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Record No. 7388

In the
Supreme Court of Appeals of Virginia
at Richmond

JACK R. TURNEY, JR., ET AL.

v.

GEORGE SMITH, JR., ET AL.

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 7388

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 19th day of January, 1970.

JACK R. TURNEY, JR., AND
RACHEL H. TURNEY, Appellants,

against

GEORGE SMITH, JR., AND
DORA P. SMITH, Appellees.

From the Circuit Court of Fairfax County
Percy Thornton, Jr., Judge

Upon the petition of Jack R. Turney, Jr., and Rachel H. Turney an appeal and *supersedeas* is awarded them from a decree entered by the Circuit Court of Fairfax County on the 1st day of May, 1969, in a certain chancery cause then therein depending, wherein George Smith, Jr., and another were plaintiffs and the petitioners were defendants; upon the petitioners, or some one for them, entering into bond with sufficient security before the clerk of the said court below in the penalty of $5,000, with condition as the law directs.

RECORD

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page 1 }

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BILL OF COMPLAINT FOR SPECIFIC PERFORMANCE

To the Honorable Judges of the Above-Styled Court:
Your Plaintiffs respectfully represent:

* * * * *

page 2 }

* * * * *

5. By reason of Defendants' refusal and failure to deliver an executed Deed in pursuance of the aforesaid agreement, Plaintiffs have suffered damage and injury in the sum of $5,000.00.

* * * * *

Wherefore, Plaintiffs pray for the entry of a decree:
a. That Defendants be required to specifically perform said agreement and pay damages in the sum of $5,000.00;
b. If specific performance is not granted, judgment against Defendants in the sum of $20,000.00.

* * * * *

George Smith, Jr. and Dora P. Smith

By George Smith, Jr.

* * * * *

Filed
In Circuit Court
Clerk's Office
Nov 4 1968
Clerk, Fairfax County, Va.

* * * * *

page 15 } SIXTEENTH JUDICAL CIRCUIT
OF VIRGINIA
Prince William County Fairfax County
Alexandria City

226 Peabody Street
Manassas, Virginia 22110
March 28, 1969

Harry P. Friedlander, Esquire
Friedlander and Friedlander, Attorneys
3510 Lee Highway
Fairfax, Virginia 22201

Douglass S. Mackall, III, Esquire
4031 Chain Bridge Road
Fairfax, Virginia 22030

Re: Smith, et al vs. Turney, et al
Chancery No. 28090

Gentlemen:

It is my decision to grant the specific performance sought by the complainants in the above styled cause by reason that the complainants were ready, willing and able and did in fact perform the contract in so far as requisite of the settlement attorney on October 26, 1968; all parties recognized at the outset of the contract on October 25, 1968, that many details of the settlement would and could not be accomplished on Saturday, October 26, 1968. The displeasure of Mr. Turney with the settlement actually accomplished on October 26, 1968, does not warrant his refusal to comply with the contract.

It is requested that Mr. Friedlander prepare an order in accordance with the above decision with an allowance of interest in excess of 7% as a credit in favor of the complainants on the purchase price.

Sincerely yours,

Percy Thornton, Jr.

T:d

* * * * *

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* * * * *

DECREE

This cause came on to be heard this 25th day of March, 1969, for trial upon the Bill of Complaint for Specific Performance and the answer filed herein, and the plaintiffs and defendants being present in person and by counsel and thereupon the Court heard the opening statements and the plaintiffs' evidence. At the close of the plaintiffs' evidence the defendants moved to strike the evidence of the plaintiffs; and after argument the motion was denied, to which ruling the defendants, by counsel, noted their exception.

Thereupon the Court heard the defendants' evidence and at the close of all of the evidence the defendants renewed their motion to strike the plaintiffs' evidence, which motion was denied, to which ruling of the Court the defendants, by counsel, noted their exception, and thereafter the Court heard argument of counsel and took the matter under advisement.

And the Court does find that the defendants in this cause did enter into a binding contract with the plaintiffs to sell them the following described property:

page 21 } "Beginning at a point (an iron Pipe), on the east side of Ballantrae Lane, Route 1907, said point being S. 15° 29′ 25″ W, 207.33' from the P. C. of a curve, said point also being N 15° 29′ 25″ E., 175.00′ from the southwest corner of the entire Turney Tract; thence with the east line of Ballantrae Lane N. 15° 29′ 25″ E. 207.33′ to a point; being the P. C. of a curve; thence departing from Ballantrae Lane and running through the property of Turney, the following courses and distances, S 76° 55′ 26″ E. 62.10′, N. 58° 44′ 42″ E., 73.24′, S. 87° 44′ 09″ E., 39.99′, S. 63° 56′ 55″ E. 153.18′ to a point, thence S. 29° 52′ 17″ W. 217.51′ to an iron pipe; thence N. 82° 15′ 11″ S., 250.00′ to the point of beginning. Containing 62,480 square feet or 1.434 Acres."

Subject to a 25′ ingress and egress easement along entire southern property line,

and that the purchase price of said real estate was $65,000.00 and that the plaintiffs are to assume an existing $48,000.00 deed of trust which deed of trust called for the payment of 7% interest.

The Court finds that the plaintiffs did substantially perform the contract on October 26, 1968, and that the defendants were not justified in refusing to execute the deed on October 26, 1968, and therefore, it is

Adjudged, Ordered and Decreed that the defendants execute a general warranty deed to the plaintiffs for the land mentioned and if said interest rate *execeeds* 7% at the time of settlement on the existing deed of trust then the cost of interest above 7% that the plaintiffs would have to pay on account of said deed of trust for the life of the deed of trust should be deducted from the cash payment to the defendants, and that upon payment of the sum of $65,000.00 to the defendants by the plaintiffs, less and except the assumption of an existing $48,000.00 trust by the plaintiffs and less and except the cost, if any, of interest that plaintiffs are required to pay on account of the first deed page 22 } of trust above 7% provided in the contract, for the life of said deed of trust, the defendants shall deliver said deed to the plaintiffs, to all of which action the defendants, by counsel, noted their exception.

Whereupon, the defendants informed the Court of their intention to appeal from the decision and requested that a stay be granted pending the filing of such appeal and action thereon by the Supreme Court of Appeals in denying or granting same, and

It Appearing to the Court that said request should be granted, it is

Ordered that this decree be, and the hereby is suspended for a period of seventy (70) days from the date of this Order, and thereafter until the Supreme Court of Appeals of Virginia has acted upon a Petition for an Appeal and *supersedeas* presented to the said Court, if such petition is actually filed within the time prescribed by law, or until the time for presenting such petition shall have expired, upon the condition that the defendants or someone for them enter into a *supersedeas* bond before the Clerk of this Court in the penalty of $5,000.00 with surety to be approved by the said Clerk and conditioned to perform and satisfy this decree, proceedings on which are stayed, in case such decree be affirmed or the appeal dismissed or refused or not petitioned for within the time prescribed by law, and also to pay all damages cost and fees which may be awarded against or

incurred in connection with a *supersedeas* that may be granted by the Appellate Court, said bond to be given on or before May 16, 1969.

Enter: May 1, 1969

Percy Thornton, Jr.
Judge

* * * * *

page 29 }

* * * * *

ASSIGNMENTS OF ERROR

1. The Court erred in finding that a binding contract was entered into between the plaintiffs and the defendants.

2. The Court erred in permitting the witness Kendall Stock to testify as to statements made by others.

3. The Court erred in finding that the Deed of Trust binding on the property at the time of the execution of the contract between the parties was in the sum of $48,000.00 and that it called for the payment of 7% interest.

