

233 Va 254

CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
OCT 24 1984
RECEIVED
RICHMOND, VIRGINIA

IN THE
Supreme Court of Virginia
AT RICHMOND

WASHINGTON & LEE
LAW LIBRARY

RECORD NO. 840164

SEP 17 1987

FIRST NATIONAL EXCHANGE BANK OF VIRGINIA,
Appellant,

v.

PEGGY M. JOHNSON,
ALSO KNOWN AS PEGGY MITCHELL,
Appellee.

JOINT APPENDIX

Charles E. Schelin
114 Mill Avenue
P.O. Box 156
Lebanon, VA 24266

David J. Scyphers
189 Valley Street
Abingdon, VA 24210

Counsel for Appellant

Counsel for Appellee

TABLE OF CONTENTS

	<u>Page</u>
1. MOTION FOR JUDGMENT, WITH ATTACHMENTS FILED NOVEMBER 4, 1982-----	1
2. ANSWER, FILED JANUARY 4, 1983-----	8
3. REQUEST FOR ADMISSION, FILED FEBRUARY 7, 1983-----	11
4. MOTION FOR SUMMARY JUDGMENT, FILED MARCH 24, 1983-----	13
5. NOTICE, FILED MARCH 28, 1983-----	15
6. MOTION FOR SUMMARY JUDGMENT, FILED MARCH 24, 1983-----	16
7. LETTER AND ATTACHMENTS TO JUDGE PHILLIPS FROM CHARLES E. SCHELIN, MAY 18, 1983-----	17
8. LETTER FROM JUDGE PHILLIPS TO COUNSEL OF RECORD, JUNE 7, 1983-----	25
9. LETTER TO JUDGE PHILLIPS FROM CHARLES E. SCHELIN, JUNE 7, 1983-----	26
10. LETTER TO JUDGE PHILLIPS FROM DAVID SCYPHERS, JUNE 7, 1983-----	29
11. ORDER, FILED JUNE 30, 1983-----	32
12. PLAINTIFFS' EXHIBIT NO. 8, FILED JULY 1, 1983-----	34
13. NOTICE, FILED JULY 19, 1983-----	37
14. MOTION FOR JOINDER, JULY 19, 1983-----	39
15. ORDER, FILED AUGUST 24, 1983-----	45
16. LETTER TO JUDGE PHILLIPS FROM DAVID SCYPHERS, SEPTEMBER 7, 1983-----	46
17. TRANSCRIPT OF THE HEARING BEFORE THE HONORABLE GLYN R. PHILLIPS ON JULY 1, 1983-----	48

18.	LETTER TO JUDGE PHILLIPS FROM CHARLES E. SCHELIN, SEPTEMBER 20, 1983-----	109
19.	OPINION, FILED OCTOBER 6, 1983-----	112
20.	FINAL ORDER, FILED NOVEMBER 14, 1983-----	121
21.	NOTICE OF APPEAL, FILED NOVEMBER 22, 1983-----	123
22.	ASSIGNMENT OF ERROR-----	125

VIRGINIA:

IN THE CIRCUIT COURT OF RUSSELL COUNTY

FIRST NATIONAL EXCHANGE BANK
OF VIRGINIA,

Plaintiff,

vs.

AT LAW DOCKET NO. 5450

EARL D. JOHNSON,
Green Valley Estates
Lebanon, Virginia 24266

and

PEGGY M. JOHNSON,
Green Valley Estates
Lebanon, Virginia 24266

Defendants.

MOTION FOR JUDGMENT

Comes now the Plaintiff, by counsel, who respectfully represents unto this Court as follows:

1. Your Plaintiff is a corporation organized and operating under the Laws of the Commonwealth of Virginia and has its branch banking office situate in Lebanon, Russell County, Virginia.

2. On January 25, 1980, Defendants executed a Demand Note in the principal amount of FORTY THOUSAND (\$40,000.00) DOLLARS payable to your Plaintiff. A copy of said note is attached as Exhibit "A".

3. That Defendants executed a Deed of Trust to secure the aforesaid Demand Note, said Deed of Trust being recorded in the Clerk's Office of the Circuit Court of Russell County, Virginia, in Deed Book 294, at page 397. A foreclosure sale was made pursuant to the aforesaid Deed of Trust on July 10, 1982. A copy of the Trustee's accounting of that sale is attached as Exhibit "B".

4. After all expenses of the aforesaid sale had been paid, a deficiency remained which the Defendants have refused to pay.

5. The aforesaid Note provided that the noteholder shall be entitled to collect all reasonable costs and expenses of suit, including, but not limited to, reasonable attorney's fees.

6. An Affidavit executed by Plaintiff and in support of this claim is attached hereto pursuant to Section 8.1-28 of the 1950 Code of Virginia, as amended.

WHEREFORE, your Plaintiff prays for judgment against the Defendants jointly and severally, in the amount of THIRTY TWO THOUSAND SEVEN HUNDRED EIGHTY FOUR (\$32,784.56) DOLLARS & 56/100, plus 14% interest on that amount until judgment is entered plus 10% interest on the judgment amount until paid, plus its costs incurred herein.

FIRST NATIONAL EXCHANGE BANK
OF VIRGINIA

By Counsel

BROWNING, MOREFIELD, SCHELIN,
and ARRINGTON, P. C.
Two Mill Street - P. O. Box 156
Lebanon, Virginia 24266

By Charles E. Schelin
CHARLES E. SCHELIN
Counsel for Plaintiff

AFFIDAVIT

STATE OF VIRGINIA,

COUNTY OF RUSSELL, To-Wit:

The undersigned, after being first duly sworn, states that:

1. He is a Vice-President of the FIRST NATIONAL EXCHANGE BANK OF VIRGINIA;

2. Earl D. Johnson and Peggy M. Johnson are justly indebted to said FIRST NATIONAL EXCHANGE BANK OF VIRGINIA in the amount of THIRTY TWO THOUSAND SEVEN HUNDRED EIGHTY FOUR (\$32,784.56) DOLLARS & 56/100

as a result of the Demand Note dated January 25, 1980, said amount being determined as follows:

- a. Principal Amount Due as of November 1, 1982 - \$20,253.42
- b. Interest Due as of November 1, 1982 - 8,254.89
- c. Reasonable Attorney Fees of 15% of the above
amount per terms of the note dated
January 25, 1980 - 4,276.25
- d. Total Due as of November 1, 1982 - \$32,784.56

- 3. Said sum is true and correct;
- 4. Said sum is due and owing as of November 1, 1982;
- 5. There are no offers or counterclaims against the same;
- 6. The Affiant is duly authorized to make this oath being familiar with the account of said FIRST NATIONAL EXCHANGE BANK OF VIRGINIA.

FIRST NATIONAL EXCHANGE BANK
OF VIRGINIA

By Thomas S. Bundy
THOMAS S. BUNDY

STATE OF VIRGINIA,

COUNTY OF RUSSELL, To-Wit:

Subscribed, taken and sworn to before me by THOMAS S. BUNDY, this
4 day of November, 1982.

Jean K. Horton
Notary Public Whose Commission
Expires November 24, 1984.

Filed in the Clerk's Office the 4 day of Nov, 1982
Writ Tax \$ 5.00 Teste:
Fee 25.00
Law Lib. 1.00
Total Paid \$ 31.00 Peggy Blewett Clerk
D. C.

NOTE

US \$ 40,000.00

Lebanon Virginia
City

January 25 19 80

FOR VALUE RECEIVED, the undersigned ("Borrower") promise(s) to pay FIRST NATIONAL
EXCHANGE BANK OF VIRGINIA - LEBANON, VIRGINIA or order, the principal sum of
FORTY THOUSAND AND NO/100-----Dollars, with
interest on the unpaid principal balance from the date of this Note, until paid, at the rate of
-----14-----percent per annum. Principal and interest shall be payable at the LEBANON
OFFICE - FIRST NATIONAL EXCHANGE BANK OF VIRGINIA or such other place as the Note holder may
designate, in consecutive monthly installments of DEMAND
Dollars (US \$), on the
day of each month beginning 19 Such monthly installments
shall continue until the entire indebtedness evidenced by this Note is fully paid, except that any remaining indebted-
ness, if not sooner paid, shall be due and payable on DEMAND

If any monthly installment under this Note is not paid when due and remains unpaid after a date specified by a
notice to Borrower, the entire principal amount outstanding and accrued interest thereon shall at once become due
and payable at the option of the Note holder. The date specified shall not be less than thirty days from the date such
notice is mailed. The Note holder may exercise this option to accelerate during any default by Borrower regardless of
any prior forbearance. If suit is brought to collect this Note, the Note holder shall be entitled to collect all reasonable
costs and expenses of suit, including, but not limited to, reasonable attorney's fees.

Borrower shall pay to the Note holder a late charge of percent of any monthly
installment not received by the Note holder within days after the installment is due.

Borrower may prepay the principal amount outstanding in whole or in part. The Note holder may require that
any partial prepayments (i) be made on the date monthly installments are due and (ii) be in the amount of that
part of one or more monthly installments which would be applicable to principal. Any partial prepayment shall be
applied against the principal amount outstanding and shall not postpone the due date of any subsequent monthly
installments or change the amount of such installments, unless the Note holder shall otherwise agree in writing.

Presentment, notice of dishonor, and protest are hereby waived by all makers, sureties, guarantors and endorsers
hereof. This Note shall be the joint and several obligation of all makers, sureties, guarantors and endorsers, and shall
be binding upon them and their successors and assigns.

Any notice to Borrower provided for in this Note shall be given by mailing such notice by certified mail addressed
to Borrower at the Property Address stated below, or to such other address as Borrower may designate by notice to
the Note holder. Any notice to the Note holder shall be given by mailing such notice by certified mail, return receipt
requested, to the Note holder at the address stated in the first paragraph of this Note, or at such other address as may
have been designated by notice to Borrower.

The indebtedness evidenced by this Note is secured by a Deed of Trust, dated January 25, 1980
-----CIRCUIT COURT, RUSSELL COUNTY-----
evidenced by this Note.

FILED

NOV 4 1982

Green Valley Estates

Lebanon, Virginia 24266

Property Address

Earl D. Johnson (Seal)

Legg N. Johnson (Seal)

..... (Seal)

(Execute Original Only)

This is to certify that this is the Note described in and secured by a Deed of Trust dated January 25, 1980
-----on property located in Lebanon Virginia.

My commission expires: July 11, 1982

~~November 10, 1980~~

William W. Bolby
Notary Public

Exhibit "A"

SETTLEMENT OF CHARLES E. SCHELIN, TRUSTEE, IN EXECUTION OF A CERTAIN DEED OF TRUST FROM EARL D. JOHNSON AND PEGGY M. JOHNSON, DATED JANUARY 25, 1980, AND RECORDED IN THE OFFICE OF THE CIRCUIT COURT OF RUSSELL COUNTY, VIRGINIA, IN DEED BOOK 294, PAGE 397, SALE HAVING BEEN MADE PURSUANT TO THE TRUST THEREIN ON THE 10TH DAY OF JULY, 1982.

RECEIPTS

Exhibit "B"

1982

July 12	To	Amount received from William H. Sykes, proceeds on purchase price at auction	\$ 2,100.00
August 9	To	Washington County National Bank, (Cashier's Check - William H. Sykes) proceeds on purchase price at auction	<u>\$18,900.00</u>
TOTAL RECEIPTS			\$21,000.00

DISBURSEMENTS

1982

August 19	To	M. Randall Hillman, Treasurer - Real Estate Taxes	\$ 66.42
August 19	To	Charles E. Schelin, Trustee, Commission on sale	\$ 962.00
August 19	To	Charles E. Schelin, Trustee, Reimbursement for recording costs advanced	\$ 21.00
August 19	To	The Lebanon News - Advertisement	\$ 116.00
Sept. 29	To	George W. Cozzolino - Recording Settlement	\$ 8.00
Sept. 29	To	J. R. Tiller - Commissioner of Accounts Fee	\$ 80.00
August 19	To	First National Exchange Bank - Proceeds of Foreclosure Sale	<u>\$19,746.58</u>
TOTAL DISBURSEMENTS			\$21,000.00

Respectfully submitted the 29th day of Sept., 1982.

CIRCUIT COURT RUSSELL COUNTY

FILED

NOV 4 1982

2994 William H. Sykes Clerk

Charles E. Schelin
Charles E. Schelin, Trustee

OFFICE OF THE COMMISSIONER OF ACCOUNTS OF RUSSELL COUNTY, VIRGINIA

To the Honorable Glyn R. Phillips, Judge of the Circuit Court of Russell County, Virginia:

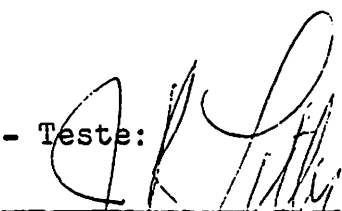
Your undersigned Commissioner of Accounts reports that on the 29th day of September, 1982, the above-named fiduciary purported to show all money and assets with which he is chargeable, has received or disbursed as such fiduciary, together with vouchers and receipts therefor; that, after complying with the statutes for such cases made and provided, your Commissioner of Accounts has completed the foregoing account and found that said fiduciary has made final and proper settlement of said account.

The said account was not completed until ten days and more after it has been mentioned in a list of fiduciaries, whose accounts were pending before the undersigned Commissioner of Accounts of said Court, posted at the front door of the Courthouse of Russell County, Virginia, on the 4th day of October, 1982, that being the first Monday in October, 1982.

FINAL SETTLEMENT.

Given under my hand this the 14th day of October, 1982.

A Copy - Teste:



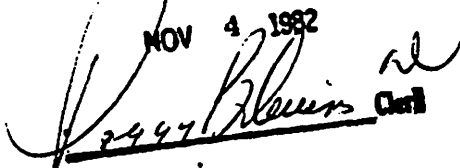
Commissioner of Accounts

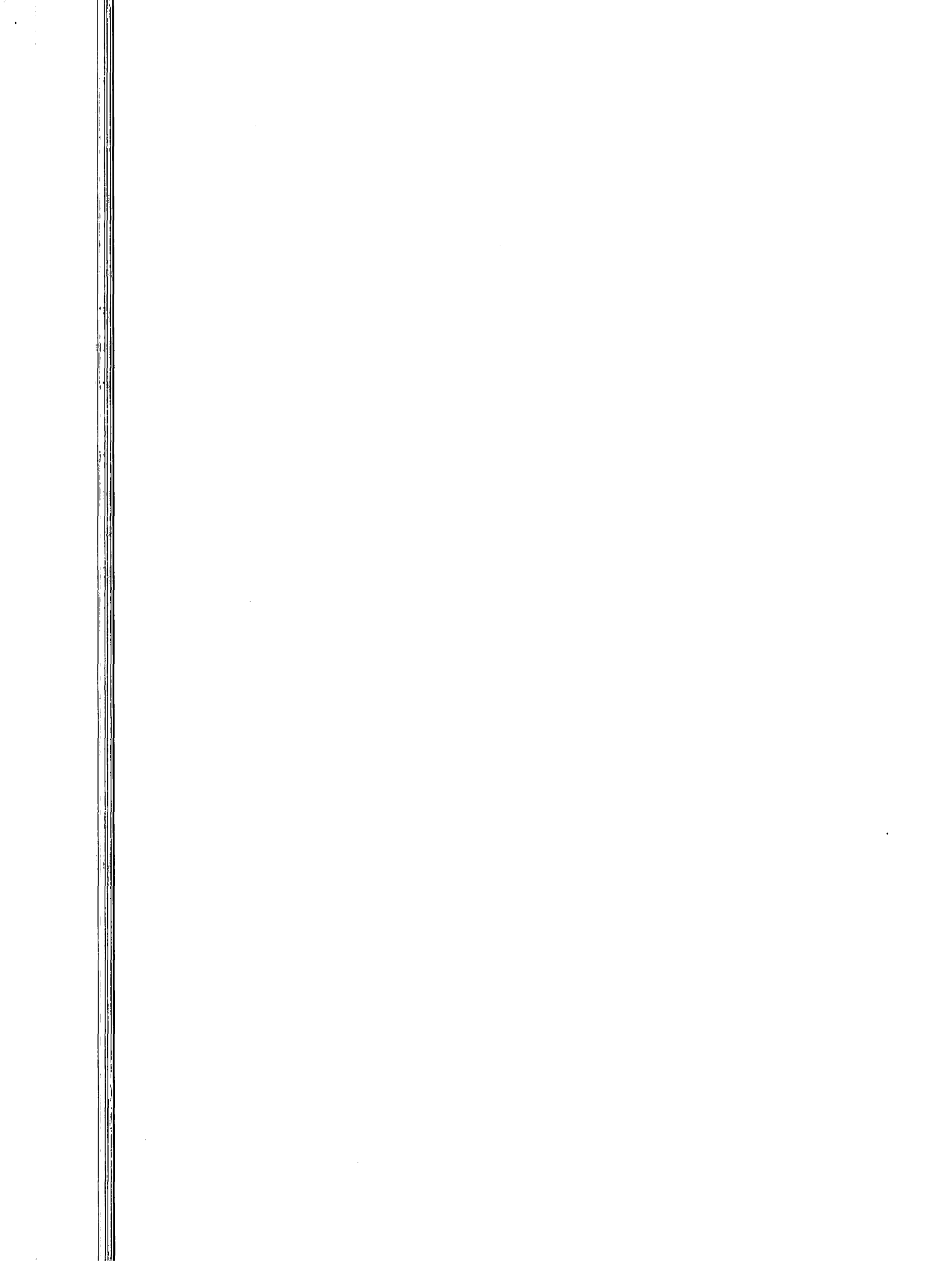
/s/ J. R. Tiller

Commissioner of Accounts of Russell County, Virginia

CIRCUIT COURT RUSSELL COUNTY
FILED

NOV 4 1982


2447 Phillips Clk



V I R G I N I A:

IN THE CIRCUIT COURT OF RUSSELL COUNTY

FIRST NATIONAL EXCHANGE BANK
OF VIRGINIA

vs.

EARL D. JOHNSON

and

PEGGY M. JOHNSON

A N S W E R

Comes now the defendant, Peggy M. Mitchell, known as Peggy M. Johnson, by counsel, who respectfully answers the Motion for Judgment filed herein as follows:

1. The defendant neither admits nor denies the allegations of Paragraph No. 1 and strict proof is demanded thereof.

2. The defendant would answer Paragraph No. 2 by stating that on January 25, 1982, the defendant was in the process of obtaining a loan on a different piece of property than the one mentioned in the motion for judgment also in the amount of \$40,000.00 and that at the time of the closing she understood this was the only note that she was signing and further did not understand that she was signing a second \$40,000.00 note, being the one attached as Exhibit A to the Motion for Judgment.

3. The defendant would answer the same as in Paragraph No. 2, that she executed a deed of trust on this date on some property which is not the subject of this motion for judgment and that she signed any deed of trust or note she signed thinking it to be only one \$40,000.00 not being the one which is the subject of this motion for judgment. The remaining allegations of Paragraph No. 3 are neither admitted nor denied and strict proof is demanded thereof.

4. The defendant has insufficient knowledge to neither admit nor deny Paragraph No. 4 and strict proof is demanded thereof.

5. The defendant neither admits nor denies the allegations contained in Paragraph No. 5 and strict proof is demanded thereof.

6. The defendant neither admits nor denies the allegations contained in Paragraph No. 6 nor No. 7 and strict proof is demanded thereof.

Your defendant, Peggy Mitchell, a/k/a Peggy M. Johnson, denies that she is indebted to the plaintiff in any manner whatsoever on the note and deed of trust described in the motion for judgment and denies that she knowingly signed any note or deed of trust and that she should not be held accountable nor liable for any debt as described in said motion for judgment.

WHEREFORE, your defendant prays that the motion for judgment filed herein against her be dismissed, with her cost incurred herein.

