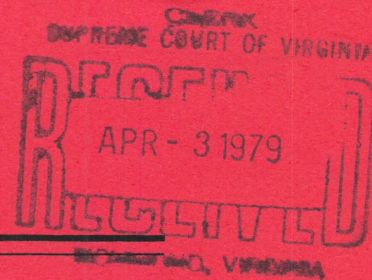


221VA 582



IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 781558

ROBERT L. LEONARD
and
BETTY J. LEONARD
Appellants

v.

H. LYMAN COUNTS
Appellee

JOINT APPENDIX

Dennis E. Jones, Esq.
Dennis L. Godfrey, Esq.
JONES & GODFREY
One Flannagan Avenue
Lebanon, Virginia 24266

Counsel for Appellants

Charles E. Schelin, Esq.
BROWNING, MOREFIELD, SCHELIN,
CODY AND ARRINGTON, P.C.
Two Mill Street
Lebanon, Virginia 24266

Counsel for Appellee

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Plaintiff's Exhibits

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BILL OF COMPLAINT

TO THE HONORABLE JUDGES OF SAID COURT:

Your Complainant respectfully represents as follows:

1. That on the first day of October, 1977, your Complainant, H. Lyman Counts, and the Defendant, Robert L. Leonard, attended an auction in Russell County, Virginia, for certain land owned by Howard Herman Cassell and Ann Cassell, his wife.

2. That both H. Lyman Counts and Robert L. Leonard made bids at said sale and then and there, prior to said sale being completed, entered into an agreement/partnership whereby Robert L. Leonard was to bid for both of them and, if successful, the parties would then take title to the Cassell land and later partition the land among themselves according to a boundary line to be surveyed at a later date, said survey having been preformed by Frank A. Carpenter, C.L.S. and dated October 25, 1977. Said agreement is evidenced by an informal description of the boundary line, later surveyed by Frank A. Carpenter, and signed by Robert L. Leonard, a copy of which is attached as Exhibit A, and is requested to be incorporated by reference.

3. Your Complainant and the Defendant Robert L. Leonard agreed that your Complainant was to have as an easement appurtenant a forty (40) foot right of way across the land to be retained by the Defendants to State Route 645.

4. That your Complainant agreed to pay the sum of FORTY-ONE THOUSAND, SIX HUNDRED SIXTY-SEVEN DOLLARS (\$41,667.00),

to be paid as follows: \$11,667.00 cash upon delivery of deed, which amount is tendered to the Clerk of this Honorable Court with the request to place it in an interest bearing account until the termination of this matter; the remaining sum of \$30,000.00 to be secured by a \$30,000.00 note bearing the interest rate of 7 per cent per annum on the unpaid balance and payable in THREE (3) annual installments of \$10,000.00 each, the first payment to be made on or before the 1st day of October, 1977, which note is attached as Exhibit B.

5. That the Defendant, Howard Herman Cassell, was informed of the agreement between your Complainant, H. Lyman Counts, and Robert L. Leonard and when so informed showed your Complainant over the entire tract of land and made recommendations as certain actions which should be taken to preserve the property.

6. That unknown to your Complainant and contrary to his interest, the Defendant, Robert L. Leonard, fraudulently induced the Defendants, Howard Herman Cassell and Ann Cassell, his wife, to convey all of the land in question to the Defendants, Robert L. Leonard and Betty J. Leonard, his wife, as tenants by the entirety with the right of survivorship, as at common law, by Deed dated October 6, 1977, and recorded in the Clerk's Office of the Circuit Court of Russell County, Virginia, in Deed Book 276, at Page 15, a copy of which is attached as Exhibit C and is requested to be incorporated by reference.

7. That by Deed dated October 27, 1977, the Defendants purported to convey to your Complainant and his wife the land agreed upon but with material differences; i.e., the agreed upon forty (40) foot right of way had been reduced to thirty (30) feet

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CODY
AND
BROWNING, P.C.
ATTORNEYS AT LAW
ABINGDON, VA.
LEBANON, VA.
ROYAL CITY, VA.

and the Defendants restricted the 30.7202 acres from the possibility of subdivision or commercial improvement, said reduction and restrictions being completely contrary to the agreement between your Complainant and the Defendant, Robert L. Leonard and completely unacceptable to your Complainant; the said Deed being attached as Exhibit D.

8. That the Defendants have been requested to reform the aforesaid Deed so that your Complainant would ultimately receive the land and right of way agreed upon free and clear of any and all restrictions and they have refused to do so.

9. That the wrongful reduction of the forty (40) foot right of way and the wrongful inclusion of the restrictions and limitations will cause ^{your Complainant} an irreparable damage in that he is to such extent denied the full and complete use of the property to which he is lawfully entitled by virtue of his agreement with the Defendant, Robert L. Leonard.

10. That the description on Page 2 of the purported Deed aforesaid does not conform to the plat prepared by Frank A. Carpenter dated October 25, 1977.

11. That your Complainant has no adequate remedy at law.

WHEREFORE, your Complainant, having no adequate remedy at law, prays that:

1. The purported Deed or writing aforesaid dated October 27, 1977, and attached as Exhibit B be reformed and rectified by inserting in it provisions for a forty (40) foot right of way in lieu and place of the thirty (30) foot right of way as agreed upon; and further by striking out and removing

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BANON, VA.
AL CITY, VA.

any and all of the restrictions and limitations contained in the fourth paragraph of the second page of the purported Deed; and further the metes and bounds description on Page 2 of the purported Deed be corrected to conform to the plat prepared by Frank A. Carpenter and dated October 25, 1977; or in the alternative,

2. That the Defendants, Robert L. Leonard and Betty J. Leonard, his wife, be DECREED constructive Trustees and Ordered to convey the said 30.7202 acres of land to H. Lyman Counts with a forty (40) foot right of way and without restrictions; and,

3. That the Defendants be required to pay all expenses incurred by your Complainant, including but not limited to, rent on the said 30.7202 acres of land from the twelfth day of October, 1977; and reasonable attorney fees incurred by your Complainant necessitated by the fraudulent conduct of the Defendant Robert L. Leonard and that your Complainant may have such other and further relief his case may require and to equity may seem mete and proper.

H. LYMAN COUNTS

By Counsel

Browning, Morefield, Schelin,
Cody and Arrington, P.C.
Two Mill Street
Lebanon, Virginia 24266

By Charles E. Schelin
Counsel for Complainant

BROWNING
MOREFIELD
SCHELIN
CODY
AND
ARRINGTON, P.C.
ATTORNEYS AT LAW
ABINGDON, VA.
LEBANON, VA.
ROYAL CITY, VA.

Filed in the Clerk's Office of the Circuit Court of the County of Loudoun, Virginia, on this 9th day of Dec, 1977 9:30 AM
V. 5.00
F. 25.00
L. 1.00
Total Paid \$ 31.00
Clerk
D. C.
004

6.47
515

Oct. 6, 1977

Agreed to between
R. L. Leonard and
Lynne Corinto -
Boundary line to be
Northern boundary line -
from fence to Joe Worthy
Stinson. Property in line
with upper or eastern
fence of Orchard to corner
post at upper side of
barn to town limit
line at lower side of
barn to stake on crest
of hill ^{measuring} 15 to 20 feet
west of barn & in direct line
to south boundary line
fence of Corinto farm.

Agreed Price of \$4,667

Term to be agreed on at later
date.

Robert L. Leonard



KLEIN TOOLS, INC.

NOTE SECURED BY DEED OF TRUST

\$30,000.00

Lebanon, Virginia,

October 27, 1977

FOR VALUE RECEIVED LYMAN COUNTS and ERMA K. COUNTS promise to pay to ROBERT L. LEONARD and BETTY J. LEONARD or at any other place as may be designated by the holder of this note(s), the principal sum of THIRTY-THOUSAND DOLLARS (\$30,000.00), with interest thereon at the rate of 7 per centum per annum, until paid in annual installments of, at least, the sum of \$10,000.00 each, the first of said installments being due and payable on the 1st day of October, 1978, and a like amount on the same day of each successive year thereafter, until paid in full. Each payment shall be applicable first to interest, then to escrow and then to principal, with the balance of principal and interest, if not sooner paid, being due and payable on the 1st day of October, 1980.

The makers reserve the right to prepay this note, or any portion thereof, without penalty.

If default be made in the payment of any installment under this note(s), and if such default is not made good prior to the due date of the next such installment, the entire principal sum and accrued interest shall at once become due and payable without notice at the option of the holder of this note(s). Failure to exercise this option shall not constitute a waiver of the right to exercise the same in the event of any subsequent default.

The maker(s) and endorser(s) hereof, hereby waive the benefit of our Homestead Exemptions as to this debt; and also hereby waive notice of maturity, presentment, demand, protest and notice of protest of this note(s).

Lyman Counts (SEAL)
LYMAN COUNTS

Erma K. Counts (SEAL)
ERMA K. COUNTS

Note 1 of 1 Note(s)

This is to certify that this is the note described in
and secured by certain Vendor's Lien reserved in a deed of even
date herewith, and in the same principal amount as herein
stated.

DATED: October 27, 1977

Christine Ball
NOTARY PUBLIC

My commission expires:

August 28, 1980

RECEIVED
DEC 2 1977

Joseph A. Ince

Exhibit "C"

BOOK 276 PAGE 15

THIS DEED, made this October 6, 1977, by and between HOWARD HERMAN CASSELL and ANN CASSELL, husband and wife, (hereinafter referred to as Grantors) and ROBERT L. LEONARD and BETTY J. LEONARD, husband and wife (hereinafter referred to as Grantees);

W I T N E S S E T H

That in consideration of a cash payment of TEN (\$10.00) DOLLARS, and other good and valuable consideration, receipt and sufficiency of which is acknowledged, Grantors hereby convey to Grantees as tenants by the entirety with right of survivorship as at common law, and with GENERAL WARRANTY and ENGLISH COVENANTS of title, that certain real property lying and being in the Lebanon Magisterial District of Russell County, Virginia, and more particularly described as follows:

All of Lot (Tract) Numbered 48, containing 49.3 acres, more or less, in the Subdivision of the lands, or a part of the lands of Edgar Wiley Jessee and which said lot herein conveyed lies on the east side of and adjacent to Secondary Highway No. 645 of the Virginia Highway System and about 1/5 of a mile north of the intersection or junction of Secondary Highway No. 645 with Primary Highway No. 71 (being the Fincastle Highway) of the Virginia Highway System, as shown by map and plat of said subdivision, designated "Subdivision of the E. W. WILEY JESSEE FARM" prepared by R. T. Felkner, surveyor, a copy of which is duly spread of record in Plat Book No. 1, page 125, in the Clerk's Office of the Circuit Court of Russell County, Virginia, and which said lot herein conveyed is described as follows, to-wit:

BEGINNING at a stake in the center of Secondary Highway No. 645, a corner to Lot No. 54; thence with the northern line of Lot No. 54, N 64° 40' E 1200 feet to a stake; thence leaving lot No. 54 and with two calls in lot No. 47, N 67° 30' E 583 feet to a stake; thence, N 82° 10' E 786 feet to a stake in the southwest line of Lot No. 46; thence leaving Lot No. 47 and with one line of Lot No. 46 N 23° 15' W 1200 feet to a stake; thence leaving Lot No. 46 and with three calls in Lot No. 46 and with three calls in Lot No. 49 S 58° 20' W 1465 feet to a stake; thence, S 64° 30' W 200 feet to a stake; thence N 77° 30' W 378 feet to a stake in the centerline of Secondary Highway No. 645; thence with five calls in the centerline of Secondary Highway No. 645, S 37° 14' W 48 feet; thence S 29° 48' W 300 feet; thence S 2° 27' E 222 feet; thence S 6° 00' E 300 feet; thence S 7° 20' W 350 feet to a stake in the center of Secondary Highway No. 645, the BEGINNING, containing 49.3 acres, more or less.

Verified
11-2-77

R. L. Leonard
R. L. Leonard
R. L. Leonard

BOOK 278 PAGE 16

Being the same real property conveyed to Grantors from Edgar Wiley Jesse and Laura Mae Jesse by Deed dated November 12, 1956, and of record in said Clerk's Office in Deed Book 155, page 424.

This conveyance is made expressly subject to all easements, rights of way and conditions of records affecting the above described property.

Real property taxes for 1977 with respect to this property shall be paid by Grantors.

WITNESS our signatures and seals:

Howard Herman Cassell (SEAL)
HOWARD HERMAN CASSELL

Ann Cassell (SEAL)
ANN CASSELL

STATE OF VIRGINIA

COUNTY OF Washington

The foregoing instrument was acknowledged before me this October 12, 1977, by HOWARD HERMAN CASSELL AND ANN CASSELL.

Betty Heather Lewis
Notary Public whose commission expires on July 27, 1980

VIRGINIA: In the Clerk's Office of the Circuit Court of Washington County, Oct 12, 1977. This deed was this day received in said office, and, upon the certificate of acknowledgment thereon annexed, admitted to record, at 4:20 o'clock P. M., after payment of \$ 150.00, tax imposed by Sec. 58-54 (b).

Tax: Party A. Duckett Clerk.

Tax \$ 150.00 Transfer Fee \$ 1.00

CIRCUIT COURT WASHINGTON COUNTY

DEC 12 1977

Party A. Duckett Clerk

THIS DEED, made this 27th day of October, 1977, by and between ROBERT L. LEONARD and BETTY J. LEONARD (Hereinafter referred to as Grantor) and LYMAN COUNTS and ERMA K. COUNTS, husband and wife (Hereinafter referred to as Grantee);

W I T N E S S E T H

That in consideration of a cash payment of FORTY ONE THOUSAND, SIX HUNDRED SIXTY SIX & .62/100 (\$41,666.62) DOLLARS, ELEVEN THOUSAND SIX HUNDRED SIXTY SIX & .62/100 (\$11,666.62) cash in hand paid by the Grantee to the Grantor at and before the signing, sealing and delivery of said Deed, receipt of which is hereby acknowledged and remaining sum of \$30,000.00 as evidenced by one installment note of even date herein with the principal sum of \$30,000.00 signed by the Grantee hereto as makers and payable to the order of Robert L. Leonard and Betty J. Leonard in THREE (3) annual installments of \$10,000.00 each, together with interest thereon at the rate of 7 per cent per annum on all unpaid balances, the first installment to become due and payable on or before the 1st day of October, 1978, one installment to become due and payable on or before the 1st day of October, 1979, and one installment to become due and payable on or before the 1st day of October, 1980, with interest from date at the rate of 7 per cent per annum on all unpaid balances, and to secure the said deferred payments, there is expressly reserved a Vendor's Lien, Grantor hereby conveys to Grantee as tenants by the entirety with right of survivorship as at common law, and with GENERAL WARRANTY and ENGLISH COVENANTS of title, that certain real property situate, lying and being in the Lebanon Magisterial District of Russell County, Virginia and more particularly described as follows:

X
~~BEGINNING at an iron pin S. 70° 31' 21" W. 1,001.91 ft. from State Rt. 645, a corner to the lands of the Grantor herein; thence S. 70° 31' 21" W. 231.80 ft. to an angle point in fence; thence S. 69° 32' 54" W. 517.97 ft. to an angle point in fence; thence S. 84° 07' 17" W. 753.88 ft. to an iron pipe, in the line of lands of Cecil Warner; thence with the Warner line S. 21° 40' 23" E. 1,198.09 ft. to a stone; thence N. 59° 44' 48" E. 1,406.47 ft. to an iron pipe; thence S. 26° 31' 05" E. 233.76 ft. to an iron pipe; thence S. 69° 47' 20" W. 70.56 ft. to an iron pipe in the line of the Grantor; thence with the line of Grantor S. 18° 04' 59" E. 533.06 ft. to the point of BEGINNING and containing 30.7202 acres more or less;~~

And being the same properties conveyed to the Grantor herein by Deed dated the 6th day of October, 1977 from Howard Herman Cassell and Ann Cassell and recorded in the Office of the Clerk of the Circuit Court of Russell County, Virginia in Deed Book _____ at page _____.

This conveyance is made expressly subject to all Easements, Rights of way, and Conditions of record affecting the above described property.

as an easement appurtenant to the above described property and running with the land 40 ft

Grantor conveys to Grantee [^] a certain [^] right of way over Lot 48-B for ingress and egress to the aforescribed property, Said right of way being shown by that certain map and plat described as the "E. W. Wiley Jessee Farm" prepared by Frank A. Carpenter, C.L.S. dated the 25th day of October, 1977 and of record in the Office of the Clerk of the Circuit Court in Plat Book _____ at page _____.

~~Grantee, his heirs, executors and assigns covenant with Grantor, his heirs, executors and assigns, that the above described lands shall not be sub-divided for the purposes of building residential homes or apartment complex, campgrounds, hotels, motels industry or commercial use, said covenant to be made covenant with said land.~~

Real property taxes for the calendar year 1977 is to be paid by the Grantor.

Witness the following signatures and seals:

Robert L. Leonard (SEAL)
ROBERT L. LEONARD

Betty J. Leonard (SEAL)
BETTY J. LEONARD

STATE OF VIRGINIA

COUNTY OF RUSSELL

The foregoing instrument was acknowledged before me
this 27th day of October, 1977 by ROBERT L. LEONARD and
BETTY J. LEONARD.

[Signature]
NOTARY PUBLIC WHOSE COMMISSION
EXPIRES ON July 7 1980

[Faint Notary Seal]
OCT 3 1977
Darryl A. Duckett

ANSWER TO BILL OF COMPLAINT

TO THE HONORABLE JUDGE OF THE AFORESAID COURT:

Comes now your defendants and answers the Bill of Complaint filed against them as follows:

I

The defendants admit the allegations contained in Paragraph I of the Complainant's Bill of Complaint.

II

The defendants admit that both the Complainant and the Defendant, Robert L. Leonard, made competitive bids on the property made the subject of this controversy but deny that any partnership agreement was entered into. Defendants admit that on October 6, 1977 that defendants agreed to sell the property made the subject of this controversy to the Complainant but with certain restrictions and covenants the terms of same to be agreed upon at a later date.

III

The defendants deny the allegations contained in Paragraph III of the Complainant's Bill of Complaint.

IV

The defendants admit the allegations contained in Paragraph IV of the Complainant's Bill of Complaint.

V

The defendants do not have sufficient knowledge of the allegations contained in Paragraph V to either admit or deny the allegations contained therein.

VI

Defendants deny that any fraudulent conduct on their part but admit that the property was conveyed to them as sold to them the date of the sell as tenants by the entirety with right of survivorship.

VII

The defendants admit that by Deed dated October 27, 1977 they attempted to convey to the Complainant herein the real property made the subject of this controversy with a 30 foot right of way and restrictions prohibiting the further subdivision or commercial improvement of the subject property. These being the conditions of the sale by the defendants, Robert L. Leonard and Betty J. Leonard, in consummating the transaction which was their prerogative as the owners in fee simple of the property made the subject of this controversy.

VIII

The defendants deny the allegation contained in Paragraph VIII of the bill of Complaint, but aver that negotiations proceeded between your Complainant and defendants following October 27, 1977 wherein your Complainant attempted to purchase the property without any restrictions and with a 40 foot right of way which said defendants were not agreeable so to do.

IX

Defendants deny the allegations contained in Paragraph IX of Complainants Bill of Complaint.

X

Defendants admit the allegations contained in Paragraph X but say that it was an oversight in the preparation of said Deed. Defendants further represent to the Court that it has been at all times and continues to be willing to convey the said property to your Complainant with a 30 foot right of way and restrictions from further subdivision or commercial improvement, said restrictions to be made covenants running with the land. Defendants aver that they have the right to convey their property to a prospective purchaser under their terms and conditions.

XI

All allegations not specifically denied in Complainant's Bill of Complaint are herein generally denied.

NOW having fully answered Complainant's Bill of Complaint Defendants move that the Complainant's Bill of Complaint be dismissed with their cost.

ROBERT L. LEONARD, Defendant
BETTY J. LEONARD, Defendant

By Counsel

JONES & GODFREY
One Flannagan Avenue-P.O.Box 600
Lebanon, Virginia 24266

By: /s/ Dennis E. Jones
DENNIS E. JONES
Counsel for Defendants

CERTIFICATE

This is to certify that I have this 13th day of December, 1977, mailed a true copy of the foregoing Answer to Bill of Complaint to Charles E. Schelin, Esq., Browning, Morefield, Schelin, Cody & Arrington, East Main Street, Lebanon, Virginia 24266, Counsel for Complainant.

781558

8/1/78

V I R G I N I A:

CIRCUIT COURT OF RUSSELL COUNTY

H. LYMAN COUNTS,

Plaintiff

V.

ROBERT L. LEONARD and BETTY J.
LEONARD,

Defendants

CIRCUIT COURT RUSSELL COUNTY

FILED

SEP 26 1978

Peggy Blum Clerk

July 19, 1978

VOLUME 1
pages 1 - 123



Reference: Martindale-Hubbell

RUTH JONES GREINER
Certified Shorthand Reporter
Registered Professional Reporter
20 PINE STREET
BRISTOL, VIRGINIA - TENNESSEE 24201

PHONE: (703) 669-2214

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APPEARANCES:

CHARLES E. SCHELIN, ESQ., Lebanon, Virginia

Counsel for Plaintiff

DENNIS E. JONES, ESQ., Lebanon, Virginia

DENNIS L. GODFREY, ESQ., Lebanon, Virginia

Counsel for Defendants

2

I N D E X

3

WITNESS:

DIRECT

CROSS

REDIRECT

RECROSS

4

Robert L. Leonard
(recalled)

3
52

5

Philip Puckett

23 25

6

Mrs. Joy Crookshank

27 32

7

Howard Herman Cassell

40 47 51

8

H. Lyman Counts

53 84 115 118

9

Motion to strike

120

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018

The following cause came on to be heard on this the 19th day of July, 1978, at 2:25 p.m., before The Honorable Glyn R. Phillips, Judge of the Circuit Court of Russell County, sitting at Lebanon, Virginia, when the following proceedings were had.

Mrs. Ruth Jones Greiner, Certified Shorthand Reporter and Registered Professional Reporter, was duly sworn. Witnesses were sworn and excluded under the rule. Counsel presented opening statements to the Court.

THE COURT: Call your first witness.

MR. SCHELIN: I would like call Mr. Robert L. Leonard as an adverse witness.

ROBERT L. LEONARD

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

DIRECT EXAMINATION

BY MR. SCHELIN:

Q What is your name?

A Robert Leonard.

Q Are you the defendant in this suit being tried today of H. Lyman Counts and Betty J. Leonard?

A Yes, I am part of it, yes.

Q Where do you live, Mr. Leonard?

A Lebanon, Virginia.

019

2 Q What is your occupation?

3 A Contractor, real estate development.

4 Q How many houses and parcels of land would you
5 say you have sold in the last five years?

6 A It would be hard to say. I would say up to 40
7 or 50.

8 Q What were the details of the agreement between
9 you and Mr. Counts arrived at during the bidding of the
10 auction of the land in question?

11 A There was no agreement, other than I would at
12 some time sell him some of the property.

13 Q In other words, you did have an agreement?

14 A There was no actual agreement, no, sir, just
15 that if he wanted to buy a portion of the farm, I some time
16 would sell it to him.

17 Q Are you saying there was no agreement whatso-
18 ever or are you saying there was an agreement?

19 A There was no agreement.

20 Q When did you and Mr. Counts arrive at an agree-
21 ment to buy and to sell this property?

22 A We never agreed to buy and sell together.

23 Q Not ever?

24 A No, sir.

25 Q Did you ever sign any document as to boundary

020

2 lines or purchase prices concerning this property?

3 A Yes, sir.

4 Q Isn't that contradictory to what you just
5 stated, that you never agreed to sell?

6 A That was after the sale of the property, the
7 original sale.

8 Q I asked you when you arrived at an agreement
9 to sell and you said you never did. What is correct? Did
10 you ever agree to sell this property?

11 A I agreed to sell it to him under my terms,
12 after I had bought the land, but not during the sale.

13 Q When did you agree to sell him this property?

14 A It was on the 6th of October, sir.

15 Q I show you a writing. Do you recognize this
16 writing dated October 6th?

17 A I recognize my signature.

18 Q But you don't recognize the writing itself?

19 A I think it is Mr. Counts' writing.

20 Q And it is your signature?

21 A Yes, sir.

22 Q Do you deny signing it?

23 A No, sir.

24 Q This writing here specifies boundary lines and
25 a certain price, does it not?

021

2 A Yes.

3 Q \$41,667, is that correct?

4 A Yes, sir.

5 MR. SCHELIN: Your Honor, I would like to
6 introduce this as Plaintiff's Exhibit 1.

7 THE COURT: It will be admitted into evidence
8 as Plaintiff's Exhibit 1.

9 (PLAINTIFF'S EXHIBIT NO. 1 was
10 marked for identification and
11 filed.)

12 BY MR. SCHELIN:

13 Q What was that agreement that you entered into?

14 A That agreement was to sell Mr. Counts a portion
15 of the back part of the farm at a certain price in terms to
16 be announced later.

17 Q What were those terms?

18 A Those terms --

19 MR. JONES: Objection. The document speaks
20 for itself.

21 THE COURT: You are talking about the terms in
22 this document?

23 MR. SCHELIN: Yes.

24 MR. JONES: That document right there, Your
25 Honor, there is a case directly in point on the

particular matter. It is Duke v. Tobin, 198 Va. 758, wherein two parties purported to enter into an agreement for the sale of property, and the Court goes into great length to discuss the memorandum and the legal merits of that memorandum. In that particular case one of the terms, or one of the comments on the memorandum was that the terms and payment to be decided on after survey, that is a direct quote from it, in that particular case, both parties to be charged under the memorandum had, in fact, signed the agreement. This piece of paper right here does not readily identify the property. In addition, it states that the terms are to be agreed on at a later date, and that Mr. Counts did not sign it.

In that particular case the Supreme Court said that that particular contract was certainly violative of the Statute of Frauds and predicated on that case we will object to any questioning beyond this memorandum.

THE COURT: Do you have that case with you?

MR. JONES: Yes, Your Honor.

THE COURT: Mr. Jones, talking about the last sentence of this contract: "Terms to be agreed on at a later date." You mean you think that has something

2 to do with the boundary lines?

3 MR. JONES: Well --

4 THE COURT: The way the Court interprets it,
5 looking at it, it means that the terms of payment will
6 be agreed on later.

7 MR. JONES: It says terms.

8 THE COURT: But it is immediately after \$41,667,
9 "terms to be agreed on at a later date." I am just
10 wondering what your contention was, if you are con-
11 tending that the terms of the transaction would be
12 agreed upon later or whether you say it only means
13 method of payment.

14 MR. JONES: We are saying the terms of the
15 transaction, because the property was purchased in
16 the name of Mr. and Mrs. Leonard, and certainly the
17 law states by tenants by the entirety, when two indi-
18 viduals own it, certainly one party cannot agree to
19 sell that which he does not own, but when you have
20 tenants by the entirety, the right of survivorship,
21 both parties must sign it.

22 THE COURT: The Court is going to admit it in
23 evidence for the time being, under further interroga-
24 tion by the lawyers.

25 BY MR. SCHELIN:

024

2 Q Mr. Leonard, what was the original intention
3 of this writing where it said: "\$41,667, terms to be agreed
4 on later"?

5 A I think it speaks for itself.

6 Q Mr. Leonard, do you recall taking depositions
7 in my office on January 26, 1978?

8 A Yes, sir.

9 Q Do you recall my asking you the question:
10 "Did that small handwriting compose the entire agreement
11 between the two of you?"

12 And your answer: "No."

13 A No, sir, I don't remember that.

14 Q You don't remember that?

15 A No, sir.

16 Q I would like to read from page 5 of those dis-
17 covery depositions. My question: "It did not?"

18 Your answer: "No."

19 Do you recall that?

20 A No, sir.

21 Q My question: "What did it leave out?"

22 Do you recall your answer? "It left out the
23 terms of sale."

24 Do you recall that?

25 MR. JONES: Your Honor, if he is going to use

2 the deposition of Mr. Leonard's testimony, he should
3 admit it, if he is going to use it for impeachment
4 purposes, he should first refer to Mr. Leonard and
5 then revert back to the deposition. We object to
6 reading the deposition.

7 THE COURT: Go ahead. If he stated something
8 that was contrary to the deposition, you may contradict
9 it.

10 BY MR. SCHELIN:

11 Q Do you recall my asking you what were the terms
12 of the sale?

13 A No, sir, I don't. It has been a pretty good
14 while.

15 Q You don't recall your answer: "I don't think
16 they were final until the time that the deed was drawn up.
17 I think that they pay a certain amount down and the balance
18 in three years."

19 A That is what I said probably.

20 Q Do you remember my asking you: "Not right off
21 I don't -- wait a minute. Were they the ones included in the
22 notes that you presented him at a later date?" And your
23 answer: "Yes."

24 A I don't remember, sir.

25 Q That was in direct response to what the terms

2 of the sale were and you don't remember that?

3 A No, sir.

4 Q What was your discussion with Mr. Counts during
5 the auction of this property? What did it entail?

6 A The only discussion that I had with Mr. Counts
7 at that time, he asked me to come to his presence, where he
8 was standing, motioned for me to come, and I went to him and
9 he asked me, he said, "How is the sale going?"

10 I said, "It is going pretty high."

11 Q Did you have any agreements with him?

12 A No, sir, no agreements.

13 Q You did not have any agreements with him con-
14 cerning the sale of this property?

15 A No, sir.

16 Q None at all?

17 A No, sir.

18 THE COURT: After that conversation, did Mr.
19 Counts stop bidding?

20 THE WITNESS: He stopped bidding, as I under-
21 stand it, Your Honor, before we had any conversation.

22 THE COURT: Did he make any bid after you had
23 the conversation?

24 THE WITNESS: Not as I know of. I didn't, you
25 know, keep up with him.

2 THE COURT: Did he tell you or did Mr. Counts
3 state to you that he would stop bidding?

4 THE WITNESS: No, sir. No, sir.

5 THE COURT: Go ahead.

6 BY MR. SCHELIN:

7 Q What was the discussion? What was the agree-
8 ment that you and Mr. Counts arrived at concerning the right
9 of way to this 30.72 acres?

10 MR. JONES: Your Honor, that is a leading
11 question.

12 MR. SCHELIN: He is an adverse witness, I can
13 ask that.

14 THE COURT: Objection overruled.

15 A The only thing, we pointed out from one side
16 of the property to the other where the line ran, so that is
17 what is what I had it surveyed by.

18 BY MR. SCHELIN:

19 Q Was there any discussion as to the width of
20 the right of way?

21 A No, sir.

22 Q None whatsoever?

23 A No, sir, no discussion.

24 Q That was left strictly up to your --

25 A Only an easement mentioned, he asked if he

2 could have an easement over it.