4. The Court erred in finding that the plaintiffs did substantially perform the contract on October 26, 1968.

5. The Court erred in finding that the defendants were not justified in refusing to execute the deed on October 26, 1968.

page 30 } 6. The Court erred in considering the possibility of any increase in the interest rate on the existing deed of trust prior to the date of compliance with the decree of specific performance and in directing that possible future interest payments for the life of said trust in excess of 7% be deducted from the cash payment to be made by the plaintiffs to the defendants.

7. The Court erred in refusing to permit counsel for the defendants to show the negotiations leading up to the execution of the contract on October 25, 1968.

8. The Court erred in failing to find that time was of the essence of the contract and that the plaintiffs failed to perform on the date specified.

9. The Court erred in permitting the plaintiffs to prove and in enforcing a contract the terms of which are materially different from the one in writing which they relied on while at the same time refusing to permit the defendants to show the actual agreement, parts of which were admitted by the plaintiffs.

Edward Kendall Stock

10. The Court erred in directing the defendants to convey the real property described in the Bill of Complaint to the plaintiffs.

Jack R. Turney, Jr. and
Rachel H. Turney

By Douglas S. Mackall, III
Of Counsel for Defendants

* * * * *

Filed
Jun 27 1969
W. Franklin Gooding, Clerk of the Circuit Court of Fairfax County, Va.

* * * * *

page 10 }

* * * * *

Thereupon EDWARD KENDALL STOCK was called as a witness by and on behalf of the plaintiffs, and after having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Friedlander:

Q. State your full name.

page 11 } A. Edward Kendall Stock.

Q. And what is your profession?

A. I am an attorney at law.

Q. How long have you been so engaged?

A. Since October of 1965.

Q. And what is your office address?

A. 1427 Dolley Madison Boulevard, McLean, Virginia.

Q. And your residence, sir?

A. Leesburg, Virginia.

Q. And during the course of your professional practice, do you specialize in any particular field?

A. Well, I have a general practice.

Q. Does that include the settlement of sales and purchases of real estate?

Edward Kendall Stock

A. Yes.
Q. And in making such settlements, do you also undertake to search the titles?
A. Sometimes I do, yes.
Q. Otherwise?
A. Sometimes I get another attorney to do it for me.
Q. But you take the responsibility for the contract?
A. That's correct.
page 12 } Q. Now, did there come a time in October of 1968, in which you were asked to perform settlement attorney functions in the sale of certain property belonging to the defendants, Jack R. Turney, Jr., and his wife?
A. Yes.
Q. And can you tell us the circumstances of the employment and what you did in relation thereto?
A. I was called on the evening of October 25, which was a Friday evening, about 8:00 o'clock, and I was asked to come to my office on Saturday, October 26, to handle the real estate settlement.
I was called by the broker, real estate broker.
Q. And as a result of that call, did you go to your office Saturday?
A. Yes, I did.
Q. And were you then handed any papers or documents relating to the proposed settlement?
A. I was given a copy of the contract.
Q. And what did you do then, sir?
A. Well, my secretary came in also that morning and we proceeded to get on the phone and collect information for the purpose of trying to hold the settlement on
page 13 } that day.

Mr. Mackall: Your Honor, I would object to anything his secretary did as far as conversations.

By Mr. Friedlander:
Q. Did she do it in your presence?
A. She was present when I made the calls, yes.
Q. But as a result of what you learned irrespective of the source, did you prepare a settlement sheet?
A. Yes, I tried to.
Q. And when you say you tried to, you mean that it was impossible to complete the transaction?
A. Well, the problem that I ran into on this settlement was trying to—in calling both the purchasers and the sellers—let me go back to the night before.

Edward Kendall Stock

When the broker called me, I asked him about the financing on the property and what the arrangements were—

Mr. Mackall: (Interposing) I would object to anything the broker said.

The Court: Is the broker here to testify today?

Mr. Mackall: Your Honor, we may have him later on.

The Court: Is he present in Court today?

Mr. Mackall: No, sir; he's coming later on, I
page 14 } think.

The Court: If he's going to be here to testify today, I will allow him to go ahead and testify.

Mr. Mackall: Your Honor, I would object and note an exception to that.

The Court: All right.

The Witness: I was told to contact the purchaser and seller the next morning to get that information. I went to my office at 9:00 o'clock in the morning and proceeded to get on the phone and make calls to both the purchaser and the seller to work out what the terms of the loan were to be, whether it was to be an assumption or whether it was to be a new loan.

I got what proved to be some conflicting information, but based on what information I had, I proceeded to work up a settlement statement for the purchaser and for the seller.

By Mr. Friedlander:

Q. Now, were the purchasers the plaintiffs in this case, George Smith, Jr., and his wife Dora P. Smith, were they present in the office on Saturday?

A. Yes, they came to my office.

Q. And what was the purpose so far as you
page 15 } could tell? Were they there for settlement?

A. Yes.

Q. And how long were they in your office?

A. Well, if my recollection serves me on that, I believe they were there about an hour.

Q. And during that period, did you review the settlement sheet with them?

A. Yes.

Q. And were they satisfied with it?

A. No, we had some questions about it, some discussions.

Q. Did you at that time request them to pay any money? Was there any conversation about money at that time?

A. Well, we weren't—the figure that I had shown at the bottom of the settlement statement was not a firm figure be-

cause I had had no instructions from a lender and vague instructions from the parties to the settlement as to the type of loan it was to be, whether I was to hold out any money for insurance escrow and whether I was to hold out any money for tax escrow, and I had to get at those two figures, the tax and the insurance escrows.

Q. Had the title been examined at that time?

page 16 } A. The title to the total tract had been examined.

Q. Had there been a run-down? In other words, had the title examination been brought up to date?

A. No, it hadn't. I had done the title about a month before and it had not been brought down to this particular lot.

Q. Had you ever seen the plaintiffs prior to that morning?

A. No, I don't believe I did.

Q. Had you known the defendants, Mr. and Mrs. Turney before?

A. Yes, I had seen them before.

Q. And at their request had you made these prior examinations of title?

A. I don't know whether it was at their request or not. I did do a settlement.

Q. For property they owned?

A. That's right. It wasn't at their request. It was at the request of the purchaser.

Q. All right. Now, did you have any documents that were prepared that day?

A. I prepared on Saturday morning a settlement statement for the seller and the purchaser. I prepared

page 17 } a deed for the seller to sign and I prepared a note and deed of trust for the purchasers to sign.

Q. Well, the note and deed of trust, did you request them to sign it on Saturday the 26th or did you make some arrangements for signing at a later date?

A. Well, after preparing the trust, there was some conflict as to whether it was prepared correctly or not, and not having any written or oral instructions from the lender, I—we decided that it would be better to wait until the first of the week so we could contact the lender and double check to make sure it was drawn properly.

Q. In other words, a delay was suggested or agreed to from Saturday to Monday?

A. Well, yes, or as soon thereafter when we could get the information.

Q. Then what documents had to be prepared and could not be prepared on Saturday?

A. I made an effort to prepare all the documents necessary to the settlement on Saturday morning.

Q. But to run down the title and to verify the documents, you needed the additional documents, is that correct?

A. That's correct.

page 18 } Q. Well, now, when did the Smiths leave your office, if you recall, approximately?

A. I think they left before noon. The exact time I do not remember.

Q. Had they given you any initials on any papers or had they indicated orally to you that the settlement, corrected settlement sheet would be approved?

A. We had a discussion as to the settlement statement and neither of us were sure as to the figures on it. And so we decided we would wait until the first of the week to sign the settlement statement.