PEGGY MITCHELL
a/k/a Peggy M. Johnson
By Counsel

JOHNSON, SCYPHERS & AUSTIN, P.C.
Attorneys at Law
189 Valley Street
Abingdon, Virginia 24210

CIRCUIT COURT RUSSELL COUNTY
FILED

JAN 4 1983

Peggy M. Johnson Clerk

By:

David L. Scypers
David L. Scypers
Counsel for Peggy Mitchell, a/k/a
Peggy M. Johnson

CERTIFICATE

This is to certify that I have this the 3rd day of
January, 1983 mailed a true copy of the foregoing to Charles
E. Schelin, Attorney at Law, Lebanon, Virginia 24266, Counsel
for Plaintiff.

David L. Scypers

David L. Scypers

VIRGINIA:

IN THE CIRCUIT COURT OF RUSSELL COUNTY

FIRST NATIONAL EXCHANGE BANK)	
OF VIRGINIA,)	
)	
Plaintiff)	
)	
vs.)	AT LAW DOCKET NO. 5450
)	
DONNA J. RAY, Administratrix)	
of the Estate of)	
Earl D. Johnson, Deceased,)	
)	
)	
PEGGY M. JOHNSON,)	
)	
Defendants)	

REQUESTS FOR ADMISSIONS

Comes now your Plaintiff, First National Exchange Bank of Virginia, by counsel and requests that the Defendant, Peggy M. Johnson, A/K/A Peggy M. Mitchell, admit, pursuant to the Rules of the Supreme Court of Virginia, the following statements:

1. That the Plaintiff, First National Exchange Bank of Virginia, is a corporation organized and operating under the Law of the Commonwealth of Virginia and has a branch banking office in Lebanon, Russell County.
2. That she can both read and write the English Language.
3. That she was under no duress of any kind when she executed the \$40,000.00 Note, a copy of which is attached as Exhibit "A" to the Motion for Judgment.

FIRST NATIONAL EXCHANGE BANK
OF VIRGINIA
By Counsel

BROWNING, MOREFIELD, SCHELIN,
and ARRINGTON, P. C.
Two Mill Street - P. O. Box 156
Lebanon, Virginia 24266

By Charles E. Schelin
Counsel for Plaintiff

CERTIFICATE

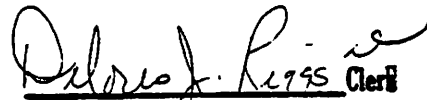
I hereby certify that I have mailed a true copy of the above pleading to Randall A. Eads, Esquire, P. O. Box 103, Lebanon, Virginia 24266, counsel for Donna J. Ray, and to David L. Scyphers, Esquire, Johnson, Scyphers, & Austin, P. C., 189 Valley Street, Abingdon, Virginia 24210, counsel for Peggy M. Johnson, on this the 7th day of February, 1983.


CHARLES E. SCHELIN

CIRCUIT COURT RUSSELL COUNTY

FILED

FEB 7 1983


Delores J. Lewis Clerk

V I R G I N I A:

IN THE CIRCUIT COURT OF RUSSELL COUNTY

FIRST NATIONAL EXCHANGE BANK)
OF VIRGINIA,)

Plaintiff)

vs.)

AT LAW DOCKET NO. 5450

EARL D. JOHNSON, et al.,)

Defendants)

MOTION FOR SUMMARY JUDGMENT

Comes now your Plaintiff, First National Exchange Bank of Virginia, by its counsel, and moves for Summary Judgment against the Defendant, Peggy M. Johnson, on the following grounds:

1. That personal service of the Motion for Judgment and attached Affidavit filed herein was made on Peggy M. Johnson.
2. That Peggy M. Johnson admits to signing the \$40,000.00 Note.
3. That Peggy M. Johnson admits that she can read and write the English Language.
4. That Peggy M. Johnson admits that she was under no duress of any kind when she executed the \$40,000.00 Note, a copy which is attached as "Exhibit A" to the Motion for Judgment.
5. Plaintiff further alleges that there is no longer any material fact in this action genuinely in dispute.

FIRST NATIONAL EXCHANGE BANK
OF VIRGINIA

By Counsel

BROWNING, MOREFIELD, SCHELIN
& ARRINGTON, P.C.
Two Mill Street - P.O. Box 156
Lebanon, Virginia 24266

By Charles E. Schelin
Counsel for Plaintiff

CIRCUIT COURT RUSSELL COUNTY

FILED

MAR 24 1983

Debra J. Ruggs Clerk

NOTICE

TO: Peggy M. Johnson
c/o David L. Scyphers, Esquire
JOHNSON, SCYPHERS & AUSTIN, P.C.
189 Valley Street
Abingdon, Virginia 24210
Counsel for Peggy M. Johnson

TAKE NOTICE: That at 9:30 AM on the 7th day of April, 1983, I shall present the attached Motion to the above Court.

FIRST NATIONAL EXCHANGE BANK
OF VIRGINIA

By Counsel

CIRCUIT COURT RUSSELL COUNTY

FILED

MAR 28 1983

Delores J. R. 745 Clerk

BROWNING, MOREFIELD, SCHELIN
& ARRINGTON, P.C.
Two Mill Street - P.O. Box 156
Lebanon, Virginia 24266

By Charles E. Schelin
Counsel for Plaintiff

C E R T I F I C A T E

I hereby certify that I have mailed a true copy of the above Notice and attached Motion to David C. Scyphers, Esquire, 189 Valley St., Abingdon, Virginia 24210, Counsel for Peggy M. Johnson, on this the 25th day of March, 1983.

Charles E. Schelin
CHARLES E. SCHELIN

MOTION FOR SUMMARY JUDGMENT

Comes now your Plaintiff, First National Exchange Bank of Virginia, by its counsel, and moves for Summary Judgment against the Defendant, Peggy M. Johnson, on the following grounds:

1. That personal service of the Motion for Judgment and attached Affidavit filed herein was made on Peggy M. Johnson.
2. That Peggy M. Johnson admits to signing the \$40,000.00 Note.
3. That Peggy M. Johnson admits that she can read and write the English Language.
4. That Peggy M. Johnson admits that she was under no duress of any kind when she executed the \$40,000.00 Note, a copy which is attached as "Exhibit A" to the Motion for Judgment.
5. Plaintiff further alleges that there is no longer any material fact in this action genuinely in dispute.

FIRST NATIONAL EXCHANGE BANK
OF VIRGINIA

By Counsel

BROWNING, MOREFIELD, SCHELIN
& ARRINGTON, P.C.
Two Mill Street - P.O. Box 156
Lebanon, Virginia 24266

By

Charles E. Schelin
Counsel for Plaintiff

CIRCUIT COURT RUSSELL COUNTY

FILED

MAR 28 1983

Peggy M. Johnson *Chas*

BROWNING, MOREFIELD, SCHELIN, AND ARRINGTON, P.C.

LARRY GRANT BROWNING
JAMES DALE MOREFIELD
CHARLES E. SCHELIN
JAMES E. ARRINGTON, JR.

GREGORY R. HERRELL
JOHN LAMIE

ATTORNEYS AT LAW

LAW BUILDING

2 MILL STREET

POST OFFICE BOX 156

LEBANON, VIRGINIA 24266

TELEPHONE (703) 889-2989

ABINGDON OFFICE
200 EAST MAIN STREET
POST OFFICE BOX 1066
ABINGDON, VIRGINIA 24210
TELEPHONE (703) 628-8121

GRUNDY OFFICE
WALNUT STREET
POST OFFICE BOX 676
GRUNDY, VIRGINIA 24614
TELEPHONE (703) 935-8128

May 12, 1983

The Honorable Glyn R. Phillips, Judge
Circuit Court of Russell County
Courthouse
Lebanon, Virginia 24266

Re: First National Exchange Bank of Virginia vs.
Earl D. Johnson, et al
At Law Docket No. 5450

Dear Judge Phillips:

In response to David L. Scyphers' letter brief dated April 27, 1983, submitted in the above matter, I submit the following:

1. Peggy Mitchell obtained funds under false pretenses; i. e., she claimed to be the wife of Earl D. Johnson, deceased, when in fact, she was not! All of her arguments for estoppel and fraud can be more effectively used against her because of her absolutely false statement of a material fact; i. e., she was Mrs. Earl D. Johnson.
2. On January 25, 1980, Earl D. Johnson and Peggy Mitchell [Johnson] both executed separate "Notice of Right of Recision" which informed them that they had entered into a transaction which may, and did, result in a Deed of Trust being placed against their home. They both executed a "Disclosure Statement" and "Good Faith Estimates" documents at the same time. See attachments 1, 2, 3, & 4. These documents were executed pursuant to the "Truth and Lending Act".
3. The note signed by Earl D. Johnson, deceased, and Peggy Mitchell, secured by a Deed of Trust against their home, bore interest at the rate of 12-1/4% per annum and was payable in monthly installments of \$447.43. The Deed of Trust securing same referred to certain land located in "Green Valley Estates, Section No. 1" Sub-division.
4. The \$40,000.00 note executed by Earl D. Johnson, deceased, and Peggy Mitchell on January 25, 1980, also, secured by Deed of Trust on property located

in "Fincastle Estate Section No. 1" Sub-division bore interest at the rate of 14% per annum and was payable on Demand.

5. There were no disclosure documents of any kind executed on the \$40,000.00 note bearing 14% interest, payable on Demand because it was a commercial transaction and disclosure on commercial transactions is not required by the Truth and Lending Act.
6. The two \$40,000.00 notes executed by Earl D. Johnson, deceased and Peggy Mitchell were signed at different times and as parts of totally separate transactions even though they were signed on the same day.
7. The 12-1/4% note for \$40,000.00, secured by a Deed of Trust on the Green Valley Estates property was a second note and a second Deed of Trust on the property used as Peggy Mitchell's residence. The first note and Deed of Trust on her residents was for \$80,000.00 and dated May 17, 1979, and executed by Earl D. Johnson only.
8. It is well settled law that "one cannot enter into a contract and, when called upon to abide by its conditions, say that he did not read it or did not know what it contained when he signed." G. L. Webster Co., Inc., v. Trinidad Bean & Elevator Co. 92 F. (2d) 177 (1937) [appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Luther B. Way, Judge.] Also, Willison on Contracts, §35.

A party who signs an instrument manifests assent to it and may not later complain that he did not read the instrument or that he did not understand its contents. 180 S. E. 2d 691 (1971). One having the capacity to understand a written document who reads it, or, without reading it or having it read to him, signs it, is bound by his signature. Rossi v. Douglas, 203 Md. 190; 100 A. 2d 3 (1953).

9. In paragraph 2 of his letter brief, counsel for Peggy Mitchell states that she MAY have mistakenly signed a second Note and Deed of Trust on her home. In paragraph 7 of the same letter, counsel states that Peggy Mitchell MAY have mistakenly signed two notes, assuming it to be one transaction.

Counsel's intent by including the above statements is not clear. However, what is clear is that MISTAKE is no defense in this matter presently before the Court.

The Plaintiff, First National Exchange Bank of Virginia, renews its Motion for Summary Judgment on the grounds that there is no bona fide dispute of material fact between the parties.

Respectfully submitted,

BROWNING, MOREFIELD, SCHELIN,
and ARRINGTON, P. C.

By Charles E. Schelin
CHARLES E. SCHELIN

CES/dcj

cc: David L. Scyphers, Esquire
Thomas S. Bundy, Vice-President

CIRCUIT COURT RUSSELL COUNTY

FILED

MAY 18 1983

Delores J. Rags Clerk

NOTE

US \$ 40,000.00

Lebanon, Virginia
City

January 25, 1980

FOR VALUE RECEIVED, the undersigned ("Borrower") promise(s) to pay The First National Exchange Bank of Lebanon, Virginia, or order, the principal sum of FORTY-THOUSAND AND NO/100 Dollars, with interest on the unpaid principal balance from the date of this Note, until paid, at the rate of TWELVE AND ONE-FOURTH (12 1/4%) percent per annum. Principal and interest shall be payable at LEBANON OFFICE OF THE FIRST NATIONAL EXCHANGE BANK or such other place as the Note holder may designate, in consecutive monthly installments of FOUR-HUNDRED FORTY-SEVEN AND 43/100 Dollars (US \$ 447.43), on the 25TH day of each month beginning FEBRUARY 25, 1980. Such monthly installments shall continue until the entire indebtedness evidenced by this Note is fully paid, except that any remaining indebtedness, if not sooner paid, shall be due and payable on JANUARY 25, 2000.

If any monthly installment under this Note is not paid when due and remains unpaid after a date specified by a notice to Borrower, the entire principal amount outstanding and accrued interest thereon shall at once become due and payable at the option of the Note holder. The date specified shall not be less than thirty days from the date such notice is mailed. The Note holder may exercise this option to accelerate during any default by Borrower regardless of any prior forbearance. If suit is brought to collect this Note, the Note holder shall be entitled to collect all reasonable costs and expenses of suit, including, but not limited to, reasonable attorney's fees.

Borrower shall pay to the Note holder a late charge of 4 percent of any monthly installment not received by the Note holder within 15 days after the installment is due.

Borrower may prepay the principal amount outstanding in whole or in part. The Note holder may require that any partial prepayments (i) be made on the date monthly installments are due and (ii) be in the amount of that part of one or more monthly installments which would be applicable to principal. Any partial prepayment shall be applied against the principal amount outstanding and shall not postpone the due date of any subsequent monthly installments or change the amount of such installments, unless the Note holder shall otherwise agree in writing.

Presentment, notice of dishonor, and protest are hereby waived by all makers, sureties, guarantors and endorsers hereof. This Note shall be the joint and several obligation of all makers, sureties, guarantors and endorsers, and shall be binding upon them and their successors and assigns.

Any notice to Borrower provided for in this Note shall be given by mailing such notice by certified mail addressed to Borrower at the Property Address stated below, or to such other address as Borrower may designate by notice to the Note holder. Any notice to the Note holder shall be given by mailing such notice by certified mail, return receipt requested, to the Note holder at the address stated in the first paragraph of this Note, or at such other address as may have been designated by notice to Borrower.

The indebtedness evidenced by this Note is secured by a Deed of Trust, dated January 25, 1980, and reference is made to the Deed of Trust for rights as to acceleration of the indebtedness evidenced by this Note.

"Green Valley Estates"

Lebanon, Virginia 24266

Property Address

EARL JOHNSON

PEGGY M. JOHNSON

(Execute Original Only)

This is to certify that this is the Note described in and secured by a Deed of Trust dated January 25, 1980, on property located in Russell County, Virginia.
My commission expires: July 11, 1982

Notary Public

Attachment 1

NOTICE OF RIGHT OF RESCISSION
THE FIRST NATIONAL EXCHANGE BANK OF VIRGINIA
Roanoke, Virginia

To Peggy M. Johnson

} Borrower

Box 124 Rosedale, Va. 24280

Address of Borrower

NOTICE TO CUSTOMER REQUIRED BY FEDERAL LAW:

You have entered into a transaction on January 25, 1980 which
(Date)

may result in a lien, mortgage, or other security interest on your home. You have a legal right under federal law to cancel this transaction, if you desire to do so, without any penalty or obligation within three business days from the above date or any later date on which all material disclosures required under the Truth in Lending Act have been given to you. If you so cancel the transaction, any lien, mortgage, or other security interest on your home arising from this transaction is automatically void. You are also entitled to receive a refund of any down payment or other consideration if you cancel. If you decide to cancel this transaction, you may do so by notifying

The First National Exchange Bank of Virginia

Attention: Mr.S. Joan K. Dorton

P. O. Box 157

(Address of Bank's Place of Business)

Lebanon, Va. 24266

by mail or telegram sent not later than midnight of January 30, 1980

(Date)

You may also use any other form of written notice identifying the transaction if it is delivered to the above address not later than that time. This notice may be used for that purpose by dating and signing below.

I hereby cancel this transaction.

(Date)

(Customer's Signature)

SEE REVERSE SIDE FOR IMPORTANT INFORMATION ABOUT YOUR RIGHT OF RESCISSION.

Receipt is herewith acknowledged of two copies of the foregoing notice by each of the undersigned borrowers, this

1 day of Feb., 1980

"Attachment 2"

Peggy M. Johnson 21

NOTICE OF RIGHT OF RESCISSION

THE FIRST NATIONAL EXCHANGE BANK OF VIRGINIA

Roanoke, Virginia

To Earl D. Johnson

Box 124 - Rosedale, Virginia 24280

Address of Borrower

Borrower

NOTICE TO CUSTOMER REQUIRED BY FEDERAL LAW:

You have entered into a transaction on January 25, 1980 which
(Date)

may result in a lien, mortgage, or other security interest on your home. You have a legal right under federal law to cancel this transaction, if you desire to do so, without any penalty or obligation within three business days from the above date or any later date on which all material disclosures required under the Truth in Lending Act have been given to you. If you so cancel the transaction, any lien, mortgage, or other security interest on your home arising from this transaction is automatically void. You are also entitled to receive a refund of any down payment or other consideration if you cancel. If you decide to cancel this transaction, you may do so by notifying

The First National Exchange Bank of Virginia

Attention: Mrs. Joan K. Dorton

P O. Box 157

(Address of Bank's Place of Business)

Lebanon, Virginia 2 24266

by mail or telegram sent not later than midnight of January 30, 1980
(Date)

You may also use any other form of written notice identifying the transaction if it is delivered to the above address not later than that time. This notice may be used for that purpose by dating and signing below.

I hereby cancel this transaction.

(Date)

(Customer's Signature)

SEE REVERSE SIDE FOR IMPORTANT INFORMATION ABOUT YOUR RIGHT OF RESCISSION.

Receipt is herewith acknowledged of two copies of the foregoing notice by each of the undersigned borrowers, this

1 day of Feb., 1980

Attachment 3

22

Earl D Johnson

DISCLOSURE STATEMENT
THE FIRST NATIONAL EXCHANGE BANK OF VIRGINIA
Lebanon, Virginia

☒ CONV.
☐ FHA
☐ VA

January 25, 1980

Earl D. Johnson / Peggy M. Johnson

NAME

P. O. Box 124 - Rosedale, Virginia 24280

Borrower

ADDRESS

The subject property lies in the City/County of Russell, State of Virginia, and is briefly described as follows:

Parcel F-5 - Green Valley Estates - Section Number 1

1. Principal Amount of Loan \$40,000.00

2. Less Prepaid FINANCE CHARGES:

(a) Paid by Borrower:

origination fee \$ 400.00

construction fee _____

Private Mortgage Insurance Premium _____

Prepaid Interest _____

(b) Paid by Seller:

_____ % loan discount \$ _____

Total Prepaid FINANCE CHARGES \$ 400.00

3. Amount Financed (1-2) \$39,600.00

4. Computation of FINANCE CHARGE: The Total Prepaid FINANCE CHARGE in paragraph 2 above plus interest at the rate of 12.25 % per annum, which will accrue as the loan proceeds are disbursed; and, plus FHA Mortgage Insurance, if any, at the rate of 1/2 % per annum on the average annual balance of debt.

5. ANNUAL PERCENTAGE RATE 12.42%

7. The debt is payable in 240 equal monthly instalments of \$ 447.43

each, beginning approximately one month after the loan proceeds are first disbursed. All subsequent payments are due on the same day of each succeeding month. The following additional amounts are payable each month:

Mortgage Insurance Premium (to decrease each year) \$ _____

Personal Insurance Premium (see below) _____

Estimated escrow for property tax _____

Estimated escrow for Hazard insurance _____

Estimated Total monthly payment, including payments on debt \$ 447.43

8. Default Charges: The note or deed of trust provides for a late charge of () FHA: Not to exceed 2 cents for each dollar (\$1) of each payment more than 15 days in arrears; () VA: Not to exceed 4% of any instalment when paid more than 15 days after the due date thereof; (X) CONVENTIONAL: Not to exceed 4% of any instalment when paid more than 15 days after the due date thereof. Late charges that are due must be paid by borrower to lender at the same time such payment that is in arrears is paid. In event of default, the borrower must, in addition, pay all costs of collection and foreclosure, including a reasonable attorney's fee, and the fees and expenses of Trustees.