3 Q You could have made that five feet or 100 feet?

4 A That is exactly right.

5 Q What was your purpose in putting these restric-
6 tions in the deed?

7 A Well, my wife and I talked it over and we
8 decided if we sold it, it would be protected, the property
9 would, because she did not and I did not want the property
10 developed. We wanted it to stay as it was.

11 Q Why?

12 A For our purposes.

13 Q Why?

14 MR. JONES: If the Court please, objection.

15 They own the property as tenants by the entirety with
16 right of survivorship. They don't have to have a
17 reason for any particular thing. They can sell it as
18 they choose.

19 THE COURT: Of course, that is the question in
20 issue. Objection overruled.

21 BY MR. SCHELIN:

22 Q How long after the sale of this property did
23 you decide on these restrictions?

24 A On the day of the 6th, on October 6th.

25 Q This was after your discussion with Mr. Counts?

2 A Yes, sir, it was.

3 Q So, in fact, Mr. Counts never did agree to
4 these terms?

5 A There never was any terms, as far as easement,
6 right of way or any restrictions mentioned at that time.

7 Q So he never agreed -- you never mentioned them,
8 he never agreed to the restrictions?

9 A He never asked for any.

10 Q So there wasn't any agreement then, was there?

11 A There was as far as I was concerned.

12 Q It takes two to have an agreement, does it not?

13 A It should be in writing.

14 Q So it is true then that the only thing you
15 agreed on, whenever you agreed, whether it is the 6th or
16 whether it was the 1st, whether it was the day of the auction,
17 was the terms of cash and the boundary line, is that correct?

18 A That is all he asked for.

19 Q That is all, that is the only statement that
20 was ever made?

21 A That is all --

22 MR. JONES: Objection. He questioned him on
23 that memorandum and that memorandum states clearly at
24 the bottom, the very last line, the terms and condi-
25 tions to be agreed upon at a later time. If we are

2 getting into a situation where an offer or we are
3 involved in negotiations as to how it is going to be
4 sold and under what terms and what conditions it is
5 going to be sold, we aren't discussing about a con-
6 tract, we are simply discussing here today negotiations.
7 We object to any reference to that being made into a
8 contract at this point in time.

9 MR. SCHELIN: Your Honor, we are discussing
10 the whole transaction that occurred. There was an
11 agreement reached on the first day of October, later
12 reduced to writing.

13 THE COURT: What was the date of sale?

14 MR. SCHELIN: The 1st of October.

15 THE COURT: And this written instrument that
16 you have offered in evidence as Exhibit 1, was October
17 6th?

18 MR. SCHELIN: That is correct.

19 THE COURT: Objection overruled.

20 BY MR. SCHELIN:

21 Q Are you presently developing the front part of
22 that property now?

23 A No, sir.

24 Q You have not put any apartments on it?

25 A I put an apartment, but I don't consider that

2 a development.

3 Q You have built an apartment on it?

4 A I built one apartment building, yes.

5 Q There were restrictions in the deed that you
6 tendered to Mr. Counts, prohibiting him putting apartments
7 on it?

8 A He wasn't buying the front part of that prop-
9 erty.

10 Q You prohibited him from putting apartments on
11 the back part?

12 A That was the intention of my sale.

13 Q When did you say you decided on those restric-
14 tions?

15 A On the evening of October 6th, sir, with the
16 suggestion of me and my wife.

17 Q Do you recall during the depositions that we
18 took back on January 26th, my asking you when did you decide
19 to impose those restrictions? And your answer: "At the time
20 the deed was being prepared."

21 A That was to impose then upon him. The restric-
22 tions on him, at the time the plat was prepared and presented
23 the plat to Mr. Counts, told him there would be restrictions
24 and the right of way would be restricted to 30 feet, and he
25 did not object, and I took it on to the lawyer's office, Mr.

2 Jones, and he wrote the deed to that effect, and that was it

3 Q These restrictions and the right of way of 30
4 feet were not decided upon by you until the deed was being
5 prepared, is that correct?

6 A It was decided upon by me and my wife on October
7 6th, between me and my wife, that there would be restrictions
8 on that property.

9 Q Did you go by Mr. Counts' office prior to the
10 preparation of the deed and ask him whether the restrictions
11 and the 30-foot right of way would be agreeable?

12 A Yes, sir, I certainly did.

13 Q What was his response?

14 A I didn't have any response. He told me to take
15 it to the lawyer's office.

16 Q Said it is perfectly okay, I guess?

17 A He didn't say it that way. He didn't say
18 nothing.

19 MR. JONES: Your Honor, we object to this line
20 of questioning. If there is a written contract of
21 sale, it should be presented. If it is consummated
22 in the deed, the deed should be presented. As a matter
23 of fact, the deed to which he is referring to was filed
24 as an exhibit in a preliminary pleading.

25 MR. SCHELIN: It is well established law that

when fraud is alleged that any evidence whatsoever can be presented to show that fraud and circumstances surrounding that.

MR. JONES: Your Honor, the very purpose of the Statute of Frauds in dealing with transactions in regard to real estate is to prevent fraud and perjury and there has been no contract shown here, only the deed, which would represent a consummation of the agreement.

MR. SCHELIN: I believe the Statute of Frauds said a writing. This is very definitely a writing signed by the person in this case now who had, due to the circumstances, had to take the action to convey title. I submit that that is an acceptable document and acceptable evidence as to the agreement between the parties.

THE COURT: Maybe you haven't gotten this far along, but was a deed subsequently prepared, after the written exhibit, which has been admitted in evidence as Exhibit No. 1, was the deed subsequently prepared which provided for the terms of payment?

MR. SCHELIN: Yes, sir.

MR. JONES: Yes, it was filed as an exhibit in the Court file and should already be made an exhibit.

2 THE COURT: All right. Objection overruled.
3 I am going to hear all the evidence and get at the
4 heart of the matter.

5 BY MR. SCHELIN:

6 Q Why did it take you six days, Mr. Leonard, to
7 sign a document reflecting the conditions of the sale of
8 this property from the date you inquired in my office?

9 MR. JONES: Excuse me, what was the question?

10 THE WITNESS: I didn't understand it either.

11 BY MR. SCHELIN:

12 Q Why did it take you six days to reduce this
13 thing to writing?

14 MR. JONES: What writing?

15 MR. SCHELIN: The agreement.

16 A It didn't take me six days. He approached me
17 for it.

18 Q Did Mr. Leonard or did Mr. Counts sign the
19 agreement of sale, this option agreement of sale in your
20 presence?

21 A Which agreement are you talking about?

22 Q The one that you signed after the sale was
23 knocked down to you.

24 A I don't remember whether he signed it or not.

25 Q You would remember if he had signed it, would

1

R. Leonard - Direct

20

2

you not? Why would he sign it, if, as you say, he had no
3 interest in it?

3

4

A You are talking about the agreement as Exhibit
5 1?

5

6

Q I introduce to you, or I would like to show to
7 you a document or copy of the document which says, let's see,
8 "State of Virginia, County of Russell. This is to certify
9 that I have this date purchased at auction from Mr. and
10 Mrs. Howard H. Cassell" and so forth. Do you recognize this
11 document?

12

A Yes, sir.

13

Q Did you sign it?

14

A Yes, sir.

15

Q Did Mr. Counts sign it?

16

A I don't know whether he signed it or not, but
17 his name is on there.

18

Q You weren't present when he signed it?

19

A No, sir. No, sir.

20

MR. SCHELIN: Your Honor, I would like to intro-
21 duce this document as Exhibit 2.

22

THE COURT: It is admitted in evidence as
23 Plaintiff's Exhibit No. 2.

24

(PLAINTIFF'S EXHIBIT NO. 2 was

25

marked for identification and filed.

2 BY MR. SCHELIN:

3 Q Why would Mr. Counts sign that, if he didn't
4 have some interest in this property from the date of this
5 sale?

6 A You will have to ask him. I don't know why he
7 signed it.

8 Q You didn't see him sign it?

9 A No, sir.

10 Q You didn't object to him signing it?

11 A Yes, sir.

12 Q How could you have objected to him signing it,
13 if you didn't see him sign it?

14 A I would have objected later on, if I had seen
15 it soon enough. It wasn't signed in my presence.

16 Q Is the proposed right of way to this 30 acres
17 the same right of way that existed prior to the sale?

18 A There was never a right of way to the 30 acres,
19 sir.

20 Q Was there ever a road that led back to it?

21 A No, sir.

22 Q Was there ever a driveway that led back to it?

23 A The driveways lead to the house.

24 Q Didn't go back to the 30 acres?

25 A There was --

2 Q Was there any kind of path or any kind of a
3 way that was obvious that people had traveled in the past
4 back to this 30 acres?

5 A Yes.

6 MR. JONES: Objection. You can take a car and
7 run all over the farm. Any of it is away from the
8 road back to the rear portion.

9 THE COURT: You may ask him if there was any
10 designated right of way that he knew about.

11 THE WITNESS: No, sir, there wasn't any desig-
12 nated right of way.

13 BY MR. SCHELIN:

14 Q Did you and Mr. Counts ever drive over the
15 proposed right of way?

16 A No, sir.

17 Q You say there was no existing road of any kind?

18 A No existing right of way.

19 Q No existing road either, or travel pathway?

20 A There was pathways anywhere you go.

21 Q Are you asking this Court to believe that Mr.
22 Counts would change that voluntarily and have no idea where
23 you put a right of way back there?

24 MR. JONES: Objection. He is testifying the
25 best of his knowledge.

THE COURT: If he doesn't know, he won't be required to answer.

MR. SCHELIN: That is all I have.

THE COURT: Thank you, Mr. Leonard.

Do you want to recall him later one, Mr. Jones?

MR. JONES: Just a minute, Your Honor.

(Witness excused.)

MR. SCHELIN: Call Philip Puckett, please.

THE COURT: Who is the witness you called?

MR. SCHELIN: Philip Puckett.

DEPUTY SHERIFF: He is not here.

MR. SCHELIN: He was here until the witnesses were excused.

THE COURT: Let Mr. Counts go out there. Step out there.

Take a five-minute recess while they are finding the witness.

. . . Thereupon, a recess was taken at 3:05 p.m. and reconvened at 3:08 p.m. . . .

PHILIP PUCKETT

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

DIRECT EXAMINATION

BY MR. SCHELIN:

2 Q What is your name, please, sir?

3 A Philip Puckett.

4 Q Where do you live?

5 A Lebanon, Lebanon, Virginia.

6 Q What is your occupation?

7 A Insurance agent, Lebanon Insurance Agency, Inc.

8 Q Mr. Puckett, I ask you to think back in the
9 deep dark recesses of your mind and recall the first day of
10 October, 1977. Did you attend an auction that day of the
11 H. H. Cassell property in Russell County?

12 A Yes, sir.

13 Q Do you recall seeing Mr. H. Lyman Counts and
14 Mr. Robert L. Leonard at that auction?

15 A Yes, sir.

16 Q Do you recall whether or not you saw them stand-
17 ing at, each of them at opposite ends of the property or were
18 they standing near to each other?

19 A As I recall, they were standing in a small group
20 of people, as we came in.

21 Q Do you recall hearing or seeing either one of
22 them make bids on this property?

23 A I recall Mr. Leonard making a bid at the time
24 I was there.

25 Q Do you recall Mr. Counts making any bids?

2 A To my knowledge, no.

3 Q You don't recall him making any bids at all?

4 A Not to my knowledge.

5 Q Were you there the whole day?

6 A No, sir, I left early, before the sale was
7 completed.

8 MR. SCHELIN: All right, that is all. Thank
9 you.

10 CROSS EXAMINATION

11 BY MR. JONES:

12 Q Mr. Puckett, did you arrive before the sale
13 started?

14 A Yes.

15 Q Do you recall, were the terms of that sale
16 announced?

17 A I recall that the terms were announced before
18 they started the auction itself.

19 Q Do you recall specifically whether or not the
20 terms of money being paid as a down payment on the date of
21 the auction were announced?

22 A I don't recall. I wasn't interested myself.
23 I was simply there as a spectator.

24 Q Approximately how many people were there?

25 A Strictly a guess. I would estimate there was

2 probably 100 to 125 people on the ground maybe.

3 Q Did you see Mr. Counts mingling with other
4 people?

5 A I don't recall that I did see him mingling
6 with other people. The situation, when I got there, I remem-
7 ber seeing both of them. I know both of the gentlemen. I
8 happened to speak to them as I would any other time I would
9 see them. I went on up the hill and parked my vehicle. I
10 had my young son with me.

11 I walked back down toward the house just a
12 little bit and I talked with some other individuals, but I
13 don't recall any of them.

14 Q Were the two of them together or were there
15 other individuals?

16 A I recall there were a group there. I didn't
17 single them out as being two individuals standing there
18 together myself.

19 Q Approximately how many people were in that par-
20 ticular group?

21 A Maybe four or five people, something like that.

22 Q Were there other groups of people standing
23 around on that property?

24 A Yes, there were several people.

25 Q Did you recognize other people at that auction?

2 A Yes, I talked with several different people.

3 MR. JONES: That is all I have.

4 THE COURT: Thank you.

5 May he be excused?

6 MR. SCHELIN: Yes.

7 MR. JONES: Yes.

8 (Witness excused.)

9 MR. SCHELIN: Call Mrs. Crookshank, please.

10

11 MRS. JOY CROOKSHANK

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

13 DIRECT EXAMINATION

14 BY MR. SCHELIN:

15 Q What is your name, please, ma'am?

16 A Joy Crookshank.

17 Q Where do you live, Mrs. Crookshank?

18 A Abingdon, Virginia.

19 Q For whom do you work?

20 A Steve Wise Auction Company.

21 Q Were you present at the auction of the Mr. and
22 Mrs. H. H. Cassell property in Russell County, Virginia on
23 or about the first day of October, 1977?

24 A Yes, sir, I was.

25 Q Do you recall who purchased that property?

2 A Yes, sir, I do.

3 Q Who?

4 A Mr. Leonard.

5 Q How much did he pay?

6 A \$125,000.

7 Q When one purchases property at an auction,
8 does he sign anything acknowledging his purchase?

9 A Yes, sir.

10 Q Is this a copy of the document that Mr. Leonard
11 signed?

12 A Yes, sir.

13 Q Did anybody else sign that document?

14 A Yes, sir, Mr. Lyman Counts put his name in the
15 margin.

16 Q Do you know why Mr. Counts put his name in the
17 margin?

18 A Yes, sir.

19 Q Why?

20 A He said that he and Mr. Leonard were in agree-
21 ment that Mr. Leonard was to sell him a portion of the prop-
22 erty.

23 MR. JONES: Objection, grounds of hearsay.

24 THE COURT: Was Mr. Leonard there?

25 THE WITNESS: Yes, sir, they were standing

2 together.

3 THE COURT: Was Mr. Leonard present when Mr.
4 Counts said that?

5 THE WITNESS: Yes, sir.

6 THE COURT: Objection overruled.

7 BY MR. SCHELIN:

8 Q They were standing together?

9 A Yes, sir.

10 Q Would you please go on. I don't recall exactly
11 what you said when you were interrupted. What did Mr. Counts
12 say?

13 A That he, Mr. Counts said that he and Mr.
14 Leonard, that Mr. Leonard had agreed that they had bought
15 the property together and he was to sell him a portion of
16 the property.

17 Q Said that they had bought the property together?

18 A Yes, sir.

19 Q And Leonard was to sell him a portion of it?

20 A Yes, sir.

21 Q Why did Mr. Counts want to sign that document?

22 A He volunteered this, I didn't ask, but he did
23 say in case anything happened to one or the other, that it
24 would be known that he was to have bought a part of the
25 property.

045

2 Q Where did he sign it?

3 A On the margin.

4 Q On the margin. Do you recall how the deed to
5 this property was to be drawn up or was anything like that
6 mentioned at this time?

7 A Yes, sir. Mr. Leonard said that he would be
8 in touch with Mr. Cassell's attorney, but he wanted the deed
9 drawn in his name and his wife's name.

10 Q Nothing at that time was mentioned about Mr.
11 Counts' name?

12 A No, sir, as I recall at that time, when I asked
13 about how the deeds were to be made, Mr. Counts was not there.
14 It was after I asked how the deeds were to be made that Mr.
15 Counts came over and asked to have his name put in the margin.

16 Q All right. That was after you got the instruc-
17 tions from Mr. Leonard?

18 A Yes, sir.

19 Q And then Mr. Counts came after those instruc-
20 tions and said, "I am part of this thing, I want to sign
21 something, too"?

22 A Yes.

23 MR. JONES: If Your Honor please, objection.

24 Mr. Schelin is testifying for Mrs. Crookshank.

25 THE COURT: Objection overruled.

2 BY MR. SCHELIN:

3 Q Did Mr. Leonard make any statements after Mr.
4 Counts had told you this information, or did he object to
5 anything that Mr. Counts told him?

6 A No, sir, he did not object, but he didn't make
7 any affirmative statements at that time either.

8 Q He just stood there and listened and didn't
9 say anything?

10 A Yes, sir.

11 Q How far apart was Mr. Leonard from Mr. Counts
12 at this time?

13 A I was between the two and they were diagonally
14 on each side of me.

15 Q No way possible that Mr. Leonard could not
16 have heard what Mr. Counts said?

17 A That is true.

18 Q Was that form that was signed by Mr. Leonard
19 and Mr. Counts the same form that you present at each sale
20 of property that you all conduct?

21 A Yes, sir. It is just a book form.

22 Q That is considered a binding document by your
23 organization?

24 A Yes, sir. Oh, yes, sir.

25 Q Did you tell Mr. Counts where to sign it?

2

A He asked where he could sign it and it had already been signed by Mr. Leonard, so I just asked him please, to sign here, which was the margin.

3

4

5

Q At your instruction Mr. Counts put his name in the margin?

6

7

A In the margin, yes, sir.

8

Q Who put "jointly" there?

9

A "By Robert L. Leonard and Betty J."?

10

Q Yes.

11

A That is mine. That is the way he said he

12

wanted his deed.

13

Q That is your writing there?

14

A Yes, with "right of survivorship", yes, sir,

15

it is. That is all mine, because that is the way he wanted

16

it, requested that they be made to himself and his wife with

17

right of survivorship.

18

Q That is also in the margin, is it not?

19

A That is right.

20

MR. SCHELIN: Thank you. That is all the

21

questions that I have.

22

CROSS EXAMINATION

23

BY MR. JONES:

24

Q Mrs. Crookshank, when this sale was started,

25

were the terms announced?

048

151

2 A Yes, sir, I am sure they were.

3 Q Do you recall what those terms were?

4 A No, sir, I was not there at the time. I was
5 late coming.

6 Q Now following the conclusion of the sale, how
7 many times was Mr. Counts or -- where were you stationed?

8 A There was a patio or carport off of the house
9 that is a porch and a storm was coming. We were under this
10 patio, the back porch.

11 Q Did you eventually go on inside the house?

12 A Well, we walked inside the house, but not when
13 the contract was signed, not at that time.

14 Q The contract was signed outside?

15 A Yes, sir.

16 Q Was anyone there with Mr. Leonard? Do you
17 recognize Mrs. Leonard?

18 A Oh, yes.

19 Q Was she there?

20 A I think she was at the sale, but I don't recall
21 Mrs. Leonard was with Mr. Leonard when he signed the contract.

22 Q Do you recall seeing her up around the carport
23 or patio?

24 A No, sir, I don't, because there were so many
25 people and all strangers.

049

2 Q Started raining that day?

3 A A storm came.

4 Q Some of them sought shelter up there, did they
5 not?

6 A True.

7 Q Mr. Leonard, after this sale was knocked down,
8 Mr. Leonard came in and signed this document?

9 A Yes, sir.

10 Q And that is when you asked him how to make the
11 deed?

12 A Yes, sir.

13 Q He told you to make it to Robert L. Leonard
14 and Betty J. Leonard jointly?

15 A True.

16 Q With right of survivorship?

17 A True, right of survivorship.

18 Q Did he leave then?

19 A He left to go get the check. I had 30 percent
20 on that contract, but for tax reasons, I understand we took
21 a 29 percent down payment, and he did not have his check with
22 him, and he left to go get his check and returned with the
23 check, with the down payment check.

24 Q Wasn't it while he was gone that Mr. Counts
25 came and asked you --

050

2 A Oh, no, sir, he was standing there when Mr.
3 Counts came.

4 Q Who was standing there?

5 A Mr. Leonard was standing when Mr. Counts came
6 and put his name.

7 Q That was after this was signed?

8 A That is after he told me how to make it out,
9 yes.

10 Q So when Mr. Counts signed this thing then, it
11 was just as it is, with the exception of his name?

12 A Right.

13 Q Now isn't it true that Mr. Counts told you that
14 Mr. Leonard had agreed to possibly sell him the back part of
15 the farm?

16 A I think he called it the upper part.

17 Q The upper part. But that is what, actually
18 that is what Mr. Counts told you, wasn't it, that Mr. Leonard
19 had agreed to sell him the upper part?

20 A The upper portion I think he said.

21 Q There wasn't any discussion about the two of
22 them buying this property jointly?

23 A Not as a joint thing, only that he was, that a
24 portion of the property -- now what portion he didn't say and
25 I didn't ask.

051

2 Q But that he was to purchase from Mr. Leonard?

3 A True. No, excuse me. I mean, I will clarify
4 this by saying he said that they had agreed to purchase it
5 together.

6 Q Do you recall us taking depositions?

7 A Yes, sir.

8 Q In this case. And I don't remember when that
9 was, but on page 11, starting at line 3, I asked you, I said
10 "I believe you testified that you, did you not, that Mr.

11 Counts stated to you or in his presence that he had an agree-
12 ment to purchase the back half of the farm from Mr. Leonard?"

13 And you said: "I believe the upper part."

14 And then in the next question I asked on line
15 8: "The upper part, he was to purchase that, Mr. Leonard?"

16 And your answer: "Yes, he said that they were
17 in agreement on this."

18 A That they were in agreement to purchase it.

19 Q Well, to purchase what?

20 A That they were in agreement on the purchase
21 price, that they had gone along with the purchase price and
22 some sort of assumption that Mr. Counts would buy a part of
23 it.

24 Q From whom?

25 A Whether he was to buy it from Mr. Counts or

2 whether he was to be in it, I only know I had Mr. Leonard's
3 check, I didn't have Mr. Counts' check as a down payment.

4 Q On the day of the deposition, I think -- you
5 were testifying to the best of your belief and best of your
6 knowledge on that day?

7 A As I am now.

8 Q On that day you stated in response to my ques-
9 tions that Mr. Leonard had indicated or Mr. Counts indicated
10 he was buying it from Mr. Leonard?

11 A It seems to be a technical question as to
12 whether he said was he purchasing it or --

13 Q I will show you.

14 A I will agree if it is there, but it is a tech-
15 nical question as to whom he said -- he certainly didn't say
16 he was purchasing it from Mr. Cassell.

17 Q So, in other words, he was buying it from Mr.
18 Leonard?

19 A He said that he and Mr. Leonard had agreed to
20 purchase the farm.

21 Q I don't believe that is what you testified to,
22 though.

23 MR. SCHELIN: I believe he is badgering the
24 witness. She already stated the reasons for the
25 possible discrepancies, that it was on a technical

question and so on.

MR. JONES: She was asked two or three times now. I don't think she can be technical about that.

Who did he say he was going to purchase the property from, was the question. Your answer in response to the deposition, when they were taken --

THE COURT: Well, the deposition, I have seen the deposition.

MR. JONES: It is in there simply that it is her understanding in April that Mr. Counts was purchasing from Mr. Leonard. I don't see anything technical.

THE WITNESS: Well, he said that he did agree that Mr. Leonard would let him have the upper portion. Now if that is purchasing it from him, but he also made the statement that they had agreed to buy it together, that they were together on the bidding price.

BY MR. JONES:

Q When did you receive the money, the down payment on this?

A Within, I would say probably 20 or 25 minutes, whatever time it took for Mr. Leonard to go into the office and have a check written and returned shortly.

Q Who gave you that money?

A Mr. Leonard.

2

Q Did Mr. Counts offer you any money?

3

A No, sir.

4

Q Did you ask Mr. Counts for any money?

5

A No, sir.

6

MR. SCHELIN: Please speak louder, Mr. Jones.

7

I can't hear you.

8

BY MR. JONES:

9

Q Upon whose check, was it paid by check?

10

A Yes, sir.

11

Q Upon whose check was that money paid to you?

12

A Mr. Leonard.

13

Q Do you recall the other name that was on that

14

check?

15

A No, sir, I do not. I turned it directly over,

16

along with a copy of the sale, to Mr. Cassell's daughter,

17

Jackie, the check and the agreement, the sales agreement.

18

Q Do you know, within your own knowledge, whether

19

Mr. Counts was buying the property from Mr. Leonard or if

20

they were buying it jointly?

21

A No, sir, I do not. If I knew, I would most

22

happily tell you.

23

Q But I believe it is your testimony today that,

24

in one instance Mr. Counts was buying it from Mr. Leonard

25

and in another instance they were buying it together?

2 A That they had agreed to buy it.

3 Q You don't know which is which?

4 A No, sir, I do not.

5 Q But you knew back when the depositions were
6 taken?

7 A As I said, to me that is a technical question.

8 Q Have you discussed the case with either Mr.
9 Counts or Mrs. Counts or Mr. Schelin since these depositions
10 were taken?

11 A No, sir.

12 Q Have you read these depositions?

13 A No, sir.

14 MR. JONES: I believe that is all.

15 MR. SCHELIN: That is all. As far as I am
16 concerned, this lady can be excused.

17 THE COURT: Mrs. Crookshank, you may be excused.
18 Thank you very much.

19 THE WITNESS: Can I stay back here?

20 THE COURT: Yes, ma'am, you are welcome.

21 (Witness excused.)

22 MR. SCHELIN: Call Mr. Howard H. Cassell, please.

23

24 HOWARD HERMAN CASSELL

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

2 DIRECT EXAMINATION

3 BY MR. SCHELIN:

4 Q What is your name, please, sir?

5 A Howard Herman Cassell.

6 Q Where do you live, Mr. Cassell?

7 A Abingdon, Virginia.

8 Q Mr. Cassell, did you have the Steve Wise
9 Auction Company auction off your property in Russell County
10 during the month of October, 1977?

11 A I did.

12 Q Who purchased it?

13 A Bob and Betty Leonard.

14 Q For how much?

15 A \$125,000.

16 Q Did Mr. H. Lyman Counts contact you after the
17 sale of the farm?

18 A Yes, sir.

19 Q Was this before or after you had signed the
20 deed to Mr. Leonard?

21 A Before.

22 Q What did he tell you?

23 A He told me that he and Bob were going in --

24 MR. JONES: Objection. That is hearsay.

25 THE COURT: Was Mr. Leonard there?

2 THE WITNESS: No, sir.

3 THE COURT: Was this on the day of the sale?

4 THE WITNESS: No, sir, sometime afterward.

5 THE COURT: I will sustain the objection. That
6 would be hearsay because Mr. Leonard was not present.

7 BY MR. SCHELIN:

8 Q Did you and Mr. Leonard, did you and Mr. Counts
9 view the property shortly after the sale?

10 A I beg your pardon.

11 Q Did you and Mr. Counts go out and look at the
12 property after the sale?

13 A Yes, after he told me that he and Bob had --

14 MR. JONES: Objection to any references to
15 what he --

16 THE COURT: Sustain the objection.

17 When you went over the property, did Mr. Counts
18 and Mr. Leonard go with you?

19 THE WITNESS: No, sir, Mr. Counts only.

20 BY MR. SCHELIN:

21 Q What did you and Mr. Counts do?

22 A Well, after he told me that he had bought his
23 half interest in it --

24 MR. JONES: Objection.

25 THE COURT: I will disregard the fact that he

· said that because it is hearsay. Go ahead.

BY MR. SCHELIN:

Q What did you and Mr. Counts do, not what he said, but what did you do?

A We just went around over the farm and he tried to tell him a few things.

Q What did you tell him?

A A few things about the water system and one thing and another.

Q How to winterize it and so forth?

A Yes.

Q Was there any paint in the barn?

A Pardon?

Q Was there any paint in the basement?

A Yes, sir.

MR. JONES: Your Honor, we object to this line of questioning. It is irrelevant as to whether or not an agreement existed between Mr. Counts and Mr. Leonard to purchase the property jointly, and it is irrelevant to any agreement between Mr. Leonard and Mr. Counts for Mr. Counts to purchase the property from Mr. and Mrs. Leonard.

MR. SCHELIN: It is not irrelevant. It shows a pattern. It corroborates the entire thing, connects

2 up the entire case of the plaintiff. It shows what
3 was done and it goes to make up a very important part
4 of the entire picture that the plaintiff is trying to
5 present here today.

6 MR. JONES: Your Honor, it is very crucial
7 though so far as the distinction between when they
8 were in, as alleged, agreement to purchase it jointly
9 or in a contractual relationship for Mr. Counts to
10 purchase it from Mr. Leonard. Both theories are
11 present.

12 THE COURT: Of course, I will not permit him
13 to make any statement as to hearsay evidence, that
14 being what Mr. Counts said, but I will permit him to
15 go into what he did for the purposes of determining
16 whether or not there was a meeting of the minds between
17 Mr. Lyman Counts and Mr. Leonard with reference to the
18 purchase of the property.

19 BY MR. SCHELIN:

20 Q What did you tell Mr. Counts with reference to
21 that paint?

22 A That the barn roof, part of it needed painting
23 and there was sufficient paint in the basement of the house
24 down there for that purpose.

25 Q Did you ever see the signed agreement of

2 purchase that was executed the day of the sale?

3 A I signed it, but I did not notice Mr. Counts'
4 name on it. He said I signed it down on the corner, the
5 bill of sale.

6 Q Are you saying that you did not notice it or
7 it was not there?

8 A I didn't notice it. It could have been there.
9 There was a little disturbance along about that time. There
10 was a bad storm abrewing and was concerned about lightning
11 and so on going on around and a big crowd of people around
12 there, was trying to get them all in shelter and so forth.

13 Q Did you know which part of the property Mr.
14 Counts was to be purchasing?

15 A Nothing except hearsay.

16 MR. JONES: Objection. He is starting to
17 testify --

18 THE COURT: I will sustain the objection. If
19 he knows what Mr. Counts told, as to what Mr. Counts
20 told him.

21 BY MR. SCHELIN:

22 Q After talking with Mr. Counts and signing that
23 purchase agreement, why did you convey the property to Mr.
24 and Mrs. Leonard?

25 MR. JONES: Objection. That is a loaded

2 question. The purchase agreement was signed on
3 October 1 and his conversation with Mr. Counts occurred
4 afterwards. Mr. Schelin indicated in his question
5 that it was after he talked to Mr. Counts concerning
6 this proposition and after the document was signed.