We also made that decision as to the note because I wasn't sure of the—I believe if my recollection serves me correctly, I wasn't sure as to the length of the note, and I had a couple of other questions about it.

We decided that we—they would come back Monday and we would finish it up then.

Q. Now, the contract itself provided for—well, that's not in evidence yet. I will offer it later.

Let me ask you this: where was the seller? Where were the sellers? Where were Mr. and Mrs. Turney? Were they in your office?

A. I went—

page 19 } Q. (Interposing) Were they in your office that day, Saturday morning?

A. Mr. Turney was in my office around noon or shortly thereafter.

Q. Did he come in early when the Smiths were there?

A. No, he didn't.

Q. Did he know you were meeting at that time, if you know from what he told you?

A. Yes, he knew I was.

Q. Did he explain why he was late in coming there?

A. No, we didn't get into any explanation of why he was there.

Q. Well, did he sign the deed?

A. No, he didn't.

Q. Did he tell you that you should have gotten money from these people, the plaintiffs, at that time?

A. I don't remember his saying anything about that.

Edward Kendall Stock

Q. Did he ever indicate to you that he was cancelling the deal while he was in your office?

A. No.

Q. As a matter of fact, what happened later? Did you present the deed to him later?

page 20 } A. I presented the deed to him twice, earlier in the morning at his home and then I—it was about afternoon if my recollection serves me correctly and I gave him the deed again and I asked him if he wanted me—I was a notary and I would go to his home and he and his wife could sign it.

And he said, "No, I will take it and get it signed and bring it back."

Q. When was this?

A. This was Saturday, October 22 (sic).

Q. Was this the first visit you made to the house?

A. This was the second time.

Q. What happened the first time? Were there corrections to be made?

A. I took the deed up there. I had gotten a legal description of this particular parcel of land that morning after 9:00 o'clock from the surveyor and Mr. Turney and I had a—I copied the deed based on what the surveyor had given me and I took it to Mr. Turney.

There was a question about an easement and the way the language was in the deed, I think there was an ingress and egress.

page 21 } If I had the deed in front of me I could remember, but I don't recall exactly, but there was a question over it.

So he and I took it down to the surveyor and got it straightened out.

Q. This was your first visit to him?

A. That's correct.

Q. All right.

A. And then my secretary, we made the changes in accordance with what Mr. Turney wanted. And that's when I gave him the deed again.

Q. And then you took it back to him. He promised to sign it and have it notarized and give it back to you?

A. That was what he had indicated to me, that he would take care of it and see that I got it back.

Q. Did you ever get it back?

A. No.

Q. Did you ever hear from him about this settlement on Monday?

Edward Kendall Stock

A. The first notice I had of it not being—that the deal had fallen through was from the broker in the morning.

Q. That was Monday morning?

A. Yes.

Q. And did you get in touch with the pur-
page 22 } chasers? Did they talk to you on Monday?

A. No, I got together that evening with the purchasers. I may have talked to them on the phone, but I got together with them that evening.

Q. All right. Explain how far you got and so forth.

A. We had a conference at the broker's office between Mr. Smith, Mr. Turney, the broker and myself.

Q. Were the Smiths still anxious to buy the property at that time?

A. Yes.

Q. And the conference was about what they could do about getting the deed?

A. Well, the conference was to try to bring everybody up to date as to what had transpired since I had given the deed to Mr. Turney and if there was any possibility of working it out.

Mr. Friedlander: I have no further questions, if the Court please.

The Court: Cross examination?

Mr. Mackall: Yes.

CROSS EXAMINATION

By Mr. Mackall:

Q. Mr. Stock, you were called on the 25th by
page 23 } Harper?

A. That's right.

Q. And did he tell you then that they had to have a settlement on the 26th, that time was of the essence?

A. Yes, this is the reason why I went in on Saturday. I didn't—I had no desire to go in there at all and try to attempt this thing on Saturday, but I— it was understood they had to get it, they wanted to settle on the 26th.

Q. All right. And you had been informed of this the night of the 25th?

A. That's correct.

Q. All right, sir. Now, did the Smiths offer to pay you any money on the 26th?

A. We had a discussion at settlement over the payment of funds and they had—we did not have a final figure on the

settlement statement so we didn't know exactly what to ask them for.

And Mr. Smith explained to me he had money in another bank and would like to have time to transfer the money over and give me a check, a final figure on the settlement statement that was correct.

Q. He didn't offer to pay you any money that day, is that correct?

page 24 } A. Well, I don't—I don't believe we—I don't think there was a definite offer. We had a discussion over the figure and over his getting the money into the other bank and we kind of mutually agreed it would be better to wait until we had a final figure and—

Q. (Interposing) But he didn't tender you a check that day or tender you any money?

A. No, he didn't hand me a check.

Q. He didn't say, "I offer to pay you" any money?

A. No.

Q. He did not?

A. Not that I recall.

Q. Now, are these the settlement sheets that you prepared? (Indicating)

A. Yes.

Q. And this is the sellers and this is the purchasers? (Indicating)

A. That's correct.

Mr. Friedlander: Are you going to offer them?

The Court: Are you introducing those into evidence?

Mr. Mackall: Yes.

The Court: Defendant's A and B.

page 25 } (Thereupon, the documents referred to above were marked Defendant's Exhibits A and B in Evidence.)

By Mr. Mackall:

Q. Did they sign the settlement sheet?

A. No.

Q. You had prepared a trust and a note?

A. Yes.

Q. Do you have those?

A. Yes, sir.

Q. Could I see those? You had prepared these that morning?

A. That's correct.
Q. Did Mr. and Mrs. Smith sign either one of these that morning?
A. They didn't.

Mr. Mackall: I would like to offer these.
The Court: Any objection?
Mr. Friedlander: No objection.
The Court: They will be marked and received as defendant's C and D.

(Thereupon, the documents referred to above were marked Defendant's Exhibits C and D in Evidence.)

page 26 } By Mr. Mackall:
Q. Mr. Stock, did you tell Mr. and Mrs. Smith since Mr. Turney was a lawyer that you would look after their interests?
A. That was the understanding. I did tell them that morning that my primary concern was to see that they got a clear title to the property and that their funds were properly handled and that my primary responsibility was with them because Mr. Turney was a lawyer.
Q. Mr. Turney was a lawyer so you were going to look after their interests basically?
A. Well, I just stated what I—.
Q. All right, sir.
Now, while the Smiths were there, did they object to the language in the deed you had drawn?
A. No, not to the language.
Q. Not to the language?
A. No.
Q. Did they object to the amount of acreage they were getting?
A. We had a discussion over the amount of acreage. The contract called for—if my recollection serves me correctly,
I think it called for 1.5 acres, more or less, and
page 27 } I believe the deed had language in it of 1.434
acres.
I'm not sure on that. If I had it, I could tell you.

Mr. Friedlander: Here's a copy of the contract.
The Witness: 1.5 acres, more or less. The deed said, I believe, 1.434 acres. I don't have the deed in front of me.

Edward Kendall Stock

And they asked for an explanation of why the difference in the amount of acreage from 1.5 to 1.434.

By Mr. Mackall:

Q. What did you tell them?

A. Well, I told them that they—that the contract called for 1.5 more or less acres and that they had agreed to it and they would have to—I was sorry that they couldn't get more land, but they had to accept the amount that was being conveyed, but I told them I would go to Mr. Turney and see if I could try to work something out.