9. Prepayment Penalty: The note and deed of trust provides borrower shall have the privilege to make prepayments in the following manner and conditions: () FHA: At any time, the whole amount of the loan or any part may be paid with no prepayment penalty; () VA: At any time, the whole amount of the loan or any part may be paid with no prepayment penalty; () CONVENTIONAL: Within five years from the date of the Note, Borrower make(s) any prepayments in any twelve month period beginning with the date of the Note or anniversary dates thereof ("loan year") with money lent to Borrower by a lender other than the Note holder, Borrower shall pay

the Note holder (a) during each of the first three loan years 2% of the amount by which the sum of prepayments made in any such loan year exceeds 20% of the original principal amount of the Note and (b) during the fourth and fifth loan years 2% of the amount by which the sum of prepayments made in any such loan year exceeds twenty percent of the original principal amount of the Note.

10. Neither life nor health and accident insurance is required. I desire to purchase insurance which may be canceled by me at any time, at a cost to me each month as follows: Credit Life \$ _____; Accident and Health \$ _____; Total \$ _____.

DATE

SIGNATURE OF BORROWER

11. Security: This indebtedness will be secured by a first lien deferred purchase money DEED OF TRUST on the Subject Property of even date with the note to evidence this indebtedness.

I acknowledge receipt of a copy of this Statement prior to entering into any contractual arrangement with reference to this credit.

BORROWER

BORROWER

Attachment 11

TWENTY-NINTH JUDICIAL CIRCUIT OF VIRGINIA

COUNTIES OF BLAND, HUGHANAN, DICKENSON, GILES, RUSSELL AND TAZEWELL

CIRCUIT COURT JUDGES:

GLYN R. PHILLIPS
CLINTWOOD, VIRGINIA 24226

NICHOLAS E. PERSIN
GRUNDY, VIRGINIA 24614

ROBERT L. POWELL
PEARISBURG, VIRGINIA 24134

June 6, 1983

Mr. Charles E. Schelin, Esquire
Browning, Morefield, Schelin
and Arrington, P.C.
P.O. Box 156
Lebanon, Virginia 24266

Mr. David L. Scyphers, Esquire
Johnson, Scyphers & Austin, P.C.
189 Valley Street
Abingdon, Virginia 24210

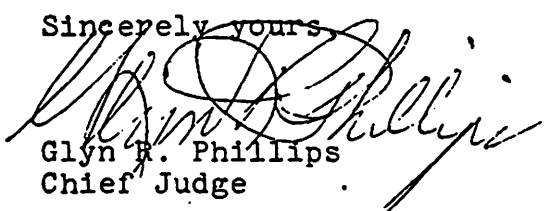
RE: First National Exchange Bank of Virginia
vs.
Earl D. Johnson, et al
At Law Docker No. 5450

Gentlemen:

The Court is of the opinion that the issue in the above case is one of fact for a jury and therefore the Court denies the Plaintiff's Motion for Summary Judgment. Mr. Scyphers is directed to prepare an appropriate order to be endorsed by Mr. Schelin and forwarded to the Court for entry.

With kind regards, I am,

Sincerely yours,


Glyn R. Phillips
Chief Judge

GRP/nch

✓cc:Clerk, Circuit Court

CIRCUIT COURT RUSSELL COUNTY

FILED

JUN 7 1983

BROWNING, MOREFIELD, SCHELIN, AND ARRINGTON, P.C.

**LARRY GRANT BROWNING
JAMES DALE MOREFIELD
CHARLES E. SCHELIN
JAMES E. ARRINGTON, JR.**

**GREGORY R. HERRELL
JOHN LAMIE**

**ATTORNEYS AT LAW
LAW BUILDING
2 MILL STREET
POST OFFICE BOX 156
LEBANON, VIRGINIA 24266
TELEPHONE (703) 889-2989**

**ABINGDON OFFICE
200 EAST MAIN STREET
POST OFFICE BOX 1066
ABINGDON, VIRGINIA 24210
TELEPHONE (703) 628-8121**

**GRUNDY OFFICE
WALNUT STREET
POST OFFICE BOX 676
GRUNDY, VIRGINIA 24614
TELEPHONE (703) 935-8128**

May 12, 1983

The Honorable Glyn R. Phillips, Judge
Circuit Court of Russell County
Courthouse
Lebanon, Virginia 24266

Re: First National Exchange Bank of Virginia vs.
Earl D. Johnson, et al
At Law Docket No. 5450

Dear Judge Phillips:

In response to David L. Scyphers' letter brief dated April 27, 1983, submitted in the above matter, I submit the following:

1. Peggy Mitchell obtained funds under false pretenses; i. e., she claimed to be the wife of Earl D. Johnson, deceased, when in fact, she was not! All of her arguments for estoppel and fraud can be more effectively used against her because of her absolutely false statement of a material fact; i. e., she was Mrs. Earl D. Johnson.
2. On January 25, 1980, Earl D. Johnson and Peggy Mitchell [Johnson] both executed separate "Notice of Right of Recision" which informed them that they had entered into a transaction which may, and did, result in a Deed of Trust being placed against their home. They both executed a "Disclosure Statement" and "Good Faith Estimates" documents at the same time. See attachments 1, 2, 3, & 4. These documents were executed pursuant to the "Truth and Lending Act".
3. The note signed by Earl D. Johnson, deceased, and Peggy Mitchell, secured by a Deed of Trust against their home, bore interest at the rate of 12-1/4% per annum and was payable in monthly installments of \$447.43. The Deed of Trust securing same referred to certain land located in "Green Valley Estates, Section No. 1" Sub-division.
4. The \$40,000.00 note executed by Earl D. Johnson, deceased, and Peggy Mitchell on January 25, 1980, also, secured by Deed of Trust on property located

in "Fincastle Estate Section No. 1" Sub-division bore interest at the rate of 14% per annum and was payable on Demand.

5. There were no disclosure documents of any kind executed on the \$40,000.00 note bearing 14% interest, payable on Demand because it was a commercial transaction and disclosure on commercial transactions is not required by the Truth and Lending Act.
6. The two \$40,000.00 notes executed by Earl D. Johnson, deceased and Peggy Mitchell were signed at different times and as parts of totally separate transactions even though they were signed on the same day.
7. The 12-1/4% note for \$40,000.00, secured by a Deed of Trust on the Green Valley Estates property was a second note and a second Deed of Trust on the property used as Peggy Mitchell's residence. The first note and Deed of Trust on her residents was for \$80,000.00 and dated May 17, 1979, and executed by Earl D. Johnson only.
8. It is well settled law that "one cannot enter into a contract and, when called upon to abide by its conditions, say that he did not read it or did not know what it contained when he signed." G. L. Webster Co., Inc., v. Trinidad Bean & Elevator Co. 92 F. (2d) 177 (1937) [appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Luther B. Way, Judge.] Also, Willison on Contracts, §35.

A party who signs an instrument manifests assent to it and may not later complain that he did not read the instrument or that he did not understand its contents. 180 S. E. 2d 691 (1971). One having the capacity to understand a written document who reads it, or, without reading it or having it read to him, signs it, is bound by his signature. Rossi v. Douglas, 203 Md. 190; 100 A. 2d 3 (1953).
9. In paragraph 2 of his letter brief, counsel for Peggy Mitchell states that she MAY have mistakenly signed a second Note and Deed of Trust on her home. In paragraph 7 of the same letter, counsel states that Peggy Mitchell MAY have mistakenly signed two notes, assuming it to be one transaction.

Counsel's intent by including the above statements is not clear. However, what is clear is that MISTAKE is no defense in this matter presently before the Court.

The Plaintiff, First National Exchange Bank of Virginia, renews its Motion for Summary Judgment on the grounds that there is no bona fide dispute of material fact between the parties.

Respectfully submitted,

BROWNING, MOREFIELD, SCHELIN,
and ARRINGTON, P. C.

By Charles E. Schelin
CHARLES E. SCHELIN

CES/dcj

cc: David L. Scyphers, Esquire
Thomas S. Bundy, Vice-President

CIRCUIT COURT RUSSELL COUNTY
FILED

JUN 7 1983

Delores J. Riggs Clerk

JOHNSON, SCYPHERS & AUSTIN, P.C.

ATTORNEYS AT LAW
189 VALLEY STREET
ABINGDON, VIRGINIA 24210

JOSEPH P. JOHNSON, JR.
DAVID L. SCYPHERS
R. WAYNE AUSTIN

TELEPHONE:
(703) 628-7167

April 27, 1983

Glyn R. Phillips, Judge
Russell County Circuit Court
Lebanon, Virginia 24266

Re: First National Exchange Bank of Virginia v. Peggy
M. Johnson, et al

Dear Judge Phillips:

Please consider this letter a response to the
Motion for Summary Judgment filed in the above styled
matter.

In essence, our theory of the case involves
the theory of estoppel against the bank, constructive
fraud which is tied in with the estoppel argument, mistake
and in connection with all of these defenses to enforcement of
the deed of trust and note, an asertion of a more stringent
duty on the part of the bank to disclose all information
involved. We assert that the bank failed to properly inform
Peggy Mitchell of what she was signing. Due to the lack of
disclosure, she may have mistakenly signed a second note
and deed of trust on the property used as her residence.

"A party who by his acts, declarations, or admissions
or by a failure to act or speak under circumstances when he
should do so, either designedly or with willful disregard to
the interests of others, induces or misleads another to conduct
or dealings which he would not have entered upon but for this
misleading influence, will not be allowed afterwards to come
in and assert his right to the detriment of the person so
mislead. That would be fraud." Michie's Jurisprudence, Fraud
and Deceit, Section 17, page 302. It is clear that if the
defendant can prove the allegations that there were two notes
and deeds of trust signed in the exact same amount on the same
day there would be a duty on the part of the bank to make sure
that she understood that she was signing two separate sets of
documents. She should have the opportunity to present evidence
that this was not discussed with her thus she was misled as
to the transaction into which she was entering. This would then
become a question for the jury to decide.

Glyn R. Phillips, Judge
April 27, 1983
Page 2

Our evidence would further go to show that the second deed of trust was never discussed with Peggy Mitchell and that she received no benefits, no consideration whatsoever, from the signing of this deed of trust. It is my understanding that this money may have gone to pay an already existing debt of Mr. Johnson.

It is not our contention that the closing agents for the bank intentionally set out to defraud Ms. Mitchell but it is our contention that a constructive fraud exist thus giving rise to an estoppel by conduct argument due to the failure to disclose material information. ("Even if a party innocently misrepresents material facts by mistake, the effect is the same on the party who is misled by it as if he who innocently made this misrepresentation knew it to be positively false. Therefore, it is immaterial that an act was done in good faith and without fraudulent intent. If by it an advantage has been obtained which it is against good consequence to enjoy, a Court of equity will relieve against it." (Michie's Jurisprudence, Fraud & Deceit, Section 20, pages 306-307. See Union Trust Corporation v. T. H. Fugate, 172 Va. 82(1939).) It is the contention of the defendant that omissions of material facts are as much a misrepresentation as stated positive misrepresentations. ("If a party conceals a fact that is material to the transaction, knowing that the other party is acting on the assumption that no such fact exist, the concealment is as much a fraud as if the existence of the fact were expressly denied, or the reverse of it expressly stated." Clay v. Butler, 132 Va. 464, 474 (1922). The omission of the fact that she was signing two notes in the case at bar is as much a concealment, even though it may be an innocent concealment, constituting a constructive fraud, stopping the bank from enforcing the second note and deed of trust. "To establish equitable estoppel it is not necessary that actual fraud be shown but it is only necessary that actual fraud be shown, but is only necessary to show that a person is stopped by his statements or conduct misled another to his prejudice." For Use and Benefit of Noland Company v. Wood, 99 F2d 80 (4th Cir. 1938).

Federal Law requires that disclosures be made of all material matters in such a transaction as the one involved in the case at bar, U.S. Code 15, Section 1601 et seq. provide for said requirements under a section entitled Consumer Credit Protection, under Commerce and Trade. Thus, there is not only a common law duty to make all material facts known and not to conceal any facts, or failed to disclose

Glyn R. Phillips, Judge
April 27, 1983
Page 3

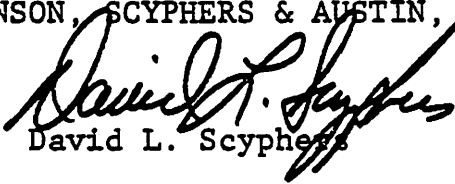
any facts, but there is an affirmative duty placed on the bank or its agents through this federal statute to make disclosures. The defendant is not seeking damages pursuant to this section, but merely submits this as authority for the position that the bank does have affirmative duties of disclosures and that if the defendant can prove facts as stated in her answer then this would be a question to present to the jury for their determination.

Due to the neglect and omissions by the bank, the defendant, Peggy Mitchell, may have mistakenly signed two notes and deeds of trust, assuming it to be one transaction.

There are many cases cited under the above references in Michie's Jurisprudence but the defendant has attempted to keep the issues as narrow as possible while submitting sufficient authority to warrant denying the Motion for Summary Judgment. It is respectfully submitted by the defendant that the pleadings themselves present an issue to be presented to the jury. The defendant therefore request that Your Honor deny the Motion for Summary Judgment and proceed to trial on July 1, 1983 on the issues joined.

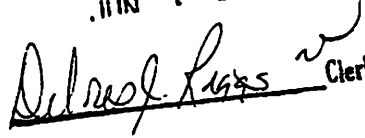
Respectfully submitted,

JOHNSON, SCYPHERS & AUSTIN, P.C.

By:  David L. Scyphers

DLS/lfm

cc: Charles E. Schelin, Esquire
Attorney at Law
Lebanon, Virginia 24266

CIRCUIT COURT RUSSELL COUNTY
FILED
JUN 7 1983
 Delores R. Lewis
Clerk

V I R G I N I A:

IN THE CIRCUIT COURT OF RUSSELL COUNTY

FIRST NATIONAL EXCHANGE BANK

OF VIRGINIA,

BOOK

5 PAGE 640

Plaintiff

vs.

AT LAW
DOCKET NO.: 5450

EARL D. JOHNSON, ET AL,

Defendants

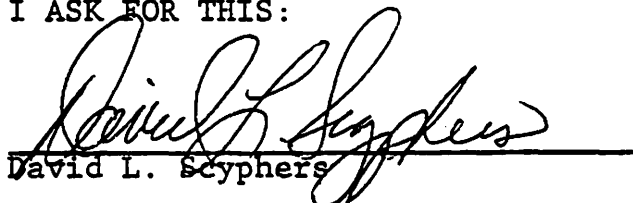
O R D E R

Pursuant to notice given, the parties came before the Honorable Judge Glyn R. Phillips on the 17th day of April, 1983, to argue the motion for summary judgment filed herein by the plaintiff on the 24th day of March, 1983.

Upon the record, argument by counsel, and briefs submitted by counsel for the respective parties, the Court did by letter of opinion of June 6, 1983 overrule the motion for said summary judgment.

It is therefore ORDERED, that the plaintiffs motion for summary judgment is hereby denied.

I ASK FOR THIS:


David L. Scyphers

SEEN & OBJECTED TO:

Charles E. Schelin
Charles E. Schelin

ENTERED the 30th day of June, 1983.

W. David Phillips
JUDGE
"-

BOOK 295 PAGE 94

P-7-#8
J.P. Judge
July 1, 1983

Verified
3.24.80

THIS DEED, made this the 4th day of March, 1980, between EARL JOHNSON and PEGGY M. JOHNSON, husband and wife, parties of the first part; and EARL JOHNSON and PEGGY M. JOHNSON, husband and wife, as tenants by the entirety, with the right of survivorship, as at common law, parties of the second part:

: W I T N E S S E T H :

That for and in consideration of the sum of TEN-DOLLARS (\$10.00), cash in hand paid, the receipt of which is hereby acknowledged, and for other good and valuable consideration, the parties of the first part hereby grant and convey, with covenants of general warranty and with English Covenants of title, unto the parties of the second part, as tenants by the entirety, with the right of survivorship, as at common law, the real estate described as follows:

All that certain lot or parcel of land, with all appurtenances thereunto belonging and all improvements thereon, lying and being in the Lebanon Magisterial District of Russell County, Virginia, and being a part of "Parcel F" of the "Green Valley Estates, Section No. 1" Subdivision, and designated as "Parcel F-5", containing 3.208 acres, more or less, as shown on a map and plat prepared by L. K. Addison, Certified Land Surveyor, dated May, 1977, a copy of which is recorded in Deed Book 281, at page 824, Russell County, Virginia, records, reference to which is hereby made for a more full and complete description of said property.

And being a part of the property conveyed to Earl Johnson, by Russell Developers, Inc., by deed dated May 1, 1977, and recorded in Deed Book 272, at page 639, Russell County, Virginia, records.

This conveyance is made subject to and accepted upon the "Green Valley Estates, Section 1", subdivision stipulations, conditions and restrictions recorded in Plat Book 6, page 50, Russell County, Virginia, records, and all easements of record and those shown on the map and plat of the aforesaid subdivision recorded in Plat Book 6, pages 46 through 49, Russell County, Virginia, records, and the restrictions, conditions and stipulations as set out in the deed from C. B. Yates and others to Russell Developers, Inc., recorded

in Deed Book 267, at page 68, Russell County, Virginia, records, reference to both of which are hereby made for a more full and complete description of said restrictions and easements.

There is further granted and conveyed, as an appurtenance to the property herein conveyed, a right of way and easement, over and through the street lying to the north of and adjacent to "Parcel F-1" and a right of way and easement over and through the right of way lying between "Parcel F-2", and "Parcel F-3", as shown on the aforesaid plat by L. K. Addison, Certified Land Surveyor, recorded in Deed Book 281, at page 824, Russell County, Virginia, records.



This conveyance is made subject to an oil and gas lease, to Gulf Oil Corporation, dated July 22, 1976, and recorded in Deed Book 265, at page 160, Russell County, Virginia, records, reference to which is hereby made.

This conveyance is made subject to the exception and reservation of a one-half undivided interest in all minerals of every kind, nature and description underlying said land, as excepted and reserved in the deed to Earl Johnson, dated May 1, 1977, and recorded in Deed Book 272, at page 639, Russell County, Virginia, records.

There is further granted and conveyed, as an appurtenance to the property herein conveyed, all those certain water rights acquired by Earl Johnson, from Charles E. Schelin and wife, by deed dated November 19, 1979, and recorded in Deed Book 294, at page 395, Russell County, Virginia, records.

This conveyance is subject to the conditions, restrictions and easements on said property, if any there be, to the extent that they are binding on the property hereby conveyed and on first parties.

WITNESS the following signatures and seals:

 (SEAL)
EARL JOHNSON
 (SEAL)
PEGGY M. JOHNSON

STATE OF VA.

COUNTY/CITY OF Russell, To-wit:

I, William W. Bolling, a Notary Public in and for the County/City aforesaid, in the State of VA., do hereby certify

that Earl Johnson and Peggy M. Johnson, whose names are signed to the writing above, bearing date on the 4th day of March, 1980, have this day acknowledged the same before me in my County/City aforesaid.

My commission expires 7-11-1982.

Given under my hand this 6 day of Feb, 1980.

William W. Bolling
Notary Public

VIRGINIA: In the Clerk's Office of the Circuit Court of Russell County, 7 Feb 1980, 1980. This deed was this day received in said office, and, upon the certificate... of acknowledgment... thereto annexed, admitted to record, at 2:30 o'clock PM, after payment of \$, tax imposed by Sec. 58-54 (b).
Teste: [Signature] Clerk.

