. What hospital?

A. Emergency Hospital in Washington.

Q. What did he say, if you recall it, in that complaint?

A. I can't recall what he said. I know he intimated something about the well not being in good condition.

Q. I hand you a letter dated November 12, 1938, signed E. A. Hodges, addressed to W. S. McDaniel, Jeffersonston, Virginia, which I will ask the stenographer to mark Exhibit 2 with McDaniel's testimony. I ask you if that is the letter you received and is that the first letter you received from him?

A. I think so. I wrote Mr. Hodges that the in-page 81 } terest was due and that I was badly in need of some money, in the hospital and needed the money.

Q. Is that the letter? You have not answered the question.

A. I think that is the letter.

Q. That is the letter?

A. Yes.—

Mr. Miller: The letter is introduced in evidence, as Exhibit 2 with McDaniel's testimony.

—I would like to say that that was a reply to the request I made to Mr. Hodges for the interest. I believe it to be in

*Mr. McDaniel.*

reply to mine. I received that letter after I had made my written request.

Q. Did you see him anywhere after the writing of that letter?

A. Not before the latter part of April, 1938.

Q. That letter was written on November 12, 1938, was it not?

A. Yes. I was in the hospital in 1938 and I think that is the letter I received while I was in the hospital.

Q. Did you see Mr. Hodges at any time after that?

A. Not until April, 1939.

Q. Then what took place?

A. I visited the place.

Q. Last April?

A. Yes, last April.

Q. Of this year?

A. Yes.

Q. I am asking you if you saw Mr. Hodges at all after November 12, 1938?

A. I saw him in April, 1938.

Q. After this letter which was written in the latter part of 1938; did you see him anywhere? Have you seen page 82 } him this year?

A. Yes, I have seen him since then.

Q. Where?

A. I went to the property and he was not there, that was probably two months ago. I went to a colored man's house, a neighbor, right close by—

Q. That was this year?

A. Yes, this year.

Q. Were you there at this place at any other time this year?

A. Probably a month ago.

Q. Who was with you?

A. You were.

Q. Who? Who do you mean—?

A. Burnett Miller.

Q. We went by there together?

A. Yes.

Q. After being here in Orange?

A. Yes.

Q. But you have never seen him since then?

A. No.

Q. You have said that this letter of November, 1938, was written by you and you have seen him twice since then?

*James Stringfellow.*

A. Yes. I didn't see him the day in March when I went there.

Q. You didn't reserve a copy of the letter you wrote him from the hospital?

A. No.

Q. Have not a copy of that letter?

A. No.

Q. Did you ever, yourself, make any investigation or anything of the sort, of that well?

A. I never did. Some years ago I know they did use water from that well.

page 83 } Q. Did you make any investigation on the day you went by there with me?

A. Yes, we did.

Q. What did we do?

A. We tried to see the condition, and evidently nothing whatever had been done to it since the property was sold. Apparently no effort had been made to make any improvement in the condition. It looked just the same as when I had last seen it.

Q. Have you called on Mr. Hodges very recently for payment of the interest or the note?

A. No, I have not.

Defendant rests.

## PLAINTIFF'S TESTIMONY, continued.

## JAMES STRINGFELLOW,

another witness of lawful age, being duly sworn, testified as follows:

By Mr. Beirne:

Q. Do you know Mr. B. E. Wheeler of Charlottesville, Virginia?

A. Yes.

Q. Do you know his reputation for truth and veracity? How he is regarded in the community where he lives?

A. Yes, I do.

Q. Is it good or bad?

A. Bad.

Q. Based on that, would you believe him on oath?

A. That is hard to say, I don't know whether I would or not.

*James Stringfellow.*

CROSS EXAMINATION.

By Mr. Miller:

page 84 } Q. With whom did you ever discuss Mr. Wheeler's reputation for truth and honesty?