Q. Now, you told them you would go see Mr. Turney and see if you could get them some more land or something?

A. Right.

Q. And this was agreeable with them?

A. Yes.

Q. Now, the Smiths left your office, right?

page 28 } A. Yes, they were in a hurry.

Q. They were in a hurry?

A. Yes.

Q. And you told them you would talk to Mr. Turney for them?

A. Right.

Q. Now, is this the deed that you prepared?

A. It looks like it.

Q. After the Smiths had left your office, did you make a change in this deed?

A. Yes, that is this easement, subject to a 25-foot ingress and egress easement along the entire southern property line.

This was based on a discussion that I had with Mr. Turney and the surveyor, I think, before it had different language in it, but we did change it subject to a 25-foot ingress and egress easement.

Mr. Mackall: Have you seen this? (Indicating)

Mr. Friedlander: No objection.

The Court: It will be received as defendant's exhibit E.

page 29 } (Thereupon, the document referred to above was marked Defendant's Exhibit E in Evidence.)

By Mr. Mackall:

Q. Now, after the Smiths left, you went to see Mr. Turney and then you all went to the surveyor's, is that correct, Mr. Smith's?

A. That's right. We went down to see the surveyor.

Q. Did you tell Mr. Turney that the Smiths would not take the land with the easement and/or the 1.434 acres?

A. We had a discussion over that and I naturally as an attorney tried to represent a client, I told them they—they were disappointed they did not get more than 1.434 acres.

We had a long discussion over it and the ultimate end of the discussion was—

Q. (Interposing) My question Mr. Stock, was, did you tell Mr. Turney in Mr. Smith's office—and this is the surveyor, Mr. Smith the surveyor—that the Smiths would not take this land unless it was 1.5 acres or the easement wasn't there?

A. No, I don't recall saying that. I made statements to the effect that they were disappointed with the

page 30 } amount and wanted more than 1.4 acres.

Q. Did you make a statement, "They won't go through with settlement unless we correct this"?

A. No.

Q. All right. You were trying at that time to get the Smiths more land or negotiate the easement, is that correct?

A. I was trying to get them more land.

Q. Were you trying to get them more land at that time?

A. Yes.

Q. And this was after the Smiths had left your office without putting up any money or signing anything?

A. It was after they left my office, yes, sir.

Q. Now, you said something about a meeting Monday night with all of the parties.

A. Yes.

Q. Was something mentioned at that meeting about dating the papers back to October 26?

A. Not by me.

Q. Was something mentioned on that Monday night about dating the papers back to October 26?

A. I don't recall. I really don't It may have

page 31 } been mentioned. There were a lot of people there and there was a lot of conversation.

Q. Didn't Mr. Turney say he would have no part of something like that?

A. Well, I think both he and I agreed that you couldn't date it back. And he didn't want to date it back. I recall that.

Q. He did not want to date the papers back?

A. That's right, to the 26th.

Q. To the 26th?

A. That's right.

Edward Kendall Stock

Mr. Mackall: Excuse me a minute, Your Honor.

By Mr. Mackall:

Q. Did Mr. Turney call you that morning several times on the 26th?

A. Yes, we had—oh, I don't know how many times he called, but I do recall talking to him on the phone.

Q. Was that before they had gotten there?

The Court: Before who had gotten there?

By Mr. Mackall:

Q. Before the Smiths got there.

A. We were in contact with each other and I don't know specifically whether he called me about the terms
page 32 } of this new trust to be put on the property or—then, I believe he called me—when the Smiths arrived, he called me on the phone.

Q. Didn't you tell the purchasers, the Smiths, that, "This is the way the settlement is going to be handled, this part now and the Turney's part later"?

A. Mr. Turney was moving that morning and I told Mr. Turney I would take—I did take Mr. Turney's papers up to his house to accomondate him.

Q. This was after the Smiths had left?

A. I don't recall if it was before or after, but I did go to his house and present him with the deed and the settlement statement.

Q. Now, did Mr. Turney discuss with you trying to get in touch with the Smiths that afternoon or being able to try to locate them?

A. Yes, I think there was some discussion—there may have been some discussion along that line. I just can't really recall. There may have been.

Q. Did you ever tell Mr. Turney when you finished this conversation in the engineer Smith's office, well, you felt the Smiths had to settle?

A. I told Mr. Turney before we walked out of
page 33 } the surveyor's office that it was an ironclad deal and that the purchasers would have to settle.

Q. The contract was ironclad and they would have to settle.

A. Right, on the terms in the contract.

Q. Did you ever review that morning—when the Smiths were in your office for an hour, did you ever review the title

or anything with them and tell them it was free and clear or go into the subdivision with them or anything like that?

A. No, it was—everybody was under a time pressure, trying to get this thing through in time, and I told them that if there were any problems with the title and everything, it would take me a week or so to clear it up.

Q. But everybody was under pressure to finish that thing that day?

A. I was under pressure to try and get it finished that day or to do as much of it as I could.

Q. Did the purchaser approve the terms of the note and trust?

A. I don't recall. I really don't. I don't remember.

Q. You showed them to him, did you not?

page 34 } A. Yes, I believe I took them down. I don't remember, in all honesty. I just don't remember whether we went over the terms of the note and trust or not.

Q. Did the purchasers initial the contract or do anything that day as far as signing anything or anything?

A. They didn't initial the contract.

Q. They did not?

A. No.

Q. They signed nothing in your office?

A. No, they didn't sign the settlement statement or a trust.

Q. Or anything?

A. Well, that was the only two things there were.

Q. And the note?

A. And the note.

Mr. Mackall: No further questions.

Mr. Friedlander: I have only a few, if the Court please.

REDIRECT EXAMINATION

By Mr. Friedlander:

Q. During the 26th right up until midnight, could you tell the Court how long Mr. Turney had that deed in his possession after you delivered it to him corrected?

page 35 } A. I would say he had it from sometime after noon on Saturday the 26th. He had it from then on.

Q. Up until midnight?

A. That's right.

Q. Did the Smiths ever refuse to pay any sum of money you requested in the settlement?

A. There wasn't a request and there wasn't a refusal.

Edward Kendall Stock

Q. Well, did they refuse to sign any papers that you handed them that day?

A. There wasn't a request and there wasn't a refusal.

Q. That includes the note and deed of trust form that you had prepared?

A. That's correct.

Q. Now, was there any problem about the fact that the Smiths were going to come in and sign whatever papers and furnish all the money on Monday? Was there a problem about that?

A. No, no problem.

Q. Do you have a copy of the original contract in your files that's signed by everybody?

A. No, I don't.

page 36 } Mr. Friedlander: The reason I ask the witness, if the Court please, we have a very bad copy that's been signed and a reasonably good copy which is not signed and I presume we should probably put them all together and offer them in evidence, unless Your Honor has a copy you can read.

The Court: I understand from Mr. Mackall there is some question on the contract. Can you stipulate to the part of the contract in question?

Mr. Mackall: I'm willing to say what part of the contract we are talking about, but there's a change that was made on it after the Smiths signed it which they have never accepted or acquiesced in as far as the written contract itself is concerned.

Mr. Friedlander: That statement we must reject as evidence.

Mr. Mackall: I understand.

Mr. Friedlander: The question I think the Court is posing, do you admit the execution of the document in its present form?

Mr. Mackall: By the Smiths?

Mr. Friedlander: By the Smiths and by the Turneys.

Mr. Mackall: No.

page 37 } Mr. Friedlander: Subject to the one word you claim was changed?

Mr. Mackall: It was changed and they never acknowledged this change, Your Honor.

Mr. Friedlander: Well, I will prove the contract. I don't know what he's saying.