7 MR. SCHELIN: Mr. Cassell has testified that
8 he talked with Mr. Counts prior to signing the deed.
9 I think it is a legitimate question.

10 MR. JONES: The contract speaks for itself,
11 Your Honor.

12 THE COURT: Did you go ahead and make a deed
13 to Mr. Leonard only, Mr. Leonard and his wife?

14 THE WITNESS: I did, sir. They made the down
15 payment and made the deed of trust for the balance.

16 THE COURT: All right. Go ahead.

17 BY MR. SCHELIN:

18 Q Did Mr. Leonard tell you anything about any
19 agreement that he and Mr. Counts had?

20 A No, sir.

21 Q Did he ever deny any agreement?

22 A No, sir, I told him I gave Mr. Counts a key.

23 MR. JONES: Objection.

24 BY MR. SCHELIN:

25 Q What did he say?

2 A He didn't say anything.

3 Q He didn't say you shouldn't have done that?

4 A No, he didn't.

5 Q He didn't pat you on the back either?

6 A No.

7 THE COURT: Did you discuss with Mr. Leonard
8 anything with reference to Mr. Counts claiming he had
9 one half the property? Did you talk with Mr. Leonard
10 prior to making the deed with reference to Mr. Counts
11 claiming part of the property?

12 THE WITNESS: I think it was casually mentioned
13 and I think he said yes, that they was going to.

14 THE COURT: Go ahead.

15 MR. SCHELIN: I have no more questions.

16 THE COURT: All right, Mr. Jones.

17 CROSS EXAMINATION

18 BY MR. JONES:

19 Q Mr. Cassell, it was your understanding that
20 Bob Leonard and his wife were the sole purchasers of that
21 property, wasn't it?

22 A Yes, that is true, they signed it, made the
23 payment and deed of trust.

24 Q That was your understanding on the day of the
25 sale, wasn't it?

2 A Yes, as far as I know.

3 Q That was your understanding on the day that
4 the deed was prepared?

5 A Yes, sir.

6 Q And the deeds were prepared dated October 6th,
7 isn't that correct?

8 A I don't remember exactly. It was shortly after,
9 early in October.

10 Q If I showed you a copy of the deed, you would
11 recognize it?

12 A Oh, yes.

13 MR. JONES: Judge, that deed --

14 THE COURT: I believe it is in the file.

15 MR. JONES: In the Court file.

16 Your Honor, this is filed as an exhibit with
17 the bill of complaint. I believe that will stand as
18 sufficient for itself without it being introduced.

19 THE COURT: Yes, you may ask him from that.

20 BY MR. JONES:

21 Q Mr. Cassell, this is marked Exhibit C to Mr.
22 Counts' bill of complaint in this matter. I will ask you if
23 this is not a deed dated October 6, 1977 from Howard Herman
24 Cassell and Ann Cassell to Robert L. Leonard and Betty J.
25 Leonard, and if that document is not signed by you, signed

2 on October 12 or acknowledged on October 12?

3 A Yes, that is my signature.

4 Q So you had your attorneys then prepare -- I
5 believe your attorney was Mr. Jim Elliott, was he not?

6 A Yes, sir.

7 Q I believe you had him prepare this deed then
8 on October 6th, or prior to October 6th, didn't you?

9 A (Affirmatively nods head.)

10 Q And that was at your request?

11 A Yes.

12 Q At that point in time you had it signed or
13 prepared for Mr. and Mrs. Leonard?

14 A Yes.

15 Q So there is no doubt in your mind but Mr. and
16 Mrs. Leonard were the sole purchasers of the property?

17 A Yes. I assumed if there was any division, that
18 it would be between them two, not me.

19 Q Mr. Counts would then be purchasing it from Mr.
20 Leonard, if there was any?

21 A Yes.

22 Q That is a big "if"?

23 A Yes.

24 Q That is something that they would have to work
25 out between them?

2 A That is what I thought.

3 Q All right, now at the time -- this thing
4 apparently from the testimony we have heard here today, this
5 thing was completed in its entirety on the date of the sale.
6 Everything that is on it was there on the date of the sale?

7 A (Affirmatively nods head.)

8 Q And even in light of that, in light of the fact
9 that Mr. Counts, for whatever purpose it is there, his name
10 was signed or is placed there on the margin of that, you
11 still instructed your attorneys to make the deed over to Mr.
12 and Mrs. Leonard?

13 A Yes.

14 Q That is correct, isn't it?

15 A That is right. I didn't know any better.

16 Q When you -- well, if Mr. Counts didn't give
17 you any money, you wouldn't make a deed to him, would you?

18 A No, I guess not.

19 Q You didn't get any from Mr. Counts, did you?

20 A No, sir.

21 Q When it came time to sign the deed of trust
22 which was made to you?

23 A Yes.

24 Q And the note was made to you?

25 A (Affirmatively nods head.)

2 Q You received money over a period of time?
 3 A Counts was not there the day we closed.
 4 Q Counts didn't sign that note either, did he?
 5 A No.
 6 Q Who signed that note?
 7 A Betty and Bob Leonard.
 8 Q Did Mr. Counts owe you a dime?
 9 A No.
 10 Q For anything?
 11 A No.
 12 Q Involving that property?
 13 A No.
 14 Q Who owes you the money?
 15 A Betty and Bob Leonard.
 16 MR. JONES: I believe that is all.

17 REDIRECT EXAMINATION

18 BY MR. SCHELIN:

19 Q Mr. Cassell, to your own particular knowledge
 20 did Mr. Counts know anything about the signing of this deed
 21 or about the signing of that note or about the signing of
 22 that deed of trust?

23 MR. JONES: We object to the question.

24 A Not from me, he didn't. I didn't advise him.

25 MR. JONES: He complied with his contract.

1

R. Leonard - Direct

52

2

THE COURT: Go ahead.

3

MR. SCHELIN: That is all I have, Your Honor.

4

THE COURT: All right. Thank you very much.

5

MR. SCHELIN: As far as I am concerned, he can

6

be excused.

7

THE COURT: You may be excused or you may

8

remain here.

9

THE WITNESS: Thank you.

10

(Witness excused.)

11

MR. SCHELIN: I would like to recall Mr. Leonard

12

as an adverse witness.

13

14

ROBERT L. LEONARD

15

was recalled and further testified as follows:

16

DIRECT EXAMINATION

17

BY MR. SCHELIN:

18

Q Mr. Leonard, is it your contention, since your

19

wife is a party to this transaction, she is bound only by

20

what she signed?

21

MR. JONES: Objection. That is a legal conclu-

22

sion.

23

THE COURT: Sustained. That asks for a conclu-

24

sion of law.

25

MR. JONES: I state to the Court --

THE COURT: Sustain the objection.

BY MR. SCHELIN:

Q Mr. Leonard, did you get out of a contract with the Gillenwaters using your wife as a tenants by the entirety?

MR. JONES: Objection.

THE COURT: That is not a part of this.

MR. SCHELIN: That is right, it is not a party to this action, however, I believe it shows a pattern that Mr. Leonard acts by.

MR. JONES: Object to any pattern.

THE COURT: I sustain the objection. I will have to decide this case on the evidence herein and not on some other transaction, what he might do in another case.

MR. SCHELIN: I except to the ruling.

That is all.

THE COURT: Thank you, Mr. Leonard.

(Witness excused.)

H. LYMAN COUNTS

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

DIRECT EXAMINATION

BY MR. SCHELIN:

C69

2 Q What is your name?

3 A Lyman Counts.

4 Q Where do you live?

5 A I live in Lebanon, just on the outskirts in
6 East Lebanon.

7 Q What is your occupation?

8 A Insurance agency.

9 Q Is that here in Lebanon also?

10 A Yes, it is.

11 Q On the first day of October, 1977, did you
12 attend an auction of the H. H. Cassell property in Russell
13 County?

14 A Yes, I did.

15 Q Did you bid on this property?

16 A I did.

17 Q Did you later stop bidding on this property?

18 A I did stop bidding at a later time.

19 Q Why?

20 MR. JONES: Objection. This is direct examina-
21 tion and he cannot ask a question that is all encompass-
22 sing of that nature.

23 THE COURT: Objection overruled.

24 A I entered in an agreement with Mr. Leonard where
25 we had been --

170

2 MR. JONES: Objection to any reference to an
3 agreement. That is the basis for my initial objection.
4 When a partnership or agreement is entered into by
5 two or more parties for the purchase of land, the
6 Supreme Court, in the case of Burgwyn v. Jones and
7 others, 113 Va. 511, it is a 1912 case, and a leading
8 case in this matter states three principles which must
9 first be proven in order to get to such an agreement.
10 One is that the foundation must be laid that there
11 was a pre-existing partnership, showing that has been
12 in existence a long time. Two, that they were using
13 partnership funds, and three, that if they do, in
14 fact, enter into it upon the spur of the moment, there
15 must be some basis for foundation laid for the specula-
16 tive nature of the venture.

17 In order to permit Mr. Schelin and Mr. Counts
18 to get to any agreement that was entered into at this
19 time is precluding or is omitting the base foundation
20 which the Court has already indicated must first be
21 laid.

22 THE COURT: That may very well be true with
23 reference to the Statute of Frauds, with reference to
24 writing, but with reference to resulting trust or con-
25 structive trust, the evidence may be produced which

2 is not in writing, such things as an oral trust.

3 MR. JONES: We agree.

4 THE COURT: I think the real gist of this case,
5 it will help the lawyers to proceed, I think the real
6 gist and the real legal issue in this case is whether
7 or not an agreement was made between Lyman Counts and
8 Robert Leonard on the day of the sale to the effect
9 that only one would bid and the property would be
10 divided, and if that oral agreement was made, then
11 Bob Leonard would be a trustee. He would hold in
12 trust for Lyman Counts the portion so proved in the
13 oral agreement.

14 I think the only theory of law under which you
15 can proceed, Mr. Schelin, is on an oral trust or
16 resulting trust or a constructive trust, whichever
17 you choose to prove. I have my serious doubts as to
18 the various written documents which have been intro-
19 duced in evidence, specifically Exhibit No. 1, because
20 it is so indefinite and fails to really set out all
21 the terms. In fact, it says the terms to be agreed
22 on at a later date.

23 I am going to overrule your motion as to any
24 evidence pertaining to this original verbal or oral
25 agreement which the complainant is alleging, and he

may produce any evidence to substantiate that position. If there is any release to be granted to the complainant, it seems to the Court at this stage, and I reserve the right to change my mind if additional evidence is introduced which is not before the Court on some other aspect of the case, but at this stage it appears that this is strictly an oral trust case, and I think any evidence pertaining to that original agreement, anything which would substantiate or cause the parties to be put on knowledge that there was an oral agreement, I think that evidence will be admissible.

MR. JONES: Your Honor, we certainly go along with the Court's wishes here. Again, the case that we just cited is an area that is out, that states the Supreme Court went into that, said this is where you can go outside the Statute of Frauds, but yet those three factors, according to the Court and in subsequent cases, must be shown prior to getting into that, notwithstanding the Statute of Frauds.

THE COURT: There is a case on an oral trust that arose in this county in Salyers v. Salyers. There certainly wasn't any written agreement, just an understanding, and there have been several other cases

2 decided by the Supreme Court by local judges on oral
3 trusts in various areas. I think this is just the
4 case, is there an oral trust or is there not an oral
5 trust. Did he take it -- I think the whole turning
6 point in the case, with the evidence thus far produced,
7 is going to hinge on whether or not there was an agree-
8 ment on October 1, or the date of the sale between Mr.
9 Leonard and Mr. Counts. If there was an agreement,
10 even though it is oral, Mr. Leonard is obligated to
11 live up to it. If it was not an agreement, Mr. Counts
12 didn't get anything. Go ahead.

13 BY MR. SCHELIN:

14 Q I repeat my question, Mr. Counts: Why did you
15 stop bidding?

16 A Well, I had been bidding, Mr. Leonard, along
17 with others had been making bids. I approached Mr. Leonard,
18 I motioned for him to come over and talk to me. I knew he
19 was in the construction business, or I assumed that he was.
20 I thought I knew that much about him. We discussed the
21 situation and I asked him if he wasn't interested in the
22 front part of the property, because I was more interested in
23 the back part of the property removed from the highway. With
24 that agreement in mind, that he would take the first part of
25 the property, adjoining the highway with the house, and I

2 wasn't interested in the house, I wanted the back part of
3 the property, with the intention of building a house on it
4 probably and with that, we quit being competitive in bidding
5 and we agreed tentatively from that point how much we would
6 bid on the property, and we agreed on what percentage of the
7 total purchase price I would pay. We tentatively agreed on
8 where the boundary line would be between the two, when it was
9 divided, and on this basis he was to be paying a higher per-
10 centage of the total purchase price than I was. So I assumed
11 it would be proper for him to do the bidding instead of me,
12 and this is the way it was continued.

13 I did not make another bid and Mr. Leonard did
14 continue to bid until the auction was completed.

15 Q Mr. Counts, what were the specifics of your
16 agreement? Specifics, I want the prices, the parts of the
17 land, who was to do what, and so forth and so on. I want
18 exactly what your agreement was and when was this agreement
19 made.

20 A All right. The agreement --

21 MR. JONES: Objection. He has already testified
22 as to what the terms were.

23 THE COURT: He didn't say what the percentage
24 was. He said Mr. Leonard was to pay more. Objection
25 overruled.

075

2 A There was a pause in the bidding and many
3 people had left the property and quit, and I thought had
4 quit bidding. Anyway, many people had left. This gave us
5 time to discuss it. We pointed our fingers and so forth
6 about where the boundary line would be.

7 There is a tobacco plot or cultivated field
8 where tobacco had been raised. Close to that field is a
9 barn where tobacco could be hung or stored. We agreed that
10 the boundary line fence would run along a fence above an
11 orchard on the property, on the property. Would follow that
12 fence out close to the barn, then it would come down toward
13 the house and really make an offset in the boundary line to
14 include the barn, because we agreed that I would -- that is
15 the portion I would get and that I would need the barn for
16 the tobacco. The portion that he was to get, I don't remember
17 being any cultivated land, so the property was to include the
18 barn and this is what made the offset. Then it would run
19 from below the barn, straight across to another property line
20 and it wasn't difficult for us to point out where the boundary
21 line would go. We agreed that I would pay 30 percent of the
22 total purchase price.

23 We agreed, as I said before, on approximately
24 what we would pay for it, but if it went higher than that,
25 we would reconsider, if we wanted to bid more.

2 BY MR. SCHELIN:

3 Q Was there any agreement as to the width and
4 the location of the right of way from Highway 645 to the
5 property that you were supposed to purchase?

6 A I am not positive if we discussed the length
7 or the width of the right of way at this point, but we did
8 at a later date discuss where the right of way would be and
9 how much it would be, how wide.

10 Q How wide was it to be?

11 A The exact way it came out as to how wide it
12 would be, Mr. Leonard asked me if it would be agreeable to
13 him changing the normal road of traffic or travel from the
14 highway over to the back portion of the property, going
15 through the front portion. He pointed out where he would
16 like to put it.

17 MR. JONES: At this time, I think I understood
18 the Court's earlier ruling, but I would like to make
19 an objection at this time that insofar as a trust is
20 concerned, as the Court has mentioned earlier in a
21 partnership, I don't think we have any problems there,
22 because I agree with the Court that such a thing can
23 occur, but if we are going forward and proceed then
24 on the document of October 6th, which purports to be
25 a written contract to sell this land, it is our

2 position that the testimony Mr. Counts is giving at
3 this time would be objectionable because the role is
4 violative and is violative of the Statute of Frauds.

5 THE COURT: Objection overruled. Go ahead.

6 BY MR. SCHELIN:

7 Q Mr. Counts, go on with your explanation about
8 the right of way.

9 A Mr. Leonard indicated that this would move the
10 right of way away from the house that was already on the
11 property, the dwelling house, which I think, the way he put
12 it, he had already promised it to be in the family. This
13 would move it over away from the house. In fact, on or about
14 October 6th, we got in Mr. Leonard's pick-up truck with Mr.
15 Leonard driving the automobile, and drove down the grade as
16 to where the right of way would be, and he showed me that it
17 would not be a steep grade, and I agreed that this was okay
18 with me. I had no qualms about it. He explained that when
19 he had the property surveyed, he would have the surveyor,
20 and this is exactly the way he explained it, he would have
21 the surveyor put markers or stakes or so forth on the center
22 where he wanted the right of way to be and where we had
23 agreed on. Then the right of way would be 20 feet to either
24 side of that, which would encompass a 40-foot right of way.

25 Q What later or what caused you to put this

2 agreement in writing?

3 A On the same day that we discussed the right of
4 way, where it would be that I just finished, when I talked
5 to Mr. Leonard, he had told me on the day of the sale, on
6 October 1st, on Saturday, he said, "Okay." It was raining
7 then and people were not interested in staying around. They
8 were leaving. He said, "I will come by your office Monday
9 and we will fix up the details."

10 Monday he did not come by my office. Tuesday
11 he didn't come by. Later in that week I went out to see
12 what was taking place, and drove up on the property. He was
13 there. This is when we discussed the right of way. At that
14 time he brought up the subject, said, and I am not sure how
15 it came about, but he said, "My wife is about to kill me now,"
16 or something to that effect, because he agreed for me to take
17 the back part of the property. In other words, insinuating,
18 I thought --

19 MR. JONES: Objection to any statements that
20 he made.

21 THE COURT: I will sustain the objection about
22 what he thought he meant.

23 BY MR. SCHELIN:

24 Q Just say what he said.

25 A He said, "My wife is about to get me for letting

2 the back part go, especially at that price," something like
3 that. Then it came up and we got to talking about the price.
4 And he said that he had asked Mr. Cassell or he had thought
5 Mr. Cassell had some bad advice, that he thought he should
6 take a different down payment from what the sales agreement
7 was to be the day of the sale, and he said, "Would it make
8 any difference to you on the amount of down payment?"

9 And I said, "None at all." I said, "I am going
10 to make -- I have made arrangements for the money anyway and
11 it doesn't make any difference what the down payment is."

12 Then the amount came up, percentage. Mr.
13 Leonard said something about a third. I said there wasn't
14 any agreement on the third. The agreement was that I pay
15 25 percent.

16 He said, "Well, you know I can't let you have
17 the back for 25 percent."

18 I said, "Mr. Leonard, you are forgetting you
19 are not letting me have anything. I am buying from Mr.
20 Cassell."

21 He said, "Well, there is just no way I can go
22 along with that." Said, "The agreement was a third."

23 I saw then that Mr. Leonard had second thoughts.
24 Mr. Leonard had changed the thing from our original agreement.

25 MR. JONES: Objection. Mr. Counts is going

2 into --

3 THE COURT: Let me ask you, no one has intro-
4 duced Exhibit D into evidence, but the Court, it is
5 before the Court and I notice in the file as Complain-
6 ant's Exhibit No. D a deed made from Robert L. Leonard
7 and Betty Leonard to Lyman Counts and Erma K. Counts.
8 Was money transferred between the parties pursuant to
9 that deed?

10 MR. SCHELIN: I just haven't gotten into all
11 that yet.

12 THE COURT: If you would put all the exhibits
13 in here together, I can consider them all at one time

14 Did you pay any money pursuant to this deed
15 that is in the file here, dated the 27th day of
16 December, to you and to your wife?

17 THE WITNESS: Money was deposited, Your Honor,
18 when the question arose as to, that there would be a
19 conflict and whether the property would be deeded and
20 how it would be deeded, and I thought it was going to
21 be deeded to me when it wasn't, and it was deeded
22 without my knowledge.

23 THE COURT: What was the percentage? Do you
24 know what the percentage of it was, percentage of
25 overall purchase price was as set out in this deed?

2 THE WITNESS: This is the reason for Exhibit 1
3 We agreed the day on the price of 25 percent. When I
4 was back talking to him on the property, after he had
5 failed to keep his agreement to come to my office,
6 then he came up with the third. I told Mr. Leonard,
7 I said, "Look, it looks like I need an attorney now,
8 but," I said, "I do not want this to get into a drawn
9 out court process. I am not saying that I will not
10 agree to pay a third, if that is what it takes, because
11 I do want the back portion of the property, as I had
12 shown earlier. If this is a disagreement, then okay,
13 but let's put it in writing now, so when I come back
14 the next time it won't be 50 percent or 60 percent."

15 THE COURT: Is the amount in the deed, what I
16 am trying to get at now, is the amount in the deed
17 that was made to you and to your wife, is that based
18 on 33 1/3 percent?

19 THE WITNESS: Yes, sir, for that reason.

20 THE COURT: All right. But you were willing
21 to accept the 33 1/3 percent?

22 THE WITNESS: Yes, sir.

23 THE COURT: All right, go ahead. Excuse me
24 for interrupting.

25 MR. SCHELIN: I have lost my train of thought.

2 BY MR. SCHELIN:

3 Q Mr. Counts, after your agreement with Mr.
4 Leonard on the day of the sale, did you subsequently cease
5 bidding?

6 A I made no other bids after we agreed what we
7 would do.

8 Q How many bids did you make that day prior to
9 your agreement?

10 A I don't know how many. I made more than one,
11 but I don't know how many.

12 Q Did you know of the deed from Mr. Cassell to
13 Mr. Leonard and his wife?

14 A I did not know it was being deeded to Mr.
15 Leonard and his wife until I was presented a deed from some-
16 one from Mr. Leonard's counsel

17 Q Say that again.

18 A I was not aware that it had been deeded from
19 Mr. Cassell to Mr. Leonard until I saw a deed deeding it
20 from Mr. Leonard to me. I did not expect it to be deeded
21 that way.

22 Q I show you a copy of a deed dated October 27,
23 from Robert L. Leonard and Betty J. Leonard to Lyman Counts
24 and Erma K. Counts. Is this the deed that you are referring
25 to?

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2 A Yes, it is. This is the first deed that I saw,
3 and this deed, this property was not to be deeded to Mr.
4 Leonard, and I would not accept it.

5 Q Why wouldn't you accept it?

6 A There were two or three things in it that we
7 had not agreed to when, I thought Mr. Leonard was having
8 deeds prepared to the correct purchaser of the property, and
9 that is deeded the first part of the property to him and the
10 back part to me. I thought this was being done.

11 MR. JONES: We object to what he thinks. There
12 has been testimony here today as to what happened and
13 Mr. Counts is now thinking --

14 THE COURT: Overruled.

15 THE WITNESS: Mr. Leonard came by my office,
16 not with this deed, he came by my office and said,
17 "The deeds are almost ready." He said, "Would it be
18 okay if we put in the deed on the back part," or
19 something to that effect, "you don't subdivide it for
20 at least five years?"

21 I said, "No, it wouldn't be okay, because I
22 should have that right to do what I want to with it."
23 I wouldn't agree to that.

24 I said, "What if I got in a financial bind and
25 I may have to sell a lot or something to maybe save

2 the whole thing or something of that nature?"

3 He said, "Well, if you got to where you had to,
4 you come to me and I would release it."

5 I said, "If you will do that then, why not now?
6 I will not agree to it."

7 With that, he left my office.

8 BY MR. SCHELIN:

9 Q Mr. Counts, was it part -- according to the
10 agreement that you and Mr. Leonard had the day of the auction,
11 who was to complete the negotiations for this property?

12 A Ask that again.

13 Q I said according to the agreement that you and
14 Mr. Leonard had on the day of the auction, who was to com-
15 plete the negotiations for the property?

16 A Well, when Mitty and Mr. Leonard were together
17 when the bidding was completed, Mr. Leonard was at that time,
18 my understanding was that I was paying 25 percent. And he
19 got up to go on to complete the deal, I thought that he
20 should do that because he was 75 percent owner and I was 25
21 percent. I didn't think that I should be in front of him
22 doing it for that reason.

23 Q Who arranged for the preparation of the plat
24 of this property?

25 A We discussed the surveying and we agreed that

2 Mr. Leonard would contact Mr. Carpenter here in Lebanon, who
3 is a land surveyor. I would contact Mr. Kenneth Addison, who
4 lives in my area, who is a land surveyor, and the one that
5 could survey it the soonest is the one that we would have do
6 it.

7 Q Who ultimately did it?

8 A Mr. Carpenter ultimately did it, and that was
9 after I called the Addison residence to check on when I could
10 have him do it.

11 Q Did Mr. Carpenter perform, do the survey as a
12 result of any communication with you?

13 A None.

14 Q In other words, Mr. Leonard gave him all the
15 details?

16 A To my knowledge.

17 Q Did the plat constructed or performed pursuant
18 to Mr. Leonard's instructions accurately show the boundary
19 line between the 18.58 acres that Mr. Leonard was to receive
20 and the 30.7202 acres that you were to receive?

21 MR. JONES: I think the best evidence on what
22 the plat shows would be the plat.

23 THE COURT: Let him say whether or not he is
24 in agreement.

25 A It appears that it was surveyed as we had

2 agreed on that date, because the fence, and I didn't put up
3 a fence, but a fence has been erected since the day of the
4 auction, and the fence is erected on the general lines that
5 we agreed on, yes.

6 THE COURT: Who put up the fence?

7 THE WITNESS: I did not see any of it being
8 erected and I do not know.

9 THE COURT: Has it been put up since the date
10 of the sale?

11 THE WITNESS: Since the auction, yes, sir.

12 BY MR. SCHELIN:

13 Q You say this fence does follow the general
14 lines that you and Mr. Leonard agreed upon?

15 A That is right.

16 Q Do you have a copy of that plat?

17 A Not in my presence. I have a copy I think at
18 my home or office, yes, and it appears to be in order.

19 Q Could you have someone go and get that plat?

20 A Probably so.

21 THE COURT: Mr. Counts, was the description
22 given in the deed on the 27th, was that the description
23 which was taken from the Carpenter survey?

24 THE WITNESS: It is my understanding that it
25 was, Your Honor. There were things, I looked at it,

2 it appears that there are some errors in some direc-
3 tions.

4 MR. JONES: Not by way of objection, but in
5 order to assist the Court, we had a girl in our office
6 prepare the deed and she used the exact calls. How-
7 ever, by using the exact calls and not reversing it,
8 the property ended up being on the west side of the
9 highway as opposed to the east side where it actually
10 lays, but the calls are identical to the ones that
11 are there, but they should be reversed.

12 THE COURT: In other words, you are not in
13 dispute on the Carpenter survey and on the deed, other
14 than the fact that the description needs to be, calls
15 need to be reversed?

16 MR. SCHELIN: The calls need to be reversed.
17 The only thing in dispute is the width of the right
18 of way and restrictive covenant.

19 THE COURT: I don't see how the survey would
20 help us then.

21 MR. JONES: I would also point out for the
22 Court's information that the survey does call for a
23 30-foot right of way.

24 MR. SCHELIN: That is right.

25 THE COURT: All right.

2

BY MR. SCHELIN:

3

Q Mr. Counts, does the survey call for a 30-foot

4

right of way?

5

A It appears on the survey as a 30-foot easement.

6

Q That is what was agreed upon by you and Mr.

7

Leonard?

8

A We did not agree on 30-foot. In fact, Mr.

9

Leonard volunteered that we would have a survey made, the

10

stakes put up and right of way would be 20 feet of either

11

side of the stakes, totaling 40 feet.

12

Q What clauses in the deed that you have there

13

were not the same as agreed upon between you and Mr. Leonard?

14

A Well, your paragraph showing the easement or

15

ingress and egress to the aforesaid property, it does not

16

specify in here the amount, or the width. It says right of

17

way being shown by that map in plat, and the plat shows 30

18

feet. Of course, it does not say 30 feet in the deed. On

19

the plat it does.

20

Q Are there any other objections to this deed?

21

A Well, it has in the paragraph about the heirs,

22

executors, and assigns, "that the above described land shall

23

not be subdivided for the purposes of building residential

24

homes or apartment complexes, campgrounds, hotels, motels,

25

industry or commercial use, said covenant to be made covenant

2 with said land."

3 Q Was that agreed?

4 A We did not agree that we would not subdivide
5 or develop either part of the property, Mr. Leonard's property
6 or the back portion that I was purchasing.

7 Q No agreement similar to that was entered into
8 on the day of the sale?

9 A None.

10 Q Did you at any time have a conversation regard-
11 ing the sale and the purchase of this property with its
12 owner, Mr. Cassell, and if so, would you please describe the
13 events and so forth.

14 A I had been to look over the property before
15 the sale, and I had talked to Mr. Cassell before and had met
16 him. On the day of the sale, I signed a copy of the purchase
17 agreement for the agent of the auctioneer, exactly on the
18 document where she asked me to sign it. I did not think it
19 was proper for me to go to Mr. Cassell and say, "Hey, I own
20 the back part of the farm now," because he had other people
21 selling it for him and taking care of the paper work at that
22 time.

23 After Mr. Leonard failed to come by and meet
24 the agreement, the first of the following week later, I went
25 back out and talked to Mr. Cassell. I don't believe he was

2 on the property the first time I went out there. But anyway,
3 later I talked to Mr. Cassell on the first, I believe it was
4 the first time that I saw him after the sale, informed him
5 that I was in partnership with Mr. Leonard in buying this
6 property, and we got to talking about the property in general.
7 He said, he brought up the fact that the water, he had a
8 spring with lines running into water troughs for the stock.
9 He said, "If you don't drain those lines in the winter, they
10 will freeze."

11 I asked him if he would walk over with me to
12 look at it, show me what to do.

13 He said, "No, I don't feel like doing that."

14 I said, "Would you ride over in my car." We
15 got in my automobile, drove over to the farm spring and he
16 showed me precisely how to drain the pond for winter protec-
17 tion.

18 Coming back, or after we got back to the prop-
19 erty, he said, "Now I will tell you something else." And he
20 was aware then that the part of the farm that was to go to
21 me included the barn. He said, "We started painting the barn
22 roof and we didn't complete it." He said, "There is paint
23 left over and it is in the basement of my house, enough to
24 finish it." He said, "I would advise you getting this paint
25 and finish painting the barn roof before winter."

2 Q Did he give you a key to the place?

3 A I asked him about coming in on the property.
4 You see, at the time he was living in Abingdon. He would
5 come over occasionally to oversee things, see that everything
6 was okay. Sometimes you go out there and the gate would be
7 locked and other times he would be there. He said, "If you
8 need to come back or something of that nature," he said, "I
9 have got a key. You can have the key to the property." So
10 he gave me a key to the front gate.

11 Q Is that the last time that you saw Mr. Cassell?

12 A No, I saw Mr. Cassell after that.

13 Q I know, but what -- is that the last time you
14 saw him prior to getting this copy of the deed?

15 A I don't remember talking to Mr. Cassell again
16 until I found out the deeds weren't prepared the way that
17 they were supposed to be.

18 MR. JONES: Objection. That is a conclusion
19 on his part, what he understands.

20 BY MR. SCHELIN:

21 Q Did you sign or execute a note for the purchase
22 of this property and to act as part of the purchase price of
23 this property?