A. I can't give you any individual names. It is entirely a case of hearsay.

Q. Where do you live?

A. Orange, Virginia.

Q. How long have you known Mr. Wheeler?

A. I should say for the past six years, possibly longer.

Q. Did you ever live in Charlottesville?

A. Yes, eight years.

Q. How long since you moved away?

A. Two years ago.

Q. And you can't remember a single man you heard say Mr. Wheeler's reputation for truth and honesty was bad?

A. No.

Q. Did you ever hear different persons discuss it?

A. Yes, from one word to another.

Q. But you don't know who you heard discuss it?

A. I couldn't say.

Q. Do you mean to say you would tell the Judge that Mr. B. E. Wheeler's reputation for truth and honesty is bad and then that you couldn't mention a single man's name that you ever heard mention it?

A. Yes.

Q. Do you remember ever saying anything to anyone about it?

A. How do you mean? As far as my personal knowledge is concerned? No, it's what I have heard. I can't say he is dishonest or untruthful, I have had no personal dealings with him.

Q. Did you ever hear anyone who had had personal dealings with him say anything about his general reputation, that made an impression on you, whose name you can remember, speaking generally of him and saying that his reputation was bad?

A. I still can't give you any names, but I have heard his general reputation from hearsay.

Q. Do you know where you got this impression?

A. In Charlottesville.

Q. But don't remember any names?

A. No, I can't remember any names. Don't know where I got it.

## NETTIE LAMB,

another witness of lawful age, being duly sworn, testified as follows:

By Mr. Beirne:

Q. Please state your name?

A. Nettie Lamb.

Q. Where do you live?

A. I live three miles north of Gordonsville.

Q. Did you formerly live in Albemarle County?

A. Yes.

Q. Do you know Mr. B. E. Wheeler?

A. Yes.

Q. Do you know his general reputation for truth and veracity and honest dealing in Albemarle County?

A. Honest dealing?

Q. Do you know his general reputation for truth and veracity?

A. No. Do you mean has he a good reputation?

Q. Yes.

A. No, he has not.

Q. Based on that would you believe him on oath?

A. No, I would not.

page 86 }

## CROSS EXAMINATION.

By Mr. Miller:

Q. Can you remember any one individual you have heard say his reputation was bad?

A. Yes, I can.

Q. Who?

A. You mean in Albemarle County?

Q. Yes, who?

A. Mr. Durrett, he has had trouble with Mr. Wheeler, and also trouble between Mr. Wheeler and Mr. Lamb, Mr. Wheeler beat Mr. Lamb out of two hundred dollars.

Q. And Mr. Lamb and he were not friendly?

A. I think not. I guess they are not.

Q. How are you related to Mr. Lamb?

A. My husband.

Q. Did you ever hear anyone else say anything of that sort about him?

A. I am not acquainted with people in Albemarle County and—

Q. Can you name any others?

A. I don't say I can.

*L. D. Douglass.*

Q. Only the two?

A. Yes.

Q. Only two?

A. I can say Mr. Durrett said others, Mr. Durrett said—

Q. Not what he said. Do you *remember* any other people who—

A. I can't say any certain ones. I have heard people talking about it.

Q. What did they say?

A. They said he would never give a man a fair deal.

Q. Do you remember any others except Mr. Durrett and your husband saying that?  
page 87 } A. I can't call their names. I have heard different people talk.

Q. You don't know how people generally, in the community in which he lives, regard him?

A. No, I couldn't say I do. I only lived there twelve months, I didn't know people long enough.

Q. You couldn't call the names of any other people you have heard refer to Mr. Wheeler except those two you named?

A. No.

Q. What does your husband do?

A. We run a store.

Q. Where?

A. Half a mile from Piedmont Service Station on route 22.

Q. Do you know where Mr. Durrett lives? He didn't live in Charlottesville, did he?

A. No, I don't know.

Q. Your husband didn't live in Charlottesville?

A. In 1931 he did.

Q. Did he have any transaction with Mr. Wheeler while he lived there?

A. Yes.

L. D. DOUGLASS,

another witness of lawful age, being duly sworn, testified as follows:

By Mr. Beirne:

Q. Please state your name?

A. L. D. Douglas.

Q. Do you know Mr. B. E. Wheeler?

A. Yes.

Q. Do you know his general reputation for truth and veracity in the community in which he lives?

*L. D. Douglass.*

page 88 } A. Yes.

Q. Is that reputation good or bad?

A. Bad.

Q. Based on that would you believe him on oath?

A. I don't think so.

CROSS EXAMINATION.