The Court: All right.

Mr. Friedlander: I have no other questions of the witness

and I would like to ask that he be excused, if the Court please.

The Court: Do you have any further need of Mr. Stock?

Mr. Mackall: No, sir.

The Court: You may be excused.

(Witness excused)

The Court: Call your next witness.

Mr. Friedlander: Mrs. Smith.

The Court: All right, sir. You may proceed.

page 38 } Thereupon, DORA SMITH, a plaintiff, was called as a witness by and on behalf of the plaintiffs, and after having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Friedlander:

Q. I hand you a document which I might call for identification plaintiff's one. (Handing document to witness)

(Thereupon, the document referred to above was marked Plaintiff's Exhibit No. 1 for Identification.)

By Mr. Friedlander:

Q. I ask if that is your signature and your husband's signature on that contract.

A. (Witness examines document) Yes, it is.

Q. Do you recall when you signed it?

A. Friday, the 25th.

Q. Of October?

A. Right.

Q. Now, did there come a time on Saturday when you went to the office of Mr. Stock, Ken Stock? Do you
page 39 } remember?

A. Yes, I remember that.

Q. That was on Saturday?

A. That's right.

Q. And what time did you go there?

A. It was between 10:30 and 11:00. It was a little before 11:00, I believe.

Q. And when you left the office, did you leave his office that day?

A. Yes.

Dora Smith

Q. And I think you were going to visit your daughter?
A. Yes. Right.
Q. And at the time you left, had you looked over the papers? Do you remember that? Do you remember looking over the papers?
A. Yes.
Q. Had you at that time indicated to anybody that you were not going to go through with the deal?
A. No.
Q. Had you done anything in the way of contacting Mr. Turney? Had you seen him?
A. No.

page 40 } Q. When you left, did you understand from what was told you by Mr. Stock that the deed running to you and your husband would be signed by Mr. Turney, his wife, and delivered to Mr. Stock that day?
A. Yes.
Q. Were any requests made of you or payments or signatures which you did not comply with?
A. No.
Q. What was the purpose of being there?
A. We were told to go there to settlement.

Mr. Friedlander: I have no other questions.
I would like to offer plaintiff's one in evidence.
The Court: Any objection?
Mr. Mackall: No.
The Court: It will be received as plaintiff's exhibit one in evidence.

(Thereupon, the document referred to above was marked Plaintiff's Exhibit No. 1 in Evidence.)

CROSS EXAMINATION

By Mr. Mackall:
Q. Mrs. Smith, after you signed this contract, was this—when you signed it, was this word "allowance" in?

page 41 } A. No.
Q. Was this word "less 500"?
A. No, I don't believe it was.
Q. Now, Mrs. Smith, you were in a hurry to go to Sweet Briar that day?
A. Yes.
Q. So you were anxious to get out of Mr. Stock's office?
A. We were wanting to be on our way, yes.

Dora Smith

Q. Now, had Mr. Turney discussed with you his tax problem?
A. Yes.
Q. And what had he told you about his tax problem?
A. That the property would have to be sold on the 26th.
Q. Have to be sold?
A. To us, yes.
Q. And settlement would have to take place?
A. Pardon?
Q. That settlement would have to take place?
A. Yes.
Q. Did he ever say anything to you about taking possession of the house?

page 42 } Mr. Friedlander: We suggest to the Court in the form of an objection that this evidence, I presume—if it's made to change the terms of the contract, we object to it, the parol evidence rule.

If it's cross examination beyond the scope of direct examination for the purpose of testing the witness, we have no objection, but we do think the contract speaks for itself.

Mr. Mackall: Your Honor, that contract was signed on the 25th with settlement on the 26th. I think we are entitled since we are in a court of equity to show all the circumstances leading up to why the 26th is important here and I have some case law to support this position, Your Honor.

Mr. Friedlander: I think the Court has to read the contract the way it is and not the way counsel says it is.

The contract says on the 26th or as soon thereafter.

Mr. Mackall: Your Honor—

Mr. Friedlander: (Interposing) The title was to be examined and the necessary documents prepared and the man sign this contract as seller.

page 43 } He is an experienced and tried and seasoned lawyer and—

Mr. Turney: (Interposing) Seasoned only.

The Court: I will allow him to proceed. I will note your exception to the Court's ruling.

Mr. Friedlander: Thank you.

By Mr. Mackall:
Q. Mrs. Smith, you knew that the 26th was the important day for the Turneys?
A. Yes.

Dora Smith

Q. Did they say anything to you about taking possession of the house on the 26th?

A. In what way?

Q. Putting a suitcase in?

A. Yes, they mentioned that.

Q. They asked you all to do this?

A. They mentioned it. They didn't emphasize it.

Q. They mentioned it? That was one of the things mentioned to you?

A. Yes.

Q. They told you that settlement had to take place on the 26th?

A. Yes.

page 44 } Q. And hadn't they indicated to you that in the negotiations this was why the price was what it was?

A. Yes.

Q. All right. And what had been the price when you first looked at the house?

Mr. Friedlander: We must object to this, if Your Honor please.

The Court: Objection sustained.

Mr. Mackall: Your Honor, if I may—

The Court: (Interposing) If you want to proffer it for the record, all right, but I think the objection is well taken.

Mr. Mackall: Your Honor, we are in a court of equity.

The Court: Yes, sir.

Mr. Mackall: If this thing, this, for instance, specific performance would be unfair to Mr. Turney here, we are allowed to show that.

It's a question of fairness and has a lot to do with it and we are allowed to show that if the price was let's say $75,000 or $79,000 and because of this tax thing he reduced it to 65—

page 45 } and then we will put on evidence to show what the Smiths did on this Saturday—and we intend to put on this evidence—it was not enough to allow Mr. Turney to get the tax deferment and his tax benefit, then, we will—we are in a position to show the loss to Mr. Turney, the unfairness of this.

Mr. Friedlander: I think counsel's statement is not in accordance with the law as I understand it. You are entitled to show in specific performance that the endorsement of the contract might be not unfair to a person, but not equitable altogether, but what you are saying to the Court is rather foolish, I think.

You are saying to the Court that if a man says he will get a tax gain because of a deal and that's ground for denying specific performance, there's nothing in the contract about that.

You are bound by the contract. I don't think the parol evidence rule, if the Court please, is varied in the specific performance cases, except to show some fraudulent inducement in the contract.

Where a contract is made by a lawyer and his wife, firm and fixed in its terms, he is bound by it just like everybody else.

The Court: There's no allegation of fraud and no allegation of ambiguity. We have a price of $65,000.

page 46 } Now, you want to go behind to show how this was reached?

Mr. Mackall: Yes, sir; to create specific performance—we are in a court of equity and you have to say that it's fair.

Mr. Friedlander: That it's equitable.

The Court: This is the price they reached themselves.

Mr. Mackall: Yes, sir; but this shows the unfairness of the specific performance because he gave—

The Court: (Interposing) The objections are well taken and I'm going to deny you to change the figure of $65,000.

Mr. Mackall: Your Honor, I would like to except for the reasons stated for the record.

The Court: All right.

By Mr. Mackall:

Q. Well, now, did Mr. Turney mention anything about this tax, about putting the money in escrow?

A. No.

Q. Nothing was said about that?

A. No.

Q. All right. Was anything said about signing the papers?

A. Not to us, no.

page 47 } Q. Did Mr. Stock ever say anything about putting money in escrow while you were in his office?