Tax \$ Transfer Fee \$ 1.00

V I R G I N I A:

IN THE CIRCUIT COURT OF RUSSELL COUNTY

FIRST NATIONAL EXCHANGE BANK
OF VIRGINIA,

Plaintiff

vs.

DONNA J. RAY, Administratrix
of the Estate of
EARL D. JOHNSON, Deceased

and

PEGGY M. JOHNSON,
Route 1, Green Valley Estates
Lebanon, Virginia 24266

Defendants

NOTICE

TAKE NOTICE: That on August 24th 1983, at 9:00 a.m. in the
Chambers of the Circuit Court of Russell County, Lebanon, Virginia, I will
move the Court to enter an order adding First Russell County Bank & Trust
Co. and Abingdon Wholesale Plumbing and Electric, Inc. as additional party
plaintiffs in the above styled case.

Browning, Morefield, Schelin
& Arrington, P.C.
Two Mill Street - P.O. Box 156
Lebanon, Virginia 24266

By


JAMES E. ARRINGTON, JR.

FIRST RUSSELL COUNTY BANK & TRUST CO.

and

ABINGDON WHOLESALE PLUMBING AND ELECTRIC,
INC.

By Counsel

C E R T I F I C A T E

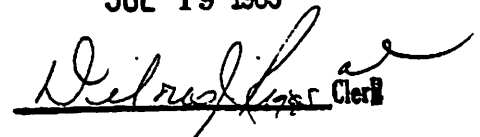
I hereby certify that a true copy of the foregoing Notice has been mailed to David L. Scyphers, Esquire, Johnson, Scyphers and Austin, P.C., 189 Valley Street, Abingdon, Virginia 24210, Counsel for Peggy M. Johnson, and to Randall A. Eads, Esquire, P.O. Box 103, Lebanon, Virginia 24266, Counsel for Donna J. Ray, this the 19 day of July, 1983.


JAMES E. ARRINGTON, JR.

CIRCUIT COURT RUSSELL COUNTY

FILED

JUL 19 1983


Clerk

V I R G I N I A:

IN THE CIRCUIT COURT OF RUSSELL COUNTY

FIRST NATIONAL EXCHANGE BANK)
OF VIRGINIA,)
)
Plaintiff)
)
)
vs.)
)
)
DONNA J. RAY, Administratrix)
of the Estate of)
EARL D. JOHNSON, Deceased)
)
and)
)
PEGGY M. JOHNSON,)
Route 1, Green Valley Estates)
Lebanon, Virginia 24266,)
)
Defendants)

MOTION FOR JOINDER

Comes now, First Russell County Bank & Trust Co. and Abingdon Wholesale Plumbing and Electric, Inc., by counsel, and, pursuant to Rule 3:9 A of the Rules of the Supreme Court of Virginia, move to join in the above styled action as additional party Plaintiffs, and as grounds for said motion First Russell County Bank & Trust Co. and Abingdon Wholesale Plumbing and Electric, Inc., say:

1. That the Estate of Earl D. Johnson is indebted to First Russell County Bank & Trust Co. in the sum of \$5,463.12 with interest thereon from June 23, 1982, due by Judgment received in the General District Court of Russell County on February 11, 1983, a copy of said Judgment is attached as "Exhibit A."

2. That the Estate of Earl D. Johnson is indebted to Abingdon Wholesale Plumbing and Electric, Inc., in the sum of \$101.41 with interest thereon from February 11, 1983, due by Judgment received in the General District Court of Russell County on February 11, 1983, a copy of said

Judgment is attached as "Exhibit B."

3. That the Estate of Earl D. Johnson is indebted to Abingdon Wholesale Plumbing and Electric, Inc., in the sum of \$1,070.83 with interest thereon from February 11, 1983, due by Judgment received in the General District Court of Russell County on February 11, 1983, a copy of said Judgment is attached as "Exhibit C."

4. That First Russell County Bank & Trust Co. and Abingdon Wholesale Plumbing and Electric, Inc., have interests relating to the subject of the above styled action and are so situated that the disposition of the action in their absence would impair or impede their ability to protect these interests.

WHEREFORE, First Russell County Bank & Trust Co. and Abingdon Wholesale Plumbing and Electric, Inc., pray that they be joined as additional party plaintiffs in this action.

FIRST RUSSELL COUNTY BANK & TRUST CO.

and

ABINGDON WHOLESALE PLUMBING AND ELECTRIC,
INC.

By Counsel

Browning, Morefield, Schelin
& Arrington, P.C.
Two Mill Street - P.O. Box 156
Lebanon, Virginia 24266

By


JAMES E. ARRINGTON, JR.

C E R T I F I C A T E

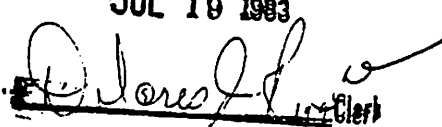
I hereby certify that a true copy of the foregoing has been mailed to David L. Scyphers, Esquire, Johnson, Scyphers and Austin, P.C., 189 Valley Street, Abingdon, Virginia 24210, Counsel for Peggy M. Johnson,

and to Randall A. Eads, Esquire, P.O. Box 103, Lebanon, Virginia 24266,
Counsel for Donna J. Ray, this the 19 day of July, 1983.


JAMES E. ARRINGTON, JR.

CIRCUIT COURT RUSSELL COUNTY
FILED

JUL 19 1983


Clerk

ABSTRACT OF JUDGMENT

VA. CODE ANN. §§ 8.01 - 449;
16.1 - 95.96

FILE NO.

C83-0057

JLD 31

Page 293

☒ General District Court

☐ Juvenile and Domestic Relations District Court
(for court-ordered support)

This is to certify that a Judgment was rendered in this Court in favor of:

☒ PLAINTIFF(S) against DEFENDANT(S)

☐ DEFENDANT(S) against PLAINTIFF(S)

☐ V

DATE OF JUDGMENT

2-11-83

\$ 5463.12

AMOUNT OF JUDGMENT

HOMESTEAD EXEMPTION WAIVED ☐ YES ☒ NO ☐ CANNOT BE DEMANDED

\$

ALTERNATE VALUE OF SPECIFIC PROPERTY AWARDED

INTEREST RATE(S) AND BEGINNING DATE(S)

16.25% from 10-23-82

\$ 9.00

ATTORNEY'S FEES

TOTAL CREDITS

\$

AMOUNT RECEIVED SINCE JUDGMENT (ITEMIZED LIST ATTACHED)

OTHER:

ABSTRACT OF JUDGMENT

First Russell Co. Bank
PLAINTIFF(S)

V.

Donna Ray, Administrator
DEFENDANT(S)
Earl Douglas Johnson
CIRCUIT COURT RUSSELL COUNTY

FILED

FEB 25 1983

Delroy R. Ragsdale
Clerk

ATTORNEY FOR PLAINTIFF(S):

1:30 P.M.

ATTORNEY FOR DEFENDANT(S):

I certify the above to be a true copy of a Judgment rendered in this Court.

"Exhibit A"

Russell

10-1-95, 96

133-0 56

CITY OR COUNTY

☒ General District Court

☐ Juvenile and Domestic Relations District Court
(for court-ordered support)

JLD 31
Page 293

This is to certify that a Judgment was rendered in this Court in favor of:

☒ PLAINTIFF(S) against DEFENDANT(S)

☐ DEFENDANT(S) against PLAINTIFF(S)

☐ V

DATE OF JUDGMENT

2-11-83

\$ 101.41

AMOUNT OF JUDGMENT

HOMESTEAD EXEMPTION WAIVED ☐ YES ☒ NO ☐ CANNOT BE DEMANDED

\$ ALTERNATE VALUE OF SPECIFIC PROPERTY AWARDED

INTEREST RATE(S) AND BEGINNING DATE(S)

10% from 2-11-83

COSTS

\$ 9.00

ATTORNEY'S FEES

\$

TOTAL CREDITS

\$ AMOUNT RECEIVED SINCE JUDGMENT (ITEMIZED LIST ATTACHED)

OTHER:

ABSTRACT OF JUDGMENT

Abington Wholesale
Plumbing & Electric, Inc.
(PLAINTIFFS)

Donna Ray, Admin.
v.
Earl V. Douglas Johnson
DEFENDANT(S)
CIRCUIT COURT RUSSELL COUNTY

FILED

FEB 25 1983

Calvin J. Ricks
Clerk

ATTORNEY FOR PLAINTIFF(S):
J. B. P. H.

ATTORNEY FOR DEFENDANT(S):

"Exhibit B"

I certify the above to be a true copy of a Judgment rendered in this Court.

2-25-83

DATE

Joan B. Jetter
CLERK

JUDGE

ABSTRACT OF JUDGMENT 1

V.A. CODE ANN §§ 801-449
10-1-95, 96

FILE NO.

115.0055

Russell

CITY OR COUNTY

☒ General District Court

☐ Juvenile and Domestic Relations District Court

(for court-ordered support)

JLD 31

Page 293

This is to certify that a Judgment was rendered in this Court in favor of:

☒ PLAINTIFF(S) against DEFENDANT(S)

☐ DEFENDANT(S) against PLAINTIFF(S)

☐ V

DATE OF JUDGMENT

11-83

\$ 1070.83

AMOUNT OF JUDGMENT

HOMESTEAD EXEMPTION WAIVED ☐ YES ☒ NO ☐ CANNOT BE DEMANDED

\$ ALTERNATE VALUE OF SPECIFIC PROPERTY AWARDED

INTEREST RATE(S) AND BEGINNING DATE(S)

10% from 2-11-83

\$ 9.00

COSTS

\$

ATTORNEY'S FEES

TOTAL CREDITS

\$ AMOUNT RECEIVED SINCE JUDGMENT (ITEMIZED LIST ATTACHED)

OTHER:

ABSTRACT OF JUDGMENT

Admission Hardware
Plumbing & Electric, Inc.

PLAINTIFF

Donna Ray Adm.
Earl Douglas Johnson

DEFENDANT

CIRCUIT COURT, NORTH COUNTY

FILED

FEB 25 1983

Debra J. Smith Clerk

ATTORNEY FOR PLAINTIFF(S):

ATTORNEY FOR DEFENDANT(S):

I certify the above to be a true copy of a Judgment rendered in this Court.

2-25-83

DATE

John B. Vetter

CLERK

JUDGE

"Exhibit C"

VIRGINIA:

IN THE CIRCUIT COURT OF RUSSELL COUNTY

FIRST NATIONAL EXCHANGE BANK)
OF VIRGINIA,)
Plaintiff)
vs.)
DONNA J. RAY, Administratrix)
of the Estate of)
EARL D. JOHNSON, Deceased)
and)
PEGGY M. JOHNSON,)
Route 1, Green Valley Estates)
Lebanon, Virginia 24266)
Defendants)

ORDER

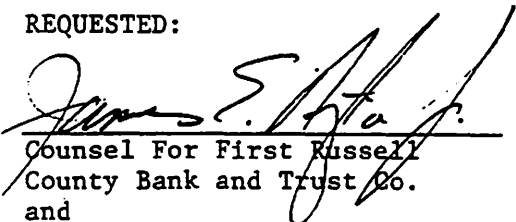
THIS DAY, came First Russell County Bank and Trust Co., and Abingdon Wholesale Plumbing and Electric, Inc., by counsel, to be heard upon their Motion to join in the above-styled action as additional party Plaintiffs, notice having been duly given to the Defendants, the Defendants having neither appeared nor objected to the motion;

UPON CONSIDERATION WHEREOF, it appearing that said motion is proper pursuant to Rule 3:9A of the Rules of the Supreme Court of Virginia, it is hereby

ADJUDGED, ORDERED, and DECREED that the First Russell County Bank and Trust Co., and Abingdon Wholesale Plumbing and Electric, Inc., are hereby joined as party Plaintiffs in this action.

ENTER this 24th day of August, 1983.

REQUESTED:


Counsel For First Russell
County Bank and Trust Co.
and
Abingdon Wholesale Plumbing
and Electric, Inc.


JUDGE

JOHNSON, SCYPHERS & AUSTIN, P.C.

ATTORNEYS AT LAW
189 VALLEY STREET
ABINGDON, VIRGINIA 24210

JOSEPH P. JOHNSON, JR.
DAVID L. SCYPHERS
R. WAYNE AUSTIN

September 6, 1983

TELEPHONE:
(703) 628-7167

Hon. Judge Glynn Phillips
Russell County Circuit Court
Lebanon, Virginia 24266

Re: First National Exchange Bank of Virginia
vs.
Earl D. Johnson and Peggy M. Johnson

Dear Judge Phillips:

I want to apologize for the delay in forwarding this memorandum concerning the matter of consideration in the above styled matter. I will now proceed to outline my position concerning the issue of consideration in the above styled matter and would further rely on previous briefs, evidence submitted and argument of counsel.

In Michie's Jurisprudence, Contracts Section 30, et seq., a full discussion is had on consideration and its adequacy. "Consideration is defined to be of benefit to the party promising by loss or detriment to the party to whom the promise is made". I could state at considerable length the different definitions of consideration but I think it is sufficient to state this definition. In the case at bar, Peggy Mitchell had received no benefits nor was there any loss or detriment to the bank. Peggy Mitchell received nothing since this was a preexisting debt of Earl Johnson only. Agents of the bank who testified at the hearing in this matter confirmed same. Prior to the signing of the note and deed of trust, the bank was unsecured and afterwards held a secured interest in real estate. Bank officials stated that basically the only reason they had Peggy Mitchell to sign was because they believed her to be the wife of Earl Johnson, in essence to release her dower or spousal rights. They were not relying upon her signature as a guarantor or obligator on the note. The general rule is that new promise without other consideration and the performance of an existing contract and according with these terms is a naked promise

September 6, 1983
Page 2

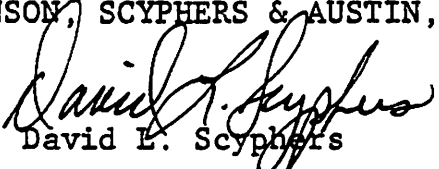
Re: First National Exchange Bank of Virginia
vs.
Earl D. Johnson and Peggy M. Johnson

without legal consideration and therefore unenforceable. Michie's Jurisprudence, Contracts, Section 34. Stuart v. New York Life Insurance Company, 154 Va. 154 (1930). In fact, the bank officials admitted had they known that Peggy Mitchell was not the wife of Earl Johnson, they would not have required her to sign anything whatsoever. The bank received exactly what they wanted, i.e., secured note instead of unsecured, and have already foreclosed on said property. They admitted they would have still executed the deed of trust as they were securing with real estate a previously unsecured debt of Earl Johnson only.

The defendant does not waive her previous arguments of mistake and constructive fraud as to the signing of the documents. In fact, defendant would further emphasis that the bank officials who executed the contract admitted that nothing was explained at the time of the closing. Statement made by Ms. Mitchell at the time of the closing should have drawn the attention of the bank officials to the fact that she was not aware of signing but one note. The transcript of this matter is not yet available so I cannot refer to same. I would ask the Court to review the transcript to verify the statements made by the officials of the bank when same is available.

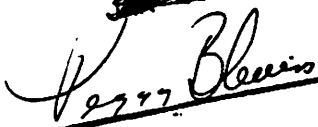
Respectfully Submitted,

JOHNSON, SCYPHERS & AUSTIN, P.C.

By:  David E. Scypers

DLS/lfm

cc: Charles Schelin

CIRCUIT COURT RUSSELL COUNTY
FILED
Sept 7 1983

Peggy M. Johnson Clerk

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

846164

11/14
doe 2/14
pull 2/28

5450

FIRST NATIONAL EXCHANGE BANK

Plaintiff

VS.

EARL D. JOHNSON

AND

PEGGY JOHNSON

Defendants

FEB 1 1984

RECEIVED
LEBANON, VIRGINIA

IN THE CIRCUIT COURT OF RUSSELL COUNTY, LEBANON, VIRGINIA

APPEARANCES:

CHARLES E. SCHELIN, ESQ., Lebanon, Virginia

Counsel for the Plaintiff

DAVID L. SCYPHERS, ESQ., Abingdon, Virginia

Counsel for the Defendants

CIRCUIT COURT RUSSELL COUNTY
FILED

SEP 18 1983

PROCEEDINGS OF HEARING OF JULY 1ST, 1983

I N D E X

WITNESS:

DIRECT CROSS REDIRECT RECROSS

PEGGY M. JOHNSON	16-19	19-22	22	--
JOAN DORTON	22-25	25-31	31-34	34-36
THOMAS S. BUNDY	36-42	42-47	47-48	48
	--	--	48-50	--
WILLIAM W. BOLLING	50-52	52-57	57-58	--

EXHIBITS:

PLAINTIFF EXHIBIT NO. 1 - Copy of note - R-17

PLAINTIFF EXHIBIT NO. 2 - Copy of Deed of Trust - R-18

PLAINTIFF EXHIBIT NO. 3 - Copy of Note - R-18

PLAINTIFF EXHIBIT NO. 4 - Copy of Note - R-18

PLAINTIFF EXHIBIT NO. 5 - Copy of Recision - R-18

PLAINTIFF EXHIBIT NO. 6 - Disclosure Statement - R-19

PLAINTIFF EXHIBIT NO. 7 - Good Faith Estimate - R-19

PLAINTIFF EXHIBIT NO. 8 - Copy of Deed of Trust - R-52

2 The following matter came on to be heard on this
3 the 1st day of July, 1983, before the Honorable Glyn R.
4 Phillips, Judge of the Circuit Court of Russell County,
5 Virginia.

6 THE COURT: Let me ask you this. I have been glancing
7 over this and I remember we entered a default judgment then
8 set it aside.

9 MR. SCHELIN: Right.

10 THE COURT: I remember that much of it. Why don't
11 you give me -- I read your briefs in connection with your
12 summary judgment. Why don't you just give me a brief open-
13 ing statement and kindly apprise me.

14 MR. SCHELIN: I have a couple of pretrial motions
15 I'd like to make, also.

16 THE COURT: Okay.

17 MR. SCHELIN: My first motion revolves about the
18 original motion for judgment. In the original motion we
19 asked that if a judgment were entered that we be awarded
20 ten percent interest on the judgment until it's paid off.
21 I'd like to amend that to read fourteen percent, pursuant
22 to Section 6.1-330.10 of the Code, wherein it says that
23 in contracts for the loan of money that the contract rate
24 will prevail. And the contract rate in this case is four-
25 teen percent.

2 THE COURT: What is that section?

3 MR. SCHELIN: 6.1-330.10. I have a machine copy
4 of it here, Your Honor, if it would help you any.

5 THE COURT: I have it. You may give Mr. Scyphers a
6 copy of that.

7 MR. SCYPHERS: Judge, I'm familiar with that section
8 of the Code. It was, I think, enacted in 1981 or 1982.
9 This is provided on bank notes if judgment is entered.

10 MR. SCHELIN: Yes, of course, if its not entered
11 then its moot.

12 MR. SCYPHERS: Right.

13 THE COURT: There's no defense to that. I will grant
14 your motion then.

15 MR. SCHELIN: Your Honor, I don't recall the date,
16 but I filed a request for admissions. There was no
17 response to the admissions so pursuant to the Rules of
18 Court I would like the following to be taken as admitted.
19 Number one, that First National Exchange Bank is a Virginia
20 Corporation organized and operating under the laws of
21 Virginia and has a branch office here in Lebanon, Russell
22 County, Virginia.

23 THE COURT: Let's take them one by one. No objection
24 to that?

25 MR. SCYPHERS: No objection.

2 MR. SCHELIN: Second, that the defendant, Peggy M.
3 Johnson, also known as Peggy Mitchell, can read and write
4 the English language.