24 A Did I sign a note?

25 Q Yes.

2 A For who?

3 Q To Mr. Leonard. Did you and your wife execute
4 a note for the balance of the purchase price to Mr. Leonard?

5 A I believe we did.

6 MR. SCHELIN: Your Honor, I don't have a copy
7 of that right now, but it is one of the exhibits.

8 THE COURT: The note is an exhibit in the file.

9 THE WITNESS: I am not sure what day, but I am
10 pretty sure we did.

11 THE COURT: It is before the Court.

12 BY MR. SCHELIN:

13 Q Did you also deposit the down payment with the
14 Court when the difficulties arose over the deed and the way
15 it was prepared?

16 A I did. I made that deposit, yes. I was will-
17 ing at all times from the beginning of the transaction to do
18 what was to be done. The reason that it was made was to --
19 Mr. Leonard made the down payment, I assume, because he was
20 carrying the transaction at the time. It was not asked for
21 me to make a deposit before this disagreement came up.

22 Q When you entered or when you went out there
23 for this auction, did you have any intention of entering into
24 an agreement with Mr. Leonard on purchasing it?

25 A I did not.

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2 Q What caused you to enter into the agreement?

3 A I thought, Mr. Leonard being a building con-
4 tractor, he might be interested in the front part of the
5 property, but not the back part of the property, because I
6 did not think that there was --

7 MR. JONES: Objection. He is testifying on
8 assumption.

9 THE WITNESS: This was my feeling at the time
10 that I was out there at the sale. I did not want the
11 first part of the property on the highway. There was
12 a house on it. I didn't want the house. If I had
13 bought the whole property, I would have tried to sell
14 the front part anyway. This is the reason, I thought
15 I was wanting the back part of the property. Mr.
16 Leonard probably was more interested in the front part
17 and we would buy it together, and not bid against each
18 other.

19 MR. JONES: He is testifying on assumption.

20 THE COURT: Did you subsequent to that decision
21 discuss this matter with Mr. Leonard?

22 THE WITNESS: I did discuss this matter with
23 him and he agreed, said he was more interested in the
24 first part of the property that joined the highway.

25 THE COURT: Objection overruled.

2 BY MR. SCHELIN:

3 Q When was the first time you found out that he
4 wasn't satisfied with the agreement he made with you the day
5 of the sale?

6 MR. JONES: Objection. That is asking for a
7 conclusion on the part of the witness.

8 THE COURT: If he knows. Find it out from Mr.
9 Leonard.

10 THE WITNESS: He was to come by my office on
11 Monday following the sale. That was the agreement.
12 He did not. The first time I saw Mr. Leonard again,
13 I drove out there. He was there. Before I left, I
14 found out that there was a disagreement, something to
15 the effect that his wife was about to get him for
16 letting the back part of the farm go, and from there,
17 the disagreement started as to the percentage that I
18 was to pay.

19 BY MR. SCHELIN:

20 Q That is what caused --

21 A That is exactly and the only thing that caused
22 this Exhibit 1 to be in writing. We looked in the vehicles
23 for a piece of paper. I did not have anything larger to
24 write on. Mr. Leonard brought that out of his pick-up truck.

25 Q Who wrote the agreement?

2 A I wrote the agreement on paper furnished by
3 Mr. Leonard, and we resolved the difference and the only
4 differences at the time that we had were resolved in writing.

5 MR. JONES: Objection. That writing speaks for
6 itself. The writing states unequivocally at the bot-
7 tom that there were other things to be agreed upon.

8 THE COURT: Go ahead.

9 BY MR. SCHELIN:

10 Q What did the phrase "\$41,667 and terms to be
11 agreed upon later" mean?

12 MR. JONES: Objection. I think that question

13 MR. SCHELIN: Where there is fraud alleged,
14 then any and all evidence as to what agreements and
15 so forth is admissible in evidence, and we are alleg-
16 ing fraud in this case. We allege it in the bill of
17 complaint. We allege it in the opening arguments and
18 we are alleging it now. I think that it is permissible
19 for Mr. Counts to explain what that means, since the
20 opposing party has raised objections to it.

21 MR. JONES: There has been no underlying proof
22 or any basis of proof of any fraud from any witness
23 up to this and certainly there hasn't been any now.

24 THE COURT: There is an ambiguity and the Court
25 is going to let him ask.

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2 MR. SCHELIN: 76 Corp. Jur. 372.
3 states that one of the definitions of fraud is the
4 insertion of restrictions or reservations not agreed
5 upon.

6 THE WITNESS: The reason for that, it still
7 was not established at that time to my knowledge what
8 the down payment would be. There was 29 percent men-
9 tioned and there was 30 percent mentioned. Mr.
10 Leonard said, "I believe Mr. Cassell is getting some
11 bad tax advice." He said, "I am going to ask him if
12 he will take more as a down payment." He said, "Does
13 it make any difference to you how much we pay him as
14 a down payment?"

15 I said, "It makes no difference whatever, if
16 we pay him all of it or if we pay whatever. It makes
17 no difference." That is the reason for those terms
18 that was to be established later, at that date it
19 wasn't established.

20 BY MR. SCHELIN:

21 Q These terms included the financial terms,
22 nothing to do with restricted covenants?

23 A Restricted covenants hadn't come up.

24 MR. JONES: He is asking for a conclusion.
25 There has to be a meeting of the minds of the two

2 parties.

3 MR. SCHELIN: There was a meeting of the minds.
4 The property with boundary lines.

5 THE COURT: Sustain the objection on the ground
6 the question is leading. I will permit him to answer
7 if the question is properly asked.

8 In other words, did you discuss anything at any
9 time about putting restrictions about a subdivision
10 in the deed?

11 THE WITNESS: Your Honor, it had never been
12 mentioned at that time.

13 THE COURT: Did you know anything about it
14 until you received the deed dated October 27?

15 THE WITNESS: No, Your Honor, I did not.

16 THE COURT: Go ahead.

17 BY MR. SCHELIN:

18 Q I believe that you testified earlier that Mr.
19 Counts had asked you if you would object to certain restric-
20 tions, is that correct?

21 A If Mr. Leonard asked me if I would?

22 Q Mr. Leonard, I am sorry.

23 A He came by the office and stopped and came into
24 my office, sat down and sat down at my desk. He said the
25 deeds were almost ready. He did not say that the land was

2 deeded to him and would be deeded to me, he said, "The deeds
3 are almost ready. Would you object to putting in the deed
4 that it would not be subdivided for five years?"

5 Then I said I would object, and this is the
6 first knowledge I had when he said that "the deeds are almost
7 ready, would you object?"

8 I said I would object. But I still did not
9 know that they were to be put in until I visually saw the
10 deed.

11 Q This was after the first of October, is that
12 correct?

13 A Yes.

14 Q There were no agreements as to restrictive
15 covenants at all on that day?

16 A There was not and there was no agreement or
17 mention of them the day that I went out there and we talked
18 about the right of way. It still did not come up. As I say,
19 we resolved all of the differences at that time on this piece
20 of paper, Exhibit 1.

21 Q That piece of paper was to resolve the differ-
22 ences that arose from the agreement on the 1st, is that
23 correct?

24 MR. JONES: He is asking for a conclusion on
25 behalf of the witness. There still has to be a meeting

2 of the minds between the parties.

3 THE COURT: I sustain the objection.

4 MR. SCHELIN: That is all I have.

5 THE COURT: Before we start cross examination,
6 we will take a five-minute recess.

7 . . . Thereupon, a recess was taken at 4:15 p.m.
8 and reconvened at 4:30 p.m. . . .

9 THE COURT: All right, go ahead, Mr. Jones,
10 with cross examination.

11 CROSS EXAMINATION

12 BY MR. JONES:

13 Q Mr. Counts, what time did you arrive at the
14 sale?

15 A I am not sure what time it was.

16 Q Was it before the sale started?

17 A I think it was, yes.

18 Q Was there any announcement made prior to the
19 beginning of the sale?

20 A I believe there was.

21 Q Were the terms of the sale announced?

22 A I believe they were announced. They had talked
23 about it or something, yes.

24 Q Was one of those terms of the sale the fact
25 that there would be a down payment made on the property that

2 day at a certain percent?

3 MR. SCHELIN: Would you speak louder, Mr. Jones.

4 I am having trouble hearing you.

5 A I think there was something said about the down
6 payment, the percentage. I am not exactly sure what it was.
7 Not only did I hear it announced, it had been mentioned, yes.
8 BY MR. JONES:

9 Q At that point in time you knew whoever pur-
10 chased the property would have to pay some money down that
11 day?

12 A I expected that, yes.

13 Q You went prepared to do that then?

14 A I wasn't prepared?

15 Q You went prepared to do that?

16 A If necessary, yes, to pay, yes. It said cash
17 down, but it did not say definitely that day, it said cash
18 down. That could have meant the day the deed was prepared,
19 I don't know.

20 Q You were prepared to pay money down that day
21 if you purchased the property?

22 A If I purchased the property individually, I
23 was prepared to pay.

24 Q Did you make bids on this property?

25 A I did.

2

Q When did you start making bids?

3

A When did I start?

4

Q Yes. Do you remember what amount?

5

A I don't, but it was less than \$100,000. I

6

don't remember when.

7

Q Did you make bids subsequent to that first bid?

8

A I did.

9

Q How high did you go?

10

A I believe the last individual bid that I made,

11

I didn't bid -- in other words, just the two people exchanging

12

bids, but I believe the last individual bid I made was

13

\$107,000.

14

Q Had you made arrangements for financing of that

15

farm?

16

A I had.

17

Q Who with?

18

A With the Cumberland Bank and Trust Company.

19

Q Was that, you had made those arrangements, I

20

assume, then or you had made those arrangements in the event

21

you purchased it individually or with someone, had you not?

22

A No, I made those arrangements that I would buy

23

it individually. It hadn't entered my mind that I would be

24

purchasing it with somebody, especially Mr. Leonard.

25

Q Did you intend to use whatever arrangements you

2 had made to purchase it, regardless of the manner in which
3 you purchased it? In other words, were you going to borrow
4 the money to do it?

5 A That is right.

6 Q Where did you make those arrangements?

7 A I answered that, Cumberland Bank and Trust
8 Company.

9 Q What individual did you deal with there?

10 A I talked with Mr. Carl Arrington.

11 Q Do you have him here to testify to substantiate
12 that?

13 A He is not here, but he could be.

14 Q But you don't have him here?

15 A He is not here, no.

16 Q Did you go over this piece of property prior
17 to the day of the sale?

18 A I had been over the property, yes, basically,
19 the outline of it, not every foot of it.

20 Q Who did you go over that property with?

21 A I had been over the property with my wife and
22 once or twice, I don't remember now, if I had been over it
23 with anyone else.

24 Q Went over it with your brother-in-law, Bob
25 Rasnake?

2 A I believe one time I did, because at one time
3 he mentioned that he might be interested in buying, before it
4 was put up for auction.

5 Q Were the two of you interested in buying?

6 A We thought before the auction we might go
7 together and buy it, and I talked to him before the auction
8 and he did not seem interested at the time. He had lost
9 interest.

10 Q Why did he lose interest?

11 MR. SCHELIN: I object.

12 A No way I can tell you how he lost his interest.

13 BY MR. JONES:

14 Q You have told us a lot about what Mr. Leonard
15 thinks. You should know what Mr. Rasnake thought.

16 A No, I don't believe I told something that Mr.
17 Leonard thought. I talked about what he said.

18 Q You have assumed a lot though today.

19 THE COURT: Let's go on and ask him questions.

20 BY MR. JONES:

21 Q Mr. Counts, approximately how many people were
22 there at that sale?

23 A I would say probably 40 or 50 people.

24 Q Were numerous bids made?

25 A They were.

2 Q Did you know Bob Leonard before this date?

3 A I did.

4 Q How long had you known him?

5 A I had known the name and the face where I
6 could put them together for maybe two or three years, I don't
7 know. I had not talked to Mr. Leonard to my knowledge or
8 had any dealings with him until just a few short months prior
9 to that.

10 Q What was the basis of those dealings?

11 A He had been in my office and we had done some
12 business together.

13 Q With regard --

14 A I had insured some property that he owned.

15 Q Did you insure the property or did he just
16 make an inquiry as to the price?

17 A Policies were issued, premium was paid.

18 Q In Mr. Leonard's name?

19 A Yes, sir.

20 Q How long before the purchase of this property
21 did this occur?

22 A A few months. I didn't go back and check the
23 record.

24 Q Did you have any other contact, either social
25 or businesswise, prior to the sale, other than that?

2 A I did not, to my knowledge. I don't remember
3 having any other.

4 Q Had you ever bought property with Mr. Leonard
5 before?

6 A I had not.

7 Q Do you visit with him socially?

8 A I never have.

9 Q At what point in time or what was the bidding
10 when you alleged to have entered into this agreement with Mr.
11 Leonard?

12 A I believe we entered into an agreement -- well
13 the bid was definitely over \$107,000, and it was less than
14 \$120,000 when I entered in with him. It seems like it was
15 approaching \$120,000 maybe.

16 Q You discussed then what you were going to pur-
17 chase?

18 A Yes, we did.

19 Q You discussed what you were going to purchase?

20 A We discussed together that we would try to
21 purchase the property.

22 Q Jointly?

23 A That is right.

24 Q And you at that time discussed, I believe you
25 testified earlier where the boundaries were going to be?

2 A That is right.

3 Q Where were you standing from this boundary?
4 Could you see it?

5 A We could see the general lay of it, yes, we
6 could see -- in other words, see the barn, tell where it was.
7 You could see the orchard to tell where the fence would be
8 to run above it. Yes, you could outline it from where we
9 were.

10 Q You didn't know where the back part of it
11 would be?

12 A The back part of the line?

13 Q The back part of the farm, you didn't know
14 what the perimeter would be?

15 A Didn't know what the perimeter was, but we
16 established a line before the barn, the part that we could
17 see, a straight line.

18 Q From that point could you determine the part
19 that you supposedly were to get was larger than the part that
20 Mr. Leonard was to get?

21 A It was obvious to me, yes.

22 Q Obvious to you that it was larger or smaller or
23 the same size?

24 Q A larger piece of property. It appeared to me
25 that it was more acreage, yes. 107

2 Q Did you know the amount, number of acreage,
3 the total acres?

4 A Total acres?

5 Q What was it?

6 A Forty-nine plus, between 49 and 50 acres was
7 my understanding.

8 Q You were to get more than Mr. Leonard was to
9 get?

10 A In acreage.

11 Q In acreage. That was your agreement?

12 A Right. It hadn't been surveyed and hadn't
13 been established and sometimes looking over property can be
14 deceiving, but it appeared to be it was more in acreage, yes.

15 Q You say that you indicated that you would pay
16 25 percent, I believe?

17 A That is right.

18 Q That was the term that you agreed on at that
19 time?

20 A Yes.

21 Q That was the term that Mr. Leonard agreed on,
22 according to your testimony?

23 A Yes, sir.

24 Q You agreed on that boundary line and Mr. Leonard,
25 according to you, agreed on that boundary line?

2 A Right.

3 Q There was nothing else agreed on other than
4 that?

5 A Well, the boundary line, it showed -- of course,
6 to take in the barn, we mentioned the barn to Michael and so
7 forth, but the boundary line would encompass those two items.
8 We said there would be a right of way. It didn't come down
9 as to that time as to width of the right of way.

10 Q Didn't know where it would be?

11 A No, we didn't discuss where it would be. At
12 the time I assumed that he would leave it where it was. It
13 was okay with me where it was.

14 Q What right of way?

15 A Well, not right of way maybe, but where the
16 general travel, there is a place and I guess it is still
17 there, as to one mode of travel or one path of travel that
18 vehicles travel going up to the house is a driveway and there
19 is gravels on it and from there leading to the gate of the
20 back part of the property, there is one line of travel that
21 is easier to travel than others and there was evidence that
22 that was the traveled path.

23 Q That is what you thought or what you assumed
24 in your mind would be your easement, didn't you?

25 A I assumed that the right of way at that time

2 would stay in the same place.

3 Q Which would be, that particular driveway and
4 that path that you are referring to.

5 A I assumed that.

6 Q How wide was that? Just guessing, how wide is
7 that right of way or that road, driveway?

8 A It is wide enough for a vehicle easily, but
9 the highway --

10 Q Eight feet or 10 feet?

11 A I would say 12 to 15 feet.

12 Q And you agreed upon that as the easement then?

13 A No.

14 Q You just said you did.

15 A We agreed on that area, that location, we
16 didn't agree on the width.

17 Q Did you discuss the footage?

18 A We didn't discuss the footage at that time, no.

19 Q How soon after did you discuss the footage?

20 A When we came back and I talked to Mr. Leonard
21 on the property later, the next week, when he suggested we
22 move it.

23 Q That is when you discussed your right of way?

24 A That is when he volunteered the width of the
25 right of way and asked if I objected, which I didn't.

2 Q Then, Mr. Leonard, I believe, had the property
3 surveyed and the survey came out at 30 feet as you testified
4 earlier?

5 A Yes.

6 Q That is what happened, isn't it?

7 A That is what happened.

8 Q So either Mr. Leonard instructed somebody
9 incorrectly or you are incorrect as to the width of the road,
10 as to what the agreement was?

11 A The agreement we had is not what is on the
12 plat.

13 Q In answering my question, either you misunder-
14 stood or Mr. Leonard misunderstood as to the width of the
15 easement?

16 A No, there was no misunderstanding with either
17 one of us, we agreed.

18 Q The plat showed 30 feet, you agree to that?

19 A The plat shows 30 feet and I don't know but
20 what that wasn't a mistake on the surveyor's part, he mis-
21 understood.

22 Q That is what I am asking, either you are mis-
23 taken, Mr. Leonard is mistaken or the surveyor is mistaken.

24 A There you go.

25 MR. SCHELIN: He is putting words into his

2 mouth and Mr. Counts testified that 30 feet is not
3 what he agreed to.

4 MR. JONES: This is cross examination. He just
5 testified there was a mistake, somebody is wrong.

6 MR. SCHELIN: Not necessarily a mistake. You
7 are the one that said mistake, not Mr. Counts.

8 BY MR. JONES:

9 Q Someone made an error, didn't they, Mr. Counts?

10 A I don't know if someone made an error.

11 MR. SCHELIN: Mr. Jones is putting words into
12 his mouth.

13 THE COURT: Objection overruled.

14 THE WITNESS: We had an agreement on 40 feet.
15 The next thing I saw anything in which was a plat
16 with 30 feet. You can draw your conclusion as to who
17 made a mistake or if there was a mistake, or if there
18 was --

19 BY MR. JONES:

20 Q There is a difference?

21 A There is a difference, I will agree.

22 Q As to what you are testifying on or what you
23 want and what actually happened?

24 A There is a difference, yes.

25 Q When this bidding became final, did you leave

2 Mr. Counts' presence?

3 A I am Mr. Counts.

4 Q I am sorry. I know you are.

5 MR. SCHELIN: You are doing the same thing I
6 did.

7 MR. JONES: I apologize. Strike the question.
8 We will get it straight.

9 BY MR. JONES:

10 Q When you entered into this agreement -- let's
11 go back a little earlier still. When you entered into this
12 agreement, I believe one of your witnesses testified earlier
13 that there were several of you standing in a group. Who was
14 in that group?

15 A I am not aware of standing in a group with
16 anyone. There were people close during the bidding, because
17 it was raining. There were some umbrellas up and people
18 standing close. I was not associating myself with a group
19 as such.

20 Q So Mr. Puckett was wrong in his testimony?

21 A Well, Mr. Puckett may have assumed that there
22 was a group of people there, but I was not a member of any
23 group as such. I bid individually with no agreement with
24 anyone until I got with Mr. Leonard.

25 Q Was anyone with Mr. Leonard when you entered

2 into an agreement?

3 A It appears there was a gentleman with him.

4 Q Who?

5 A I don't know the man personally.

6 Q Did he stop there while you discussed the
7 terms of your agreement?

8 A There was a gentleman there part of that time,
9 I believe, yes. I don't know that he was, but he came to
10 the auction with Mr. Leonard or was working with him or any-
11 thing. I did see him with Mr. Leonard more than one time
12 during that day.

13 Q Did you see him after the final bid went down?

14 A He was there in our presence, close by, yes.

15 Q Did he not, in fact, witness that document
16 there?

17 A He may have. I did not see him witness it.

18 Q What else did you agree to during this time
19 period with Mr. Leonard?

20 A Well, he mentioned that he come by my office
21 on Monday and, in other words, the details would be worked
22 out.

23 Q The details of what?

24 A In other words, as to getting, I figured, it
25 surveyed, he said, "I will be by your office Monday and we

2 will fix up the paper work," something to that effect.

3 Q You were going to continue working on this
4 relationship then?

5 A Sure.

6 Q There were other things that remained to be
7 done for the two of you to agree to then?

8 A Well, deeds were to be made.

9 Q Deeds from who to who?

10 A Well, that was it, the deeds from Mr. -- I
11 assumed from Mr. Cassell to me and Mr. Leonard, the purchasers
12 of the property.

13 Q But you and Mr. Counts worked on other matters
14 whenever you did get together?

15 A Me and Mr. Leonard.

16 Q I am sorry. You are going to have to bear
17 with me, Lyman. I am not used to calling you Mr. Counts.

18 A We didn't discuss anything until I came back
19 on the property the following week.

20 Q Lyman, after you had these problems apparently,
21 you apparently had some apprehension, did you not?

22 A Sure, the agreement that we had made and to my
23 knowledge, there was no misunderstanding as to the percentage
24 I would pay for the property, and he comes back, because of
25 something that maybe his wife had said that made him change

2 his mind, I don't know, but he said, "I can't go along with
3 that. I can't let you have that property that way."

4 Q The terms started changing?

5 A He started changing terms and attitude that
6 day.

7 Q You started negotiating further, didn't you?

8 A We didn't start negotiating further. We started
9 tying things down then so it wouldn't get completely out of
10 hand.

11 Q That is when you wrote this little document up?

12 A That is right, when he goes from 25 percent to
13 33 1/3, I said the next trip he may be at 50 percent. I see
14 now what he is trying to do.

15 Q The question of the right of way, you didn't
16 put that in that writing?

17 A The question of the right of way didn't come up.

18 Q The question of the tobacco allotment, you
19 didn't put that on there?

20 A We talked about the tobacco, but it goes with
21 the property and that was the part that was surveyed, the
22 upper end that was to be deeded to me. That is the reason
23 the offset in the line, to take in the barn to handle the
24 tobacco crop.

25 Q Did you sign this document right here, this

2 contract for sale?

3 A That was signed by me the day of the sale.

4 Q How much of it was completed when you signed it?

5 A I can't swear to all of it being completed, but
6 I assume that all of it was. I don't remember there being
7 any blank lines on it that hadn't been completed.

8 Q I think you heard Mrs. Crookshank say it was
9 completed.

10 A I think it was.

11 Q You are not disputing her word?

12 A I am not.

13 Q So when you signed that document, you knew how
14 the deed was to be made, didn't you?

15 A When I signed that document, the only thing
16 that I knew is that I was part purchaser of the property
17 with Mr. Leonard, in partnership with him. The lady that
18 Mr. Leonard took me to to sign that, when we agreed to it,
19 I asked her where do I sign, and she pointed out where I
20 was to sign. She specifically asked for your name, address
21 and telephone number and pointed, "Sign here."

22 Q What did you tell her?

23 A What did I tell her?

24 Q Yes.

25 A Me and Mr. Leonard both may have made a

2 statement to her, but we made a statement in essence to her
3 that we were joint purchasers of the property.

4 Q You made that statement to her together?

5 A One of us did or both of us. Anyway, we were
6 both there and it was in agreement. There was no disagree-
7 ment about it.

8 Q I think you heard her testify though she doesn't
9 recall Mr. Leonard either confirming or denying that fact.
10 She said that Mr. Leonard didn't say anything.

11 A Well, when I told her that I was to sign the
12 document that I was purchaser of the property also, he was
13 there, and he did not dispute that, and he did not try to
14 prevent me from doing it.

15 Q Just to refresh my memory a little bit, Lyman,
16 isn't it true that after the sale occurred or after the sale
17 knocked down at \$125,000, that you and your wife left and
18 rode to the back portion of the farm?

19 A That is right, just got in the automobile.

20 Q And Mr. Leonard then left your presence and
21 went somewhere?

22 A Right.

23 Q And then you got up to the top of the hill, I
24 believe, and you made some mention to your wife that some-
25 thing might happen to you and you wanted to protect her

2 interest in the future?

3 A That is exactly right.

4 Q And you wanted to put your name on this contract
5 isn't that right?

6 A That is right.

7 Q So then you turned around and you came back.

8 A But I had not been off the property. I came
9 back to the house where people had congregated inside to get
10 out of the rain.

11 Q I don't care if you went to Atlanta and came
12 back and signed it. I am trying to put it in sequence the
13 way it happened. You stayed on the property, went directly
14 to the house. Where was Bob? Was he on the premises or was
15 he gone?

16 A Bob was there, he was on the back porch.

17 Q That document had been signed by himself, by
18 the witness, by Mr. Cassell, indicated there who the deed
19 was to be made to when you indicated to Mrs. Crookshank --

20 A I did not read down through there that the
21 deed was to be made to Bob Leonard.

22 Q But it was filled out?

23 A The agent for the auctioneer or for Mr. Cassell
24 was handling the piece of property and it was filled out,
25 that is right. Mr. Leonard had signed it as purchaser and

2 I asked her where I should sign it.

3 Q Didn't you explain to her, didn't you go
4 through that same sequence of events, you mentioned to your
5 wife that you wanted to protect your interests? Isn't that
6 exactly what you told Mrs. Crookshank?

7 A I believe I did tell her. Anyway, I did to
8 Bob, I said, "Look, we bought this property together but,"
9 I said, "something -- "

10 Q What did you tell Mrs. Crookshank?

11 MR. SCHELIN: I object. He asked a question
12 and is not giving him a chance to answer.

13 MR. JONES: He is not answering my question.

14 THE WITNESS: I am going to answer, if you will
15 let me get around to it.

16 THE COURT: Go ahead.

17 THE WITNESS: I said, "Mr. Leonard" -- in fact,
18 Mr. Leonard was coming by my office, I believe I men-
19 tioned that to him. I said, "Something could happen
20 before Monday and I think my name should be on that
21 purchase agreement to protect my family's interests
22 or my wife's interests." I don't know how I put it,
23 in case something did happen to me. I took Mr. Leonard
24 at that day at his word that our agreement was final
25 and binding, and if I hadn't thought that something

2 might happen to me, I still would have taken Mr.
3 Leonard at his word until Monday.

4 BY MR. JONES:

5 Q Did you explain to Mrs. Crookshank why you
6 wanted your signature on there?

7 A I did. I believe I did.

8 Q Did you tell her the manner in which you were
9 buying it?

10 A I think I made a statement to Mrs. Crookshank
11 that we were buying together. I don't know the exact wording
12 of that statement.

13 Q And Mr. Leonard was there when that statement
14 was made, I believe you testified?

15 A Definitely.

16 Q Did Mrs. Crookshank ask you for any money?

17 A She did not.

18 Q Did you offer any money?

19 A I did not.

20 Q You were prepared to pay money, weren't you?

21 A I was.

22 Q Said cash payment of 30 percent on that document
23 when you signed your name on it, didn't it?

24 A It said cash payment 30 percent, but there was
25 still, Mr. Leonard was handling 75 percent of the purchase

2 price and we had agreed that we would straighten this out on
3 Monday.

4 Q If Mr. Leonard was handling 75 percent of it
5 and you agreed to handle 25 percent, why were you not willing
6 to pay your 25 percent of the down payment?

7 A I was willing to pay 25 percent. I wasn't
8 asked to pay.

9 Q You come in and say, "I was a joint purchaser
10 of this property." You didn't expect Mr. Leonard to give
11 that property to you, did you?

12 A I did not, it wasn't his.

13 Q You didn't expect Mr. Cassell --

14 MR. SCHELIN: He is arguing with the witness.
15 All he can testify to is what actually happened that
16 day.

17 THE COURT: Objection overruled.

18 BY MR. JONES:

19 Q You were not expecting a gift?

20 A I was not expecting a gift.

21 Q You knew you were going to have to pay money?

22 A I knew I was going to pay money.

23 Q Why didn't you offer money to Mrs. Crookshank?

24 A I made arrangements to get the money and I have
25 bought property before and I have made payments when papers

2 were drawn up.

3 MR. JONES: Your Honor, will you instruct the
4 witness to respond to my question.

5 THE COURT: Go ahead. You are straying afield.
6 Get to the point here with your questions and answers.

7 BY MR. JONES:

8 Q Really, in effect your negotiations went through
9 Bob and Bob was just going to sell you part of the property,
10 or thought that he might sell part of that property to you,
11 didn't he?

12 A No, I wasn't buying anything from Bob Leonard.

13 Q Isn't that exactly what happened?

14 A Pardon?

15 Q After Bob purchased the property, Mr. Cassell
16 sold it to him, he came back and you all began discussing the
17 purchase of this property from Bob to you?

18 A No.

19 Q That is what happened though, isn't it?

20 A That is what Bob tried to get to happen, but
21 that is not what happened.

22 Q As it stands at this time, even if the Court
23 rules in your favor, you are still going to end up purchasing
24 the property from Bob, aren't you?

25 A It doesn't make any difference who the deed

2 comes through, if it comes through Bob, then so be it.

3 Q After Bob presented the deeds to you from he
4 and Betty, to you and your wife, you objected to those deeds
5 and I believe you had Chuck, Mr. Schelin prepare some deeds
6 for you, didn't you?

7 A I think he did.

8 Q As a counter offer back to Bob, isn't that
9 correct?

10 A There were stipulations in there that we didn't
11 want in it, yes, and we asked them to correct the deed, and
12 we did not object to it coming through Mr. Leonard.

13 Q When Bob delivered to you the deed that you
14 have been testifying from, I think you have a copy of it
15 there, did he not also bring a note with him?

16 A Bring a note with him?

17 Q Yes, sir.

18 A He may have.

19 Q That you signed to secure further payment of
20 the \$30,000?

21 A I believe so, yes.

22 Q I believe that one, for some reason, was dis-
23 agreeable with you and you had another one prepared, didn't
24 you?

25 A Yes, there was some difference in it maybe.

2 Q Anyway, you had another note prepared?

3 A Right.

4 Q That note was dated the 27th of October and
5 was filed as an exhibit here, I believe, isn't that right,
6 October 27th?

7 A Right.

8 Q October 27 is when Bob apparently presented
9 the deed to you with the note that you disagreed with, both
10 documents?

11 A Right.

12 Q Did you sign this note on the 27th of October?

13 A If my signature is on it. I don't remember
14 the date that I signed it. I would have to look. I don't
15 deny that I did, but I am not sure.