A. Well, we had put $1,000 down. We had given the broker $1,000. Is that what you mean?

Q. Did Mr. Stock say anything about putting money in escrow?

A. No.

Q. Or holding money in escrow?

A. No.

Q. He didn't say anything about money?

Dora Smith

A. No.
Q. Now, you first saw this house on Sunday?
A. That's correct.
Q. And after, were the Turneys in the process of moving at that time?
A. On Sunday when we saw the house?
Q. Yes, was there anything packed?
A. No.
Q. When did you last see the Turneys before the contract was signed?
A. Tuesday night.
Q. Tuesday night?
page 48 } A. Yes, during that week.
Q. Were they in the process of packing that night?
A. Not noticeably. I believe Mrs. Turney had gone through some papers, but there were no cartons and that sort of noticeable evidence of moving.
Q. Did you go by the house on the 26th of October?
A. No.
Q. At settlement did you or your husband object to the amount of land you would get?
A. No, we didn't object. We discussed a road, an access road.
Q. And you objected to the access road or what?
A. We discussed it with Mr. Stock.
Q. And Mr. Stock said he would try to get you more land or get rid of the access road or something?
A. He said he would check with Mr. Turney and he felt sure that what we had agreed to do with Mr. Turney was the way it would be finally stated.
Q. That you would get 1.5 acres?
A. Yes.
Q. Did Mr. Stock tell you that the 1.4 was equivalent of 1.5 plus or minus?
A. I don't remember.
page 49 } Q. Did he tell you he would get rid of the road, try to get rid of the access road?
A. No, he didn't say that.
Q. Did you intend to pay Mr. Stock some money when you went there?
A. Did we what?
Q. Did you intend to pay Mr. Stock some money when you went there?
A. Were we prepared to?
Q. Did you intend to?

Mr. Friedlander: Do you understand his question?
The Witness: I think so. If he asked us, we would. Yes, we thought we were going to settlement to buy a house.

By Mr. Mackall:
Q. You thought you were going to pay some money that day?
A. Yes.
Q. After you left Mr. Stock's office, where were you for the rest of the day?
A. Sweet Briar, Virginia.
Q. Sweet Briar, Virginia?
A. Yes.
page 50 } Q. Did anybody have your phone number, Mr. Stock or Mr. Turney or Mr. Harper? Did they know how to get in touch with you?
A. We didn't know our phone number. We were visiting our daughter there.

Mr. Mackall: No further questions.

(Witness excused)

Mr. Friedlander: I hand you a paper, a plat, and ask you where you got it from and what it was connected with.
The Court: Let's identify him for the record so we know who he is.

Thereupon, GEORGE F. SMITH, JR., a plaintiff, was called as a witness by and on behalf of the plaintiffs, and after having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Friedlander:
Q. Will you state your full name?
A. George F. Smith, Jr.
Q. And your residence address?
page 51 } A. 947 Spring Hill Road, McLean, Virginia.
Q. What is your occupation and business?
A. Engineer.
Q. And how long have you been—I think you were in the military service up to a certain time.
A. I was.
Q. And when did you leave the military service?

George F. Smith, Jr.

A. 1965.
Q. And since that time you have been engaged with the government?
A. Yes, I have.
Q. As an engineer?
A. As an engineer.
Q. And where are you employed, unless it's secret?
A. I am currently working in the Pentagon.
Q. I hand you a document and ask you if you can identify that, the source of it. (Handing document to witness)
A. (Witness examines document) This document is a representation of the property that we were negotiating with Mr. Harper to buy.
Q. How did you get the plat?
A. I believe we got it from Mr. Harper.
page 52 } Q. Mr. Harper is a real estate agent?
A. Yes.
Q. You got the plat. Now, did you get the plat and did you also get a form contract from him, a contract?
A. Yes.
Q. We have as plaintiff's exhibit number one a contract which has been offered in evidence. Does this bear your signature? (Handing document to witness)
A. (Witness examines document) Yes.
Q. Do you know whether it has the signature of the Turneys?
A. Yes, I believe so.

Mr. Friedlander: Now, may I ask counsel at this time: do you stipulate that those other signatures are of Jack Turney and Rachel?
Mr. Mackall: Yes, sir.
The Court: All right.

By Mr. Friedlander:
Q. Now, in this contract reference is made to some sort of plat. Can you identify the plat?
A. The plat was as presented here.

Mr. Friedlander: We would like to offer this as plaintiff's exhibit number two.
page 53 } Mr. Mackall: What was the last question?

(Thereupon, the question and answer commencing on page 52, lines 19 through 21, inclusive, were read back by the court reporter.)

Mr. Friedlander: We offer as plaintiff's number two the plat.

The Court: Any objection to the plat?

Mr. Mackall: No, Your Honor; no objection.

The Court: It will be received and marked plaintiff's exhibit number two.

(Thereupon, the document referred to above was marked Plaintiff's Exhibit No. 2 in Evidence.)

By Mr. Friedlander:

Q. I would like to go one step along. There's been some testimony about the word "allowance" which was written in the contract after you signed and "less $500."

Did you have any conversations with Mr. Turney in respect to those interlineations?

Mr. Mackall: Your Honor, they have objected to the—

The Court: (Interposing) Proceed and see what
page 54 } happens. I will allow you to proceed.

By Mr. Friedlander:

Q. Tell us the circumstances under which you had any conversation with Mr. Turney about the $500 and the word "allowance" when he inserted that in the contract.

A. Yes, as Mr. Harper had written up the contract, we asked that in addition to the other things, that the drapes be included in the property.

When Mr. Harper presented the contract or our proposal to the Turneys, they indicated they would like to take the drapes with them.

Mr. Harper contacted us and offered an allowance of $500 if we would be willing to allow them to take the drapes. We indicated that we would and he added the word "allowance" to cover that change.

Q. I show you a photostat of the contract fully signed. Can you tell me, did you ever receive from anybody a copy of the contract with those changes in it? If so, from whom? (Handing document to witness)

A. (Witness examines document) This was the contract that was presented by Mr. Stock on Saturday morning.

Q. That was the one with all of the signatures and the changes?

page 55 } A. Yes.

Q. You had no objection to the allowance of $500 instead of the drapes, had you, Mr. Smith?

George F. Smith, Jr.

A. No, we wanted to accommodate the Turneys.

Q. Now, at the time of the settlement, were you ready, willing and able to pay the contract price?

A. Yes.

Q. And are you today ready, willing and able to pay the contract price?

A. Yes.

Q. And have you ever refused at any time including the time of settlement and so forth—settlement on the 26th—to pay any sums of money under this contract?

A. No.

Q. Have you ever refused to sign any documents or papers in order to consummate the transaction?

A. No, we have not.

Q. When you left the settlement on the 26th, were you of the opinion that you had completed everything you were supposed to do?

Mr. Mackall: Your Honor, that calls for a conclusion.

The Court: Objection sustained.

page 56 } Mr. Friedlander: All right.

By Mr. Friedlander:

Q. When you left Mr. Stock's office and went to see your daughter, had you been advised that you should stay in town by anybody?

A. No.

Q. When did you first learn that Mr. Turney had changed his mind?

A. When we returned Sunday night.

Q. And how did you learn it?

A. From Mr. Harper.

Mr. Friedlander: We have no further questions.

The Court: Cross examination?

CROSS EXAMINATION

By Mr. Mackall:

Q. Mr. Smith, have you ever tendered any money?

Mr. Friedlander: I think the question is improper.

Mr. Mackall: Have you ever tendered any money?

Mr. Friedlander: In the bill we tendered the money and we think it's a matter of record.