By Mr. Miller:

Q. Where do you live?

A. At Barboursville.

Q. Did you ever live in Charlottesville?

A. No.

Q. Did you ever hear Charlottesville people discuss the general reputation of Mr. Wheeler?

A. Yes.

Q. Who?

A. Two revenue men.

Q. Did they have trouble with him?

A. No, but they said he was tricky. Said you had to watch him in a deal.

Q. You only heard two people say that?

A. I have heard others.

Q. Are they Charlottesville people?

A. Yes, one of them lives there.

Q. And they said he was tricky and had to be watched. Do you remember which one of the revenue said he was tricky and which one said he had to be watched?

A. Yes.

Q. Which one said he was tricky?

A. Mr. Griever.

Q. What did he say?

page 89 } A. Just what I said.

Q. Did he say his reputation was bad?

A. He did.

Q. Where did he say it was bad, in what place?

A. I didn't ask him what place.

Q. Where—

A. Where he lived I guess.

Q. Did he say in Charlottesville it was bad?

A. I didn't ask him where.

Q. Who else can you recall who ever reflected directly on Mr. Wheeler except those two?

A. I don't know that I can recall. I have heard his general reputation discussed. I can't recall exactly who.



*L. D. Douglass.*

Q. You ought to know, when you testify that a man's reputation is bad, you ought to know who said it—

A. I didn't know I was coming here to testify.

Q. You knew you were coming on the witness stand?

A. Yes.

Q. Can you truthfully tell this Court that you know what Mr. Wheeler's general reputation is for truth and veracity in Charlottesville?

A. I can say what I have heard.

Q. And you can only name two people?

A. There was a third—

Q. Can you name a third?

A. Another revenue man.

Q. What did they have against him?

A. I don't know. They have heard I suppose, cases.

Q. What cases?

A. This case.

page 90 } Q. Were they in here hearing the case?

A. No. They were in the room all the time the case was going on.

Q. Were they subpoenaed here as witnesses?

A. No.

Q. They were not?

A. No.

Q. There is no question of what two revenue men have said, but the question for you to answer is, the question the Court wants to know is, do you know how people generally in the city of Charlottesville consider Mr. Wheeler as regards truth and veracity?

A. Only the ones I have heard talk.

Q. Were these three men?

A. I have heard it discussed in Barboursville.

Q. That is the community in which he lives?

A. No.

Q. But in Charlottesville, where he lives, can you say?

A. I don't know that I have heard it discussed in Charlottesville.

Q. And you cannot mention any except these two men this morning—

A. I don't know that I can mention their names. I didn't study it up.

Q. But you have heard it discussed at Barboursville by who?

A. I can't say who.

Q. But Barboursville is not Charlottesville?

*Sam. Johnson.*

A. It could be Charlottesville people in Barboursville though.

Q. Were they Charlottesville people?

A. I don't know.

Q. Do you know who they were?

A. No.

page 91 } Q. You said you heard it discussed at Barboursville. I am asking you if they were Charlottesville people talking?

A. I think so.

Q. Do you remember who any of these parties were from Charlottesville that you heard discussing Mr. B. E. Wheeler's reputation at Barboursville?

A. I don't remember their names. I have not memorized them.

Q. You do remember its being there at Barboursville that you heard it, but you cannot remember a single man's name. Don't you think that is remarkable?

A. No.

Q. You said you remembered Charlottesville people discussing Mr. Wheeler's reputation at Barboursville, but can't recollect who any of these people were?

A. I have answered that question—

Mr. Beirne: Objected to, as witness has answered the question several times.

Q. I am asking you—well, all right, that'll do.

SAM JOHNSON,

another witness of lawful age, being duly sworn, testified as follows:

By Mr. Beirne:

Q. What is your name?

A. Sam Johnson.

Q. Sam, do you know where Mr. Hodges lives?

A. Yes, sir.

Q. Do you know the well on that place?

A. Yes, sir.

Q. Did you dig it?

page 92 } A. Yes, sir, I dug it.