16 Q There was another note prepared and delivered
17 to Mr. Counts, dated the same day, that is not signed. I
18 show you a note. It has the paper of Browning, Morefield,
19 Schelin, Cody and Arrington. The same note, \$30,000, and it
20 also has the typed date of October 27 and that one isn't
21 signed. So when you presented this back along with the deed,
22 did you have this note signed?

23 A I think a note may have been signed then. I
24 am not sure.

25 MR. JONES: Your Honor, we would like to admit

2 this at this time as an exhibit.

3 THE COURT: That will be Defendant's Exhibit 1.

4 It is admitted into evidence as Defendant's Exhibit 1.

5 (DEFENDANT'S EXHIBIT NO. 1 was
6 marked for identification and
7 filed.)

8 BY MR. JONES:

9 Q Mr. Counts, isn't it true that the second note,
10 the one that you signed, was prepared only as an after thought
11 when you got ready to file this lawsuit to go in with this
12 bill of complaint? You didn't sign the first --

13 A The note was signed to meet the agreement that
14 there would not be something come up on this, if we did go
15 to court, to say that I was not willing to make a deposit on
16 it. I was willing and I was able to do it.

17 Q That is the reason that you got that note.
18 Why back date it to October 27?

19 A I did not back date a piece of paper for anyone.

20 Q Who back dated it?

21 A I don't know if I signed -- I told you that I
22 did not know the date that I signed it. I stand by that. I
23 do not know the date it was signed.

24 Q You authorized Mr. Schelin or somebody to pre-
25 pare that document for you, didn't you?

2 A If he did, I authorized him to, yes. We talked.

3 Q So if you authorized him to prepare the docu-
4 ment, it only stands to reason that you authorized him to
5 back date it?

6 A No.

7 Q Mr. Counts, you are in the insurance business,
8 aren't you?

9 A Yes, I am.

10 Q You write a good many insurance contracts?

11 A I have never written an insurance contract.

12 Q Well, let me rephrase that then. You have
13 certain applications which you take from potential policy
14 holders?

15 A I do.

16 Q You prepare those?

17 A Yes, I do.

18 Q Do you have binding authority as an agent?

19 A I do.

20 Q So if Mr. Schelin or myself were to come to
21 you and ask you for insurance, you would have the power and
22 authority to issue that insurance policy on that particular
23 day, subject to an investigation?

24 A I do have.

25 Q When you take these binding agreements, is this

2 something that you take money, consideration that passes?

3 A Some of the times we do and some of the time we
4 don't.

5 Q Do you provide a stated type of coverage? In
6 other words, let me clarify that. By stated type of coverage,
7 for X number of dollars, either receive or to be received,
8 you provide us with \$40,000 liability or what have you?

9 A That is right.

10 Q In other words, we give you something and you
11 give us something?

12 A That is right.

13 Q Then when you prepare that binding agreement,
14 I know what I have got from you and you know what you have got
15 from me, and what our obligations are, if I go out here and
16 have an accident?

17 A Is that a question?

18 Q Yes. Isn't that the way it works?

19 A I would say it is.

20 Q How often do you deal with this type of arrange-
21 ment during the course of a day?

22 A An application?

23 Q Yes.

24 A I doubt that I personally will -- well, I may
25 every day for some time and it may be a week or two weeks or

2 three weeks I don't do it.

3 Q During a month how many of these type of appli-
4 cations do you take?

5 A During a month, 25 or 30, maybe 50 a month
6 applications, different types.

7 Q Some of those, do all of those result in a
8 final binding policy being issued by the company?

9 A They do not, no.

10 Q Some of them are rejected?

11 A That is right.

12 Q Do you bind all of them?

13 A Do I bind all of them?

14 Q Do you use your binding authority to bind all
15 of them? In other words, do you provide coverage for those
16 25 or 30 people or 50 people?

17 A Not all the time. We do a certain amount of
18 time. A lot of times we send in an application where we don't
19 bind them.

20 Q You use your own discretion?

21 A Yes.

22 MR. SCHELIN: I don't see what is the point.
23 Plenty of latitude.

24 MR. JONES: It is very important. I will point
25 the point out in a few seconds.

2 THE COURT: You better make it pretty fast,
3 because we are going to stop.

4 BY MR. JONES:

5 Q You are used to dealing with contracts and
6 agreements?

7 A Not contract agreements as such, no. I am used
8 to dealing with applications, but the actual contract itself,
9 a little, not much.

10 Q You have within your knowledge what becomes
11 involved in making an agreement?

12 A I have basic knowledge of it, yes. I am not an
13 insurance contract expert.

14 Q But you know that there must be a meeting be-
15 tween the minds of the people?

16 A Yes.

17 Q And that when it is in writing, there is a
18 meeting of the minds and that is why you wanted that October
19 6th memo prepared, wasn't it?

20 A Yes, that is established, definitely.

21 Q And the terms which you thought that Mr. Leonard
22 had originally agreed upon changed?

23 A What do you mean?

24 Q Well, to use your example, you originally thought
25 you had an agreement of 25 percent and it later became a third?

2 A Yes, this is tied down a third, so it wouldn't
3 become a half.

4 Q So Mr. Leonard was not in agreement with you?

5 A On what?

6 Q Well, at least on that particular --

7 A He was in agreement on a third, he was in agree-
8 ment on a fourth the day of the transaction, the day of the
9 bidding. I don't know if was in agreement or not, but he
10 stated that as such.

11 MR. JONES: That is all, Your Honor.

12 REDIRECT EXAMINATION

13 BY MR. SCHELIN:

14 Q Mr. Counts, could you prove by any written
15 evidence or anybody hearing your agreement between yourself
16 and Mr. Leonard that you had agreed to a fourth as opposed
17 to a third on the first?

18 A Did I what?

19 Q Could you prove by any independent evidence
20 that you and Mr. Leonard had agreed to a fourth on October
21 1st?

22 A It was an agreement between the two of us indi-
23 vidually. I do not know of anyone that overheard the conver-
24 sation.

25 Q It was not in writing, was it?

2 A It was not in writing, but it was agreed upon
3 definitely.

4 Q At a subsequent date, October 6th, you then
5 agreed to a third and you put it in writing, is that correct?

6 A That is right.

7 Q You can prove that though, can't you?

8 A I can prove that.

9 Q I show you a note that is marked up and not
10 executed. Mr. Jones made a big thing out of an unsigned
11 note just previously. Can you, looking at that and recalling
12 how the marks came on it, explain to the Court why you didn't
13 sign this note and why you signed the other note and why Mr.
14 Jones ended up with an unsigned note?

15 A Well, as I understand this note, it is after
16 agreement that he went out there and talked to, when I went
17 on the farm and talked to Bob and we established at that
18 time then, in writing the difference that would be paid. In
19 other words, the percentage or the amount that he would be
20 paid, which amounted to an even percentage.

21 Q In your agreement with Mr. Leonard, was there
22 anything mentioned about prepayment of zero percent and
23 things like this?

24 A No.

25 Q Is that included in this note that is now

2 marked off?

3 A It is. Prepayment of zero percent upon pay-
4 ment to be paid, no, this wasn't discussed then.

5 Q Is the note that you actually executed essen-
6 tially the same as that note, except for the crossed off
7 paragraph?

8 MR. JONES: If he isn't going to introduce --

9 A I would have to compare them to see if they
10 are the same.

11 MR. SCHELIN: I would like to enter this as
12 Plaintiff's Exhibit 3.

13 THE COURT: It will be admitted into evidence
14 as Plaintiff's Exhibit No. 3.

15 (PLAINTIFF'S EXHIBIT NO. 3 was
16 marked for identification and
17 filed.)

18 BY MR. SCHELIN:

19 Q In all the confusion that was going on back at
20 the time this deed was prepared by Mr. Leonard, and was sub-
21 mitted to you, do you recall why you didn't sign the note
22 that Mr. Jones presented today and why you signed another
23 note?

24 A Well, Mr. Leonard said on more than one occa-
25 sion, "I think he is getting some bad tax advice. Would you

2 have any objection to making a larger down payment? I would
3 like to pay more."

4 Q I believe you misunderstand me. The note that
5 Mr. Jones just presented, the one that my office originally
6 prepared, do you recall why you didn't sign that one as
7 opposed to the one that is part of the court record now?

8 A Well, it didn't agree with the payment arrange-
9 ments that we had talked about before and that Mr. Cassell
10 had wanted.

11 MR. SCHELIN: You may recross.

12 RECROSS EXAMINATION

13 BY MR. JONES:

14 Q Lyman, when you and Bob allegedly entered into
15 this agreement, were you all buying the property to speculate
16 with?

17 A It was not my intention to do it at that time,
18 to buy it to speculate on. I do not know his intentions and
19 will not try to figure out what they were, and we were not,
20 we had not discussed that we would buy it to speculate with,
21 no.

22 Q You then had not discussed whether or not, if
23 any, profit was made from the sale of it, you would just
24 divide that profit?

25 A No, that didn't come up.

2 Q There was no pre-existing partnership arrange-
3 ment prior to that date between you and Mr. Leonard?

4 A The arrangement that we --

5 Q Prior to that date?

6 A Prior to that date, no.

7 Q And you were not going to contribute or were
8 you going to contribute your money with Mr. Leonard's, pool
9 your money together to buy this?

10 A Yes, that is the way it was to be bought. In
11 other words, he was to pay a certain percentage of the total
12 thing, to pay to Mr. Cassell, yes, that was the percentage.

13 Q Let me clarify my question. Were you going to
14 make a deposit along with Bob and set up some sort of account
15 to purchase this in partnership form?

16 A Yes.

17 Q You were going to establish a partnership
18 account?

19 A We were not going to establish a partnership
20 account, that was not my understanding. We would pay for
21 the property, he would pay a percentage for the front part
22 of the property and I would pay a certain percentage for the
23 back part and it would be deeded from Mr. Cassell individually
24 to the two of us.

25 Q So that there was no comingling of your funds

2 with Mr. Leonard prior to the purchase?

3 A Comingling of mine only that way, of minds,
4 and we were not to have a joint checking account, no.

5 Q You got over half the farm, but paid less than
6 half the value?

7 A I didn't get a dwelling house. On the front
8 part is a right new dwelling house and it joins the highway,
9 which makes it more valuable for development, which business
10 Mr. Leonard is involved. I do not think it is the better
11 end of the deal.

12 MR. JONES: That is all I have.

13 THE COURT: Thank you.

14 MR. SCHELIN: That is all I have.

15 THE COURT: Thank you.

16 (Witness excused.)

17 THE COURT: Any other witness?

18 MR. SCHELIN: That is all.

19 THE COURT: Plaintiff rests.

20 MR. JONES: Your Honor, we would make a motion
21 to strike the plaintiff's evidence and dismiss the
22 case, because even relying upon the trust theory,
23 where an agreement is entered, it still becomes incum-
24 bent upon a plaintiff to prove that there is a meeting
25 of the minds of the parties involved.

2 . . . Thereupon, counsel argued the motion . . .

3 THE COURT: The motion to strike is overruled.

4 The Court is of the opinion that there was clearly
5 some evidence of an agreement, because the survey
6 which subsequently was made by Mr. Carpenter essentially
7 followed the division line on the tract of land being
8 sold, and the fact that a deed and a note securing a
9 deed of trust was executed on October 27th carrying
10 out the terms being one third, rather than 25 percent
11 which was originally agreed, indicates that there was
12 some contract between them.

13 The Court is of the opinion that the real issue
14 here is whether or not the right of way of 40 feet,
15 whether or not that should be 40 feet or whether or
16 not it should be 30 feet. The Court feels that the
17 subsequent adjustment from 25 percent to one third
18 was an agreed alteration of the original contract
19 between the parties. So I think really most of the
20 evidence should be confined to those points. Those
21 are the points that are disturbing the Court. However,
22 I am not saying that an oral trust has been created.

23 I think the evidence has to be, the Court would
24 have to hear all the evidence before it would conclude
25 that an oral trust had been created, and I think that

1
2 the only theory on which the complainant can win this
3 case, if the complainant prevails. I will overrule
4 your motion and hear any evidence you desire to offer.

5 MR. JONES: May we have a five-minute recess?


6 THE COURT: Yes.

7 . . . Thereupon, Court adjourned at 5:30 p.m.
8 to reconvene on July 20, 1978 at 11:00 a.m., on which
9 date this court reporter was unable to attend because
10 of a prior committment. . .

REPORTER'S CERTIFICATE

I, Ruth Jones Greiner, Certified Shorthand Reporter and Registered Professional Reporter, hereby certify that I recorded in machine shorthand all of the proceedings had in the case of H. Lyman Counts v. Robert L. Leonard and Betty J. Leonard, on the 19th day of July, 1978; that these proceedings were reduced to typewriting under my direction; and that the foregoing is a true and accurate transcript of the said proceedings.

This the 23rd day of August, 1978.


Certified Shorthand Reporter
Registered Professional Reporter

781558

IN THE CIRCUIT COURT FOR RUSSELL COUNTY, VIRGINIA

L. LYMAN COUNTS)

Complainant)

VS)

ROBERT L. LEONARD and)
BETTY J. LEONARD)

Defendants)

IN CHANCERY

TRANSCRIPT OF TRIAL

VOLUME II

July 19-20, 1978

APPEARANCES:

For the Complainant:

Charles E. Schelin, Jr., Esquire
Browning, Morefield, Schelin,
Cody and Arrington
2 Mill Street
(P. O. Box 1124)
Lebanon, Virginia 24266

For the Defendants:

Dennis E. Jones, Esquire
and
Dennis L. Godfrey, Esquire
Jones and Godfrey
One Flannagan Avenue
(P. O. Box 600)
Lebanon, Virginia 24266

Reported by:

JEREE ERNST, COURT REPORTER

P. O. Box 34

Emory, Virginia 24327

CIRCUIT COURT RUSSELL COUNTY
FILED

SEP 26 1978

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I N D E X

<u>Witness:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>COURT</u>
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VOLUME II:

DEFENDANTS EVIDENCE (C'd)

Bob Leonard	127/J	150/S			156
Betty J. Leonard	159/J	169/S			

REBUTTAL EVIDENCE

L. Lyman Counts	173/S	177/J			
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SURREBUTTAL EVIDENCE

James Elliott	187/J	192/S			
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Motion to Strike/Jones/Denied, Page 195
The Court's Opinion, noted, Page 198

E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>Page</u>
Defend. 2	Survey Plat of Subject Property	144

S T I P U L A T I O N S

The above-entitled cause came on to be heard
before the Honorable Glyn R. Phillips, Judge, on the 19th
and 20th days of July, 1978, when all parties announced
ready for trial, and the following procedures were had,
to-wit:

July 20, 1978

Second Day

THE COURT REPORTER WAS DULY SWORN BY THE CLERK

THE COURT: Go ahead.

MR. SCHELIN: Yesterday during some of the confusion I inadvertently omitted, it appears, to make a copy of this proposed deed a part of our exhibits. May I do so now?

THE COURT: Yes, sir, go ahead.

MR. SCHELIN: Do you have any objection?

MR. JONES: Is that the same deed that was filed as an exhibit to the original Complaint?

MR. SCHELIN: Right. It was filed with the Bill of Complaint.

MR. JONES: It is already in the record, I think.

THE COURT: Well, let's see. It is in the record anyway as an exhibit.

MR. SCHELIN: Well, if that takes care of it, that is fine.

THE COURT: I am assuming it is the same one that is in the record?

MR. SCHELIN: Yes, sir. It is merely a machine copy of the one you have there.

THE COURT: All right, it is already in.

1 MR. SCHELIN: All right, pardon me.

2 MR. JONES: That is the same one with the lines
3 drawn through and everything?

4 MR. SCHELIN: Yes.

5 THE COURT: All right, you may proceed.

6

7

8 The witness, ROBERT L. LEONARD, first being duly
9 sworn, was examined and testified as follows:

10 DIRECT EXAMINATION

11 BY MR. JONES:

12 Q Mr. Leonard, state your name, please, sir?

13 A Robert Leonard.

14 Q Your address?

15 A Lebanon, Virginia.

16 Q And your age?

17 A Forty-two.

18 Q Are you married?

19 A Yes, sir.

20 Q What is your wife's name?

21 A Betty Jane.

22 Q How long have you been married?

23 A I have been married seventeen years.

24 Q And what is the nature of your occupation?

25 A I am in the contracting business generally

1 and real estate development.

2 Q How long have you been in that business?

3 A Approximately thirteen year.

4 Q Is that your sole and exclusive method
5 of making a living?

6 A Yes, sir, along with rental income.

7 Q That is involved in this property as well,
8 is it not?

9 A Yes. Yes, it sure is.

10 Q Does your wife work?

11 A No, sir.

12 Q Does she do anything for you in your
13 business?

14 A Yes, sir, she does the book work.

15 Q What is the name of your business?

16 A The name of my business is R. L. Builders
17 Company.

18 Q Are you in a partnership with anyone in
19 that business?

20 A No, sir. Sole ownership.

21 Q Do you have a partnership with anyone
22 involving any of your enterprises?

23 A No, sir, none whatsoever.

24 Q Now, during this period of time that
25 you have been in the contracting and the land developing

1 business have you had occasion to buy property?

2 A Yes, sir. Quite often.

3 Q And have you had occasion to buy properties
4 in Russell County?

5 A Yes, sir.

6 Q In Russell County, Virginia?

7 A Yes, sir, I sure have.

8 Q Have you ever entered into any partnership
9 agreements in the purchase of those properties?

10 A No, sir. Never.

11 Q How have those properties been purchased?

12 A They were purchased jointly with ---

13 MR. SCHELIN: Your Honor, if this doesn't
14 pertain to this one transaction, I don't see the
15 materiality of this line of questioning.

16 THE COURT: Does it pertain to this
17 particular transaction?

18 MR. JONES: Yes, sir.

19 THE COURT: All right, go ahead. Objection
20 overruled.

21 A Yes, sir, we buy jointly with the right
22 of survivorship between me and my wife.

23 Q And when sales of this property are made,
24 you and your wife then sign the deed?

25 A Yes, sir, we do.

1 Q Now, Mr. Leonard, I will call your atten-
2 tion to October 1, 1977. I believe you were present at an
3 auction sale in Russell County, Virginia, at the Cassell Farm?

4 A Yes, sir, I was.

5 Q And do you recall the time of day at
6 which you arrived at this sale?

7 A The sale was at approximately 11:00
8 o'clock in the morning and I arrived at approximately 10:30
9 or a quarter till 11:00.

10 Q Were you accompanied by anyone?

11 A Yes, sir, by my wife.

12 Q And did the two of you remain on the
13 premises that day during the sale?

14 A Yes, sir.

15 Q Did the sale get started as scheduled?

16 A It was approximately five or ten minutes
17 late.

18 Q Had you been on the property prior to the
19 date of the sale?

20 A Yes, sir.

21 Q When?

22 A On the week before the sale. It was about five
23 days before the sale.

24 Q Did anyone accompany you the day that you
25 visited that property?

1 A Yes, sir, my wife and two other people
2 that showed it to me.

3 Q Who were the other two individuals?

4 A Mr. and Mrs. C. B. Perry.

5 Q Did you get an interest in purchasing the
6 property?

7 A Yes, sir. We went home that night and me
8 and my wife talked it over and we decided we would buy it
9 if we possibly could.

10 Q If you could get the bid in?

11 A Yes.

12 Q Were you aware of the terms of the sale
13 at the time you visited the property prior to the auction?

14 A Yes, sir. Yes, sir, I was. We had read
15 the brochure. We had talked to the people that showed it to
16 us. Yes, sir, we did.

17 Q Do you recall what those terms were at
18 that time?

19 A Those terms at that time was with a 29
20 percent or 30 percent down on the place with the remainder over
21 a five-year period at a 7 percent interest fee.

22 Q Did the brochure you are referring to
23 state when the down payment had to be made?

24 A Yes, sir. The money was to be made the
25 day of the sale.....cash on hand the day of the sale and the

1 Q And the balance as stated?

2 A As a deed of trust, yes.

3 Q Now, on the date of the sale, which would
4 have been October 1st, did those terms come to your attention
5 again?

6 A Yes, sir, just as soon as the sale was
7 over.

8 Q Well, at the beginning of the sale?

9 A Oh, yes. At the beginning of the sale
10 the auctioneer clearly read the terms of the sales before
11 proceeding with the sale.

12 Q Were you in the company of any other
13 individuals while you were there on the property?

14 A Yes, I was in the company of several people
15 in fact.

16 Q Did this occur during the sale?

17 A During the sale, yes. The sale lasted
18 approximately two hours and I guess during that time I talked
19 to thirty or forty people.

20 Q Did you begin making bids on the property?

21 A Yes, sir. I was the original bidder on it.
22 I started it.

23 Q Do you recall what that bid was?

24 A Seventy-five Thousand Dollars (\$75,000).

25 Q And did you make other bids on the property?

1 A Yes, sir, continually.

2 Q And what was the final bid that you made
3 on the property?

4 A The final bid was a Hundred and Twenty-five
5 Thousand Dollars (\$125,000).

6 Q Prior to making the final bid did you have
7 the occasion to talk to Lyman Counts?

8 A I spoke to him, yes, sir.

9 Q And what was the nature of that conversa-
10 tion?

11 A The nature of that conversation: I went
12 to Mr. Counts with the motion.....he gave me a motion to come
13 speak to him. When I went to Mr. Counts, he said, "The sale
14 is going pretty high, isn't it?" I said, "Yes, sir." And
15 he said, "Are you interested in the whole thing?" And I said,
16 "Yes, sir, I am bidding on the whole thing." And he said,
17 "Well, will you sell me the back part of the farm?" And I said,
18 "Well, I will consider it. I will give you first refusal."

19 Q Was there a discussion of any terms?

20 A No terms whatsoever.

21 Q Did you discuss anything beyond your
22 consideration of the fact that you would sell it to him if
23 you in fact bought it?

24 A No, there was no other ---.

25 Q What was your purpose in purchasing the

1 property?

2 A I bought that property for the purpose
3 of developing it. I had some property in town and I had filled
4 it up with apartments. Property was scarce. I went out there
5 to the farm and looked at it. There was good potential on
6 the front for apartment houses. I bought it for more or less
7 development.

8 Q And was there a dwelling house on that
9 property?

10 A Yes, sir, there was a dwelling house. It
11 was a fairly nice house.

12 Q After you acquired the property did you
13 dispose of that dwelling house?

14 A Yes, sir, I sold it to my wife's cousin.

15 Q And I believe it had some property with it?

16 A Yes, sir, it had five acres with it.

17 Q Now, did you have to sign any documents
18 in regards to your final bid that you made on this property?

19 A Yes, sir. Just as soon as the sale was
20 over Mr. Wise's secretary presented me with a contract of
21 sale. I immediately went to her presence, which was right
22 behind the auctioneer's truck, which was under the edge of
23 the carport of the house. At that time I did sign the
24 agreement.

25 Q Mr. Leonard, I will show you Plaintiff's

1 Exhibit No. 2, which purports to be a copy of the document
2 apparently signed by you, and ask you if that is the document
3 that you are referring to?

4 A Yes, sir. That is a copy of the document
5 that I signed, yes, sir.

6 Q Now, Mr. Leonard, that is a printed form,
7 is it not?

8 A Yes, it is.

9 Q With numerous blanks on it?

10 A Yes.

11 Q At the time you executed this what portion
12 of it was completed?

13 A Mrs. Crookshank had already started
14 filling out the heading on it: Virginia and Russell County.
15 She had got down to the price and also the date of the sale
16 and left the blank there for the signature, the name of the
17 purchaser, which I did sign at that time.

18 Q And there is a witness. It looks like....
19 it appears to be W. C. DeBusk?

20 A Yes, it was Mr. Bill DeBusk.

21 Q Did he witness it following your signing
22 of the document?

23 A Yes, sir, he followed me from the time
24 I made the original bid until the date....the time that I
25 signed this document, Mr. DeBusk did.

1 Q Did Mrs. Crookshank ask you how you
2 desired to have the deed made?

3 A She certainly did.

4 Q And did you respond to that question?

5 A Yes, I told her to make it to me and my
6 wife jointly with the right of survivorship which we always
7 make all of our deeds this way.

8 Q And is that the manner in which Mrs.
9 Crookshank completed the document?

10 A Yes, it is.

11 Q And I believe then Mr. Cassell signed the
12 document?

13 A Mr. Cassell stood right beside of me at
14 the time that I signed it.

15 Q Is there anything on that document that
16 was not there when you signed it and when you indicated how
17 the deed was to be made?

18 A Yes, sir. Mr. Counts's name and address
19 and also my phone number wasn't on there.

20 Q Now, following your signing of this
21 document, what did you do?

22 A As soon as I signed that document, I
23 told Mr. Cassell that I didn't have the check with me and
24 that I would have to go to the office to get a check to bring
25 back to him. So at that time I told my wife I was going to the

1 office and I would be back and bring the check to make the
2 downpayment.

3 Q Did your wife remain on the premises?

4 A Yes, sir, she did.

5 Q Did you go get the check for the downpayment?

6 A I immediately went to get the check.

7 Q Did you return to the premises?

8 A I returned to the premises approximately
9 fifteen minutes later.

10 Q Was Mr. Counts present when you returned?

11 A No, sir.

12 Q Did you see this document here that I have
13 just shown you when you returned?

14 A I seen that document---. The next time
15 I seen that document was at Mr. Jim Elliott's office.

16 Q Did you see Mr. Counts's name on it at
17 that time?

18 A Yes, I did.

19 Q Is that the first time that you were
20 aware that Mr. Counts had signed it?

21 A Yes, it was.

22 Q Mr. Leonard, did you have any conversation
23 with Mrs. Crookshank with regards to an alleged joint purchase
24 of the property with Mr. Counts?

25 A No, sir, I did not.

1 Q Did you have any conversations with
2 Mrs. Crookshank in Mr. Counts's presence in regard to an
3 alleged joint purchase of the property?

4 A No, sir, I did not.

5 Q What were the weather conditions that day?

6 A They were fair. It was fair weather when
7 the sale began, but by the time the sale was over and it had
8 been knocked down it was raining quite hard, yes.

9 Q Were there people mingling around at the
10 office or at the house when this document was signed?

11 A Not at the house. Everybody ganged up
12 under the little carport, which is approximately 12 by 35 or
13 40.....35 or 36 feet in size, and everybody was crowded up
14 under it, and a lot of them were going in the house which
15 has an entrance door from this carport, straight into the
16 family room in the house.

17 Q Where was Mrs. Crookshank?

18 A Mrs. Crookshank at the time I signed
19 the document, of course, was under the carport, but she and
20 the rest of the party immediately left and went toward the
21 entrance to the house that leads from under the carport.

22 Q Prior to that date had you met Mrs. Crook-
23 shank?

24 A No, sir, I hadn't.

25 Q Did you know her prior to that day?

1 A No, sir, I didn't.

2 Q To your knowledge did she know you?

3 A As far as I know, she didn't. She may

4 have heard of me.

5 Q Did you have an occasion to discuss with

6 Betty, your wife, what your plans were for this property?

7 A Before the sale we talked about it, yes.

8 Q Did you have any occasion to discuss this

9 property with Mr. Counts?

10 A Mr. Counts? No.

11 Q Did you have occasion to discuss this

12 property with Mr. Counts on October 6th?

13 A Yes, sir, I did.

14 Q Describe to the Court the nature of that

15 conversation?

16 A On approximately the 4th of October Mr. Counts

17 had contacted me and said he was interested in the property

18 in the back. He said, "Are you willing to meet me down there

19 and we will go over it....go over it and figure the lines out....

20 go over the lines, where we are going to run it?" I said,

21 "Well, my wife and I have decided on the price but we definitely

22 haven't decided on selling the property." And he said, "Well,"

23 he said, "meet us and we will get this thing started." And I

24 said, "Well, I will be down there. Just come on down." So

25 he did. He came down that evening. I was up on top of the hill

1 at the orchard. They had a nice orchard up there. He came
2 in and he said, "What are we going to do?" And I said, "We
3 will just run the lines." We pointed it out. And he wanted
4 to know what the price was going to be. I said, "It is going
5 to be Forty-five Thousand Dollars (\$45,000)." He said, "Bob,
6 you are backing out. You promised me it would be cheaper than
7 that." I said, "I didn't promise you nothing. I never give
8 you a price on nothing." I said, "There was never no price
9 quoted." And he said, "Well, I am going to take you to court."
10 And I said, "Well, something will have to be done."

11 Q Was that on October 6th when this occurred?

12 A Yes, on October 6th.

13 Q Mr. Leonard, I will show you Plaintiff's
14 Exhibit No. 1. Explain to the Court how that exhibit came to
15 be.

16 A After me and Mr. Counts had talked for
17 a little while he said, "I will offer you a third of what you
18 paid for the whole thing....the whole property." And I said,
19 "I will have to discuss it with my wife first." And he kept
20 on wanting it so bad that I said, "Well, I will sign it but
21 we will have to leave open some vital facts on this thing."

22 Q Was a tentative dividing line agreed upon?

23 A Yes.

24 Q And is that what that purports to be?

25 A Purportedly that is what this pertained to, y

1 Q That is one line?

2 A That is one line, yes.

3 Q That is not the full boundary?

4 A No, it is not the full boundary.

5 Q And you agreed upon a price then of ---

6 A Forty-one Thousand, Six Hundred and

7 Sixty-seven Dollars (\$41,667).

8 Q And then there is a part of the contract

9 that says "terms to be agreed on at a later date". What did

10 that mean?

11 A Those terms were to be discussed with my

12 wife. Betty and I discussed them that afternoon after I had

13 talked with Mr. Counts, and we decided that there would have

14 to be some restrictions to it: that we had bought the front

15 part of the property for development property (for apartments)

16 and I had an apartment right beside.....on both sides of the

17 easement coming right through it. I had four tenants that

18 were going to be in each apartment and we would have to have

19 some restrictions on the traffic flow, yes.

20 Q And what was the purpose of the restrictions?

21 A The purpose of the restrictions was to

22 protect my tenants in the apartment houses and also to protect

23 me and my wife's mobile home which we were planning on moving

24 into right above the apartments.

25 Q Did Mr. Counts on October 6th in his

1 negotiations treat this as a purchase from you?

2 A Evidently he was. Of course, I told him
3 I would have to clear it with my wife. She had agreed on
4 the Forty-five Thousand Dollars (\$45,000) for a price on the
5 back portion of the farm but we hadn't at that time discussed
6 any easements, any restrictions to go with the property.

7 Q Did you have the property surveyed?

8 A Yes, sir. I took it on my own after we
9 had decided on the lines. I called Mr. Carpenter and ran
10 some lines....some posts down the front portion of the farm
11 showing where the easement would run and also showed his men
12 where the property lines would run.