By Mr. Mackall:

Q. Have you ever offered any money to any-
page 57 } body, tendered any money?

A. Could you explain "tender" so that I can answer it?

Q. Did you ever offer Mr. Stock, offer to pay him any money that day?

A. No, I did not.

Q. Have you ever signed any papers in connection with this transaction?

A. Yes.

Mr. Friedlander: Other than the contract?

By Mr. Mackall:

Q. After the contract was signed?

A. No.

Q. Did you ever offer Mr. Turney any money?

A. On the 26th?

Q. Did you ever offer Mr. Turney any money?

A. We offered our $1,000 of earnest money.

Q. When you signed the contract, the deposit?

A. Yes.

Q. Now, Mr. Smith, were you aware of Mr. Turney's tax problem?

A. Yes.

Q. And had Mr. Turney discussed this with you?

A. Yes.

page 58 } Q. On how many occasions?

A. On a number of occasions.

Q. During that week?

A. Yes.

Q. And what had Mr. Turney told you that he had to do as far as his tax problem was concerned?

A. He had to settle by the 26th.

Q. And what did he describe to you that had to be done?

A. To settle, to complete the negotiations by the 26th.

Q. To complete it? He didn't go into detail about his tax advice or what the tax lawyer told him?

A. That had nothing to do with the contract.

Q. You didn't answer my question, Mr. Smith. What did he tell you that his tax lawyer advised him he had to do as far as settlement was concerned on the 26th?

A. He stated that his tax attorney had told him that he had to have positive assurance that the deal had been consummated on the 26th of October.

George F. Smith, Jr.

Q. What did he tell you that his tax attorney had told him?

page 59 } A. He said that there were many things that would—

Q. (Interposing) What were they?

A. The signing of the papers, the picking up of a key, the placement of property in the house.

Q. Did he say anything about putting money in escrow?

A. I don't remember that specifically.

Q. You did none of these things, is that correct?

A. Yes, we went to the settlement.

Q. I realize that, but you didn't do anything, any of these things?

Mr. Friedlander: Why don't you let him finish? You asked him a question.

By Mr. Mackall:

Q. You didn't put up any money and you didn't pick up the key and you didn't put any property in the house, did you?

A. No, we did not.

Q. You didn't sign anything that day, did you?

A. We were not required to.

Q. You didn't sign anything that day, did you?

A. No.

Q. These are the things Mr. Turney had told you that his tax attorney had advised him that should be done,

page 60 } is that correct?

Mr. Friedlander: I don't think the question is correct, if the Court please. We object to it. Counsel in addition to repeating over and over the same thing—which I'm quite sure would have no effect on the Court, the fact it's repeated—has included in the question things which were not admitted by the witness had been told him by Mr. Turney and you say, "Didn't he tell you this?" and so forth.

Now, if you want to know what happened, I think you will have to ask the questions and not make speeches or arguments.

If the Court please, we do object to the argumentative nature of the questions.

The Court: The questions are argumentative. Ask him questions and don't argue with him.

By Mr. Mackall:

Q. Mr. Turney discussed these things with you not once, not twice, but more than that, didn't he?

A. Well, there were a number of ways that he indicated that the assumption of the property could be carried out, not one point specifically like the taking of a key.

page 61 } Q. And putting a suitcase in there, didn't he mention that to you?

A. That was another possibility, yes.

Q. When did you last talk to Mr. Turney?

A. About midnight the night before we went to see him.

Q. Midnight the night before?

A. Yes.

Q. And did you agree to pick up a key and put a suitcase in at that time?

A. I don't remember that that was discussed.

Q. You don't remember that that was discussed?

A. No, I don't.

Mr. Mackall: That's all, if Your Honor please.

(Witness excused)

Mr. Friedlander: We will call Mr. Turney as an adverse witness.

I wonder if I might have the defendant's exhibits.

The Court: Yes.

page 62 } Thereupon, JACK R. TURNEY, JR., a defendant, was called as a witness by and on behalf of the plaintiffs, and after having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Friedlander:

Q. Would you state your full name, sir?

A. Jack R. Turney, Jr.

Q. And what is your address?

A. 2123 Leroy Place, Washington, D. C.

Q. Do you have with you the contract under which you purchased that property?

A. No, I do not.

Q. Do you have a copy of the deed to that property?

A. No.

Jack R. Turney, Jr.

Q. Do you have any written evidence in your possession as to when you bought it, any written evidence?

A. I don't believe I have. I know when I bought it.

Q. I'm not interested in your opinion as to when you bought it, sir. I'm interested in documents to prove when you bought it. Do you have any?

A. No, I do not.

page 63 } Q. Do you have or don't you? I withdraw that. I show you defendant's exhibit E and ask you, why didn't you sign that deed? (Handing document to witness)

A. (Witness examines document) I did not sign the deed.

Q. I said, why?

A. You said why?

Q. Yes.

A. All right. I did not sign the deed for several reasons. First, in the first place, it was initially written that the easement was in an additional property.

Q. Excuse me, sir. I'm speaking of exhibit E. I know you are a lawyer and I know we have endless tongues, but would you mind just telling the Court, why didn't you sign exhibit E?

A. This is the document that Mr. Stock whited out two words on the deed and typed over them on the same document.

This is the same document. In the first instance, the two words provided that the property was to be sold together with an easement.

The effect of that—well, I won't go into that. I

page 64 } refused to sign it because that was contrary to our agreement.

The property was to be sold subject to an easement, Mr. Stock told me, and he said this in front of Engineer Smith, that the—

Q. (Interposing) I want to know why you didn't—

Mr. Mackall: (Interposing) He's opening the door. He's asking the question why he didn't sign. He's entitled to answer the question.

Mr. Friedlander: Do you object to me making a statement I was about to make before you jumped up? I think I'm entitled to say this to the Court.

I don't want him testifying as to what other people said. He has reasons why he didn't sign it and I would like to know.

His argument in his defense of his case is one thing, but the reason he didn't sign it is given to us, one reason is there was a change.

Now, the other reason would be the deed didn't suit you or it did suit you.

Mr. Mackall: I think he's entitled to answer the question.

The Court: Go ahead and answer.

page 65 } The Witness: The main reason that I refused to sign it in the first instance was—or one of the reasons was that Mr. Stock reported to me and the engineer that the problem was that the language in the deed description as given to him in his interpretation cut the property down to 1.2 acres, that that was what the Smiths had objected to.

He told all of us that the Smiths had refused to go through with it, would not go through with it and it would take months to make them go through with it, if we could.

Then, I told him that this wasn't the arrangement. And then we went to the engineer and then we changed—he changed the language to—subject to the easement.

Then, the second reason—

By Mr. Friedlander:

Q. (Interposing) May I interrupt you a minute? Then, the difficulty with signing the deed was then corrected?

A. No, because of these other reasons that came with it. I mean, that difficulty was corrected.

Q. It wasn't the reason you didn't sign the deed,

page 66 } the change in the words?

A. No, that's the reason I didn't sign the first one.

Q. The first one? I didn't ask you about the first one. I asked about the second one.

A. The second one, it was the other reasons.

Q. What are those other reasons?

A. First, Mr. Stock said that the Smiths refused to go through with the transaction and that therefore he had let them go without calling us as he had agreed to do without having them sign anything, without having them pay anything, without taking any step in the settlement, that he had done nothing about settlement.

He—furthermore the second reason was that he said the contract was impossible of performance and because we had not—the loan matter hadn't been cleared up and because of

this it was impossible to perform because we had not obtained a subdivision approval.

And that was the first I knew you had to get one beforehand.