5 THE COURT: No objection to that?

6 MR. SCYPHERS: No objection, Your Honor.

7 MR. SCHELIN: And, third, that the defendant, Peggy
8 M. Johnson, was under no duress of any kind when she executed
9 the \$40,000.00 note which is attached as Exhibit A to the
10 motion for judgment.

11 MR. SCYPHERS: That, Your Honor, of course, we've
12 answered that before in our answer and we, of course, can't
13 deny signing the note, the signature, but duress here, the
14 only two comments that I would have to make is duress implies
15 that there was force used against her. We don't claim
16 there was any force used against her.

17 MR. SCHELIN: That's what I wanted you to admit.

18 MR. SCYPHERS: We are arguing constructive fraud
19 which is not subject to this admission. And we're arguing
20 mistake, but, of course, that's not duress. There was no
21 force applied to her. Nobody had a gun to her head.

22 MR. SCHELIN: That's what I wanted. That's the
23 admission I want.

24 MR. SCYPHERS: Of course, as far as when she executed
25 the \$40,000.00 note, as far as executing it, executing implies

2 a knowing doing of something that's been handled in our
3 answer, too. Our defense is that we didn't knowingly execute
4 but one \$40,000.00 note on the date in question.

5 MR. SCHELIN: With that response then, I will change
6 the word, executed, to signed.

7 THE COURT: All right.

8 MR. SCYPHERS: No problem.

9 MR. SCHELIN: Then I move that Peggy M. Johnson be
10 estopped to deny that she owes the Plaintiff the amount
11 sued for as the bank detrimentally relied on the fact that
12 she was Mrs. Johnson and, two, that she executed the note
13 and the deed of trust.

14 MR. SCYPHERS: Your Honor, of course, that's the
15 burden of proof on the bank to show that they relied on
16 that. That's not any admission. Of course, the evidence
17 may be that the bank or its agents knew that Mrs. Johnson,
18 Peggy Mitchell, was not actually Earl D. Johnson. (sic).
19 I think that's a subject of proof.

20 THE COURT: I think that I would deny your motion on
21 the latter issue until after I hear some evidence.

22 MR. SCHELIN: All right.

23 THE COURT: Or until evidence is produced.

24 MR. SCHELIN: In the way of opening statement, Your
25 Honor, late in 1978, probably October of 1978, Earl D.

Johnson borrowed approximately \$40,000.00 to build or complete a home in the Fincastle Estates Subdivision just outside of Lebanon here in Russell County. This incidentally, so the Court will know what property we're talking about, is the same property that Earl and Judge Bundy went to Court over.

THE COURT: And Judge Phillips got out of it.

MR. SCHELIN: Judge Phillips got out of it, right. This loan was to have been repaid in six to eight months. In January of '80, 1980, the bank told Earl Johnson that he must either repay the loan or he must secure the loan. Since the bank was under the impression that Earl and Peggy Mitchell were man and wife, it required her to execute the note and the deed of trust because of her dower rights. And on January 25th, 1980, Earl and Peggy executed, signed, or whatever, a \$40,000.00 demand note bearing interest at the rate of fourteen percent and secured by a deed of trust on the Fincastle Estate Property.

THE COURT: What's the date again of that?

MR. SCHELIN: January 25th, 1980.

THE COURT: 1980, all right.

MR. SCHELIN: Also, on the same day, but in a separate transaction, Earl and Peggy Johnson borrowed \$40,000.00 at twelve and a quarter percent payable monthly

2 over a period of twenty years. This loan was secured by a
3 second deed of trust on property located in Green Valley
4 Estates Subdivision, just outside of Lebanon.

5 THE COURT: You said that was on the same day?

6 MR. SCHELIN: Yes, sir, the same day, but in a
7 separate transaction.

8 THE COURT: Okay.

9 MR. SCHELIN: All right. In the spring of 1982,
10 Earl and Peggy Johnson were notified of their default on
11 the \$40,000.00 note secured by the deed of trust on the
12 Fincastle Estates property. The property was later sold
13 at public auction on July 10th, I believe it was, 1982.
14 And a deficiency of \$20,253.42 resulted.

15 THE COURT: How much was the deficiency?

16 MR. SCHELIN: \$20,253.42. Interest due on this
17 \$40,000.00 note as of November 1st, 1982, amounted to
18 \$8,254.89. All right. The note called for all reasonable
19 expenses including but not limited to attorney's fees. And
20 in an attempt to be reasonable, I've set my fees at fifteen
21 percent as opposed to twenty-five percent which is now the
22 going rate or at least common anyway. After filing this
23 motion for judgment back in November and before Peggy filed
24 her answer; I think she filed her answer on January 3rd; it
25 became public knowledge that she and Earl were never married.

2 Earl died on December 26th, 1982. By her response to the
3 First National Exchange Bank motion for summary judgment,
4 it appeared as though Peggy was claiming, and I refer
5 specifically to Mr. Scypher's letter of May, not May but
6 April 27th, 1983, she may, and I repeat may, have mistakenly
7 signed the second note and deed of trust on the property
8 used as her residence. So that would indicate to me that
9 she knew she was signing the one on the Fincastle Estates
10 and she mistakenly also signed one on the property in
11 Green Valley. And later on in his letter he states that
12 she mistakely signed two, so I'm just going by what is
13 said there. It ought to be noted that on this date Peggy
14 did not own any interest at all in the Green Valley Estates
15 property. The only interest she had was her dower rights.
16 Actually she had no interest at all, period, since she
17 was not married. But she was claiming to have been
18 married, therefore, claiming dower interest in that and
19 the bank was relying on the fact that she had dower interest
20 in the property in Fincastle and the property in Green
21 Valley Estates, when, in fact, she had no interest at all,
22 period. She is also claiming that the Bank owed a duty of
23 disclosure, that it failed in that duty, and thus defrauded
24 her, either if not intentionally then unintentionally.
25 She is further claiming that she received no benefits from

2 signing that note and that constructive fraud existed,
3 or I guess, if you carry that any further, that it would
4 be a unjust enrichment on the part of the bank. Well,
5 they are also claiming that Federal law requires a complete
6 disclosure under the circumstances. First National Exchange
7 Bank intends to prove that Peggy knew she was signing two
8 notes and that she indirectly, if not directly, benefitted
9 from the signing of both notes. We intend to show that
10 Peggy actively and intentionally and fraudently misled the
11 bank by claiming to be Mrs. Earl D. Johnson. That the
12 bank made a complete disclosure and had three separate
13 disclosure statements -- I mean three separate disclosure
14 statements were executed by Peggy for the \$40,000.00 loan
15 which was secured by a second deed of trust on the Green
16 Valley Estates home. Now these three separate disclosure
17 statements were in addition to the \$40,000.00 note and the
18 deed of trust on the Green Valley Estates property. There
19 were no disclosure statements executed on the \$40,000.00
20 note and deed of trust securing that note on the Fincastle
21 Estates property, because this was a commercial transaction.
22 There are no disclosure statements required for commercial
23 transactions. Because of Earl's health and the depression,
24 Earl never completed, never finished, the house in Fincastle
25 Estates and it was sold at a foreclosure sale on July 10th,

1982 at, of course, a considerable loss. The deficiency, as of November 1st, amounted to, like I said earlier, \$20,253.42 in principle and \$8,254.89 interest due as of November 1st and attorney's fees as of November 1st of \$4,276.25, for a total as of November 1st of \$32,784.56. Since November 1st, of course, there has been eight months elapse or pass, so the interest is considerable higher than that now. I don't have the figure of what it would amount to as of today. I think Mr. Bundy will. That is our opening statement.

THE COURT: All right. Mr. Scyphers.

MR. SCYPHERS: May it please the Court, our position in this matter is that the money that was owed and the note they are suing on was one that Mr. Johnson already owed the money. And its the Bank later coming in and trying to get security for a note that they had already executed to Mr. Johnson that it is our information was unsecured. And they are coming back in trying to get security. As Mr. Schelin stated in his opening statement; I'm just repeating what he said; the only reason for having Peggy Mitchell sign that was because of the alleged dower rights. I wrote that down. Our position is that the agents of the bank knew that they weren't married, that was explained to them. And they went ahead and had this executed as it

2 was. As Mr. Schelin stated, both of these notes are dated
3 the same day, January 25th; I don't remember the year; 1980,
4 I believe. Mrs. Mitchell always thought that she was only
5 getting one loan on the house in which she is living. And
6 as far as having any interest in that, she took money that
7 she got from a settlement on the sale of a previous house
8 and put that money in that house. So she had a very
9 definite interest in it. She never applied for this other
10 loan that they are suing on now and on the loan that is on
11 her house, she has been making those payments. There is
12 nothing deficient on that. And it is our simple position
13 that when they laid the papers down there, both being in
14 the amount of \$40,000.00, nobody ever said, now, this is one
15 thing and this is another, and if by your own mistakes and
16 your own actions, you don't make sure that somebody knows
17 whats going on, then you can't come in later and say, hey,
18 give us our money. And I think there is no unjust enrich-
19 ment argument here because the bank is in no worse position
20 by not having Mrs. Mitchell on a judgment than they were
21 if she had never executed anything. They are not one bit
22 worse off. As a matter of fact, when Mr. Johnson signed
23 on that house in Fincastle, they are better off than they
24 were, because previously they were unsecured. Now, as far
25 as any mistake in language possibly in our brief of April

2 27th, I don't think that anyone can claim that they didn't
3 know what we were arguing because I think its clear on its
4 face and its clear from our answer that she thought she
5 executed only one note. She is willing to stand liable for
6 that one note on the Green Valley Estate property because
7 that is her house. And that any other thing that was
8 signed, it was signed without her knowing what she was
9 doing. It was a duty on the bank to disclose it. And by
10 their actions, having both \$40,000.00 notes signed on the
11 same day, it's easy to see how any reasonable person could
12 be mistaken. I don't think if the bank had loaned somebody
13 \$1,000.00, but put the decimal point in the wrong place and
14 made it a million dollars, they wouldn't try to hold any-
15 body liable for it. And that's our position in this case.
16 And I think that the evidence -- of course, we're demanding
17 strict proof from the Plaintiff in all of the matters they
18 have alleged in their opening statement.

19 THE COURT: Well, let me ask you, what was the
20 original date of the first loan on the Fincastle property?

21 MR. SCYPHERS: We don't have it Judge. You'd have
22 to ask them.

23 THE COURT: You've given me the date of the deed of
24 trust, but if your statement is correct, that Mr. Johnson
25 obtained the loan first and then later the bank came back

2 and got a deed of trust --

3 MR. SCHELIN: That's correct.

4 THE COURT: Well, of course, Mr. --

5 MR. SCHELIN: As I understand the way things work;
6 Mr. Bundy can clear this up; Mr. Johnson made arrangements
7 for approximately \$40,000.00 back in I think it was October
8 of '78. You know, when you're building a house, you don't
9 need all that money right away. So he borrowed against; if
10 you will; this line of credit. Then he didn't pay it back.
11 So then the bank says, okay, you either pay off now or we're
12 going to get it one way or another.

13 THE COURT: Well, then basically, from the two
14 statements, I gather the only real issue is on the Fincastle
15 Estates property.

16 MR. SCHELIN: That's correct. No, not really. They
17 brought in the Green Valley Estates property, too. They say
18 there's been no disclosure, no nothing, they just threw
19 two pieces of paper on the desk and said sign them. They
20 were both for \$40,000.00. And Peggy didn't read them. I
21 assume that's what she is saying because the notes were
22 different. One had twelve and a quarter percent interest
23 payable at so much money per month for twenty years, whereas
24 the other one was fourteen percent interest payable on
25 demand.

2 MR. SCYPHERS: We don't take the position that she
3 didn't know that she was signing a \$40,000.00 note.

4 THE COURT: As I understand it, you are admitting that
5 she signed the Green Valley Estates note and she is not
6 denying the obligation under that note.

7 MR. SCHELIN: Right.

8 MR. SCYPHERS: Because she has been making payments
9 on it.

10 MR. SCHELIN: We never said that she wasn't.

11 THE COURT: Okay. Well, getting it down to the basic
12 issues --

13 MR. SCHELIN: I think the basic issue is this. Did
14 she know that -- well, actually I don't even think that
15 makes any difference. Well, maybe it does, too. Did she
16 know that she was signing two different notes? I think
17 that's what it amounts to. Now, I say, number one, it
18 doesn't make any difference whether she knew she was sign-
19 ing two of them or not. He is saying that the bank had a
20 duty to fully disclose the differences between these two
21 things. And, of course, we're saying, well, the bank did.

22 MR. SCYPHERS: That's a matter of proof.

23 THE COURT: Well, I think we're ready. I appreciate
24 your opening statements. I think the Court knows what it's
25 about. All I need to know is to see what the witnesses

2 have to say.

3 MR. SCHELIN: I'll call Peggy M. Johnson as adverse
4 witness.

5 PEGGY M. JOHNSON

6 having been duly sworn, was examined and testified as
7 follows:

8 DIRECT EXAMINATION

9 BY MR. SCHELIN:

10 Q Would you please state your name, address
11 and occupation?

12 A Peggy Mitchell. Green Valley Estates. I'm
13 a school bus driver.

14 Q All right. As Peggy Mitchell you are also
15 the same person known as Peggy M. Johnson, are you not?

16 A Right.

17 Q What date did you move into your home in
18 Green Valley Estates?

19 A I believe it was in the last of '79 or the
20 first of '80. December of '79 maybe. Somewhere along
21 there, if I'm not mistaken.

22 Q Who occupied that home with you on that date?

23 A Earl, myself and my kids.

24 Q Were you ever married to Earl?

25 A No, sir.

2 Q Have you ever permitted others to call you
3 Mrs. Johnson, or Peggy Johnson?

4 A They have.

5 Q Have you ever referred to yourself as Mrs.
6 Johnson or Peggy M. Johnson?

7 A Yes.

8 Q On or about January 25th, 1980 did you sign
9 a note in the amount of \$40,000.00 payable to the First
10 National Exchange Bank bearing fourteen percent interest
11 payable on demand?

12 THE COURT: Do you want to show that to her?

13 MR. SCHELIN: I've got a copy of it here, Your
14 Honor. And we've got it in the file. I don't know how you
15 want to do it, but I'm willing to do it any which way.

16 THE COURT: Well, just show it to her.

17 MR. SCHELIN: It would be a little easier to follow
18 if we did it this way.

19 Q In other words, did you sign that note?

20 A Yes.

21 MR. SCHELIN: All right. I would like that as
22 Exhibit 1.

23 THE COURT: All right.

24 MR. SCHELIN: I'll hand you a deed of trust. I'll
25 let your lawyer look at it first. I'll ask you if you

2 signed that one, too. That's a copy of the deed of trust.
3 I'm sorry.

4 A Yes.

5 MR. SCHELIN: Just for the record, there is also
6 a recording receipt on the back of that and I'd like that
7 as Exhibit 2, Your Honor.

8 THE COURT: All right.

9 Q Did you also on the same date, January 25th,
10 1980, sign a \$40,000.00 note payable at twelve and a quarter
11 percent interest over a twenty year period?

12 A Yes.

13 MR. SCHELIN: I'd like this as Exhibit 3.

14 Q Did you sign the note of recision that I
15 have just handed your lawyer and he handed to you?

16 A Yes, sir.

17 MR. SCHELIN: This is our next Exhibit, Your Honor.

18 THE COURT: Exhibit Number 4.

19 Q Do you recognize Earl's signature?

20 A Uh-huh. That's it.

21 Q This is his signature here?

22 A Yes.

23 MR. SCHELIN: This would be the next exhibit, Your
24 Honor, 5, I believe.

25 THE COURT: 5.

2 Q All right. I would ask you if you signed
3 this document entitled disclosure statement?

4 A Yes, sir.

5 MR. SCHELIN: That's 6 Your Honor.

6 Q I'll ask you whether or not you signed this
7 document called good faith estimates?

8 A Yes, sir.

9 THE COURT: Number 7.

10 MR. SCHELIN: It looks like I've got part of this
11 deed of trust missing. But this would be the deed of trust
12 securing that same loan. This is the first and last page.
13 We'll get the other pages later.

14 MR. SCYPHERS: I have no objection to that.

15 WITNESS: Yes, sir.

16 MR. SCHELIN: That's all I have for this witness,
17 Your Honor.

18 MR. SCYPHERS: Your Honor, if I go into some of the
19 evidence now, I'll have the right to call her for direct.

20 THE COURT: Oh, yes.

21 CROSS EXAMINATION

22 BY MR. SCYPHERS:

23 Q Mrs. Mitchell, when you signed these documents
24 did you understand that you were obligating yourself on
25 two separate \$40,000.00 loans?

2 A. No, sir.

3 Q. What was your understanding when you signed
4 the documents that you signed?

5 A. That I was signing \$40,000.00 on our home
6 in Green Valley.

7 Q. And are all -- Are both of these loans for
8 \$40,000.00?

9 A. Yes.

10 Q. Did you knowingly sign any document obligating
11 yourself on the Fincastle property?

12 A. ~~Q. Q.~~ No, sir.

13 Q. Did anyone ever explain to you that you
14 were signing a \$40,000.00 note obligating yourself on a debt,
15 that if the Fincastle property didn't properly secure it
16 that you would have to be liable for it?

17 A. I didn't know anything about it until it
18 came out in the paper and I called Chuck and asked him
19 about it.

20 Q. So you never knew anything about it?

21 A. No.

22 Q. Owing anything on Fincastle. All right.

23 Now, as far as your name being Peggy Mitchell or Peggy
24 Mitchell Johnson, who helped with the closing of this loan?

25 A. Bill Bolling.

2 Q He was one. Were there others?

3 A Mrs. Dorton, she was there.

4 Q Did either Mrs. Dorton or Mr. Bolling know
5 that you were not married to Mr. Johnson?

6 A Yes.

7 Q Who knew that?

8 A Bill Bolling knew that I wasn't.

9 Q How do you know that he knew that?

10 A Because, Earl, myself and Bill were in his
11 office before the first deed was ever wrote or anything.
12 Earl told him that we were not married. And Mr. Bolling
13 said that it would be no problem.

14 Q And did you have any other contacts with
15 Mr. Bolling in his office as far as during this time
16 period?

17 A Yes, sir.

18 Q Did they do work for you all?

19 A Yes, sir.

20 Q Now, did you ever receive any money from a
21 \$40,000.00 loan on the Fincastle property?

22 A No, sir.

23 Q Did you ever have a check made out payable
24 to you for \$40,000.00 on the Fincastle property?

25 A No, sir.

2 MR. SCYPHERS: Your Honor, I reserve any other
3 questions until direct examination.

4 THE COURT: Do you wish to ask her anything else
5 now? Of course, you will have a right to cross examine her
6 when she's put back on.

7 MR. SCHELIN: I have no questions I want to ask at
8 this point. Wait a second. Yes, I do.

9 REDIRECT EXAMINATION

10 BY MR. SCHELIN:

11 Q I believe that you said that Bill Bolling
12 had prepared a number of transactions for you and Earl?

13 A Uh-huh.

14 Q In other words, any real estate that you
15 and Earl were involved in or Earl was involved in, Bill
16 handled, is that correct?