Q. How deep did you dig it?

*Sam Johnson.*

A. Fifty feet.

Q. Since Mr. Hodges bought that place has he been to see you to ask you to go into the well?

A. Yes, sir, he asked me to.

Q. When was that?

A. First of June.

Q. What year was that?

A. What year? This year, a year ago. I told him I wouldn't go in there if he give me a hundred dollars.

Q. Why did you tell him that?

A. Because the wall had caved in. Quicksand.

Q. Would you be willing to dig another well in there?

A. No, sir.

Q. In times gone by have you been a well digger?

A. Yes, sir.

#### CROSS EXAMINATION.

By Mr. Miller:

Q. How many wells did you ever dig?

A. I don't know exactly, I have dug so many. Dug one for Mr. *Rock* (?) and a lot more.

Q. You were afraid to go down in that one?

A. Yes, sir. Quicksand. All the place is quicksand. Never come back if I go in there.

Q. Do you think it would be much loss to the country if you didn't come back?

A. I don't know about that, sir.

Q. Just about how much do you get for digging  
page 93 } a well?

The Court:

Q. This well at Mr. McDaniel's place. How much did it cost to dig that?

A. He allowed me twenty dollars for digging it. I was staying on the place, took it out of the rent.

Q. You got twenty dollars for digging it?

A. Yes, sir.

Q. Forty cents a foot?

A. I don't know, sir, about that.

FRANK HANEY, recalled.

By Mr. Beirne:

Q. Mr. Haney, Mr. Wheeler has offered with his testimony, a rough drawing of Mr. Hodges' property on which he has attempted to locate a spring on this property. I want you to state to the Court first, whether or not you made a thorough search of this property for a spring?

A. I certainly did.

Q. What was the reason for your search?

A. Because I didn't have any water, the well was dry.

Q. Is there any spring on the property?

A. If it is any spring on it I didn't find it.

Q. Is there any spring in the hollow that runs immediately next to the house on the right-hand side away from the road?

A. No, sir.

Q. Have you been up and down that hollow?

A. I have been up and down it a number of times, enough times to know it is not any spring there.

Q. I hand you now Exhibit 1, McDaniel. This is supposed to point out what is indicated as a spring, here.  
page 94 } Is there any spring of any kind in that hollow?

A. No, sir, not on that property.

The Court:

Q. There isn't any spring there—do you know where the lines are on this property?

A. Yes, sir.

Q. How far is this spring from the line?

A. I would say a hundred and fifty yards from the line.

Q. Is not this spring in a different direction from the spring that is indicated on this drawing?

A. It is not exactly—this spring—you go out here and turn down another place, this comes down from the house—(Witness is indicating to the Court, points on the drawing Exhibit 1, McDaniel).

Q. Then the spring you refer to that has been used, is directly to the left of the house?

A. To the right of the house. You follow this road and turn down through the woods.

Q. It is not in the direction of the rear of the house?

A. No, sir.

HELEN DYE,  
another witness of lawful age, being duly sworn, testified as follows:

By Mr. Beirne:

Q. Please state your name?

A. Helen Dye.

Q. Did you go with Mr. Hodges to the Hodges property, with Mr. Wheeler and Harry Wheeler on the day that Mr. Hodges investigated this property?

A. Yes, I did.

Q. Did you hear any description that Mr. page 95 } Wheeler made of this property, in Charlottesville, before you went there?

A. Yes. He said that he had a property about a mile from Barboursville with a good well of water near the house.

Q. Did he state the acreage?

A. Thirty-five.

Q. When you got to this property did you go in the house and examine it?

A. Yes, went in and looked around and came back out and went around the house.

Q. Let me ask you there, where was Mr. Harry Wheeler?

A. At the front part of the house in the yard.

Q. Did he ever come around to the house where you were, at the well?

A. No, he did not. That is the truth, he did not.

Q. Did Mr. Hodges throw a small rock down in that well?

A. Yes, threw a rock down in the well and said there isn't any water in this well. He says—

Q. Who?

A. Mr. Wheeler, he says, "It is a good well of water here. All it needs is cleaning out. I have been here and drank out of it".

Q. Did Mr. Wheeler say anything further, about a spring?

A. He said "Come on and I will take you down over the hill and show you a spring that you can use until you get your well cleaned out".