13 Q Did they prepare a survey of the lines?

14 A Mr. Carpenter prepared a survey approximately
15 two to three weeks after that.

16 Q Did you discuss the sale of this property
17 with your wife following your conversation with Mr. Counts?

18 A Yes, sir, that same afternoon: on October
19 6th, we did.

20 Q Was a decision reached as to whether you
21 would sell the property?

22 A The decision....the price was agreeable
23 with her and the lines that I had drawn up were agreeable with
24 her and we discussed any restrictions we would have to have on
25 the property and I showed her where the property easement would

1 go going into Route 645.

2 Q After your discussion with Betty did you
3 go back to Mr. Counts and present these terms and conditions
4 to him?

5 A No, sir. He said he would be in touch
6 with me.

7 Q And subsequent to the decision with your
8 wife you did have a deed prepared, didn't you?

9 A Oh, yes. Yes. I had the deed prepared
10 immediately after receiving the plat which Mr. Carpenter drew
11 up.

12 Q Now, Mr. Leonard, I will show you a copy
13 of the plat dated October 25, 1977, and ask you if that is the
14 plat you had prepared?

15 A Yes, sir, it is.

16 Q And the line dividing Lot 48C and Lot 48B,
17 I will ask you if that represents the tentative line which
18 you and Mr. Counts agreed on in your October 6th memorandum?

19 A Yes, sir, it was.

20 Q And this was after your wife had agreed
21 to the sale?

22 A After my wife had agreed and looked at
23 the points on it for a sale.

24 Q Does it also show an easement for ingress
25 and egress?

1 A Yes, sir, it shows an easement for ingress
2 and egress of thirty feet from the entrance of Route 645 up
3 to Lot No. 48C.

4 Q And I believe that is across the northern
5 corner of Lot 48B, is that correct?

6 A Yes, sir, it is.

7 MR. JONES: Your Honor, we would like this
8 marked as Defendant's Exhibit No. 2.

9 THE COURT: All right, it will be admitted
10 into evidence as Defendant's Exhibit No. 2.

11 DEFENDANT'S EXHIBIT NO. 2 -- FILED

12 Q Now then, did you have the deed prepared
13 according to that plat?

14 A Yes, sir. I presented it to the Jones and
15 Godfrey Office and they prepared it according to the plat.

16 Q And that deed was dated on the 27th day
17 of October?

18 A Yes, sir, the 27th day of October of last
19 year.

20 Q Mr. Leonard, I will show you Exhibit D
21 to the Plaintiff's Bill of Complaint and ask you if you recog-
22 nize this document?

23 THE COURT: Just a minute.

24
25 (Whereupon, the Court tended to a brief

1 interruption, after which the following
2 proceedings were had, to-wit:)

3
4 THE COURT: All right, thank you very
5 much.

6 A Yes, that is the deed that I had prepared
7 and me and my wife signed it.

8 Q And I believe you reserved a Vendor's
9 Lien?

10 A Yes, sir, I did.

11 Q And the calls set forth in the description
12 in this are the exact calls as the plat?

13 A As the plat, yes.

14 Q But they need to be reversed, is that
15 correct?

16 A They need to be reversed which we did explain
17 to Mr. Counts on the day that he picked the deed up.

18 Q And does this deed then have the covenants
19 and the restrictions which you and your wife agreed upon?

20 A They are exactly what me and my wife
21 agreed on on October 6th to have installed in this deed.

22 Q And I believe it was your testimony, was
23 it not, that you did not go back to Mr. Counts with those?

24 A No, sir, he wasn't interested or didn't
25 seem to be at that time in any kind of restrictions or anything.

1 It never was mentioned. And the only time that I told him
2 there would be restrictions on this property was the day that
3 I took the plat by his office and laid it on his desk and
4 told him, "There is the plat. There is your land." I said
5 there was going to be restrictions on it. "There is going to
6 be a restriction that you cannot build above us and have
7 traffic running in and out on my property."

8 Q And does the deed relate back to the
9 easement which you instructed Mr. Carpenter to grant to
10 Mr. Counts?

11 A Yes. Yes, it certainly does.

12 Q There has been a lot of testimony here....
13 well, yesterday in regards to a forty-foot easement. Did you
14 ever discuss a forty-foot easement with Mr. Counts?

15 A There never was a discussion on a forty-
16 foot easement. There was a discussion at one time about a
17 twenty-foot right of way in there. I told him, I said, "Now,
18 I can give you....I will just put a thirty-foot." I said, "A
19 twenty-foot....you can't even turn a vehicle around in it." I
20 said, "I will give you a thirty-foot easement over it," and
21 it died at that. I mean, there never was anything else mentioned
22 about it.

23 Q Did you mention the easement on the day
24 that Mr. Counts prepared this little memorandum?

25 A The easement?

1 Q Yes.

2 A We mentioned the easement running in and

3 out from the property but nothing on width.

4 Q Did you discuss where it was to be located

5 on that day?

6 A Yes, we certainly did, and that was on

7 October 6th.

8 Q Now, at the time this deed was made and

9 delivered to Mr. Counts were you prepared and ready and willing

10 and able to sell the land to him as the deed purported to

11 convey the property to him?

12 A Yes, sir, we were.

13 Q And that is with the thirty-foot right of

14 way and ---

15 A And with the restrictions which me and my

16 wife both signed.

17 Q And did Mr. Counts accept that proposition?

18 A No, sir, he did not.

19 Q Did Mr. Counts go into further negotiations

20 with you?

21 A There never was any other discussion other

22 than in the office down there he did mention that he would

23 like to have those removed and if possible give him a five-

24 year restrictions on it instead of a lifetime restrictions, and

25 I said, "There is no way, Mr. Counts." I said, "These are

for my wife's protection and my protection as far as my

1 property on the front of that thing.

2 Q Was there subsequently a deed prepared
3 and presented to you without any restrictions?

4 A No, sir.

5 Q Was there a deed prepared from Mr. Cassell
6 to you and Betty?

7 A Yes, there was a deed prepared by Mr.
8 Jim Elliott in Abingdon.

9 Q Was there a Note and Deed of Trust also
10 prepared at that time?

11 A Yes, sir, there was.

12 Q And did you and your wife sign the note
13 and the Deed of Trust?

14 A Yes, sir, me and my wife signed the Deed
15 of Trust and the note and also Mr. Cassell signed the deed
16 over to us in October sometime in Mr. Elliott's office.

17 Q Was anyone else obligated on that note
18 except you and Betty?

19 A As far as I read, I didn't see anything
20 but me and my wife's name on it and five years.

21 Q The funds with which you paid Mr. Cassell
22 at the property, where did they come from?

23 A They came from my Building Account which
24 is in my wife's and my name.

25 Q How is that building account set up?

1 What is it called?

2 A The building account is set up as the
3 R. L. Builders and Company and my wife signs all the checks,
4 or I can sign them either one. She pays the accounts. She
5 receives the bills and she pays them and keeps up with the
6 rental property. She pays everything through the account.

7 Q And do you have an individual account
8 other than this one?

9 A Yes, sir, we do.

10
11 (Whereupon, the Court tended to a brief
12 interruption, afterwhich the following
13 proceedings were had, to-wit:)

14
15 THE COURT: Excuse me now. Go ahead,
16 Mr. Jones. Pardon the interruption.

17 Q Were any other moneys deposited in that
18 account except your moneys for payment on the property?

19 A No, sir, as far as I know there has never
20 been anybody deposit anything to my account other than what
21 I have worked out myself.

22 Q And the testimony that you sat here and
23 heard yesterday, were there ever any discussions between
24 yourself and Mr. Counts that Mr. Counts would give you money
25 for the downpayment on this property?

1 A No, sir.

2 Q On the date of the sale?

3 A On the date of the sale, there never was.

4 Q And did you enter into any type of

5 agreement with Mr. Counts on the date of the sale?

6 A No, sir, no agreement whatsoever.

7 Q Mr. Leonard, there has been a lot of

8 controversy over this land and I believe in your pleadings

9 at the time you answered Mr. Counts's Bill of Complaint that

10 you indicated at that time you were ready to go through with

11 the transaction subject to yours and Betty's restrictions?

12 A Yes, sir, that's right.

13 Q In light of everything that has happened

14 as of today are you still continually willing to go through

15 with that transaction?

16 A As of today?

17 Q Yes, sir?

18 A No, sir.

19 MR. JONES: If you will answer Mr. Schelin's

20 questions, please, sir.

21 CROSS EXAMINATION

22 BY MR. SCHELIN:

23 Q Do I understand you to say ---. Well, I

24 will tell you what, you tell me again: What was your discussion

25 with Mr. Counts on the day of the sale? What did it entail?

1 A On the day of the sale my discussion
2 with Mr. Counts was he came to me and asked me with the inten-
3 tions of a finger motion to come to him to talk with him. I
4 went to Mr. Counts and he said, "The sale is going high,
5 isn't it?" And I said, "It certainly is." He said, "Are
6 you interested in the whole thing?" I said, "Yes, sir, that
7 is what I am bidding on." And he said, "Are you interested
8 in selling any part of it?" And I said, "As of now, I don't
9 know." He said, "Well, how about the back part?" I said,
10 "I will consider it."

11 Q Are you presently developing that property?

12 A Yes, sir.

13 Q You told me "no" yesterday, didn't you?

14 A No, I didn't tell you I wasn't developing
15 that property yesterday. You asked me if there was an apart-
16 ment on that property and I told you they was. You said that
17 was "development" then.

18 Q Do you know Mrs. Crookshank?

19 A I do now.

20 Q Were you in her company when Mr. Counts
21 mentioned to her that there was some sort of an agreement
22 between you and him to purchase that property and to sign
23 the agreement?

24 A No, sir. I was not in his presence. I
25 was in her presence when we signed that agreement.

1 Q Then he did not sign that when you were
2 standing right there?

3 A No, sir, he did not sign that while I
4 was standing there talking to Mrs. Crookshank as she filled
5 out the papers.

6 Q He never made any mention of an agree-
7 ment between you and him of any sort?

8 A No, sir, none whatsoever.

9 Q You think she is mistaken about all of
10 this then?

11 A I think she was led towards that mistake.

12 Q You think so?

13 A Yes, sir.

14 Q How?

15 A That is up to somebody else to decide.

16 Q She is just lying is what you are saying?

17 A I am not saying she is lying.

18 MR. JONES: Your Honor, he has answered
19 the question. He said she was mistaken.

20 THE COURT: A better way of asking the
21 question ---. I don't recall any law now, but
22 actually you should not in asking a question ask
23 the witness if someone is lying. You can just ask
24 him is it true, or did she make a mistake, or some-
25 thing. Go ahead.

1 Q Then what she said was not true?

2 A No, it wasn't true. It wasn't true, no.

3 Q Where do you presently live?

4 A Who? Me?

5 Q Yes?

6 A I live at Fincastle Estates.

7 Q Are you selling that home there?

8 A Yes, sir, I am selling that home.

9 Q What is the price of it?

10 A The price is between me and my wife.

11 MR. JONES: Objection, Your Honor, that

12 is totally irrelevant.

13 MR. SCHELIN: I believe I can connect

14 it up.

15 THE COURT: Well, I think you would have

16 to lay the proper foundation. This home is not

17 located on the tract involved, is it?

18 MR. SCHELIN: No, he is moving from this

19 home to a mobile home, is what he said. I think

20 that is an incredible statement.

21 THE COURT: I can't see the relevancy.

22 The only thing.....I mean, I can't see the relevancy

23 of him selling a home on another tract of land, what

24 bearing it would have on this.

25 Q You said that you were going to move onto

1 this property?

2 A Yes, sir, we are.

3 Q You said you were going to occupy a
4 mobile home, is that right?

5 A Yes, sir, we certainly are.

6 Q And you are presently living in a very
7 large, custom home today, is that correct?

8 A We are living in a comfortable home,
9 yes, sir.

10 Q Please describe again this discussion
11 that you claim that you and Mr. Counts had concerning a
12 twenty-foot right of way and thirty-foot right of way?

13 A The only discussion we had was when we
14 pointed out where the easement would run. I mentioned to him
15 that it would be better to have a thirty-foot right of way
16 than it would a twenty, because all he seemed to be interested
17 in was getting in and out of the property, and a twenty-foot....
18 you can't turn a truck around on it or a car or nothing.

19 Q He was only interested in a twenty-foot
20 right of way initially, is that correct?

21 A No, sir, I wouldn't say he was just interested
22 in the twenty-foot. He was only interested in an easement
23 to get to the property.

24 Q When did the twenty-foot come up? Who
25 mentioned that?

1 A Well, I think he mentioned it one time,
2 maybe.

3 Q Do you recall the depositions that were
4 taken in my office on January 26, 1978?

5 A Yes, sir, we took depositions in your
6 office, but I don't remember the date on them.

7 Q On page 11 of those depositions do you
8 recall my question: "So in effect what you are saying is
9 that there never was an agreement between the two of you?"
10 And your answer was: "No, sir. There never was an agreement
11 on no kind of right of way, that he would just have a right
12 of way to go in and out."

13 A That is precisely what I told you.

14 Q There was never any discussion, and you
15 are saying now he was just talking about a twenty-foot right
16 of way?

17 A He probably mentioned something about a
18 twenty-foot, but all he was interested in was getting in and
19 out of the property.

20 Q He didn't mention "forty-foot" to you?

21 A No, sir. "Forty-foot" wasn't mentioned
22 until after the plat was drawn and the deed was presented,
23 and then this ruckus started.

24 Q There was never any discussion or never any
25 agreement as to the sale of this property on the 1st of October?

1 MR. JONES: Your Honor, that is three times
2 the same question has been asked in different forms.
3 Mr. Counts testified in the deposition and his testi-
4 mony so far as been consistent with that as far as
5 the right of way is concerned.

6 THE COURT: All right, go ahead.

7 Q There never was any agreement?

8 A As of when?

9 Q The 1st of October?

10 A The only agreement was on October the 6th
11 pertaining to the lines of the property.

12 MR. SCHELIN: That's all we have.

13 EXAMINATION

14 BY THE COURT:

15 Q Mr. Leonard, let me ask you a few questions to
16 clear a few things in the Court's mind. In other words, you
17 are saying that on the date of the sale there was no agreement
18 between Mr. Counts and yourself with reference to any terms
19 of cost or what he was to get?

20 A No, sir. No, sir, there never was any
21 agreement. We didn't talk that long.

22 Q Was it on October 6th that you first
23 agreed on where the line would be between, I believe, the
24 thirty acres shown on Defendant's Exhibit No. 2.....when did
25 you agree on this boundary line between your property and

1 what you later conveyed to Mr. Counts?

2 A That was on the evening of October the
3 6th, which I think we got mingled up yesterday on the dates.
4 This was discussed on October 6th; the evening of October 6th.

5 Q When this little writing was made?

6 A Yes, sir. Yes, sir, that's right.

7 MR. JONES: Your Honor, it is dated
8 October 6th.

9 THE COURT: Yes.

10 Q Let me ask you this: when was the right
11 of way first discussed?

12 A The right of way.....the easement into
13 the property was discussed very slightly as to the direction
14 of flow into the property that evening.

15 Q Was that on the same October 6th?

16 A October 6th, yes, sir.

17 Q Well, now, something was said....Mr. Counts
18 in his testimony yesterday indicated that you wanted to move
19 the right of way from where maybe the old road or a proposed
20 road was to another location?

21 A The existing driveway to Mr. Cassell's
22 farm, to his dwelling house, came right by his house. Well,
23 my wife's cousin had asked if he could have first refusal
24 on the house which he would use that driveway coming in. And
25 I told Mr. Counts the easement into the property on the back

1 would have to be moved to the other side of the farm.

2 Q And that was agreed upon?

3 A On October 6th.

4 Q On October 6th?

5 A Yes, sir.

6 Q and at that time what, if anything, was
7 said about the width of the easement?

8 A There was never anything mentioned about
9 the easement until I brought it up, I believe, that it
10 should....after he said something about a twenty-foot ---.
11 "Just give me a twenty-foot to get in and out," or something
12 to that nature. I am not quoting him. But I said, "Well,
13 now, you can't turn a car around. If you have problems, you
14 have to back out." I said, "Thirty-foot is a much better
15 easement," and it died at that. There never was anything else
16 mentioned about it.

17 Q Now, one other question: On October 6th
18 when this little writing was signed by you and written out
19 by Mr. Counts at that time was anything said by either of you
20 about these restrictions which were later put in the deed?
21 Were these restrictions ever discussed before the map....or
22 the deed was presented on some later date?

23 A No, sir. No, sir.

24 Q They were not discussed on October 6th?

25 A They were not discussed on October 6th

1 because I told him any restrictions....I would have to go
2 back to my wife and we would discuss any terms of the sale.

3 Q In other words, Mr. Counts didn't say
4 anything about any restrictions and you didn't say anything
5 about any restrictions?

6 A No. No.

7 THE COURT: All right, thank you very
8 much.

9 MR. JONES: We call Mrs. Leonard.
10
11

12 The witness, BETTY J. LEONARD, first being duly
13 sworn, was examined and testified as follows:

14 DIRECT EXAMINATION

15 BY MR. JONES:

16 Q Betty, state your name to the Court,
17 please?

18 A Betty J. Leonard.

19 Q And you are Robert Leonard's wife?

20 A Yes.

21 Q Is he correct in how long you have been
22 married?

23 A Yes, sir. Seventeen years.

24 Q And he, of course, is in the building
25 business?

1 A Yes, sir.

2 Q And he has been in the building business
3 since you were married, is that correct?

4 A Yes, sir.

5 Q Have you participated with him in that
6 building business in any manner?

7 A Well, I do all of the bookkeeping on
8 accounts payable and receivable and all of the payroll....
9 all of the bookkeeping and also for the apartment receivables.

10 Q Have you had an opportunity to purchase
11 property with Bob?

12 A Yes, several times.

13 Q And how have those purchases been made?

14 A Well, we always make them jointly. We
15 go out and if he finds a piece of land that he is interested
16 in, we go out and look it over and we come back home and talk
17 about it: what we think the value of it is, what we would pay
18 for it, what it will be used for and so forth.

19 Q As a result of those transactions, do you
20 consider yourself knowledgeable as to the value of property?

21 A Yes, sir, I do.

22 Q During your marriage to Bob and while he
23 has been in the building business, have there been any partner-
24 ship agreements entered into between yourself and Bob and any
25 other individual or individuals in the purchase of property?

1 A No. None whatsoever. Just he and I.

2 Q Have you ever entered into any partner-
3 ship agreements where individuals contributed money for the
4 purchase of any property and co-mingled it with your money?

5 A No, none whatsoever.

6 Q In calling your attention to the Cassell
7 farm on October 1, 1977, immediate prior to the sale did you
8 and Bob have an opportunity to inspect that property?

9 A Yes, about four or five days before the
10 sale. I think it was on a Monday or a Tuesday of the same
11 week of the sale. We went down and looked over the property
12 with another couple that showed it to us.

13 Q Who was that couple?

14 A C. B. and Helen Parrott from Cleveland.

15 Q After inspecting the property did you and
16 Bob discuss the purchase of it?

17 A Yes, we did that same afternoon.

18 Q Were any decisions reached as to your
19 efforts to obtain that property?

20 A Yes. We knew that we were going to buy
21 the property and approximately how much we would pay for it,
22 because we knew he had already been offered a Hundred Thousand
23 for it, so we knew it would be a Hundred or more that we
24 would be paying for it. We also discussed what we would be
25 doing with it: building apartment buildings and so forth.

1 Q In addition to the apartment buildings
2 what further discussions insofar as what you would do with it
3 did you have?

4 A Well, we had planned on moving a mobile
5 home on it to live for ourselves. We have one apartment
6 building on it now and maybe building one or two more. And,
7 of course, the house....we was going to sell it to my cousin
8 with about five acres of land with it. And then we thought
9 probably we might consider selling the back part; or if not,
10 we would farm it ourselves.

11 Q And that was prior to the sale?

12 A Yes.

13 Q Now, did you go with Bob to the sale on
14 October 1st?

15 A Yes, I did.

16 Q Were you present the entire time?

17 A Yes.

18 Q Were you with Bob the entire time?

19 A Not the entire time. We were together
20 part of the time and, of course, we were separated part of
21 the time.

22 Q Do you know of any agreement that he entered
23 into with Lyman Counts as to the joint purchase of that property?

24 A No, none whatsoever.

25 Q Do you recall the weather that day?

1 A Yes. When we got there it was kinda
2 cloudy and it looked like maybe it would rain, but the rain
3 didn't start until the sale was practically over, I guess it
4 was, and then it started raining hard and everybody moved
5 in on the carport.

6 Q Were you there on the carport?

7 A Yes, I was.

8 Q Do you recall what happened when the
9 sale was concluded?

10 A Well, yes, sir. My husband gave the final
11 bid of a Hundred and Twenty-five Thousand (\$125,000) and
12 immediately after that he went in....just inside the carport
13 with Mrs. Crookshank and Mr. Wise and all of them to sign the
14 sales contract. He signed it and he told Mr. Cassell he didn't
15 have a check with him but he would go to the office and would
16 be right back. So he told me he was leaving and he left and
17 went to the office and got the check and returned to the
18 property and presented it to them approximately fifteen minutes
19 later.

20 Q Did you know Lyman Counts prior to that
21 day?

22 A Not prior to the day, no.

23 Q Did you see Lyman Counts that day?

24 A Yes, I did. I saw him speak to my husband
25 maybe once and different people, but I didn't know who he was.

1 Q Did Lyman Counts come to the house while
2 you were there?

3 A After my husband had gone to get the check
4 I saw him go inside the house where they were selling
5 the furniture and so forth.

6 Q Do you know what Mr. Counts did or who
7 he spoke to while he was inside the house?

8 A Well, I saw him talk to Mrs. Crookshank
9 there in the kitchen at the bar.

10 Q Do you know what that conversation was in
11 regard to?

12 A No, I don't. I was outside but I could
13 only see through the door that led into the room.

14 Q When did Bob return?

15 A Approximately fifteen minutes after he
16 had left.

17 Q Was Mr. Counts still in the house when
18 Bob returned?

19 A I didn't see him come out, or I don't
20 know if he was in there. I never did go inside the house and
21 I didn't really pay that much attention.

22 Q Was the downpayment made on the property?

23 A Yes.

24 Q With whose money was that down payment made?

25 A My husband's through the....with a

1 R. L. Builders Company check.

2 Q That is also your money, isn't it?

3 A Right.

4 Q Did you along with your husband sign a
5 note for the remaining balance due on that farm?

6 A Yes, sir.

7 Q Did you and your husband prepare and
8 sign a deed over to your cousin for the five acres and the
9 house?

10 A I didn't understand.

11 Q Did you and your husband prepare and
12 sign a deed over to your cousin for that five acres of property
13 and the house?

14 A Yes, we did.

15 Q When did you first have any knowledge about
16 Mr. Counts's desire to purchase a part of this property from
17 you and Mr. Leonard?

18 A Well, approximately October 4th or some-
19 where around there he had called and asked to meet my husband
20 down there to go over it with him. And then after they left,
21 why, he came home and was telling me about it and I said that
22 I would not consider signing any deed or selling the property
23 unless there were restrictions because I knew that we were
24 going to be living on the property in the mobile home and we
25 would have the apartment buildings and I didn't want traffic

1 going back and forth, because the easement would have led
2 right beside where our trailer is going to be.

3 Q Did you, yourself, ever discuss this
4 transaction with Mr. Counts?

5 A No.

6 Q Do you recall the date that Bob and Mr.
7 Counts met on the farm?

8 A October 6th in the afternoon.

9 Q And did you and Bob have any discussions
10 other than these restrictions that you were talking about?

11 A Just the restrictions and, of course, we
12 did say that there would be an easement to the property, but
13 no size or anything was decided, and, of course, the price.
14 We said we would ask around Forty-five Thousand (\$45,000) for
15 it.

16 Q And you took less than that, did you not?

17 A Yes.

18 Q Or agreed to take less than that?

19 A Agreed to.

20 Q And that was predicated on those restric-
21 tions and the easement to be determined at a later date?

22 A Right, yes.

23 Q And to your knowledge was the plat which I
24 introduced earlier prepared at Bob's request?

25 A Yes, sir, Mr. Carpenter prepared it.

1 Q Did you have an opportunity to look at that
2 plat?

3 A Yes, I did.

4 Q And did that easement conform with what
5 you and Bob had discussed on the evening of October 6th?

6 A Yes. It had the thirty-foot right of way
7 on it.

8 Q Do you know who paid to have the survey
9 performed?

10 A Yes, sir. My husband did.

11 Q Did you prepare that check or did he
12 prepare it?

13 A He prepared it.

14 Q Did Mr. Carpenter deliver those plats to
15 you or to your husband?

16 A To my husband.

17 Q Do you recall how much that survey cost?

18 A No, I don't, not right off.

19 Q In conveying this land to Mr. Counts was
20 there any discussion as to whether he would contribute to it
21 to your knowledge?

22 A Not that I know of.

23 Q Did he ever make any contribution toward
24 it to your knowledge?

25 A No, sir.

1 Q Did you and Bob subsequently have a deed
2 prepared with the thirty-foot easement or with a reference
3 to the thirty-foot easement and the restrictions which you
4 desired?

5 A Yes, we did. We had it written in the
6 Jones and Godfrey office and we signed the deed.

7 A I will show you Exhibit D to the
8 Plaintiff's (Mr. Counts) Bill of Complaint and ask you if
9 that is the deed that you had prepared?

10 A Yes, it is.

11 Q And it contains some restrictive covenants,
12 I believe?

13 A Yes, sir.

14 Q Will you read those covenants?

15 A (Reads) "Grantee, his heirs, executors
16 and assigns covenant with Grantor, his heirs, executors and
17 assigns, that the above described lands shall not be sub-
18 divided for the purposes of building residential homes or
19 apartment complex, campgrounds, hotels, motels, industry or
20 commercial use, said covenant to be made covenant with the
21 said land."

22 Q Are those the covenants which you and
23 Bob discussed on the evening of October 6th?

24 A Yes, sir.

25 Q Did you ever have any contact with Mr. Count

1 A No, sir, I didn't, not until after all
2 of the harassment and arguments had started.

3 Q Now you were willing to convey this
4 property to Mr. Counts at that time this litigation started,
5 were you not?

6 A Yes.

7 Q Are you willing to convey that land today?

8 A No.

9 MR. JONES: If you will answer Mr. Schelin's
10 questions, please.

11 CROSS EXAMINATION

12 BY MR. SCHELIN:

13 Q Where were you standing outside of the
14 house just after the sale was knocked down by Bob?

15 A To begin with I was standing....when it
16 first started raining, I walked into the carport and went
17 over toward the far end of the carport where my relatives
18 were and some friends I knew. We stood there for a while
19 and then we moved back over after I had talked to Bob and he
20 said he was going after the check. Why, then I moved on over
21 and we were still among different friends standing there
22 talking near the doorway leading into the kitchen.

23 Q Where was Mrs. Crookshanks sitting in
24 the kitchen?

25 A She wasn't sitting, but she was standing

1 at the bar. There was some papers laying there and they
2 was selling the furniture and belongings inside the house.

3 Q When did Mr. Counts call and ask to speak
4 with Mr. Leonard after the sale took place?

5 A I am not sure. Approximately a day.
6 Probably....maybe around the 4th or something like that.

7 Q Whom did he talk with?

8 A He talked with my husband.

9 Q He didn't talk to you at all?

10 A No, I never talked to Mr. Counts until
11 after this started.

12 Q How did you arrive at the selling price
13 of \$45,000?

14 A That is just what we had decided we would
15 have to have out of it. We thought it was worth that.

16 Q Were the lights on in the house or
17 were they off?

18 A I think the lights were on, the best I
19 remember, because it was raining. It was real dark and cloudy
20 that day by the end of the sale.

21 Q Was there anybody else in the kitchen
22 besides Mrs. Crookshank?

23 A They was several people in there.

24 Q You say you had never seen Mr. Counts
25 before?

1 A I may have seen him, but I didn't know
2 who he was.

3 Q When he was in there talking with
4 Mrs. Crookshank, you didn't know who he was?

5 A No, I didn't know who he was.

6 Q Are you sure it was Mr. Counts then?

7 A Well, it was the same man that I saw
8 go in, and he is sitting here today.

9 Q What was he wearing?

10 A I don't recall.

11 MR. JONES: Objection, Your Honor. She
12 has already testified to the best of her knowledge
13 it was Mr. Counts.

14 MR. SCHELIN: Your Honor, she said she
15 didn't know it was him and how she is saying she
16 did. I would like to delve into the description
17 a little bit and find out for sure if this was
18 Mr. Counts or somebody else.

19 MR. JONES: She has just identified him.

20 THE COURT: Well, go ahead.

21 A I recognized several people's faces.....
22 I mean, people that I remember walking in, but I didn't
23 necessarily know who they were. But if I saw several of them
24 again today that I didn't know, I would recognize them....that
25 I saw that day at the sale. But I didn't look and see what

1 color of shirt and pants they had on.

2 Q Was Mr. Counts in there the same time
3 your husband was in there?

4 A No, he wasn't.

5 Q Never at any time?

6 A No. In the house, do you mean?

7 Q Yes?

8 A No.

9 Q He was never in Mrs. Crookshank's presence
10 with your husband?

11 A No.

12 Q I didn't hear the answer?

13 A No, sir.

14 MR. SCHELIN: Those are all the questions
15 I have.

16 MR. JONES: That is all we have. We rest,
17 Your Honor.

18 MR. SCHELIN: I have some rebuttal to
19 put on.

20 THE COURT: All right, you just go ahead.

21 MR. SCHELIN: We would recall Mr. Counts.
22
23
24
25

1 REBUTTAL EVIDENCE

2
3 The witness, L. LYMAN COUNTS, having been previously
4 sworn, was recalled to the stand and was examined and testified
5 as follows:

6 DIRECT EXAMINATION

7 BY MR. SCHELIN:

8 Q Mr.. Counts, when did you first meet
9 Mrs. Crookshank?

10 A In the house after the sale was completed.

11 Q Did you talk with her alone or was
12 Mr. Leonard present?

13 A Mr. Leonard was definitely present when
14 I talked to her.

15 MR. JONES: Your Honor, that is not Rebuttal.
16 That is the same testimony we had in here yesterday.
17 It is repetitious.

18 MR. SCHELIN: Your Honor, it was testified
19 to that he talked to her by himself. I am trying
20 to find out.

21 THE COURT: All right. Well, go ahead.
22 Objection overruled.

23 Q Would you please describe your conversa-
24 tion with Mr. Leonard concerning this right of way?

25 MR. JONES: Your Honor, again, that is

1 the same testimony that we heard yesterday on
2 Direct.

3 MR. SCHELIN: Your Honor, they testified
4 to something drastically different from what
5 Mr. Counts testified to and I am trying to reach
6 the bottom of it.