17 A Uh-huh.

18 MR. SCHELIN: That's all I have.

19 THE COURT: All right.

20 MR. SCYPHERS: Your Honor, I reserve all the other
21 questions.

22 THE COURT: You may call her back later.

23 MR. SCYPHERS: All right.

24 JOAN DORTON

25 having been duly sworn, was examined and testified as

2 follows:

3 DIRECT EXAMINATION

4 BY MR. SCHELIN:

5 Q Would you please state your name for the
6 Court?

7 A Joan Dorton.

8 Q That's J-o-a-n as opposed to J-o-a-n-n?

9 A Right.

10 Q Okay. And what is your address?

11 A Route 2, Box 127A, Castlewood, Virginia.

12 Q By whom are you employed?

13 A First National Exchange Bank.

14 Q What position do you hold with First
15 National Exchange Bank?

16 A Loan officer.

17 Q Are you familiar with two loan transactions
18 between First National Exchange Bank and Earl and Peggy
19 Johnson?

20 A Yes, I am.

21 Q These would be the loans wherein they were
22 each \$40,000.00?

23 A Right.

24 Q Were you present at the closing of these
25 loans and the signing of the respective notes?

2 A I was.

3 Q Please state to the Court what truth in
4 lending disclosures, if any, were made?

5 A The truth in lending disclosure was made
6 on the residential loan, on the \$40,000.00 as the deed of
7 trust on the property in Green Valley Estates. On the other
8 loan, there was no truth in lending because it was a
9 commercial loan.

10 Q All right. What statements, if any, did
11 Peggy Johnson make about signing two different notes?

12 A She made the statement, do you want me to
13 sign this one, too.

14 Q To who was she speaking?

15 A To Mr. Johnson.

16 Q What was his response?

17 A He said something to the effect, we're in this
18 together, yes. We're in this together.

19 Q Did she or did she not go ahead and sign it?

20 A She did, yes.

21 Q Was that statement that she made to Earl
22 made before she signed it or after she signed it?

23 A Well, we had completed one transaction for
24 \$40,000.00 --

25 Q On the Green Valley Estates?

2 A Green Valley Estates.

3 Q That's the one where all the disclosure
4 statements were made?

5 A Right.

6 Q And then --

7 A On the \$40,000.00 commercial loan is when
8 she made the statement.

9 Q And she made that statement before she signed
10 it?

11 A That's right.

12 MR. SCHELIN: You may ask.

13 BY MR. SCYPHERS: CROSS EXAMINATION

14 Q Ms. Dorton, did you ever say, now, this is
15 what you're signing, this is on the Fincastle property and
16 this is what you're signing and this is on the Green Valley
17 property? Or did you just lay them out there and have her
18 sign them?

19 A I always go over each transaction, the note,
20 the deed of trust, and everything and explain it to the
21 customer what they are signing.

22 Q I'm not asking you what you always do. I'm
23 asking you on this specific instance with Mrs. Mitchell, did
24 you hand it to her and say, now, this is on the Fincastle
25 property and this is on the Green Valley property?

1

2 A Well, I'm sure that I did, because I always
3 do. I don't know why it would be any different.

4 Q Are you saying that you're saying that, yes,
5 because that is your normal course of business or can you
6 truthfully say under oath on the stand today that you can
7 remember doing that for Peggy Mitchell?

8 A Yes, I can.

9 Q You say you can specifically remember it?

10 THE COURT: Now, he's asking you do you specifically
11 remember that you said that this is on the Fincastle property
12 and this note is on the Green Valley Estates. That's the
13 question that he is asking you.

14 WITNESS: Well, I'm sure that I did.

15 Q Ma'am, I'm not asking you -- I know what
16 your normal course -- you said your normal course of business
17 is. And I'm not harassing or anything. I'm not asking you
18 that. I'm asking you if you can sit here and under oath
19 testify without a doubt that you handed her one paper and
20 said this is on Fincastle property and hand her another
21 one and said this is on the Green Valley property? Can
22 you say that?

23 A Well, we closed the Green Valley property
24 first. And I always -- I would have --

25 Q No, ma'am. I'm not asking you what you always

2 do. You can answer my question and then explain it any way
3 you want to. Okay. I'm asking you can you state without
4 a doubt under oath that you did that in this instance and
5 you can specifically remember doing it?

6 A. Well, no.

7 Q. Okay. Now, ma'am, you have a document exe-
8 cuted here, a disclosure statement -- and this would have
9 been all that you would have had executed because you said
10 the other was a commercial and it wouldn't be required, is
11 that correct?

12 A. Right.

13 Q. I'm showing this document to you, Plaintiff's
14 Exhibit Number 5. It's dated January 25th, 1980, is that
15 correct?

16 A. Right.

17 Q. And it says that you must mail a telegram
18 sent not later than midnight of January 30th, 1982 to revoke
19 this. Does that say that?

20 A. Yes.

21 Q. And what's the date that it is signed?

22 A. The 1st day of February.

23 Q. So this is dated after -- this is the one
24 signed by Earl D. Johnson. It's dated after the notice
25 says here the date of rescission is void, isn't that correct?

2 A That's correct.

3 THE COURT: Let me see that.

4 MR. SCHELIN: Which Exhibit is that?

5 THE COURT: Plaintiffs Exhibit Number 5, he was
6 referring to.

7 Q Let me show you Plaintiff Exhibit Number 4.

8 MR. SCYPHERS: May I go ahead, Your Honor?

9 THE COURT: Wait just one second. All right, go
10 ahead.

11 Q This is Plaintiff Exhibit Number 4 signed
12 by Peggy M. Johnson. Is it the same way, January 25th, it
13 says transaction on January 25th, you must make the tele-
14 gram not later than January 30th and it's dated February
15 1st, 1980? Is that the same date as the one Earl D. Johnson
16 signed?

17 A That is correct.

18 Q Now, ma'am, what you have testified that you
19 heard her say; if I wrote this down right; do you want me
20 to sign this one, too. And that's what she said to Mr.
21 Johnson?

22 A (Affirmative nod of head).

23 Q And he said we're in this together. Is that
24 what was said?

25 A Right.

2 Q And that was all that was said?

3 A That's all I can remember.

4 Q Now, Mrs. Dorton, was Bill Bolling present,
5 also?

6 A Yes, he was.

7 Q Was he the one or his office, his employer
8 was the one that prepared these documents for the signature
9 of the parties?

10 A He prepared the deed of trust in his office.

11 Q And he was present there and brought the
12 parties in?

13 A (Affirmative nod of head).

14 Q And whenever he came in I gather you all
15 just engaged in normal chit chat and you said, oh, how
16 are you doing today, maybe made some comments about her
17 house or something like that, is that correct, as far as
18 you remember?

19 A (Affirmative nod of head).

20 Q You'll have to say, yes or no.

21 A Yes.

22 Q Okay. Now, ma'am, who made application for
23 the \$40,000.00 loan on the Fincastle property?

24 A Mr. Johnson.

25 Q When you come in to make an application, is

2 there a form you usually sign to apply for a loan, then
3 it goes before a loan committee or something like that?

4 A Yes, sir.

5 Q Do you have any of those documents?

6 A Mr. Bundy has them.

7 Q Mr. Bundy has those. To the best of your
8 knowledge, those were signed only by Mr. Johnson?

9 A Yes, sir.

10 Q Isn't it true, ma'am, that he had preexisting
11 loan with your bank prior to the signing of the loan on the
12 Fincastle, which was unsecured?

13 A I don't know.

14 Q You don't know that. You don't know whether
15 or not the bank had made demand on him for payment on a
16 note and subsequent thereto, after demand was made, he
17 executed the deed of trust and note on the Fincastle property?

18 A Yes, that's true.

19 Q So there was a preexisting note?

20 A (Affirmative nod of head).

21 Q Was it in the amount of \$40,000.00?

22 A I don't know.

23 Q So you don't know. Ma'am, did you make a
24 check to anybody on the Fincastle loan when that note was
25 signed? Did you make a check to anybody on that? Where did

2 the proceeds go?

3 A Mr. Bundy has that information.

4 Q So you didn't disburse it then. You didn't
5 disburse the loan proceeds that day?

6 A It's in the file that he has.

7 Q I know, but did you? You may not remember
8 who you wrote checks to.

9 A I don't remember.

10 Q But did you disburse the money that same
11 day?

12 A I don't remember.

13 Q Ma'am when you foreclosed on this property,
14 who handled that, you or Mr. Bundy?

15 A Mr. Bundy.

16 Q Okay. So you don't have any of the notices
17 that were sent out or any of those things?

18 A No.

19 MR. SCYPHERS: That's all the questions I have, Your
20 Honor.

21 THE COURT: Do you want to ask anything else?

22 REDIRECT EXAMINATION

23 BY MR. SCHELIN:

24 Q Mrs. Dorton, were these disclosure statements
25 that Mr. Scyphers just showed; I don't recall the exhibit

2 numbers but --

3 MR. SCYPHERS: 4 and 5.

4 Q One is a notice of right of rescission which
5 I think may have been --

6 THE COURT: 4 and 5. There they are.

7 Q I will show you these exhibits. I'm refer-
8 ring to Exhibits 4 and 5 now. Were those signed in front
9 of you or were they brought back to you or what?

10 A When we take a lien on a primary residence
11 there is a waiting period. That's the reason it was dated
12 January 25th. They had until midnight of January 30th to
13 change their mind. Then the loan was finalized on February
14 1st.

15 Q So that's the reason for the differences in
16 the dates?

17 A Right.

18 Q They were signed at the same time that the
19 note was signed?

20 A Each customer signs a separate form. We
21 keep a copy and give them two copies. And if they want to
22 go ahead with the transaction, they sign the form and bring
23 it back to the bank the day of the actual disbursement of
24 funds. And if they change their mind, they will sign it up
25 here.

2 Q Where it says I hereby cancel this trans-
3 action?

4 A Right.

5 Q What does it mean by signing down at the
6 bottom where Peggy has signed it? Does it mean she wants
7 to go through with the transaction?

8 A Right. That's right.

9 Q So by acknowledging that she has received
10 it on the 1st of February, then that is past her time that
11 she can rescind by law, is that correct?

12 A (Affirmative nod of head).

13 Q Or past the time which by law which she
14 could have rescinded?

15 A Right.

16 Q And that is the same as with Exhibit Number
17 5 which has Earl's signature on it?

18 A Yes, uh-huh.

19 Q Now, what date was the disclosure statement,
20 which I think is Exhibit Number 6 --

21 MR. SCHELIN: It's Exhibit 7.

22 Q What date was Exhibit Number 7 actually
23 signed?

24 A January 25th.

25 Q And that's Exhibit Number 7 and it's

2 executed by Earl D. Johnson and Peggy M. Johnson?

3 A That is correct.

4 Q And that also was signed at the same time that
5 she signed the note?

6 A That is correct.

7 MR. SCHELIN: Recross?

8 RECROSS EXAMINATION

9 BY MR. SCYPHERS:

10 Q Under Federal law, isn't it true that
11 you have to provide them with notice of their right to
12 rescission and after they have been given notice of their
13 right to rescission they have three days from that date in
14 which to rescind?

15 A Right.

16 Q With no cost to them or anything?

17 A (Affirmative nod of head).

18 Q But under Federal law you have to deliver
19 to them a copy of their right to rescission where they can
20 sign if they want to rescind and they acknowledged the date
21 that they got that, isn't that right?

22 A That's correct.

23 Q All right. And doesn't this form that you
24 just testified, you testified they got it on January 25th
25 Exhibits Number 4 and 5, don't they say, and I quote,

2 reading from, receipt is herewith acknowledged of two
3 copies of the foregoing notice by each of the undersigned
4 borrowers this 1st day of February, 1980. Now, that doesn't
5 say, does it, there's no where on here that they signed this
6 January 25th, is there? No where on here is there a date
7 of January 25th where they signed this?

8 A No, sir.

9 Q So the only thing that is signed here is
10 that they received copies of this on February 1st, 1980.
11 Isn't that what that says? Isn't that the plain reading of
12 that?

13 A Yes, sir.

14 Q So under Federal law this loan, they couldn't
15 have cancelled by what this says after January 30th, even --

16 MR. SCHELIN: Your Honor, I object to that. It calls
17 for a conclusion on the part of the witness.

18 THE COURT: Go ahead and answer it.

19 Q Isn't it true that this document says that
20 they can't cancel after January 30th and it shows they
21 only received it on February 1st, 1980? Am I correct, ma'am?

22 A Yes.

23 Q It doesn't say anything about on February
24 1st we signed this document saying we don't want to rescind.
25 That's not it. It doesn't say that, does it?

2 A No.

3 MR. SCYPHERS: Okay. That's all the questions I
4 have.

5 THE COURT: Anything else.

6 MR. SCHELIN: No, Your Honor.

7 THE COURT: She's excused.

8 THOMAS S. BUNDY

9 having been duly sworn, was examined and testified as
10 follows:

11 DIRECT EXAMINATION

12 BY MR. SCHELIN:

13 Q Please state your name, address and occupa-
14 tion to the Court.

15 A Thomas S. Bundy. Lebanon, Virginia. Vice
16 President and Chief Executive officer, First National
17 Exchange Bank, Lebanon.

18 Q Please state to the Court a brief history
19 insofar as a certain parcel of land in Fincastle Estate
20 Subdivision, Lebanon, Virginia is concerned and the Bank's
21 connection with that property.

22 A On November 30th, 1978, the bank made a
23 committment to Earl Johnson for \$40,000.00 to build a
24 house for resale on the property. That loan was to be repaid
25 within six to eight months of the sale of the property.

2 THE COURT: What was that date again?

3 WITNESS: November 30th, 1978.

4 THE COURT: Okay.

5 WITNESS: As of January 25th, of '80, some fourteen
6 months later or fifteen months practically the note had
7 not been paid. At that time we demanded payment from Mr.
8 Johnson. In lieu of payment -- Well, I guess it would be
9 considered repayment. We secured our note, our existing
10 \$40,000.00 note or rather made a new note for \$40,000.00
11 secured by a first deed of trust on the property in Fincastle
12 Estates. Then on July 10th, 1982, after another several
13 months without repayment; there was almost a year and a
14 half there; we still had not received payment and interest
15 was in arrears on the note. So at that time we proceeded
16 with foreclosure and sold the property at public auction.

17 Q Did the bank recover all of it's money at
18 that foreclosure sale?

19 A No. The principle balance of the note at
20 the time was \$40,000.00. After the sale of the property,
21 payment of necessary fees, we had deficiency balance re-
22 maining of \$20,253.42.

23 Q This is as of what, November 1st?

24 A That was the deficiency after the sale on
25 July 10th.

2 Q All right. What interest, if any, was owed
3 as of November 1st, 1982?

4 A \$8,254.89.

5 Q Were any attorney's fees also owed?

6 A At that time it was \$4,276.25.

7 Q Please state what the bank's policy is insofar
8 as disclosures are concerned in making loans on residential
9 homes?

10 MR. SCYPHERS: Your Honor, I object. If this is
11 introduced for the purpose of saying this was done on this
12 instance, he may be able to state what the policy is, but
13 I think Mrs. Dorton was the one that closed it out and she
14 and Mr. Bolling could testify to what was done on this case.

15 THE COURT: Overruled. I'll let him go ahead and
16 tell what the policy was.

17 A Repeat that for me.

18 Q What is the bank's policy or what was the
19 bank's policy on January 25th, 1980, insofar as making
20 disclosures concerning residential loans?

21 A Residential loans come under truth in
22 lending and as such we have to give good faith estimates
23 prior to or at the time of application as to what the
24 estimated closing cost will be at the time of closing and
25 in an instance where an individual is involved that already

2 owned the property, we have to give a right to rescind the
3 transaction, which requires three days -- three business
4 day waiting period. We had to give at that time, the time of
5 closing or at the end of the three days the right to rescind,
6 the final figures as concerns attorney's fees, processing
7 fees, recording costs, normal transaction fees.

8 Q Do you know for a fact whether or not this
9 was done on the Green Valley Estates property?

10 A Yes, it was.

11 MR. SCYPHERS: I object, Your Honor. He couldn't
12 know if he wasn't there.

13 THE COURT: Do your records reflect that? In other
14 words, you're testifying from your records?

15 WITNESS: Yes.

16 THE COURT: Go ahead. Objection overruled.

17 Q What is your policy, what is the bank's
18 policy, what was the banks policy, as of January 25th,
19 1980, insofar as making loans to a man and woman who are
20 not married?

21 MR. SCYPHERS: Your Honor, may this be a continuing
22 objection and I won't continue to interrupt. I understand
23 the Court has overruled me, but if the Court would allow
24 this to be continuing objection.

25 THE COURT: Yes.

2 A Any two people, whether male or female,
3 two males, two females or whatever it may be, if they are
4 not husband and wife they would be considered co-applicants
5 to the transaction, thereby both would have to provide an
6 application for a loan and separate financial information
7 and supporting documentation to qualify individually for
8 the loans.

9 Q All right. In this case, did that occur
10 with Earl and Peggy Johnson?

11 A No.

12 Q Why not?

13 A Because the bank presumed at the time that
14 they were married.

15 Q Why did the bank presume that?

16 A We had no reason to know that they weren't
17 at the time. It seemed to be common knowledge that they
18 were husband and wife.

19 MR. SCYPHERS: I object to common knowledge.

20 THE COURT: I sustain the objection.

21 Q Does the bank ever require marriage certifi-
22 cates or proof of marriage when people come into the bank
23 purporting to be husband and wife?

24 A No.

25 Q In this particular case did Earl and Peggy

2 Johnson purport to be husband and wife?

3 A Yes.

4 Q Why was the \$40,000.00 note on the Fincastle
5 Estate property required and the deed of trust and that
6 entire transaction and why were Peggy and Earl both required
7 to sign?

8 A Of course, she would have been required to
9 sign the deed of trust in order to give us security related
10 to her dower interest in the property. She would have been
11 required to have signed the note in order to give us
12 additional -- I don't know quite how to put this -- Well,
13 as in signing a note a co-maker of the note --

14 Q Would you please state your answer again
15 to that last question as to why she was required to sign it?

16 A The note?

17 Q The note?

18 A She was required to sign the note in order
19 for us, the bank, to have a call upon her income to service
20 the note as well as Mr. Johnson's income.

21 Q What amount is the bank asking for judgment?
22 What amount is the bank asking for judgment and how did you
23 arrive at it?

24 A It would be our principle amount of the
25 deficiency balance of \$20,253.42, plus the interest earlier

2 stated through November 1st, '82 of \$8,254.89 in interest
3 at contract rate from November 1st, '82 through today of
4 \$1,906.07. Those interest and principle figures total --
5 I'm sorry. I didn't total it.

6 Q Whatever they total up to?

7 A Whatever they total plus fifteen percent
8 attorney's fees.

9 MR. SCHELIN: You may ask.

10 CROSS EXAMINATION

11 BY MR. SCYPHER:

12 Q Mr. Bundy, you were not present when this
13 loan was closed out, were you?

14 A No, sir.

15 Q Did you take the application on the Fincastle
16 property for the loan?

17 A No, sir. I was not at this bank at this
18 time.

19 Q You're talking about the '78 loan?

20 A Yes.

21 Q Was that an unsecured loan, a \$40,000.00
22 unsecured loan?

23 A When it was originally made, yes, sir.

24 Q Then in '80 when the deed of trust was put
25 on the property, you were just really securing your loan

2 of '78 by taking the property, isn't that right?

3 A. Yes.

4 Q. Did you take the application for this loan?

5 A. No, sir.

6 Q. Do you know who in your bank did take it?

7 A. I believe Joe Kiser did, negotiated the
8 loan at that time.

9 Q. Do you know who signed the application
10 for that?

11 A. I can go to my records and tell you.

12 Q. Well, if you can, just go ahead. That's fine.

13 A. Actually being a commercial transaction, I
14 doubt if there is a signature on an application.

15 Q. Do you know who came into the bank and applied
16 for it?

17 A. Mr. Johnson.

18 Q. Mrs. Mitchell, Peggy Mitchell -- maybe you
19 call her Peggy Johnson. To the best of your knowledge, she
20 never came in there and applied for that loan, did she?

21 A. To the best of my knowledge, she was not
22 involved in any of the negotiations related to it.

23 Q. Did you ever take a financial statement from
24 her concerning the Fincastle loan, or anybody in your bank?

25 A. Not to my knowledge.

2 Q All right, sir. Isn't it true that the
3 primary reason you had her sign that loan or that deed of
4 trust and note on the Fincastle property was because you
5 thought that she was the wife and that would be to the
6 dower interest? Isn't that the primary reason?