Q. Did he proceed on down the hill from the house?

A. Yes, straight on.

Q. How long were they gone?

A. A few minutes.

Q. You don't know how long?

A. I couldn't say.

Q. How soon after this did you leave?  
page 96 } A. Just a few minutes.

*Helen Dye.*

CROSS EXAMINATION.

By Mr. Miller:

Q. How long did you live on the property in controversy?

A. I lived there until the 10th of March, I left there and came back around the 18th of June.

Q. Are you married or single?

A. I am single.

Q. Were you married or single while living there?

A. I was single.

Q. You had been separated from your husband?

A. Yes.

Q. Do you remember who came there with Mr. Wheeler the day you came?

A. Mr. Hodges and his son.

Q. Was Mr. Hodges' wife along—are you the one referred to as Mr. Hodges' wife?

A. Yes. I went there as housekeeper.

Q. Were you married to him?

A. No, sir.

Q. How long did you live there with him?

A. I don't know that I need to tell that. What I came for, I went there as housekeeper and I have been keeping house for him for several years. I have my own room, and I keep house like anybody should.

Q. Have you and Mr. Hodges ever been married?

A. No, we have never been married.

Q. How long was Mr. Hodges there when you came the first time, before he bought the property?

A. He wasn't there no time.

page 97 } Q. How long was Mr. Wheeler there at the time Mr. Hodges came there? How long were they there together? When Mr. Hodges bought this property? Where were you?

A. I was there. They closed the deal right away.

Q. Before they left there?

A. After they went back to the office at Charlottesville.

Q. You don't know that, but only heard about it, heard them say so?

A. I was there.

Q. You went back to Charlottesville?

A. We went back to Charlottesville after we looked at this place and made arrangements to take the place.

Q. What is your name?

A. Helen Dye.

*Mary Proctor.*

Q. You signed your name to that deed of trust as Helen Hodges, didn't you?

A. No, I don't never sign my name that way. They took me for that, took me to be that, I have never told my name. My name is Helen Dye.

The Court:

Q. You did sign as Helen Hodges in the deed of trust, didn't you?

A. I did sign it that way, but my name is Helen Dye. That is not my name to that.

Q. Did you sign that?

A. Yes, I signed it.

Q. Signed it as Helen Hodges and you were not Helen Hodges?

A. It is not my name. My name is Helen Dye.

Q. What made you sign it Helen Hodges?

A. They wanted me to sign it that way at that time. My name is Helen Dye.

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MARY PROCTOR,  
another witness of lawful age, being duly sworn,  
testified as follows:

By Mr. Beirne:

Q. Please state your name?

A. *May* Proctor.

Q. Where do you live?

A. Barboursville, Virginia.

Q. Do you live near Mr. E. A. Hodges?

A. Yes, sir.

Q. Are you familiar with the property on which he lives?

A. Not so much. I have been on it.

Q. Had that property ever been showed to you by Mr. B. E. Wheeler of Charlottesville?

A. Yes, twice.

Q. Was it showed to you with a view of your purchasing it?

A. Yes.

Q. With the idea of your buying it?

A. Yes.

*E. A. Hodges.*

Q. Did he make any statement to you with regard to the condition of that well when he showed the property to you?

A. No, he did not.

Q. Why didn't you buy it?

A. I didn't want it because I had found out the well didn't have any water in it.

Q. Did you tell that to Mr. Wheeler?

A. Yes.

Q. What were your words to him?

A. I told him that I wouldn't have the damned place because the bottom has fallen out of the well.

page 99 }

E. A. HODGES,  
recalled by Mr. Miller.

By Mr. Miller:

Q. Have you a living wife, Mr. Hodges?

A. Yes.

Q. Helen Hodges, who signed that paper, is not your wife?

A. No.

Q. Who is your wife?

A. Ella Hodges.

Q. Where does she live?

A. Michigan.

#### CROSS EXAMINATION.

By Mr. Beirne:

A. Has this woman, Helen Dye, acted as your housekeeper for you for some time?

A. A couple of years more or less.

Plaintiff rests.

Teste: this 23rd day of December, 1939.