7 MR. JONES: Your Honor, that is the very
8 reason we are here today: to let the Court decide
9 which one of them is right. It is the same testimony
10 the Court heard yesterday and is in evidence already.

11 THE COURT: Ask the question again.

12 Q Please tell us about the discussion
13 concerning the right of way that you had with Mr. Leonard?

14 A On the day of the sale or the day after
15 the sale?

16 Q Yes?

17 A On the day of the sale we agreed there
18 would be a right of way into the property and it wasn't mentioned
19 then that it would be moved or anything of that nature. He
20 said there would be a right of way to the property.

21 Q When was it discussed again and when was
22 it agreed that the right of way would be moved and was there
23 any mention as to the size of it?

24 A The next time it was mentioned was on
25 October 6th after this document was signed and he at that time

1 mentioned that he would like for it to be moved if I didn't
2 object, which I didn't.

3 MR. JONES: Your Honor, we would make
4 an objection. This is just the same testimony
5 that we heard yesterday.

6 THE COURT: This is repeating the same thing.

7 MR. SCHELIN: All right.

8 Q Did you ever say anything about the twenty-
9 foot right of way?

10 A A twenty-foot right of way was never
11 mentioned until today to my knowledge. It was not mentioned
12 on the property, definitely.

13 Q What about the \$45,000 price?

14 A That is a figure that I never heard before
15 until today. It was never mentioned.

16 Q When was the second time you saw Mrs.
17 Crookshank?

18 A The second time I saw Mrs. Crookshank
19 was at her office in Abingdon.

20 Q And what was that for?

21 A That was to find out, or to try to find
22 out, at that time what was going on about the deeds and so
23 forth, because I could see that someone was trying to.... was
24 doing something different from what we agreed on, and I was
25 just trying to find out if deeds were being prepared and how

1 and so forth.

2 Q Do you recall when that was?

3 A I do not.

4 Q Did you find out how the deeds were being
5 prepared?

6 A I went from there to Mr. Elliott's office
7 in Abingdon and found out there that the deeds were supposed
8 to be in the process of being prepared to Mr. Leonard. I don't
9 know the date that I was over there.

10 THE COURT: Was that before or after this
11 little paper was signed on October 6th?

12 THE WITNESS: That was after, definitely.

13 Q Did you call Mr. Leonard on October 4th?

14 A I did not. I have never called Mr. Leonard's
15 residence in my life. And I think the records of the telephone
16 company would substantiate that.

17 MR. JONES: I would like to approach the
18 Bench for just a few minutes. I would like to have
19 a conference with the Judge.

20 THE COURT: All right, let me see Counsel
21 in Chambers.

22

23 (Whereupon the Court and Counsel for both
24 parties retired to Chambers without the
25 Court Reporter, and after returning to Open

1 Court, the following proceedings were
2 had, to-wit:)

3
4 THE COURT: Come back around, Mr. Counts.

5 Now, go ahead, Mr. Schelin with any further questions
6 you want to ask Mr. Counts.

7 MR. SCHELIN: I don't have any other
8 questions, I don't believe. I got them all in just
9 before Mr. Jones asked for the conference.

10 CROSS EXAMINATION

11 BY MR. JONES:

12 Q According to your testimony you had a
13 subsequent conversation with Mrs. Crookshank, is that correct?

14 A That's right.

15 Q When did that conversation occur?

16 A After the 6th day of October.

17 Q When after the 6th day of October?

18 A I don't know the date.

19 Q Was it before or after you got the deed
20 from Mr. and Mrs. Leonard?

21 A It was before, I believe.

22 Q Isn't that the day that you picked up this
23 document?

24 A That's right.

25 Q You went to Abingdon and picked that

1 document up, did you not?

2 A That's right.

3 Q Now, Mr. Counts, I want you to think real
4 hard: Do you remember having a meeting in Mr. Schelin's office
5 where the three of us (Mr. Schelin, myself, and you) were
6 there? It was after this controversy arose.

7 A Yes, I do.

8 Q And do you recall Mr. Schelin provided
9 me with a copy of this after this controversy arose?

10 A I am not sure of that being that day, no.

11 Q You don't recall the conversation in that
12 meeting down there?

13 A I remember we were there, but I don't
14 remember you being presented with this document at that time.

15 Q Do you remember me being presented with
16 any document?

17 A I do not.

18 Q Do you recall when that meeting occurred?

19 A Not the date, no. I didn't keep the
20 dates down.

21 Q Was that after the deed was prepared from
22 Mr. and Mrs. Leonard to you?

23 A I am not aware that it was or wasn't. I
24 will not say it was.

25 Q Did you employ Mr. Schelin before or after

1 that deed was prepared to you?

2 A It was on or about the time. I am not
3 sure if it was before or after.

4 Q It was after that time, wasn't it?

5 A I won't say that, no, because I don't know.

6 Q Think one more time?

7 A I did not keep dates on it.

8 Q There was no controversy before that deed
9 was prepared, was there?

10 A Not really.

11 Q And there was no reason for you to have
12 any attorney before that time?

13 A Yes, there was.

14 Q Did you employ one?

15 A I don't remember if I employed one or not,
16 but I saw that there was a reason for one because I did not
17 know how it was being prepared. That was my only question.

18 Q You went later on, did you not, after you
19 got that deed....that is when you went over to Abingdon to
20 find out what had happened, wasn't it?

21 A I am not sure of the dates. I will not
22 say yes or no.

23 Q It was after you got the deed though,
24 wasn't it?

25 A I am not sure.

1 Q It wasn't before?

2 A I am not sure.

3 Q Well, you are very sure about a lot of
4 things.

5 A That's right.

6 Q But the things that hurt you and are against
7 you and the things that you have disputed and misrepresented
8 to the Court, you are not sure, are you?

9 MR. SCHELIN: Your Honor, he is badgering
10 the witness. He has answered his question, and I
11 object to this line of....whatever he is doing.

12 A I am not sure of the dates. If I had
13 kept a log and I had every appointment and the things that I
14 do....if I keep a log and I am sure of the dates, I will
15 tell you. I will not lie to you.

16 Q But this was very important to you, wasn't
17 it?

18 A This day you are talking about?

19 Q The acquisition of this property was very
20 important to you?

21 A Yes, but the date that this thing occurred
22 wasn't that important to me that I would put the date down.

23 Q And you knew that the plat was being
24 prepared?

25 A I knew it was being prepared.

1 Q And you were presented with a copy of that
2 plat?

3 A I was.

4 Q And then you were presented with that deed?

5 A (Nods head, yes.)

6 Q And you were very upset and distressed
7 over that deed, were you not?

8 A I sure was, because there was things in
9 the deed that we did not agree to.

10 Q And wasn't it a fact, as you testified to
11 here yesterday, that until you got that deed on the date of
12 the 27th of October that you thought that that deed was going
13 to be prepared to both you and Bob?

14 A I thought that they would be deeded
15 separately. That is exactly right.

16 Q And you thought that you were going to get
17 a deed, along with Bob, from Mr. Cassell?

18 A Exactly.

19 Q And it wasn't until October 27th when you
20 knew you weren't that you went to Abingdon to find out about
21 it, isn't it?

22 A I am not sure of the date. I am not.

23 Q That is when you were first aware that
24 you weren't getting the deed like you thought, isn't it?

25 A It is.

1 Q So you had no reason to make an inquiry
2 until after that time?

3 A No, that is wrong, because I did have
4 a reason for an inquiry: to see how it was being deeded.

5 Q And you barged in on Jim Elliott over
6 there, didn't you, and you raised all kinds of cane with
7 them?

8 A I did not.

9 MR. SCHELIN: Your Honor, that is completely
10 and totally out of the scope of this Rebuttal
11 Evidence.

12 MR. JONES: It is right on point, Your
13 Honor. He said he went over there.

14 THE COURT: All right.

15 MR. SCHELIN: It has got nothing to do with
16 any of my examination. It is completely and totally
17 outside of the realm of this trial.

18 THE COURT: All right, objection overruled
19 with reference to when he went to see Ms. Crookshank
20 and as to when he received the deed dated October 27th.
21 All right, go ahead.

22 Q And after you talked to Mrs. Crookshank
23 you had some other conferences with people over there, didn't
24 you?

25 A Sure.

1 Q Who did you go see?

2 A I talked to Mr. Elliott in his office to
3 see if they were writing the deeds or who were, and if they
4 were, who they were being deed to.

5 Q And he told you that the deed had already
6 been prepared?

7 A I believe he told me that it was in the
8 process of being prepared.

9 Q Did you ask him if he was in the process
10 of preparing one to you?

11 A This was when I found out that it was in
12 the process of being prepared to Mr. Leonard. This answered
13 my question.

14 Q You didn't go over there until after
15 October 27th, did you?

16 A I am pretty sure it wasn't before October
17 27th but I am not definite.

18 Q How many times did you talk to Mr. Elliott?

19 A In his office one time, I believe. Or
20 maybe on the phone one time.

21 Q The same day that you talked to Mrs. Crook-
22 shank, wasn't it?

23 A The same day.

24 Q And that was after October 27th, wasn't it?

25 A She didn't have a copy of this document.

1 That is the reason I went to Mr. Elliott's office.

2 Q And that was after this deed of October 27th
3 was, of course, given to you, wasn't it?

4 A I am not sure.

5 Q It is very convenient for you to forget
6 that, isn't it?

7 A It is not convenient for me to forget it.
8 If I knew the date....if I had kept a log, I would tell you.

9 Q It wasn't until after the controversy
10 arose. And that day that you got that document you came back
11 to Mr. Schelin's office with it, didn't you?

12 A I don't know if I contacted him the same
13 day or not, but shortly thereafter.

14 Q And you presented it to Mr. Schelin?

15 A Definitely.

16 Q And the three of us met in Mr. Schelin's
17 office?

18 A Yes.

19 Q And I got a copy of that document that
20 day from Mr. Schelin?

21 A You may or you may not have while I was
22 there or after I left, I don't know.

23 Q But you can't say that I didn't?

24 A I can't say that you didn't.

25 Q And you can't say that you were in Abingdon

1 before October 27th?

2 A Not definitely. I might go back and
3 check the records and see that I was, but I am not sure of
4 that now.

5 MR. JONES: That's all I have.

6 THE COURT: Anything else?

7 MR. SCHELIN: No, Your Honor.

8 THE COURT: All right. Thank you very
9 much, Mr. Counts.

10 Anything further?

11 (No response.)

12 I think what we will do, if it is all
13 right ---

14 MR. SCHELIN: A closing argument, but ---.

15 THE COURT: I know you want to argue,
16 but I assume you haven't had lunch. Let's adjourn
17 for about forty-five minutes for lunch and we will
18 come back ---.

19 Anything further in reference to evidence?

20 MR. JONES: May I announce that to the
21 Court after lunch?

22 THE COURT: All right, yes. Okay, we will
23 adjourn for forty-five minutes. Be back about a
24 quarter till 2:00.
25

1 (Whereupon, a lunch recess was had from
2 1:05 p.m. to 1:55 p.m., after which the
3 following proceedings were had, to-wit:)

4
5 THE COURT: All right.

6 MR. JONES: Mr. Elliott is on his way
7 from Abingdon.

8 THE COURT: All right.

9 MR. JONES: I am sorry for the delay.

10 THE COURT: Okay. Let me see the lawyers
11 in Chambers just a minute.

12
13 (Whereupon, the Court and Counsel for both
14 parties retired to Chambers, and upon
15 returning to Open Court, the following
16 proceedings were had, to-wit:)

17
18 THE COURT: Since he is here, we will go
19 ahead and hear that evidence.

20
21 THE WITNESS, ELLIOTT, WAS DULY SWORN BY THE COURT

22
23 SURREBUTTAL EVIDENCE

1 The witness, JAMES ELLIOTT, first being duly sworn,
2 was examined and testified as follows:

3 DIRECT EXAMINATION

4 BY MR. JONES:

5 Q Mr. Elliott, state your name, please, sir?

6 A James Elliott.

7 Q And your address?

8 A 247 East Valley Street, Abingdon, Virginia.

9 Q I believe you are a partner in the law
10 firm of White, Elliott, and Bundy, is that right?

11 A That is correct.

12 Q Mr. Elliott, did you have occasion to
13 become involved in the preparation of some deeds: a deed
14 of trust and possibly a note, in regards to the H. H. Cassell
15 Farm in Lebanon?

16 A I believe in regard to that farm I prepared
17 some documentation for Mr. Cassell and Mrs. Cassell on the
18 sale of their farm to Mr. Leonard.

19 Q And was that to Mr. and Mrs. Leonard?

20 A Yes, I think it was.

21 Q Where was that closing?

22 A The closing was held in my office on
23 Main Street in Abingdon.

24 Q Do you recall the date of that closing?

25 A No, I do not recall the exact date of the

1 closing.

2 Q Did you have an occasion after that to
3 talk to Mr. or Mrs. Leonard....after the date of that closing?

4 A I talked to....I know I talked to Mr.
5 Leonard that day and Mrs. Leonard was there that day. I do
6 not remember if I had a conference with them directly after
7 that or not. I may have talked to you about the closing as
8 a result of Mr. Counts approaching me after the closing, but
9 I don't know if I spoke with Mr. Leonard.

10 Q Did you have an opportunity to speak with
11 Mr. Lyman Counts in your office or anywhere in regard to this
12 transaction?

13 A Yes. After the closing....it was sometime
14 afterwards that Mr. Counts came to my office and wanted to
15 see some documentation with regard to it and was concerned
16 about the fact that he had not been included. He wanted to
17 see the deed. I think that was it. He was concerned that
18 he had not been included as a purchaser on the deed.

19 Q Was that after the closing?

20 A That was after the closing, yes.

21 Q Do you recall approximately when this
22 meeting with Mr. Counts occurred?

23 A No. With Mr. Counts, no. All I know
24 is it was just sometime after the closing and I was sort of
25 surprised by it.

1 Q I will show you an exhibit marked Exhibit C
2 to the Plaintiff's Bill of Complaint in this case and ask you
3 if you recognize that document?

4 A All right. (Witness responds as requested.)
5 Yes, this apparently is a photocopy of the deed from the
6 Cassells to Mr. Leonard that was closed that day in my office.
7 I notice that Betty Gentry Lewis is the Notary Public and she
8 is our legal assistant in charge of real estate, and she
9 undoubtedly acknowledged it on the date of closing which I
10 presume was October 12, 1977.

11 Q Is it the practice and custom of your
12 office to have the deed acknowledged and notarized on the
13 day of the closing?

14 A Generally it is. Sometimes for the con-
15 venience of the parties if the closing is relatively simple, we
16 will have a deed or a deed of trust prepared somewhere else
17 and hold the money in trust for the party we represent. But
18 generally all of the parties are present in our office and
19 we have all of the documents signed that day.

20 Q Do you recall whether all the parties were
21 present that day that the closing occurred?

22 A Mr. and Mrs. Leonard were present in the
23 office, I believe, and Mr. and Mrs. Cassell I believe were
24 also present.

25 Q Do you recall the approximate period of time

1 following this closing and Mr. Counts's appearance in your
2 office?

3 A No, I don't. It was sometime afterward.
4 I would hate to guess. I tried upon notice that I was being
5 subpoenaed for a hearing here today to check back in my records
6 but was unable to find anything to let me know when that was.
7 All I can tell you is that it was on another day following
8 the closing and I don't know how late after the closing it
9 was. It was a fairly substantial....it was not....I don't
10 think it was within a week. I think it was at least longer
11 than that, to the point that I was surprised when Mr. Counts
12 came in and asked about the deed.

13 Q What was Mr. Counts's demeanor the day
14 that he presented himself to your office?

15 A Well, he was rather perturbed about some-
16 thing. He was extremely concerned and a little aggitated. I
17 felt that he was a little aggitated with me and I was a little
18 upset about that because our firm had had no notice whatsoever
19 that anyone had any interest in the purchase of this property
20 other than Mr. Leonard, and we had prepared the documentation
21 accordingly and closed on it accordingly.

22 Q According to your instructions?

23 A Our instructions.....we had had no instruc-
24 tions other than what we had been told by the parties involved,
25 which was that Mr. Leonard was the purchaser of the property.

1 Q Do you recall whether or not Mr. Counts
2 had any documents with him when he arrived in your office?

3 A No, I don't believe he did. In fact
4 I think he was looking for some things in our office. We are
5 not in the habit of turning files loose, even to clients,
6 without reviewing them. And I think that I asked Mr. Counts
7 to give me an opportunity to look through the file and make
8 some telephone calls to see what the problem was, and also
9 to talk to my client. And I made some calls and talked to
10 some people, including the auctioneer, and my closing secretary
11 Mrs. Lewis, and then I called Mr. Cassell himself and Mr. Cassell
12 told me that Mr. Counts was at his home at that time.

13 MR. SCHELIN: Mr. Counts said what?

14 THE WITNESS: Mr. Cassell said Mr. Counts
15 was at his home at that time or had just left his
16 home at that time, Chuck.

17 MR. SCHELIN: I am sorry, I didn't hear
18 what you said.

19 Q Did you call our office?

20 A Yes, I think that I did call your office.

21 Q Do you recall whether or not you spoke
22 with me?

23 A Yes, I think I did speak with you in
24 regard to the matter, and there was no objection to it frankly
25 from the conversations I had with all of the parties. They all

1 confirmed the fact that Mr. Leonard was the only known
2 purchaser of the property.

3 Q Did you give Mr. Counts any documentation
4 that day?

5 A We may have given him some of the docu-
6 mentation. I believe that after talking with the parties
7 that we may have released to him certain documentation. But
8 I can't say for sure, Dennis. I really just don't remember
9 whether we let him have anything or not. There was no
10 reason for us not to but as I say, we are just not in the
11 habit of turning things over out of our files.

12 MR. JONES: If you will answer Mr. Schelin's
13 questions, please.

14 CROSS EXAMINATION

15 BY MR. SCHELIN:

16 Q Mr. Elliott, did you wonder why Mr. Counts's
17 name appeared on that document acknowledging the purchase?

18 A Can you show me the document?

19 Q Yes. I am sorry, I thought you had the
20 original.

21 A No, I don't have anything with me.

22 Q I will direct your attention to the right-
23 hand margin.

24 A Right.

25 Q Do you have any idea when you first

1 realized that Mr. Counts's name was there?

2 A No. I think I was aware of Mr. Counts's
3 name being there ---. I can't say for sure. It is quite
4 possible I only knew Mr. Counts's name was there the day
5 he came in the office and talked to us about it.

6 Q Who gave you your closing instructions?
7 Or were they given to somebody in your office?

8 A Oh, I imagine we closed through the
9 instruction of our client.

10 Q So you don't really know who actually gave
11 your office the instructions, do you?

12 A No, I really don't know whether the
13 instructions came from....directly from ---. I take that
14 back. There was a communication between my office and....
15 Mr. Cassell and my office and Mr. Wise's office prior to
16 the closing.

17 Q Did you make that communication or did
18 someone in your office make it?

19 A No. Someone I think called me or Steve
20 Wise called me. It was Steve Wise who was involved and Steve
21 may have left word with somebody in my office or he may have
22 talked to me personally. But I am pretty sure that there was a
23 contact with Steve Wise before the closing.

24 Q There was no contact with Mr. Counts
25 though?

1 A Mr. Counts?

2 Q Yes?

3 A No. No contact with Mr. Counts.

4 Q No explanation of why his name appeared
5 in the right-hand margin of that piece of paper?

6 A No, no, I have no idea why Mr. Counts's
7 name was on the right-hand margin and I still don't. I had
8 an explanation from Mr. Counts the day he was in my office
9 as to why his name was there.

10 Q I understand that. Just for the record,
11 who was your client?

12 A Mr. Cassell was my client.

13 Q You say you are not sure but you think
14 possibly Mr. Counts got a copy of that document from your
15 office?

16 A It is quite possible that this copy did
17 go out of our office, yes. I wouldn't deny that it came out
18 of our office. It may have come from some other source.

19 Q And you think that Mr. Counts came by to
20 see you sometime at least a week after the closing and
21 possibly longer?

22 A Chuck, to the best of my knowledge. Once
23 again, this is ---

24 Q Well, I am not trying to shoot you down.

25 A I know. I am just trying to let the Court

1 know that my memory of the thing is a little vague.

2 Q I am just trying to get it clear in my
3 mind, too. I am not trying to shoot you down.

4 A No. In thinking about the thing I
5 remember Mr. Wise calling me prior to and after the sale. I
6 think I had already by that time been contacted by Mr. Cassell
7 or by his daughter, Ms. Todd.

8 MR. SCHELIN: I don't have any further
9 questions.

10 MR. JONES: No further questions.

11 THE COURT: Thank you very much, you are
12 released now.

13 MR. JONES: Your Honor, that's our case.

14 THE COURT: In view of that testimony
15 do you have any Rebuttal?

16 MR. SCHELIN: I don't have any rebuttal,
17 no, sir.

18 MR. JONES: We would like to renew our
19 motion to strike the evidence at this time.

20 THE COURT: The motion to strike at the
21 conclusion of the evidence is denied.

22 Now, I am ready to hear argument on the
23 case.

24

25

1 ARGUMENT BY MR. SCHELIN WAS PRESENTED WITHOUT
2 INCIDENT OR OBJECTION.

3
4 ARGUMENT BY MR. JONES WAS PRESENTED WITHOUT
5 INCIDENT OR OBJECTION.

6
7 ARGUMENT BY MR. SCHELIN WAS PRESENTED UNTIL THE
8 FOLLOWING OBJECTION:

9
10 MR. SCHELIN: Mr. Leonard never asked Mr. Counts
11 to pay a downpayment that day. He never asked Mr. Counts
12 to pay for the survey. However, Mr. Counts testified to
13 getting ahold of Mr. Addison and that was never denied or
14 rebutted or anything else. It turned out that Mr. Carpenter
15 could do it quicker. Mr. Counts was never presented with a
16 apportionate bill. Those are not elements or issues to be
17 decided today.

18 Mr. Cassell did know of some arrangement with
19 Counts and Leonard. He admitted to it. The trouble was he
20 didn't dig into it. If he had of, maybe all of this would
21 have been avoided today.

22 MR. JONES: Your Honor, we might move to strike
23 Mr. Schelin's comment in this suit as to any knowledge Mr.
24 Cassell has as to any agreement because if the Court will
25 recall ---

1 THE COURT: I will sustain the objection on the
2 grounds that what Mr. Cassell knew and was stating was hearsay
3 from Mr. Counts.

4 All right, go ahead.

5
6 MR. SCHELIN: No, I believe, Your Honor, he later
7 said something to Mr. Leonard about it and Mr. Leonard just
8 went "huh" or something to that effect.

9 THE COURT: Yes, that is true, too. Go ahead.

10

11 ARGUMENT BY MR. SCHELIN CONTINUED UNTIL THE
12 FOLLOWING OBJECTION:

13

14 MR. SCHELIN: What did this back thirty acres with
15 no road frontage have on it? Well, I don't know what it had
16 on it because I haven't seen it; but the only thing I have
17 heard testified to was a fence and a barn and that's all.

18 I think Forty-one Thousand, Six Hundred and Seventy-
19 seven (\$41,677) for thirty acres with no road frontage and
20 no improvements on it is pretty high even at today's prices.

21 MR. JONES: Your Honor, Mr. Schelin is going beyond
22 the facts of this case. There was no testimony put on as to
23 the value of either parcel of this property.

24 THE COURT: Well, the value of so much per acre is
25 what he is arguing was paid. If you consider the thirty acres

1 and divide it into \$41,677.....I think that is what he had
2 reference to.

3 MR. SCHELIN: Yes, sir.

4 THE COURT: It comes out to Thirteen Hundred and
5 Eighty-eight Dollars and Ninety Cents (\$1,388.90) per acre,
6 approximately.

7
8 ARGUMENT BY MR. SCHELIN WAS CONTINUED WITHOUT
9 INCIDENT OR OBJECTION.

10
11
12 WHEREUPON, THE COURT RENDERED ITS OPINION IN
13 THE CASE, WHICH HAS BEEN SUBMITTED, SIGNED, AND
14 MADE A PART OF THE RECORD BY THE CLERK OF THE
15 CIRCUIT COURT FOR RUSSELL COUNTY.

16
17
18 WHICH WAS ALL OF THE TESTIMONY PRESENTED, EXHIBITS
19 FILED, AND PROCEEDINGS HAD IN THE HEARING OF THE
20 ABOVE-ENTITLED CAUSE.

21
22
23
24
25

CERTIFICATE

The foregoing transcript of evidence and incidents
of trial, pages 1 to 199 inclusive, approved.

Charles E. Schelin
COUNSEL FOR PLAINTIFF

Dennis C. Jones
COUNSEL FOR DEFENDANT

Tendered and received Sept 26, 1978.

Wm. R. Shillings
JUDGE

Signed September 26, 1978.

Wm. R. Shillings
JUDGE

Received and filed Sept 26, 1978.

Barry A. Duckett, Deputy
CLERK

EXCERPTS OF CROOKSHANK DEPOSITION

2 purchased or had the final bid on the property that belonged
3 to Mr. and Mrs. Cassell, and with the final bid, the bidding
4 was closed and this was at \$125,000. So we have a contract
5 that is in a contract book that is binding on the final bid
6 and is witnessed. So Mr. Leonard did not have the down
7 payment, which at that time I believe was 29% of the total
8 cost, so he left the sale to go get a check to put the down
9 payment for the property, but before he left the sale, I was
10 clerking the sale and another gentleman came up with Mr.
11 Leonard and beside me, with Mr. Leonard standing there and
12 said that he had - he would like to sign the contract, too,
13 because he had a vested interest in it. He paid no money
14 whatsoever on it. He said this was between Mr. Leonard and
15 himself, and in case something happened to either one of
16 them in the meantime, before the deeds were made, that he
17 was to have the upper part of Mr. Cassell's property as
18 farmed.

19 Q Was that all that was stated?

20 A Yes, sir. That was all that was said in my
21 presence.

22 Q This was said in Mr. Leonard's presence?

23 A Yes, sir, Mr. Leonard was standing there, too,
24 but now -

25 Q Go ahead.

2 A No, sir, none whatsoever.

3 Q I believe you testified, did you not, that Mr.
4 Counts stated to you or in your presence that he had an
5 agreement to purchase the back half of the farm from Mr.
6 Leonard?

7 A I believe he said the upper part.

8 Q The upper part, he was to purchase that from Mr.
9 Leonard?

10 A Yes, he said they were in agreement as to this.

11 Q Mr. Counts did not give you any money on the
12 payment of this farm?

13 A No, sir.

14 Q Did he offer you any?

15 A No, sir.

16 Q Do you recall the discussion between yourself
17 and - do you recall whether Mr. Counts was present when you
18 had the discussion with Mr. Leonard concerning the down
19 payment for the property?

20 A The down payment was the standardized sort of
21 thing. He knew - I noticed that the contract says 30%. I
22 had understood it to be 29%.

23 Q Well, it was changed at a later time for tax
24 reasons.

25 A For tax reasons, all right. So this was known.

2 to me, he said, "I would like to sign the contract also.
3 Mr. Leonard and I are in agreement." Now as to what their
4 agreement was, I don't know, but that is what he did say.

5 Q You do not know what their agreement was?

6 A No, sir, I do not know. I did not question
7 them about that.

8 MR. JONES: That is all I have.

9 REDIRECT EXAMINATION

10 BY MR. SCHELIN:

11 Q Mr. Leonard didn't make any comments, did he,
12 when Mr. Counts told you that the two of them were in agree-
13 ment as to whatever their agreement was?

14 A No, Mr. Counts did turn to Mr. Leonard and say,
15 "Bob, you know, I want to get my name on this contract, too."

16 Q What was Bob's response?

17 A "Fine."

18 Q Was Mr. Counts present when Mr. Leonard returned
19 with the check for the down payment?

20 A I do not recall seeing Mr. Counts at that time.

21 Q When, again, was the deed discussed? Was it
22 discussed when Mr. Leonard gave you the check or was it
23 discussed prior to his leaving to go after the check?

24 A Well, at the time he had the final bid on the
25 property. At that time I asked him how he wanted the deed

EXCERPTS OF LEONARD DEPOSITION

2 A. Contractor.

3 Q. Mr. Leonard, what are the details of the
4 agreement between you and Mr. Counts arrived at during a
5 bidding at the auction of the land in question?

6 A. There was no agreement, sir.

7 Q. No agreement whatsoever?

8 A. No agreement whatsoever.

9 Q. Are you saying that Mr. Counts did not come
10 to you and mention the possibility of the two of you pur-
11 chasing this property together?

12 A. No, sir.

13 Q. When did you and Mr. Counts then arrive upon
14 an agreement to buy and sell this property?

15 A. Sometime after the first of the month. Some-
16 time after the sale.

17 Q. When exactly?

18 A. Approximately the 6th, I think. Sometime
19 along there.

20 Q. What was the agreement?

21 A. The agreement was that I could sell him - -
22 I would sell him a certain portion of the back part of the
23 farm.

24 Q. That was the agreement?

25 A. That was the understanding. That I could

sell, or I would sell it to him.

Q. All right. Was there any agreement as to the tobacco allotment?

A. No, sir.

Q. No agreement as to the tobacco allotment?

A. No, sir.

Q. Did you put your agreement in writing?

A. There was a small handwriting, yes, sir.

Q. Did that small handwriting compose the entire agreement between the two of you?

A. No.

Q. It did not?

A. No.

Q. What did it leave out?

A. It left out the terms of the sale.

Q. All right. What were the terms of the sale?

A. I don't think they were final until the time that the deed was drawn up, I think. That he would pay me a certain amount down on it and the balance in three years.

Q. Those terms were finally agreed upon, however?

A. Yes.

Q. Do you remember what they were?

A. Not right off, I don't.

Q. Were they the ones included in the note that

property?

A. No, sir.

Q. Did you ask Mr. Counts to check with Mr. Addison while you checked with Mr. Carpenter to see who could prepare it first?

A. No, sir.

Q. Now, you've previously stated that that agreement that you signed contained everything except the terms of the sale, is that correct?

A. Terms of cash, yes. The only thing that I think we arrived at was the price and the line that the property would run on.

Q. Since you signed an agreement containing reference to such vital items as a boundary line and the terms, can you explain why it doesn't contain a reference to something so important as the restrictive covenants imposed by the deed and the size of the right of way?

A. No, sir.

Q. Isn't that you decided on that later?

A. No, sir.

Q. Isn't that that was never decided upon between you and Mr. Counts?

A. Yes, sir.

Q. It never was decided upon, was it?

A. Yes, sir.

Q. When did you decide to impose those restrictions?

A. At the time the deed was being prepared.

Q. So Mr. Counts knew nothing about it, did he?

A. Yes, sir.

Q. How could he? You said that's when you decided to do it. The agreement had been made long prior to the deed being prepared.