7 A That's one consideration.

8 Q Yes, sir. Isn't it true that if Mrs. Johnson
9 had come in there because of the banks position being
10 totally unsecured at this point, that if she had come in
11 and said I'll sign a deed of trust to release my dower
12 interest, but I won't sign that note, to be responsible
13 on it, the bank would still have made the loan, wouldn't
14 it?

15 A I can't respond to that because it didn't
16 happen that way.

17 Q Well, given the banks policies, wouldn't
18 you expect, in your opinion, the bank would have made the
19 loan given the fact that they had an unsecured loan that
20 would be going to a secured loan?

21 A I think if at the time we had been presented
22 with the decision of whether or not to make the loan with
23 or without her signature, I can't say what the decision
24 would have been at that time but I'm certain that without
25 her signature it would have caused an additional considera-

2 tion on our part.

3 Q I know, sir. But won't you agree that the
4 bank is in a better position having a deed of trust and
5 security than having an unsecured note?

6 A Certainly.

7 Q So it would be bad banking practices, would
8 it not, to pass up the opportunity to secure a note which
9 is previously unsecured?

10 A Customarily.

11 Q Of course, you had no idea what Mrs. Mitchell's
12 income was or the bank didn't because they had never taken
13 a financial statement?

14 A True.

15 Q And they didn't know what her assets were
16 for the same reason?

17 A True.

18 MR. SCYPHERS: That's all the questions I have.

19 THE COURT: Would you look in your records -- you
20 said to your knowledge there was no financial statement.
21 Do your records in this loan transaction on the Fincastle
22 Estate reflect any financial statement from Peggy Mitchell?

23 WITNESS: No, sir. Because we presumed it to be
24 common property between the two.

25 THE COURT: What would have kept the bank from putting

2 both these loans together and having one loan? If you
3 considered them husband and wife, why did you have two
4 loans?

5 WITNESS: The forties?

6 THE COURT: Yes.

7 WITNESS: Because one was a residential loan and one
8 was a commercial loan, with unrelated collateral and un-
9 related reasons for the loan.

10 THE COURT: Do your records reflect that when this
11 \$40,000.00 was paid over under the deed of trust on the
12 Fincastle property, to whom was that money paid?

13 WITNESS: The \$40,000.00.

14 THE COURT: The \$40,000.00 that came as a result
15 of the deed of trust.

16 WITNESS: The money that was disbursed on that loan
17 went to pay the unsecured loan with the bank.

18 THE COURT: In other words, was Peggy Mitchell on
19 the unsecured note that the deed of trust transaction
20 money was applied to?

21 WITNESS: On the unsecured note? No, sir. Because
22 at that time -- well, we presumed them to be married.
23 At the time when the original \$40,000.00 was made they
24 weren't together.

25 THE COURT: Well, to your knowledge did Peggy Mitchell

2 get any money or benefit from the deed of trust loan on
3 the Fincastle property?

4 WITNESS: Well, having made the assumption at that
5 time that they were husband and wife, I would think that
6 anything that was mutually beneficial to them would be
7 individually beneficial, if the property were sold at a
8 a profit or what have you.

9 THE COURT: In other words, when the deed of trust
10 money was disbursed on the Fincastle Estate deed of trust,
11 the \$40,000.00 that was given to the parties under the
12 deed of trust note was applied back and paid off the un-
13 secured note of Earl Johnson?

14 WITNESS: Yes.

15 THE COURT: Okay.

16 REDIRECT EXAMINATION

17 BY MR. SCHELIN:

18 Q Mr. Bundy, isn't it a better banking
19 practice to require two people to sign the note than just
20 one person?

21 A Certainly.

22 Q All right. Had Mr. Johnson not have secured
23 the \$40,000.00 loan on the Fincastle property, what would
24 the bank have done?

25 A As I stated earlier, in effect we had demanded

2 payment of the note and agreed in effect it was paid off
3 by renegotiating the loan. If he had refused to give us
4 additional collateral or give us collateral or make arrange-
5 ments to pay the note, then we would have in January of '80
6 preceeded to seek what ever remedy necessary to collect.

7 MR. SCHELIN: That's all.

8 RECROSS EXAMINATION

9 BY MR. SCYPHERS:

10 Q Mr. Bundy, if you had assumed that Mr.
11 Johnson was not married, assumed there was no question that
12 he was single, is it not true that the bank would have
13 made this loan to him on the Fincastle property to get the
14 security?

15 A Well, obviously the answer is, yes.

16 MR. SCYPHERS: That's all the questions I have.

17 REDIRECT EXAMINATION

18 BY MR. SCHELIN:

19 Q Since it was put to you that way, let me ask
20 you this. Since the situation existed that Mr. Johnson and
21 Peggy Mitchell were living together as man and wife in the
22 eyes of the public and in the eyes of the bank and they had
23 this property out in Green Valley Estates, which is fairly
24 valuable property, and Earl Johnson had this house out in
25 Fincastle Estates, had the bank known they were not married,

2 what would have been the banks policy and procedure in
3 this case as far as lending money only to Earl under those
4 circumstances. And those were the circumstances the bank
5 was dealing with at the time.

6 A That question was long. I'm not sure I
7 understand it.

8 Q Let me see if I can rephrase it and shorten
9 it somewhat.

10 THE COURT: If they hadn't been married --

11 Q If you had known they weren't married --

12 THE COURT: If you had known that Earl Johnson and
13 Peggy Mitchell were not husband and wife, what would have
14 been your position with reference to these two loans?

15 Q Would you have made both of them only to
16 Earl?

17 A Of course, the loan on the Fincastle Estates
18 property, the proceeds of that -- I'm still a little
19 reluctant here.

20 Q You've got two houses out there, you've
21 got one in Green Valley Estates worth a lot of money owned
22 only by Earl --

23 MR. SCYPHERS: Judge, I don't know if he can answer
24 that question, because he didn't know that. I think that's
25 an unfair question both from us and them.

2 THE COURT: Well, don't ask him that then.

3 MR. SCHELIN: Because that wasn't the situation, I'll
4 withdraw the question.

5 THE COURT: Okay. Now do you want to ask him any-
6 thing else Mr. Schelin.

7 MR. SCHELIN: No, sir.

8 MR. SCYPHERS: I have no other questions.

9 WILLIAM W. BOLLING

10 having been duly sworn, was examined and testified as
11 follows:

12 DIRECT EXAMINATION

13 BY MR. SCHELIN:

14 Q What is your name, please, sir?

15 A William W. Bolling.

16 Q For whom do you work.

17 A Browning, Morefield, Schelin and Arrington.

18 Q Mr. Bolling, did you have anything to do with
19 two loans and deed of trust and so forth, in the amount
20 of \$40,000.00 each, back in January of 1980?

21 A Yes, sir.

22 Q Did you prepare the deeds of trust for
23 signature?

24 A Yes, sir. Under your supervision.

25 Q Did you also prepare a title opinion?

2 A Yes, sir.

3 Q Did you know at that time that you did those
4 two sets of documents that Earl and Peggy Johnson were not
5 married?

6 A No, sir.

7 Q When did you discover that Earl and Peggy
8 Johnson were not married?

9 A Well, it's been some time ago since 1980, but
10 to my best knowledge, when I realized this was sometime
11 after March 4th, 1980.

12 Q How do you know?

13 A The reason I can remember that is because
14 it was unusual in respect to making them a survivorship
15 deed.

16 Q What date did we make that?

17 A March 4th, 1980. That's when it came to
18 my knowledge that they were not, sometime along there. I
19 can't tell you that it was March 4th, 1980, but it was
20 sometime along there. I believe Earl told me first in
21 telling me to prepare the deed to protect Peggy in reference
22 to this property that she was putting money into.

23 Q Which property is that?

24 A That's the house property, the 3.2 acres.

25 Q Where is it located?

2 A In Green Valley. That's the deed right
3 there. That's where I remember it. One reason I remember
4 it well is because I discussed, I believe with both of
5 them; I can't remember exactly; that the survivorship clause
6 would not, sometime after that, that the survivorship clause
7 would not be applicable because they became tenants in
8 common. I can't pinpoint days, because I can't remember.

9 MR. SCHELIN: I'd like to make this our next
10 exhibit which ever number that happens to be.

11 THE COURT: Let me mark that. I believe it's 8.

12 MR. SCHELIN: I think it's 8, but I wouldn't swear
13 to it, Your Honor.

14 MR. SCHELIN: You may cross examine Mr. Scypfers.

15 CROSS EXAMINATION

16 BY MR. SCYPHERS:

17 Q Are you absolutely for sure positive that
18 that's the first time you knew that they were not husband
19 and wife?

20 A It was right along that time. That's when
21 I remember it coming up, was in 1980, March, 1980, and
22 that's when I remember the situation coming up because
23 before that time Earl owned these properties in his own
24 name, by hisself. And prior to that we put her on the deed
25 of trust because of dower interest. That's the whole

2 reason we put her on there.

3 Q The whole reason for putting her on the
4 deed of trust for the Fincastle property was the dower
5 interest?

6 A Right. And the sole purpose of putting her
7 on the property in Green Valley was also the dower interest,
8 because at that point in time she did not have any interest
9 in the property. She didn't get an interest in the property
10 until that deed right there, March 4th, 1980.

11 Q Could you vary two weeks on March 4th, 1980,
12 either way?

13 A Maybe. I can't say. You're talking about
14 March of 1980, but it was somewhere along in that time.

15 Q Could you vary thirty days either way?

16 A I doubt if it would vary thirty days, because
17 it would not be that long between time somebody asked me to
18 fix a deed and then coming up -- I'd say it was sometime
19 after 1980. I do remember talking about the tenants in
20 common part of it because it was survivorship deed originally.
21 And that's the reason that I can remember it as well as I
22 do.

23 Q You say you doubt, but are you absolutely
24 sure it couldn't be as much as thirty days either way?

25 A I am just about sure it could not be thirty

2 days either way. It's hard to pinpoint a date three years
3 ago --

4 Q I understand it's hard to pinpoint and I'm
5 not trying to harass you, but I'm just trying to say --

6 A You see, I guess this is what I'm trying to
7 say. You see people, you know, on somewhat of a regular
8 basis and at this point in time, say '78 through '81, Earl
9 done a lot of business. He built a lot of houses and he
10 sold a lot of houses. Now, prior to this occurrence here,
11 I think this is the first time that I remember Peggy ever
12 signing anything in reference to his business. And I don't
13 know when the marriage was supposed to have been or what
14 or when that started, but that was the whole reason because
15 her name was put on those documents because we thought
16 they were married at that time.

17 Q Yes, sir.

18 A And those properties, both properties were
19 owned by Earl in fee simple.

20 Q All right, sir. So, you could have found
21 out, say, two weeks before; you say you doubt it is thirty
22 days; but whatever, two weeks before or two weeks after --

23 A It was along about the time of that deed.
24 Somewhere along there is when it come up.

25 Q All right, sir. After you found that out,

2 have you done other work for this bank since that time?

3 A. What do you mean?

4 Q. Well, you have continued to do work for
5 First National Exchange Bank all of '80, '81 and '82 and
6 you're still doing work for them, aren't you? Maybe not
7 with Earl Johnson, but just with other deeds of trust.

8 A. Sure.

9 Q. Okay. And at anytime since you found this
10 out; by your testimony, it could have been as early as the
11 middle of February, and since this document was recorded
12 February 1st, 1980; did you take any steps to do any
13 correction deed of trust?

14 MR. SCHELIN: Wait a minute. Explain what document
15 you're talking about.

16 Q. These two deeds of trust. Let's just
17 pinpoint it to the one on the Fincastle property, which I
18 believe is Exhibit Number 2, Plaintiff's Exhibit Number 2.
19 And it states that it was recorded on February 1st. Well,
20 if we take two weeks from March 4th, we're back to about
21 the middle of February, 1980, some two weeks after this
22 document was recorded. Now, given those facts, have you
23 ever since then taken any steps to do a correction deed of
24 trust showing that Earl D. Johnson and Peggy M. Johnson
25 were not married?

2 A I didn't see any reason to because the lien
3 was prefected because the deed was in Earl Johnson's name.
4 Earl Johnson executed the deed of trust. The sole purpose
5 for Peggy Johnson signing the deed was to release any
6 dower rights in the property, both properties.

7 Q All right. So you didn't think that it was
8 necessary?

9 A No, sir.

10 Q Did you ever inform the bank that they were
11 not husband and wife?

12 A No, sir.

13 Q Well, when the foreclosure -- did you help
14 with the foreclosure on this property?

15 A No, sir.

16 Q So the bank didn't know until the lawsuit
17 came up or people knew he died or whatever, that they
18 weren't married?

19 A I don't know when people knew that. The
20 only thing I can testify is when I knew it.

21 Q You were working as agent for the bank during
22 this time?

23 A No. I worked for Browning, Morefield, Schelin
24 and Arrington.

25 Q Well, the bank employed you do do this work?

2 A. I was working for Browning, Morefield, Schelin
3 and Arrington, in reference to this matter to perfect the
4 banks lien on the property, to insure that they had a first
5 deed of trust or in the one case, a second deed of trust.

6 Q. But the work you did, your firm was paid
7 for that through proceeds from these loans?

8 MR. SCHELIN: Your Honor, I object to that.

9 A. No, sir. I don't believe they were paid
10 out of the proceeds of the loan. I doubt very seriously if
11 they were, because --

12 Q. I will withdraw that question. Your firm gave
13 a title letter to the bank on this property, is that
14 correct?

15 A. Yes, sir. It's in the Exhibits there.

16 MR. SCYPHERS: That's all the questions I have, Your
17 Honor.

18 REDIRECT EXAMINATION

19 BY MR. SCHELIN:

20 Q. I have one question. Mr. Bolling have you
21 ever prepared a document such as in this particular case
22 where it's a deed of trust by two people purporting to be
23 man and wife and knowing them not to be man and wife?

24 A. No, I can't recollect any, no. I've been
25 running into it more often here lately, these situations,

2 but --

3 Q But you've never knowingly prepared a
4 document with incorrect information in it?

5 A Not to my knowledge.

6 MR. SCHELIN: That's all I have.

7 MR. SCYPHERS: I don't have any other questions.

8 MR. SCHELIN: Your Honor, the Plaintiff rests.

9 MR. SCYPHERS: Your Honor, may I have just one
10 second?

11 THE COURT: We'll take a little break.

12 THE COURT: Counsel for Peggy Mitchell has asked the
13 Court to let the cross examination on Mrs. Mitchell be
14 considered as evidence in the case, his cross examination
15 after Mr. Schelin had called Mrs. Mitchell as the first
16 witness. The Court is willing to do that. And it is my
17 understanding that both Mr. Scyphers and Mr. Schelin
18 reserve the right to ask further questions at a later stage
19 in the proceeding. At this time the Court gives either
20 Mr. Scyphers or Mr. Schelin to ask any additional question
21 of Mrs. Mitchell.

22 MR. SCYPHERS: As far as direct, Your Honor, we'll
23 rely upon her testimony under cross or our principal defense
24 or as the testimony of our defense.

25 THE COURT: Mr. Schelin, you said you wanted to ask

2 her a question.

3 MR. SCHELIN: I don't think I have any questions,
4 Your Honor.

5 THE COURT: All right.

6 MR. SCYPHERS: Would you like to hear argument or --

7 THE COURT: What I would really rather you do, there
8 are some new facets of this case that have developed in the
9 evidentiary hearing from what appeared from the record.
10 Maybe it's an enlargement of what's already been in the
11 record. For this reason, I think what I will do, I'll ask
12 each of you to submit a letter memorandum to the Court
13 based on this evidence that has been introduced here
14 today. I'd like for you to touch on whether or not if
15 Peggy Mitchell signed this deed of trust solely for the
16 purpose of relinquishing her dower interest in the
17 property as stated by the last witness, and in view of the
18 fact that she did not receive any benefit from the
19 \$40,000.00 deed of trust loan on the Fincastle property,
20 what effect, what legal effect, does that have. I think
21 Mr. Scyphers would be interested in looking into that. There
22 may be some cases on that point. This is an unusual case.
23 I have not, in my sixteen years on the bench, this is the
24 first time that I've had a similar situation. So I think
25 it bears the necessity of looking up some authorities

2 and presenting them to the Court. If you will do that, if
3 you can do that within the next couple of weeks the Court
4 will decide on it before July 28th, which is the last day
5 the Court is going to be here until it takes a vacation.

6 MR. SCYPHERS: Judge, the only problem I have with
7 that the week of July 9th, of course, you know July 4th is
8 next week and I'm going to be gone the whole week of July
9 11th, so if I could have --

10 THE COURT: Well, in other words, I will change my
11 agenda, I will -- have all of them in by the time the
12 Court comes back to work on about August 19th or 20th.

13 MR. SCYPHERS: That would be fine, sir.

14 MR. SCHELIN: Have both their brief and our's in?

15 THE COURT: Yes. In other words, you get your brief
16 in and give him plenty of time.

17 MR. SCYPHERS: I'll have it by the 1st of August,
18 Judge. That will give him time.

19 THE COURT: With the understanding that Mr. Schelin
20 will have ten or fifteen days after he receives Mr. Scyphers
21 brief to reply.

22 These were all of the proceedings of this date.
23
24
25

2 STATE OF VIRGINIA)
3 :
COUNTY OF WASHINGTON)

4 I, B. V. Branson, a Notary Public for the State
5 of Virginia and Court Reporter, do hereby certify that
6 the foregoing matter came on to be heard on the date
7 and place in the caption mentioned; that the proceedings
8 were recorded by me with a stenomask and onto a mechanical
9 recorder and were later reduced to typewriting under my
10 personal supervision; and that the foregoing transcript is
11 true and correct to the best of my ability.

12 Given under my hand and seal on this the 15th day
13 of September, 1983.

14
15 

16 Notary Public

17
18
19
20
21 My commission expires March 12th, 1984.

BROWNING, MOREFIELD, SCHELIN, AND ARRINGTON, P.C.

**LARRY GRANT BROWNING
JAMES DALE MOREFIELD
CHARLES E. SCHELIN
JAMES E. ARRINGTON, JR.**

**ATTORNEYS AT LAW
LAW BUILDING
2 MILL STREET
POST OFFICE BOX 156
LEBANON, VIRGINIA 24266
TELEPHONE (703) 889-2989**

**ABINGDON OFFICE
200 EAST MAIN STREET
POST OFFICE BOX 1066
ABINGDON, VIRGINIA 24210
TELEPHONE (703) 628-8121**

**GREGORY R. HERRELL
JOHN LAMIE
CHARLIE R. JESSEE**

**GRUNDY OFFICE
WALNUT STREET
POST OFFICE BOX 676
GRUNDY, VIRGINIA 24614
TELEPHONE (703) 935-8128**

September 19, 1983

The Honorable Glyn R. Phillips, Judge
Circuit Court of Russell County
Courthouse
Lebanon, Virginia 24266

Re: First National Exchange Bank vs.
Earl D. Johnson and Peggy M. Johnson

Dear Judge Phillips:

In response to Mr. Scypher's letter brief dated September 6, 1983,
I submit the following:

Both citations to Michie's Jurisprudence, Contracts Section 30 and 34 were slightly mis-quoted. The first is a definition of consideration and should have been quoted as "Consideration is defined to be a benefit to the party promising or a loss or detriment to the party to whom the promise is made." The second should have been quoted as "The general rule is that a new promise without other consideration than the performance of an existing contract in accordance with its terms is a naked promise without legal consideration therefore and unenforcible". The second citation is not applicable in this case because the first note for \$40,000.00 signed by Earl D. Johnson was paid off by the note signed by both Earl and Peggy Johnson. This was not the performance of an existing contract.