ALEXANDER T. BROWNING, Judge.



page 100 } AGREEMENT BETWEEN COUNSEL:

AGREED between Counsel for Complainant, E. A. Hodges, and Counsel for Defendant, W. S. McDaniel, that the original certificate of C. E. Moran, Clerk of the Corporation Court of the City of Charlottesville, Virginia, dated June 29, 1939, with the six sheets attached thereto, all of which are attested on the margins thereof: "Teste: this 23rd day of December, 1939, A. T. B., Judge", can be read before the Supreme Court of Appeals in event an appeal is granted in this cause, and to have the same force and effect as though actually copied and certified with the other evidence in the cause.

And it is further agreed between counsel for both plaintiff and defendant that the blue and white envelopes with drawings thereon attested by the judge of the trial court as follows: "This is the envelope referred to by counsel in their agreement in writing as "Exhibit #1" with W. S. McDaniel's testimony. Teste: this 23rd day of December, 1939. A. T. B. Judge"; and can be used before the Supreme Court of Appeals of Virginia in event an appeal is granted, with the same force and effect as though copied.

Witness the following signatures this 23rd day of December, 1939.

A. P. BEIRNE,  
Attorney for Complainant.  
BURNETT MILLER, SR.,  
Attorney for Defendant.

page 101 } EXHIBIT HODGES #1:

"Jeffersonton Va. Nov. 21/38

Dear Mr. Hodges

I have been in the hospital for five weeks & will have to be for sometime yet. I would appreciate if you would please send me money as I am badly in need for some— Hoping you are all well.

Yours truly

W. S. McDANIEL."

This is Exhibit Hodges #1 referred to in the record.  
 Teste: this 23rd day of Dec. 1939. A. T. B. Judge.

### EXHIBIT HODGES #2:

“2-27-34-

Mr. A. Plunkett Beirne—  
 Orange Va.

Dear Sir—

I am greatly disappointed in not finding you in your office this afternoon. I am feeling very unwell and it has been a great hardship. I wanted to talk to you and explain my side of the Hodges matter a little more fully than I have done before.

Mr. Beirne—I have seen Mr. Gilmer and Roy Wheeler today. Also have seen and talked to Mr. Hodges.

I have certainly hesitated having Mr. Wheeler who is trustee in the matter to take action and advertise the property for sale. It has always been my intention and is now to treat Mr. Hodges leniently in the matter of paying for this property. But he has not turned his hand toward trying to do anything to help me out. I believe that I wrote you some time ago about being at Mr. Hodges home about three months after he bought the property and that we talked together for quite a while and that he spoke of being highly satisfied with his purchase. Not one word was said about the well. I think I also stated to you that it would have been absolutely impossible for anyone but an entirely blind person not to have known the well was in bad condition. Having caved in somewhat several years before he bought it. I do not see how any misrepresentations could have been made and gotten away with.

I sold Mr. Hodges this property at considerable loss. And as stated before I wanted to treat him fair. I surely do not want it to cost any one more money. But I am not willing to meet his demands in the matter. He told me this afternoon that he would see you tomorrow. I hope he  
 page 102 } will be reasonable. Pay you for your services to  
 this time and call the matter off. I am as stated  
 above, not willing to make any allowance whatever.

After you talk to him I wish you would please notify me so I would know how to act. And if any further information wanted from me, I will be glad to communicate with you.

If I could have talked to you personally, I could have made matters much plainer, and given information that would I think convince you of the reasonableness of my stand. Again requesting that you please let me hear from you promptly.

I am—

Very truly yours,

W. S. McDANIEL.”

This is Exhibit Hodges #2 referred to in the record.  
Teste: this 23rd day of Dec., 1939. A. T. B. Judge.

EXHIBIT McDANIEL #2:

“Barboursville, Va.  
Nov. 12 1938

Mr. W. S. McDaniel

I was over to see Mr. Wheeler today about the well here it Has bin dry ever since I came here & cleaning it out wont do any good he said he was going to rite to you about it I thought I would rite a line sory this Happened you come down I want to talk to you. Hope to see you soon

Yours Resfully

E. A. HODGES”

This is Exhibit McDaniel #2 referred to in the record.