A. No, sir.

Q. Mr. Leonard, you say that the agreement arrived at between you and Mr. Counts, the first time that you ever had any conversations about this thing, was around the 6th of October, is that correct?

A. Yes, sir, approximately.

Q. And you just finished telling me that you didn't decide to impose these restrictions until the deed was being prepared. What was the date of that deed that was prepared?

A. I don't remember, sir.

Q. Wasn't it the 27th of October, 1977?

A. It could have been, yes, sir.

Q. Now, how in the world could Mr. Counts have agreed to these restrictive covenants and a 30 foot right

2 of way on the 6th of October when the deed wasn't prepared
3 until the 27th of October?

4 A. He probably didn't agree to them.

5 Q. All right. Was Mr. Counts present when you
6 signed the agreement of purchase with the representative of
7 Steve Wise Auction?

8 A. What do you mean by present?

9 Q. Was he there?

10 A. He was on the sale property. He was at the
sale, yes, sir.

11 Q. Was he anywhere in the vicinity when you
signed the agreement?

12 A. I didn't see him.

13 Q. Nowhere around?

14 A. No, sir, I didn't see him at that time when
the agreement was signed.

15 Q. How do you explain Mr. Counts' signature in
the margin beside yours and your wife's name to that pur-
chase agreement?

16 A. I don't know, but I understand that he went
in the house while I was gone to the office after a check
to make the down payment and put his name on it.

17 Q. If I told you that Mrs. Joy Crookshank is
willing to testify that you were right there in the pres-

ence of Mr. Counts when you signed that agreement what would you say?

A. I'd say she probably didn't know me from Adam ten minutes after the sale.

Q. Who handed you the purchase agreement to sign?

A. Mr. Wise's secretary.

Q. What is Mr. Wise's secretary's name?

A. I don't have any idea of what her name is.

Q. What would you say if I told you that his secretary's name is Mrs. Joy Crookshank?

A. It could be.

Q. So that after you signed this she wouldn't know who you were, is that what you're saying?

A. Ten minutes after she probably wouldn't recognize me.

Q. When did Mr. Counts agree to a 30 foot right of way, if he ever did?

A. He never did.

Q. So in effect what you're saying is that there never was an agreement between the two of you?

A. No, sir, there never was an agreement on no kind of a right of way. That he would just have a right to go in and out.

14

2 to this controversy, but deny that any partnership agree-
3 ment was entered into. Defendants admit that on October
4 the 6th, 1977 that defendants agreed to sell the property
5 made subject to this controversy to the complainant, but
6 with certain restrictions and covenants, the terms of the
7 sale to be agreed upon at a later date." Now, you just
8 finished telling me that you didn't even think of these
9 terms and. . .

10 A. I did, yes.

11 Q. . . . and restrictions and covenants until
12 you had the deed prepared.

13 A. Nothing never was mentioned, but I thought
14 of them.

15 Q. Yes, but you're admitting that that was not
16 part of the agreement?

17 A. It was my understanding. . . .

18 Q. How could it possibly be your understanding
19 when Mr. Counts didn't know anything about it?

20 A. He never did mention it.

21 Q. Certainly he didn't mention those restrictive
22 covenants.

23 A. Because the land belonged to me. I had the
24 right to sell it as I pleased.

25 Q. If there was no agreement with Mr. Counts to

EXCERPTS OF COUNTS DEPOSITION

2 Q. You told Mrs. Crookshank that you were the
3 joint purchaser?

4 A. Yes indeed. Well, I don't know if I used
5 those words, but I said that I went in with Mr. Leonard, or
6 something to that effect, and we were buying the property
7 together.

8 Q. Perhaps then she just simply understood that
9 you were purchasing from Mr. Leonard?

10 A. I'm not sure of what she understood, but it's
11 a possibility.

12 Q. It's possible. I mean you did not make it
13 clear to her then apparently. I mean the Steve Wise
14 Auctioneers, they completed this document and you'll note
15 there that that indicates who the deed is to be made to,
16 does it not?

17 A. Well, yes it indicates who the deed is to
18 be made to here and, of course, there is not room on the
19 lines where it specifies who the deed is to be made to. I
20 asked Mrs. Crookshank where I should sign and she said put
21 your name, mailing address, and phone number right here and
22 she pointed on the document where there was room for me to
23 sign.

24 Q. But you read the document at the time that
25 you signed it, did you not?

A. The day of the sale that that was discussed, and it was discussed later.

Q. And were you willing to him taking more?

A. Yes I was.

Q. When you learned how this property had been conveyed from Mr. Castle what was your reaction?

A. I didn't appreciate it at all because that was not my understanding.

Q. Did you contact Steve Wise at any time after the auction?

A. I did.

Q. Before the deed was made or after the deed was made?

A. I'm not certain of the date, but it was after I learned that it was conveyed to Mr. Leonard, so evidently it was after.

Q. What did you discuss with Mr. Wise?

A. I asked him why it was deeded to them and I was left out of it.

Q. What did he tell you?

A. He told me that he was there to conduct a sale. He had nothing to do with the deeding, or something of that nature. In other words, he had done his job.

Q. Did he say that he knew that you were buying

EXCERPT OF CASSELL DEPOSITION

2 Q Mr. Cassell, did you have the Steve Wise Auction
3 Company auction off your property in Russell County during
4 the month of October, 1977?

5 A Yes, sir, I did.

6 Q Who purchased it?

7 A Bob Leonard.

8 Q For how much?

9 A \$125,000.

10 Q Did Mr. H. Lyman Counts contact you after the
11 sale of your farm?

12 A Well, I don't know whether he contacted me or
13 I contacted him. He kept coming out and rousing around and
14 I didn't know what the story was. I got an inkling that he
15 had an interest or wanted an interest in it. I asked him
16 if he wanted a key to the gate, which I had a spare key.
17 He said that they bought it in cahoots, partnership. And I
18 gave him a key to it. I said something to Bob Leonard about
19 it and he hummed and hawed around about it and he didn't
20 say yes or no. He didn't admit it.

21 Q Did he deny it?

22 A Huh?

23 Q He didn't deny it either?

24 A No, he didn't deny it, no.

25 Q What conversations, once you and Mr. Counts got

IN THE CIRCUIT COURT FOR RUSSELL COUNTY, VIRGINIA

H. LYMAN COUNTS

Complainant

VS

IN CHANCERY

ROBERT L. LEONARD and
BETTY J. LEONARD

Defendants

THE COURT'S OPINION

July 20, 1978

Second Day

APPEARANCES:

For the Complainant:

Charles E. Schelin, Jr., Esquire
Browning, Morefield, Schelin,
Cody and Arrington
2 Mill Street
(P. O. Box 1124)
Lebanon, Virginia 24266

For the Defendants:

Dennis E. Jones, Esquire
and
Dennis L. Godfrey, Esquire
Jones and Godfrey
One Flannagan Avenue
(P. O. Box 600)
Lebanon, Virginia 24266

Reported by:

JEREE ERNST, COURT REPORTER

P. O. Box 34

Emory, Virginia 24327 · 233

1 THE COURT: Gentlemen, I want to commend both of
2 you for having your cases prepared well.

3 The Court is going to render a decision now rather
4 than to have Counsel submit any authorities. I think both of
5 you have submitted various authorities along with the authori-
6 ties which the Court has before it and within its knowledge.
7 I think the Court is now in a position to decide this case.

8 Number one, the Court is of the opinion that there
9 was an oral contract on the date of the sale between Lyman
10 Counts and Robert L. Leonard whereby an oral trust resulted.
11 The Court arrives at that conclusion based on the fact that
12 subsequent to the date of sale on October 1st and on October 6th
13 the parties met on the property and some of the matters that
14 may not have been certain (especially as to the purchase price)
15 were discussed at that time. And the Court is of the opinion
16 that it doesn't really make any difference what purchase price
17 was agreed to on the date of the sale, because on October 6th
18 it was put in writing to the effect that the purchase price
19 would be Forty-one Thousand Six Hundred and Sixty-seven
20 Dollars (\$41,667).

21 Now, immediately after the purchase price the words
22 "terms to be agreed upon later" appear. The Court finds that
23 the meaning of that language was to the effect that the method
24 of payment would be agreed upon later.

25 Thereafter when the deed was made conveying the

1 land to Lyman Counts and Erma K. Counts, that same amount of
2 money, Forty-one Thousand, Six Hundred and Sixty-six Dollars
3 and Sixty-two Cents (\$41,666.62) or approximately the same
4 amount, was put in and the method of payment was set out.

5 Referring to the case of Duke against Torbin,
6 198 Va. 758, in that case the Supreme Court of Virginia said
7 in 1957 in the Opinion of Justice Eggleston that if the terms
8 were not set out that the specific performance of the contract
9 could not be granted. Well, the evidence in that case as
10 stated in the Opinion was that the parties met several times
11 after the initial meeting and the initial agreement and that
12 the parties were never able to arrive at an agreement as to
13 the terms of payment.

14 I think this case is entirely different. Here,
15 in fact, the parties have arrived at the exact amount of
16 money to be passed from Lyman Counts and Erma K. Counts
17 to Robert L. Leonard and Betty J. Leonard and it set that
18 out and they have signed it and have delivered it.

19 In Salyer against Salyer, which Mr. Jones alluded
20 to in his argument, this Court decided that a constructive
21 trust to convey real estate existed.

22 This Court within the last year decided the case
23 of Hurd against Lewis in which it was held that an oral
24 trust to convey land was created when Mr. Lewis promised
25 the Hurds if they would care for him in his older age

1 and until his death, that upon his death he would devise to
2 them a house and two acres of land. The Hurds proceeded
3 to care for Mr. Lewis for six years and until his death,
4 and then it was learned that Mr. Lewis had devised this land
5 to someone else. And the Court held in that case that an
6 oral trust was created.

7 And the landmark case in Virginia on an oral contract
8 to devise property is Woodridge against Outland, 212 Va. 157,
9 and this Court followed that Opinion in the Hurd Case and it
10 is following it in this case. There was an agreement which
11 was subsequently or thereafter made definite as to the various
12 items, especially as to the terms, as stated previously.

13 Now, the second issue, first of all before I go
14 to the restrictions, the Court finds that the evidence of
15 the Complainant is not sufficient and is not definite and
16 clear enough to create a right of way of forty feet as the
17 Complainant contends. The evidence is very, very conflicting
18 and the Court finds that the Complainant has not borne the
19 burden of proof to establish a forty-foot right of way and
20 therefore it holds that the right of way of thirty feet which
21 is included in the deed shall be the existing easement with
22 reference to this property.

23 Now, the last portion of the case, the restrictions
24 that were placed in the deed: I would have to agree, to my
25 knowledge at least, with the statement made by Mr. Schelin:

1 that this is the most restrictive restriction this Court has
2 ever read in a deed. If you interpret it to the letter of the
3 law, there is some doubt whether or not he could even put one
4 home there. I do agree that it says "residential homes" in
5 that connection.

6 I think in a nutshell what happened here is the
7 parties were in agreement, and that is shown by the fact that
8 they did not in one respect disagree with the boundary line
9 from the beginning of the transaction to the end, and even
10 at this time the parties are in total agreement with the
11 boundary line between the two properties as established by
12 the surveyor Carpenter.

13 Then in the Opinion of the Court Mr. Leonard probably
14 would have preferred that Mr. Counts would not take the
15 property, and I think probably the restrictions which this
16 Court deems to be unreasonable as set out in the deed were
17 placed in the deed with the hope that Mr. Counts would not
18 take the property. And I want to read those restrictions
19 again: "Grantee, his heirs, executors and assigns covenant
20 with Grantor, his heirs, executors and assigns, that the above
21 described lands shall not be sub-divided for the purposes of
22 building residential homes or apartment complex, campgrounds,
23 hotels, motels, industry or commercial use, said covenant to
24 be made covenant with said land."

25 I think this Court would certainly have to leave the

1 realm of reasonableness and practicableness in saying that
2 land which is not adjoining a highway could not be subdivided,
3 could not be used but for one home and farming purposes, and
4 is sold for Thirteen Hundred and Eighty-eight Dollars (\$1,388)
5 or approximately that amount per acre defies reason. And
6 the Court asked Mr. Leonard and asked Mr. Counts: Were any
7 of these restrictions discussed on the date of the sale?
8 Were they discussed on October 6th when the short, handwritten
9 contract was prepared by Mr. Counts and signed by Mr. Leonard?
10 And the evidence in this case shows that Mr. Counts found out
11 for the first time when he saw the deed of October 27th that
12 these restrictions were in the deed.

13 The Court, therefore, holds that the restrictions
14 are unreasonable and were not a part of the negotiations and
15 that the Grantor could not insert restrictions such as these
16 in a deed after all of the terms had been agreed upon. Had
17 the restrictions been brought up at the appropriate time and
18 discussed, of course, they could have been incorporated
19 into the final document. Therefore, the Court is holding that
20 the deed shall be reformed only in one respect and that is
21 that all of the restrictions set out on Page Two of the deed
22 which the Court has just read into the record shall be deleted
23 and held of no effect, and that a new deed shall be prepared
24 by the landowners correcting what Counsel have agreed
25 upon with reference to the description (reversing the calls

1 in the description) and the right of way of thirty feet shall
2 remain in the deed.

3 And if the defendants do not make a deed to that
4 effect, then the Court will appoint a special Commissioner
5 for the purpose of making the deed in accordance with this
6 Opinion.

7 And, of course, Mr. Schelin, I am going to direct
8 you to prepare the decree and submit it to Mr. Jones for
9 endorsement and presentation to the Court. And if you so
10 desire, you can have the deed prepared and this Court will
11 be here on August 1st and August 7th.

12 Again, I want to commend the lawyers for preparing
13 the case. It is a complicated matter.

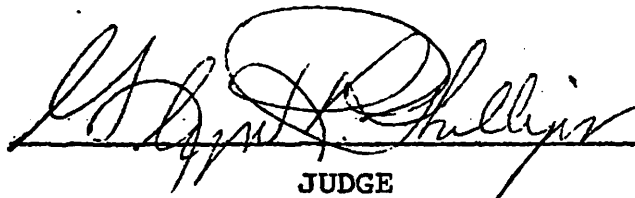
14 And I might say for the benefit of someone who may
15 hear this case hereafter: the Court does not feel that any
16 partnership existed between these parties. The Court is not
17 holding that any fraud occurred. It is merely holding that
18 there was a constructive trust created by the verbal conversa-
19 tion between Mr. Counts and Mr. Leonard at the date of the
20 sale which was followed by certain other meetings, including
21 the meeting of the written document of October 6 and the later
22 preparation of the deed and the exact amount and the note, all
23 of which are exhibits in this case.

24 Thank you again very much. I apologize that I
25 couldn't hear all of the proof yesterday.

MR. SCHELIN: Thank you, Your Honor.

MR. JONES: Thank you, Judge.

ENTERED, this 7th day of
August, 1978.


JUDGE

CIRCUIT COURT RUSSELL COUNTY

FILED

AUG 7 1978

 Clerk

FINAL ORDER

On the 19th day of July, 1978, came the Plaintiff, H. Lyman Counts and Charles E. Schelin, his Attorney, and the Defendants Robert L. Leonard and Betty J. Leonard and Dennis E. Jones and Dennis L. Godfrey, their Attorneys; and issue was joined on the Plaintiff's Bill-of-Complaint; and opening statements were made to the Court by Counsel for the respective parties; and evidence was offered on behalf of the Plaintiffs and at approximately 5:30 o'clock P.M. the Court stated that because of the hour the case should be adjourned for the day and continued until the following day.

Thence on July 20, 1978, again came the parties and Counsel and evidence was again offered on behalf of the Plaintiffs and the Plaintiffs announce closed and a Motion to strike the evidence of the Plaintiffs was made by Counsel for the Defendant for reasons assigned by Counsel for the Defendants, and the Court overruled the Motion, to which the Defendants, by Counsel, duly excepted.

Thence came the Defendants by Counsel, and the Court proceeded to further hear evidence on behalf of the Defendants and they rested, and then heard rebuttal evidence on behalf of the Plaintiff, and then heard rebuttal evidence on behalf

of the Defendants and then all parties announced that they had rested, and again the Defendants by Counsel, renewed their Motion to strike the evidence of the Plaintiffs for reasons assigned in the record and the Court overruled the Motion, to which action of the Court, the Defendants by Counsel duly excepted;

UPON CONSIDERATION WHEREOF, it appearing to the Court that a constructive trust existed between the parties, and it further appearing to the Court that the restrictions contained in the Deed dated October 27, 1977, by the Defendants were not part of the negotiations between the parties to this cause and are unreasonable, void, and of no effect.

It is accordingly ADJUDGED, ORDERED, and DECREED that the Defendants be, and they are hereby, ORDERED to deliver a good and sufficient Deed within TEN (10) DAYS following the entry of this Decree, according to the Plat prepared by Frank A. Carpenter, Certified Land Surveyor, and in evidence, together with a THIRTY (30) FOOT right-of-way, according to said Plat with covenants of GENERAL WARRANTY of title, and deleting all references to all restrictions of said land.

The Defendants indicating their intent to Petition the Supreme Court of Virginia for an Appeal and supercedeas, and the Defendants requesting that they be permitted to post a supersedeas bond in lieu of a suspending bond, execution of said judgement is suspended for a period of FOUR (4) MONTHS, and thereafter, until said Appeal is disposed of by the Supreme Court provided that Defendants execute a supersedeas

bond pursuant to the provisions of Va. Code Ann.

§ 8.01-676 (Repl. Vol. 1977) with surety approved by the

Court in the penalty of \$20,000.00 (~~\$20,000.00~~)

DOLLARS, conditioned as the law directs, within THIRTY (30) DAYS hereof and thereafter take such steps as required by law to present such petition for appeal.

It is further ORDERED and DECREED that the transcript of the trial of this case become and is hereby made a part of the record of this case, pursuant to Vs. Sup. Ct. (Civ) Rule 5:9.

Thence came the parties and announced to the Court that they had agreed to divide equally the costs of the Court Reporters per diem expenses and original of the transcript and copies of the transcript of the trial. It is therefore ORDERED and DECREED that pursuant to Vs. Code Ann. §17-30.1 (Repl. Vol. 1975) that the Plaintiffs and Defendants equally divide and pay the costs of the Court Reporter's per diem expenses and of the original of the transcript and copy of the transcripts of this trial.

Enter this 1st day of August, 1978.

SEEN:

Charles E. Schelin
Charles E. Schelin
Counsel for Complainant

/s/ GLYN R. PHILLIPS
JUDGE

SEEN and OBJECTED TO:

Dennis E. Jones
Dennis E. Jones
Counsel for Defendants

10994 Blevins
CLERK

NOTICE OF APPEAL

TO THE CLERK OF THE CIRCUIT COURT OF RUSSELL COUNTY, VIRGINIA:

The Defendants, Robert L. Leonard and Betty J. Leonard,
by Counsel, hereby give notice of Appeal from the Final
Order entered in this case on August 1st, 1978.

There will be filed hereafter a transcript of the
trial.

ROBERT L. LEONARD and
BETTY J. LEONARD

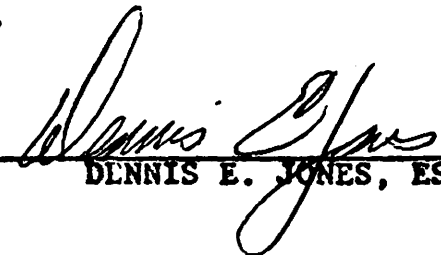
By: 
Dennis E. Jones, Of Counsel

Counsel

JONES & GODFREY
One Flannagan Avenue
Lebanon, Virginia 24266

C E R T I F I C A T E

I hereby certify that the foregoing Notice of Appeal
was served upon Complainant by mailing a copy to his Attorney
this 4th day of August, 1978: Charles E. Schelin,
Esq., Lebanon, Virginia, 24266.


DENNIS E. JONES, ESQ.

NOTICE OF OBJECTIONS TO TRIAL TRANSCRIPT

Defendant, Robert L. Leonard and Betty J. Leonard, by Counsel, hereby respectively gives Notice of it's Objection to the transcript of the trial of the above styled case, which transcript was prepared by Ruth Jones Greiner, Certified Shorthand Reporter and Registered Professional Reporter and Jeree Ernst, Certified Court Reporter, said objections being as follows, to wit:

<u>Line Number</u>	<u>Page Number</u>	<u>Objections</u>
6	23	"One" should be "On"
6	43	"He" should be "I"
3	57	"Release" should be "Relief"
3	62	"Role" should be "Rule"
3	136	"Counts" should be "Leonard"
16	171	"How" should be "Now"

ROBERT L. LEONARD
and
BETTY J. LEONARD

By Counsel

JONES & GODFREY
One Flannagan Avenue
P. O. Box 600
Lebanon, Virginia 24266

BY: _____

Dennis E. Jones

Counsel for Defendant

C E R T I F I C A T E

I, Dennis E. Jones, hereby certify that I have served a true copy of the foregoing Objections to Trial Transcript by thereby tendering the same to the Honorable Glynn Phillips, Clintwood, Virginia, 24228, to Charles E. Schelin, Browning, Morefield, Schelin, Cody & Arrington, Lebanon, Virginia, 24266, Counsel of Record for the Plaintiff, on this the 19th day of September, 1978.

DENNIS E. JONES

the parties, that no fraud occurred, but held that a constructive trust was created by a verbal conversation between Respondent and Petitioner, Robert L. Leonard, at the date of the sale. Following the opinion of the Honorable Glyn R. Phillips, the Final Order in this matter was entered on the 1st day of August, 1978. This Order of August 1, 1978, is the subject of this Appeal.

ASSIGNMENTS OF ERROR

1. The Court erred in admitting the Plaintiff's Exhibit No. 1 because the memorandum on it's face shows that it is an incomplete agreement.
2. The Court erred in admitting into evidence the testimony of the Plaintiff in regards to his alleged agreement with Defendant, Robert L. Leonard, because the transaction involved the purchase of real property and was violative of the Statute of Frauds.
3. The Court erred in admitting testimony of the Plaintiff concerning the alleged agreement as no foundation was laid showing a pre-existing partnership between the Plaintiff and Defendant; there was no showing that partnership funds were used for the purchase of the subject property, there was no

showing that partnership funds were used for the purchase of the subject property, there was no showing that the agreement was entered into for speculative purposes.

4. The Court erred in permitting the testimony of Plaintiff in regards to the written memorandum of October 6, 1977, because the document on it's face was incomplete and as such the testimony was violative of the Statute of Frauds.
5. The Court erred in overruling Defendant's Motion to Strike at the conclusion of Plaintiff's evidence.
6. The Court erred in holding that an Oral Contract was entered into between the Plaintiff and Defendant, Robert L. Leonard, on October 1, 1977, whereby an oral trust resulted.
7. The Court erred in holding that the restrictions imposed by the Defendants on the purchase of the subject property were unreasonable.
8. The Court erred in directing the Defendants to transfer to the Plaintiff the property made the subject of this controversy.
9. The Court erred in holding that a constructive trust was created by a verbal conversation between the Plaintiff and Defendants on the date of the auction.

10. The Court erred in holding that the Defendants must convey the property to the Plaintiff because no finding was made that the Defendant, Betty J. Leonard, agreed to sell or otherwise convey the subject property to Plaintiff.

ISSUES PRESENTED

1. DID THE DEFENDANT, ROBERT L. LEONARD, ENTER INTO AN ORAL AGREEMENT WITH COMPLAINANT, H. LYMAN COUNTS, WHEREBY AN ORAL TRUST RESULTED AFFECTING THE SUBJECT PROPERTY? (RELATES TO ASSIGNMENTS OF ERROR NUMBERS 1, 2, 3, 4, 5, 6, 7, & 8)
2. THAT THE DEFENDANTS, ROBERT L. LEONARD AND BETTY J. LEONARD, MADE NO JOINT AGREEMENT WITH THE COMPLAINANT, H. LYMAN COUNTS, SO AS TO CREATE EITHER A CONSTRUCTIVE TRUST OR RESULTING TRUST OF THE PROPERTY IN CONTROVERSY HEREIN. (RELATES TO ASSIGNMENT OF ERROR NUMBERS 1, 5, 7, 8, 9 & 10)

STATEMENT OF FACTS

The respondent, H. Lyman Counts, initiated suit in the Circuit Court of Russell County, Virginia on the 9th day of December, 1977 alleging that he and the petitioner, Robert L. Leonard, entered into an agreement of partnership whereby the petitioner, Robert L. Leonard, was to bid for both of

661
 115
 P-841
 7-19-78
 Oct. 6, 1977
 Agreed to between
 R. L. Leonard and
 Lyman Parents -
 Boundary line the
 Northern boundary line -
 from fence to Joe Woody
 Stinson Property in line
 with upper on eastern
 fence of Orchard to corner
 east at upper side of
 barn to town street
 line at lower side of
 barn to stake on crest
 of hill ^{summit} 15 to 20 feet
 east of barn & in direct line
 to south boundary line
 fence of Caswell Farm.
 Agreed Price of \$41,667.
 Term to be agreed on at later
 date.

Robert L. Leonard



KLEIN TOOLS, INC.

PLAINTIFFS EXHIBIT #1

Plaintiff
El WRP, Quid
July 19, 1978

State of Virginia County of Russell Total Purchases
THIS IS TO CERTIFY that I have this day purchased, at Auction from
Mr. & Mrs. Howard H. Caswell \$ 125.00
Through Simon & Co. Auctioneers Selling Agents
Tracts or Lots No. 49.3 acres Hance, Barn
as per map shown me. 00 per acre
Purchase Price \$ 125,000. per lot and I hereby bind myself to accept
said property as per terms, conditions, reservations, etc., as announced at
said Auction and pay for same accordingly, subject to seller's confirmation.
This the 1st day of October 19 77
Name Robert L. Leonard
Address Rt. 2 Box 212A
W C DeRuyter ANON, VA.
Witness
Make deed to Robert L. Leonard + Betty J. Leonard
Cash payment \$ 30% Balance in installments of 54 770 jointly with
Above offer hereby accepted H. Caswell Right of
Execution

PLAINTIFFS EXHIBIT #2

P. Ex 2
7-19-78
WRP, Quid

NOTE SECURED BY DEED OF TRUST

\$30,000.00

Lebanon, Virginia,

October 27, 1977

FOR VALUE RECEIVED LYMAN COUNTS and ERMA K. COUNTS promise to pay to ROBERT L. LEONARD and BETTY J. LEONARD or at any other place as may be designated by the holder of this note(s), the principal sum of THIRTY THOUSAND DOLLARS (\$30,000.00), with interest thereon at the rate of 7 per centum per annum, until paid in annual installments of, at least, the sum of \$10,000.00 each, the first of said installments being due and payable on the 1st day of October, 1978, and a like amount on the same day of each successive year thereafter, until paid in full. Each payment shall be applicable first to interest, then to escrow and then to principal, with the balance of principal and interest, if not sooner paid, being due and payable on the 1st day of October, 1980.

The maker reserve the right to prepay this note, in the event that any amount of the principal is prepaid, ~~without penalty~~ or any portion thereof, without penalty, excluding regular monthly payments, a prepayment charge of 0 per cent upon the amount prepaid shall be charged and the maker(s) shall not be relieved of regular annual payments called for in this note, and if this note is paid off prior to maturity date interest will be charged through the end of the month in which such payoff is made.

If default be made in the payment of any installment under this note(s), and if such default is not made good prior to the due date of the next such installment, the entire principal sum and accrued interest shall at once become due and payable without notice at the option of the holder of this note(s). Failure to exercise this option shall not constitute a waiver of the right to exercise the same in the event of any subsequent default.

PLAINTIFFS EXH. #3
252

The maker(s) and endorser(s) hereof, hereby waive the benefit of our Homestead Exemptions as to this debt; and also hereby waive notice of maturity, presentment, demand, protest and notice of protest of this note(s).

_____(SEAL)
LYMAN COUNTS

_____(SEAL)
ERMA K. COUNTS

Note 1 of 1 Note(s)

This is to certify that this is the note described in and secured by certain Vendor's Lien reserved in a deed of even date herewith, and in the same principal amount as herein stated.

DATED: October 27, 1977

NOTARY PUBLIC

My commission expires:

NOTE SECURED BY DEED OF TRUST

\$30,000.00

Lebanon, Virginia,

October 27, 1977

FOR VALUE RECEIVED LYMAN COUNTS and ERMA K. COUNTS promise to pay to ROBERT L. LEONARD and BETTY J. LEONARD or at any other place as may be designated by the holder of this note(s), the principal sum of THIRTY THOUSAND DOLLARS (\$30,000.00), with interest thereon at the rate of 7 per centum per annum, until paid in annual installments of, at least, the sum of \$10,000.00 each, the first of said installments being due and payable on the 1st day of October, 1978, and a like amount on the same day of each successive year thereafter, until paid in full. Each payment shall be applicable first to interest, then to escrow and then to principal, with the balance of principal and interest, if not sooner paid, being due and payable on the 1st day of October, 1980.

The makers reserve the right to prepay this note, or any portion thereof, without penalty.

If default be made in the payment of any installment under this Note(s), and if such default is not made good prior to the due date of the next such installment, the entire principal sum and accrued interest shall at once become due and payable without notice at the option of the holder of this note(s). Failure to exercise this option shall not constitute a waiver of the right to exercise the same in the event of any subsequent default.

The maker(s) and endorser(s) hereof, hereby waive the benefit of our Homestead Exemptions as to this debt; and also hereby waive notice of maturity, presentment, demand, protest and notice of protest of this note(s).

_____(SEAL)
LYMAN COUNTS

_____(SEAL)
ERMA K. COUNTS

Note 1 of 1 Note(s)

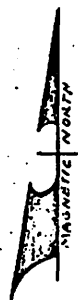
This is to certify that this is the note described in and
secured by certain Vendor's Lien reserved in a deed of even
date herewith, and in the same principal amount as herein stated.

DATED: October 27, 1977

NOTARY PUBLIC

My commission expires:

NOTE: RESULTS ARE GENERALLY ALONG
PROPERTY LINE OF ORIGINAL
LOT-48, EXCEPT WHERE
SHOWN OTHERWISE



LOT-49

LOT 48-C
30.7202 ACRES

LOT 48-B
12.383 ACRES

LOT 48-A
5.3041 ACRES

LOT-54

LOT-47



PLAT
SHOWING DIVISION OF LOT-48
AS SHOWN IN THE SUBDIVISION OF THE
E.W. WILEY JESSEE FARM
RUSSELL COUNTY, VIRGINIA
(P.B. 1 PAGE 123)

FRANK A. CARPENTER
CERTIFIED LAND SURVEYOR
LEBANON, VIRGINIA
DECEMBER 25, 1977
SCALE 1" = 100'