While Mr. Bundy admitted that the Bank would not pass up the opportunity to secure a note which was previously unsecured, Mr. Bundy stated, (transcript pages 41 and 44)

"She was required to sign the note in order for us, the bank, to have a call upon her income to service the note as well as Mr. Johnson's income." and

"....then I'm certain that without her signature it would have caused an additional consideration on our part."

In addition to the well settled law that "one cannot enter into a contract and, when called upon to abide by its conditions, say that he did not read it or did not know what it contained when he signed," G. L. Webster Co., Inc., v. Trinidad Dean & Elevator Co. 92 F.2d 177 (1937) [appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Luther B. Way, Judge], it is well

settled law that the consideration to support a contract need not be adequate. An early case on point was Jones v. Degge, 84 Va. 685, 5 S.E. 799 (1888). The Court in that case said, at 802, that "Where the parties are competent to contract, relief will not be decreed, on the grounds of inadequacy of consideration, unless the inequality be so gross as to shock the conscience, and of itself amount to proof of fraud." An unconscionable bargain has been defined to be "one that no man in his senses and not under a delusion would make, on the one hand, and as no fair man would accept, on the other." Smythe Bros.-McCleary-McClellan Co. v. Beresford, 128 Va. 137, 104 S.E. 371, 382 (1920). The Court in Pierce v. Plogger, 223 Va. 116, 286, S.E. 2d 207, 210 (1982) quoting Brewer v. Bank of Danville, 202 Va. 807, 815, 120 S.E. 2d 283, 279 (1961), said "consideration...may be in the form of a benefit to the party promising or a detriment to the party to whom the promise is made. It matters not to what extent the promisor is benefited or how little the promisee may give for the promise. A very slight advantage to the one party or a trifling inconvenience to the other is generally held sufficient to support the promise."

It would appear from the cases that the Bank's forbearance to exercise its legal right to foreclose provided such sufficient consideration for Peggy Johnson's promise.

It should also be noted that while Mr. Scyphers has argued long and loud that the Bank owed Peggy Johnson an affirmative duty to explain her liability at the time of signing, he has introduced no authority for such argument. This absence of authority is probably due to the abundance of case law concerning the signing of instruments in ignorance of their contents, which is, essentially, if one signs, one is bound.

It should also be noted, "the debt evidenced by the Notes was created when the Notes were executed. The Makers thereof became primarily liable, jointly and severally." Brown v. Hargraves, 198 Va. 748, 96 S.E. 2d 788 (1957).

Had Mr. and Mrs. Johnson not paid off the original \$40,000.00 Note by executing a new \$40,000.00 Note and Deed of Trust, the Bank would have sued Mr. Johnson for the \$40,000.00. This would have been detrimental to Mr. Johnson and therefore detrimental to his wife, for what inconveniences one, inconveniences both. The Bank's forbearance to sue was adequate consideration.

Based on the above authority, the First National Exchange Bank respectfully request that this Honorable Court find in its favor and render judgment against Peggy M. Johnson, a/k/a Peggy Mitchell.

Sincerely yours,

BROWNING, MOREFIELD, SCHELIN,
and ARRINGTON, P. C.

By Charles E. Schelin
CHARLES E. SCHELIN

CES/dcj

cc: David L. Scyphers, Esquire

CIRCUIT COURT RUSSELL COUNTY

FILED

Sept 20, 1983
~~SEP 20 1983~~

Peggy Blewett *WB*
Clerk

TWENTY - NINTH JUDICIAL CIRCUIT OF VIRGINIA

COUNTIES OF BLAND, BUCHANAN, DICKENSON, GILES, RUSSELL AND TAZEWELL

CIRCUIT COURT JUDGES:

GLYN R. PHILLIPS
CLINTWOOD, VIRGINIA 24228

NICHOLAS E. PERSIN
GRUNDY, VIRGINIA 24614

ROBERT L. POWELL
PEARISBURG, VIRGINIA 24134

October 5, 1983

David Syphers, Esquire
Johnson, Syphers & Austin
189 Valley Street
Abingdon, Virginia 24210

Charles E. Schelin, Esquire
Browning, Morefield, Schelin
And Arrington
P. O. Box 156
Lebanon, Virginia 24266

RE: First National Exchange Bank
vs. Earl Johnson, et al
Law No. 5450

Gentlemen:

This is a case in which the Court feels it is very important to review the facts set out in the record before stating the conclusions on the law. Therefore, the following is a brief review of the testimony of the witnesses before the Court:

Peggy Mitchell was asked the following questions and gave the following answers:

Q. Mrs. Mitchell, when you signed these documents did you understand that you were obligating yourself on two separate \$40,000.00 loans?

A. No, sir.

Q. What was your understanding when you signed the documents that you signed?

A. That I was signing \$40,000.00 on our home in Green Valley.

Page Two

RE: FNEB of Virginia
vs. Earl Johnson, et al

Q. And are all -- Are both of these loans for \$40,000.00?

A. Yes.

Q. Did you knowingly sign any document obligating yourself on the Fincastle property?

A. No, sir.

Q. Did anyone ever explain to you that you were signing a \$40,000.00 note obligating yourself on a debt, that if the Fincastle property didn't properly secure it that you would have to be liable for it?

A. I didn't know anything about it until it came out in the paper and I called Chuck and asked him about it.

Q. So you never knew anything about it?

A. No. (T. pg. 20, line 2 through line 21)

The witness, Joan Dorton, was asked the following questions and gave the following answers:

Q. Please state to the Court what truth in lending disclosures, if any, were made?

A. The truth in lending disclosure was made on the residential loan, on the \$40,000.00 as the deed of trust on the property in Green Valley Estates. On the other loan, there was no truth in lending because it was a commercial loan. (T. pg. 24, line 3 to line 9)

Q. Ma'am, I'm not asking you -- I know what your normal course -- you said your normal course of business is. And I'm not harassing or anything. I'm not asking you that. I'm asking you if you can sit here and under

Page Three
RE: FNEB of Virginia
vs. Earl Johnson, et al

oath testify without a doubt that you handed her one paper and said this is on Fincastle property and hand her another one and said this is on the Green Valley property? Can you say that?

A. Well, we closed the Green Valley property first. And I always -- I would have -- (T. pg. 26, line 15 to line 25)

Q. No, ma'am. I'm not asking you what you always do. You can answer my question and then explain it any way you want to. Okay. I'm asking you can you state without a doubt under oath that you did that in this instance and you can specifically remember doing it?

A. Well, no.

Q. Okay. Now, ma'am, you have a document executed here, a disclosure statement -- and this would have been all that you would have had executed because you said the other was a commercial and it wouldn't be required, is that correct?

A. Right.

Q. I'm showing this document to you, Plaintiff's Exhibit Number 5. It's dated January 25th, 1980, is that correct?

A. Right.

Q. And it says that you must mail a telegram sent not later than midnight of January 30th, 1982, to revoke this. Does that say that?

A. Yes.

Q. And what's the date that it is signed?

A. The 1st day of February.

Q. So this is dated after -- this is the one signed by Earl D. Johnson. It's dated after the notice says here the date of rescission is void, isn't that correct? (T. pg. 27, line 2 to line 25)

Page Four

RE: FNEB of Virginia
vs. Earl Johnson, et al

A.. That's correct.

THE COURT: Let me see that.

MR. SCHELIN: Which Exhibit is that?

THE COURT: Plaintiffs Exhibit Number 5, he was referring to.

Q. Let me show you Plaintiff Exhibit Number 4.

MR. SYPHERS: May I go ahead, Your Honor?

THE COURT: Wait just one second. All right, go ahead.

Q. This is Plaintiff Exhibit Number 4 signed by Peggy M. Johnson. Is it the same way, January 25th, it says transaction on January 25th, you must make the telegram not later than January 30th and it's dated February 1st, 1980? Is that the same date as the one Earl D. Johnson signed?

A. That is correct. (T. pg. 28, line 2 to line 17)

Q. Isn't it true that this document says that they can't cancel after January 30th and it shows they only received it on February 1st, 1980? Am I correct, ma'am?

A. Yes.

Q. It doesn't say anything about on February 1st we signed this document saying we don't want to rescind. That's not it. It doesn't say that, does it? (T. pg. 35, line 19 to line 25)

A. No. (T. pg. 36, line 2)

The witness, Thomas S. Bundy, was asked the following questions and gave the following answers:

Page Five

RE: FNEB of Virginia
vs. Earl Johnson, et al

Q. Please state to the Court a brief history insofar as a certain parcel of land in Fincastle Estate Subdivision, Lebanon, Virginia, is concerned and the Bank's connection with that property.

A. On November 30th, 1978, the bank made a committment to Earl Johnson for \$40,000.00 to build a house for resale on the property. That loan was to be repaid within six to eight months of the sale of the property. (T. pg. 36, line 18 to line 25)

THE COURT: What was that date again?

WITNESS: November 30th, 1978.

THE COURT: Okay.

WITNESS: As of January 25th, of '80, some fourteen months later or fifteen months practically the note had not been paid. At that time we demanded payment from Mr. Johnson. In lieu of payment -- Well, I guess it would be considered repayment. We secured our note, our existing \$40,000.00 note or rather made a new note for \$40,000.00 secured by a first deed of trust on the property in Fincastle Estates. Then on July 10th, 1982, after another several months without repayment; there was almost a year and a half there; we still had not received payment and interest was in arrears on the note. So at that time we proceeded with foreclosure and sold the property at public auction.

Q. Did the bank recover all of it's money at that foreclosure sale?

A. No. The principle balance of the note at the time was \$40,000.00. After the sale of the property, payment of necessary fees, we had deficiency balance remaining of \$20,253.42.

Q. This is as of what, November 1st?

A. That was the deficiency after the sale on July 10th. (T. pg. 37, line 2 to line 25)

Page Six

RE: FNEB of Virginia
vs. Earl Johnson, et al

Q. All right, sir. Isn't it true that the primary reason you had her sign that loan or that deed of trust and note on the Fincastle property was because you thought that she was the wife and that would be to the dower interest? Isn't that the primary reason?

A. That's one consideration. (T. pg. 44, line 2 to line 7)

Q. Of course, you had no idea what Mrs. Mitchell's income was or the bank didn't because they had never taken a financial statement?

A. True.

Q. And they didn't know what her assets were for the same reason?

A. True.

MR. SYPHERS: That's all the questions I have.

THE COURT: Would you look in your records -- you said to your knowledge there was no financial statement. Do your records in this loan transaction on the Fincastle Estate reflect any financial statement from Peggy Mitchell?

WITNESS: No, sir. Because we presumed it to be common property between the two. (T. pg. 45, line 11 to line 25)

THE COURT: In other words, was Peggy Mitchell on the unsecured note that the deed of trust transaction money was applied to?

WITNESS: On the unsecured note? No, sir. Because at that time -- well, we presumed them to be married. At the time when the original \$40,000.00 was made they weren't together. (T. pg. 46, line 18 to line 25)

THE COURT: Well, to your knowledge did Peggy Mitchell get any money or benefit from the deed of trust loan on the Fincastle property?

WITNESS: Well, having made the assumption at that time

Page Seven
RE: FNEB of Virginia
vs. Earl Johnson, et al

they were husband and wife, I would think that anything that was mutually beneficial to them would be individually beneficial, if the property were sold at a profit or what have you.

THE COURT: In other words, when the deed of trust money was disbursed on the Fincastle Estate deed of trust the \$40,000.00 that was given to the parties under the deed of trust note was applied back and paid off the unsecured note of Earl Johnson?

WITNESS: Yes. (T. pg. 47, line 2 to line 14)

The Court considers the excerpts from the transcript of the evidence set out above to be the most material in arriving at a decision in this case. First of all the defendant, Peggy Mitchell, testified that she did not understand she was obligating herself on two separate \$40,000.00 notes. It should be noted that the \$40,000.00 Deed of Trust on the Green Valley Estates property is without question and the Court considers it fully enforceable.

The witness, Joan Dorton, finally admitted that she couldn't specifically remember stating to the defendant, Peggy Mitchell, that she was executing two notes each for \$40,000.00 and that one of the \$40,000.00 notes was on the Fincastle Estates property.

The witness, Thomas S. Bundy, gave a brief history of the two transactions and stated that a loan was made on November 30th, 1978, to Earl Johnson for \$40,000.00 to build a house for resale in the Fincastle Estates, and that that loan was to be repaid within six to eight months upon the sale of the property. He further stated that as of January 25th, 1980, some fourteen to fifteen months later the note had not been repaid and was in default. It was after this note was in default that the bank was able to obtain the signature of the defendant, Peggy Mitchell, on said note. Mr. Bundy also stated that the main reason he had Peggy Mitchell to sign this note was because he thought she was the wife of Earl Johnson and her signature would release any dower interest she might have. Also, he stated he did not obtain any financial statement and did not know anything about her financial status and he further stated the \$40,000.00 note of January 25th, 1980, and Deed of Trust on the Fincastle Estates went solely toward the repayment of the \$40,000.00 note of Earl D. Johnson which was in default, and Peggy Mitchell did not receive any consideration from the transaction.

Page Eight

RE: FNEB of Virginia

vs. Earl Johnson, et al

First of all it is apparent that the bank had Peggy Mitchell to sign the note of Earl D. Johnson which was in default by fourteen to fifteen months basically to obtain a release of her dower or spousal rights. It is apparent that the bank was not relying upon her signature as a guarantor or obligator on said note since no financial statement was obtained from her. And even more important it is significant that Peggy Mitchell did not receive any benefits or consideration from the \$40,000.00 as it was used entirely on the Earl D. Johnson defaulted note. Therefore, the signature of Peggy Mitchell on said note was without legal consideration and unenforceable.

The Court is further of the opinion that the plaintiff, First National Exchange Bank of Virginia, through its agents did not intentionally or willfully set out to defraud the defendant, Peggy Mitchell, but their failure to properly inform her that she was signing a \$40,000.00 note on the Fincastle Estates property for the sole purpose of paying off the defaulted note of Earl D. Johnson amounts to a constructive fraud even though this failure to explain was innocently committed by the agent of the bank. This theory of law is set out in Michie's Jurisprudence, Fraud & Deceit, Section 20, pages 306-307 and reads as follows:

"Even if a party innocently misrepresents material facts by mistake, the effect is the same on the party who is misled by it as if he who innocently made this misrepresentation knew it to be positively false. Therefore, it is immaterial that an act was done in good faith and without fraudulent intent. If by it an advantage has been obtained which is against good conscience to enjoy, a Court of equity will relieve against it".

Also in Clay v. Butler, 132 Va. 464, the Court stated:

"If a party conceals a fact that is material to the transaction, knowing that the other party is acting on the assumption that no such fact exist, the concealment is as much a fraud as if the existence of the fact were expressly denied, or the reverse of it expressly stated."

Page Nine
RE: FNEB of Virginia
vs. Earl Johnson, et al

In conclusion the Court is of the opinion that the First National Exchange Bank agents innocently and inadvertently failed to properly inform the defendant, Peggy Mitchell, as to the \$40,000.00 note in question and that because of that failure the note was signed by her. Furthermore, she did not receive any benefits or consideration from the \$40,000.00 loan which was applied to the Earl D. Johnson note in default. This obligation is unenforceable and amounts to an unconscionable contract between the parties to this transaction.

Mr. Syphers is directed to prepare an appropriate order to be endorsed by Mr. Schelin and forwarded to the Court for entry.

Very truly yours,


Glyn A. Phillips
Chief Judge

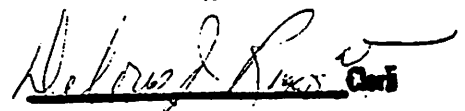
GRP/nch

cc: Clerk, Circuit Court

CIRCUIT COURT RUSSELL COUNTY

FILED

OCT 6 1983


Clerk

V I R G I N I A:

IN THE CIRCUIT COURT OF RUSSELL COUNTY

FIRST NATIONAL EXCHANGE BANK
OF VIRGINIA

Plaintiff

vs.

EARL D. JOHNSON

and

PEGGY M. JOHNSON,

Defendants

FINAL ORDER

On July 1, 1981, came plaintiff, First National Exchange Bank, and its counsel, Charles E. Schelin, and came defendant, Peggy M. Johnson, also known as Peggy Mitchell, and by her counsel, David L. Scyphers, announce that they were ready for trial.

There upon, the parties agreed to waive a jury and to proceed with a bench trial.

Thereupon, the plaintiff introduced its evidence and its case in chief and rested. Whereupon the defendant presented its case, relying upon the cross-examination of the defendant who had been called as an adverse witness by the plaintiff and the court allowing same and no objection being made by the plaintiff.


Thereupon, counsel for the parties presented arguments to the court and submitted written briefs in support of their position.

Whereupon, the court by written opinion dated October 5, 1983, setting forth the courts finding of fact and reasoning found for the defendant. It is accordingly ORDERED that the motion for judgment filed on behalf of First National Exchange Bank of Virginia against Peggy M. Johnson, also known as Peggy Mitchell, is hereby dismissed.

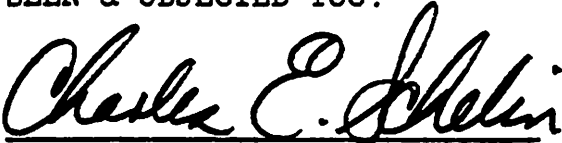
There being nothing further to be done herein, it is ORDERED that this action be stricken from the docket of this court with full prejudice of the parties as to the matters considered herein.

The Clerk shall send an attested copy of this final order to counsel of record.

REQUESTED:


David L. Scyphers
Counsel for Peggy M. Johnson,
a/k/a Peggy Mitchell

SEEN & OBJECTED TOO:



Charles E. Schelin
Counsel for Plaintiff

ENTERED the 14th day of November, 1983.


JUDGE

VIRGINIA:

IN THE CIRCUIT COURT OF RUSSELL COUNTY

FIRST NATIONAL EXCHANGE BANK)	
OF VIRGINIA,)	
)	
Plaintiff)	
)	
vs.)	AT LAW DOCKET NO. 5450
)	
EARL D. JOHNSON, et. al.,)	
)	
Defendants)	

NOTICE OF APPEAL

Comes now the Plaintiff, First National Exchange Bank of Virginia, and gives notice that it will appeal the Order entered on the 14th day of November, 1983, in the above-styled cause.

STATEMENT REQUIRED BY RULE 5:6

There will be no transcript or statement of facts, testimony, or other incidents of the case hereinafter filed.

✓ FIRST NATIONAL EXCHANGE BANK
OF VIRGINIA
By Counsel

BROWNING, MOREFIELD, SCHELIN,
and ARRINGTON, P. C.
114 Mill Avenue - P. O. Box 156
Lebanon, Virginia 24266

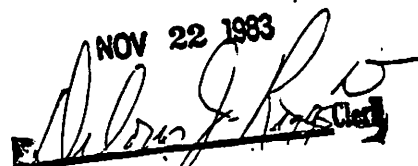
By Charles E. Schelin
CHARLES E. SCHELIN
Counsel for Plaintiff

CERTIFICATE

I, Charles E. Schelin, do hereby certify that I have mailed a true copy of the foregoing Notice of Appeal to David L. Scyphers, Esquire, Johnson, Scyphers, and Austin, P. C., 189 Valley Street, Abingdon, Virginia 24210, and to Randall A. Eads, Esquire, P. O. Box 103, Lebanon, Virginia 24266, Counsel of Record for the Defendants, on this the 22nd day of November, 1983.


CHARLES E. SCHELIN

CIRCUIT COURT RUSSELL COUNTY
FILED

NOV 22 1983

Clerk

ASSIGNMENT OF ERROR

The First National Exchange Bank of Virginia assigns as error:

The Court erred in dismissing Appellant's Motion for Judgment.