Teste: this 23rd day of Dec., 1939. A. T. B., Judge.

page 103 } Certificate of Judge that A. Plunket Beirne,  
Attorney of Record for E. A. Hodges, was present when Certificates were signed.

E. A. Hodges

v.

W. S. McDaniel.

I hereby certify that at the time and place certificates were signed by me, at my office in the Circuit Court House Build-

ing at Orange, Virginia, A. Plunket Beirne, Attorney of Record for E. A. Hodges, was present, and notice was waived.

ALEXANDER T. BROWNING,  
Judge Circuit Court of Orange County, Va.

December 23rd, 1939.

page 103¼ } Virginia:

In the Circuit Court of Orange County.

E. A. Hodges

v.

W. S. McDaniel.

#### AGREEMENT.

On June 22, 1939, the evidence in the above case was offered *ore tenus* before the said court. During the trial of the case Mr. B. E. Wheeler of Charlottesville, Virginia, was put on the witness stand by the defendant, W. S. McDaniel. Later the complainant, E. A. Hodges, put three witnesses on the stand, namely, James Stringfellow, Nettie Lamb, and L. D. Douglas, and by these witnesses offered evidence impeaching the witness, B. E. Wheeler.

At the conclusion of the hearing of the evidence on that day Mr. Burnett Miller, Counsel for W. S. McDaniel, made a motion to the court, asking to have the case continued to another date in order to give him an opportunity to get other evidence to answer and offset the testimony which had been heard on that day in connection with the impeachment of B. E. Wheeler, his client's witness. The ground on which this motion was based was surprise. The court heard the motion and over the objection of counsel for E. A. Hodges granted it, and continued the case for the sole purpose of hearing further evidence from either or both sides in connection with the credibility of the witness, B. E. Wheeler.

Later when this case came on for hearing the only evidence that was offered by either side in connection with the credibility of the witness, Mr. B. E. Wheeler, was the offering in evidence of a certified copy of the record  
page 103½ } of a case from the Clerk's Office of the Corporation Court of the City of Charlottesville,

this certified copy of the said record was offered by Counsel for E. A. Hodges and no objection was made by the defendant, W. S. McDaniel. Counsel for both sides have already agreed as to said certified copy of the record of the case from the Corporation Court of the City of Charlottesville, Virginia. (See page 100 of this record.)

The said motion for continuance, mentioned above, having been made orally and not filed in writing, and the order granting said continuance not having been reduced to writing, do not appear in the record of this case.

Therefore, desiring that said record may be made complete, Counsel for both sides have agreed that the above statement correctly sets forth the facts in connection with said motion for a continuance and the subsequent incidents of the trial of this case as to the taking of evidence, and they do hereby ask that this statement of facts be made a part of the record of this case and treated as though they were set forth in the original record.

Given under our hands this 4th day of January, 1940.

BURNETT MILLER, SR.,  
Counsel for W. S. McDaniel.  
A. PLUNKET BEIRNE,  
Counsel for E. A. Hodges.

page 104 } Virginia:

In the Clerk's Office of the Circuit Court of Orange County.

I, J. E. Wiltshire, Clerk of the Circuit Court of Orange County, Virginia, do hereby certify that the foregoing is a true and correct transcript of the record in the case of E. A. Hodges v. W. S. McDaniel, pending in the Circuit Court of Orange County, and that the attorney of record for the appellee had due notice as required by Section 6339 of the Code of Virginia of the time and place of applying for copy of the record, and of the intention of counsel for appellant to apply for such transcript before the same was copied, made and delivered.

And I further certify that the original papers referred to in the agreement between counsel and certified by the Judge of the trial court are the correct exhibits introduced in the evidence in the trial of this case.

And I further certify that notice of the time and place of presenting certificates of exception to the judge of this court

was duly given in writing to counsel for appellee, who was plaintiff in the trial court, and waived notice.

This record was delivered to me on 23rd day of December, 1939.

Given under my hand this 23rd day of December, 1939.

J. EDW. WILTSHIRE,  
Clerk of the Circuit Court of Orange  
County, Virginia.

A Copy—Teste:

M. B. WATTS, C. C.

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