The third reason was that he said the contract was unlawful because he said under the Virginia ordinances you could not sell a subdivision and then get it approved, page 67 } that we had to get the approval before we subdivided.

We had to get the approval of the easement variance in order to give some access to the back lots and make them salable before we sold it and he said, therefore, he would not have let it go to settlement on that date anyhow.

In view of the fact he had not gone to any part of the settlement, I told him that I would not sign it at that time, that I would take the deed and try to get a hold of Mr. Harper, the broker, and I would try to get a hold of the Smiths and see if we could salvage the transaction, but that their refusal to consummate as they had agreed to do both orally and in the contract had made it impossible for me to sign the deed, that there was nothing that they had done to consummate the transaction and that all of us had from the first agreed that we had to settle by the 26th or I would not give them the price because I would not get the tax deferment.

That's the reason.

Q. Now, let's talk about your testimony, sir. Did you reduce your statements that you made today, did you ever put them in a letter and send it to anybody?

A. No.

page 68 } Q. Did you ever talk to the Smiths on Monday?

A. Did I talk to the Smiths on Monday?

Q. Yes.

A. Monday night at the meeting that Mr. Stock referred to, I explained all of those things with Mr. Stock there, with Mr. Harper there, with Mr. Smith there.

Q. Didn't you say at that time, "If you raise the price, I will sell it to you"?

A. Did I say at what time?

Q. Monday, didn't you say, "If you raise the price, I will sell you the land"?

A. No, what I said was this: I said that, "It is past the 26th. Our deal for the 26th as I instructed the broker to tell you has elapsed. You failed to perform. I will renegotiate a new deal with you or we can just part friends, or if you insist, you can bring a lawsuit."

Now, that's what—I did not name a price or set a price or any language to that effect.

Q. Excuse me, sir. Didn't you set the price of $70,000?

A. I don't think $70,000 was ever mentioned. I had set $79,500.

Q. Mr. Turney, on Monday night didn't you say
page 69 } that you would sell for $70,000? Now, can you say yes or no to that?

A. Not that I remember.

Q. Well, are you saying you don't remember or are you denying that you said it?

A. I answered the question.

Mr. Mackall: He answered the question the best he could.

The Witness: I don't remember. I don't believe I did, but I don't remember if I did.

By Mr. Friedlander:

Q. Now, when you got there and were talking to Mr. Stock, you had reached a conclusion that you would not sign the deed, is that right?

A. Unless I could get a hold of Smith and salvage it.

Q. What about all of this illegal business you were ranting about? You couldn't sell no matter what if anything was illegal.

A. The problem on the illegality that had me really concerned was that Stock said that we could close the thing next week, the following week and date everything back and the IRS would never know and I could go on and
page 70 } claim my tax benefit.

And I said—and he said that in front of witnesses. And I said I would not be a party to anything like that.

Q. Well, I appreciate that.

A. And I was going to try if at all possible to catch the Smiths, get the deed to them before midnight and get their signatures and get their money in escrow to Harper—Stock couldn't be reached—and get a partial consummation and then go to the IRS and try the best I could to—

Q. (Interposing) Let me ask you a question, Mr. Turney. In simple words, are you saying to the Court that if you had signed the deed and had it notarized on the 26th, that that wouldn't have been proof that you had conveyed the property on the 26th?

A. Absolutely. I was—

Jack R. Turney, Jr.

Mr. Friedlander: (Interposing) I have no further questions.

The Witness: I had tax advice to that effect.

By Mr. Friedlander:

Q. Well, what tax advice did you have that told you that giving a deed to property wasn't a conveyance?

page 71 } A. Not if you don't have the other parts of the conveyance. They said that the cases, Mr. Friedlander, according to my tax advice, you have to have an actual full transaction, that the mere paper work is not sufficient.

You have to have the sum element of the assertion of possession.

Q. When you arranged for settlement on Saturday, you knew the deed couldn't be recorded on Saturday, didn't you?

A. You didn't have to have recordation. That is one of the rules, too.

Q. Now, Mr. Turney, what was the deed of trust that had to be signed under the contract?

A. As I read it—and I will show you the contract—

Q. (Interposing) What was the existing trust on the building? What was the existing trust, number one?

A. That's exactly my—

Q. (Interposing) What was the existing trust?

A. The existing trust was $50,000.

Q. How much?

A. Wait a minute. Do you want to hear the answer?

Q. Yes, I do.

page 72 } A. The existing trust was a $50,000 base, 48,000 left, approximately, 20 years, 6 percent, secured by 4 and ½ acres. That's all you asked me?

Q. Yes. The 48,000 was the existing first trust?

A. Yes.

Q. Which happened to have security on the rest of the property which you were not conveying, is that correct?

A. Let me hear that again.

Q. The $48,000 first trust was on this property, is that right, as well as—

A. (Interposing) Yes, all of it.

Q. And you didn't need to change the mortgage, all you had to do was get a release of the other?

A. I understood—no, sir; that is not correct.

Q. All right.

A. I was told by the bank—at Mr. Smith's request I called

the bank and was told they would have to have a new loan at seven percent.

And at the time that I talked to them, they told me that $35,000 would be the maximum.

I later went to the bank and they reported that—

Q. (Interposing) I hate to interrupt the witness, but he is testifying to more hearsay by the minute.

page 73 } A. You asked me the question.

Q. I did? I didn't ask you the amount of the mortgage. You said 48. I said, "On that property as well as the other." We agreed to that.

The next problem is, when was your conversation with the bank?

A. I had two of them.

Q. Just the date.

A. I had one on Tuesday and one on Thursday.

Q. All right. Now, when you decided not to sign for whatever reasons this deed, you made that known after midnight on the 26th, didn't you, the fact you weren't going to sign?

A. No, I made it known to Mr. Harper on the afternoon of the 26th, the evening of the 26th when he and I gave up on trying to get a hold of the Smiths.

Q. And you are saying to the Court that the reason you didn't sign the deed and convey the property was the reasons you have given.

Now, let me ask you this: can you tell me, sir, when you first made any contract for the purchase of the property in Washington on Leroy Place?

A. When I made the contract?

page 74 } Q. Yes.

A. I would say August or September, 1967.

Q. Now, when did you move in?

A. October 26, 1968. That was "D" day.

Q. And what had you done with the property in between?

A. Kept the furnace and air conditioners going and wait.

Q. Weren't you living in the Leroy Place property before that time?

A. Why wasn't I?

Q. I say, weren't you?

A. No, we moved on Saturday, the 26th. We paid double time to the moving company, gave them only two days' notice and moved—my wife accomplished the move on two days' notice.

Q. And when did you start moving?

A. Saturday morning at 7:00 o'clock.

Mr. Friedlander: I have no other questions.
Mr. Mackall: No other questions at this time.
The Court: You may stand aside.
The Witness: Thank you.

(Witness excused)

page 75 } Mr. Friedlander: Mr. Chanel. This is our last witness.
The Court: All right.

Thereupon, W. LEE CHANEL, was called as a witness by and on behalf of the plaintiffs, and after having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Friedlander:
Q. Would you state your full name, sir?
A. W. Lee Chanel. My office address is 390 Maple Avenue, East, Vienna, Virginia.
Q. What is your profession or occupation?
A. I am a real estate appraiser.
Q. And how long have you been so engaged?
A. I have been engaged actively in real estate, in the real estate business since 1950 and appraising since 1951.
Q. And during that period have you qualified in the courts of Virginia?
A. Yes, in the courts of Arlington and Fairfax.

page 76 } Mr. Friedlander: Do you want me to qualify him?
Mr. Mackall: I will stipulate to his qualifications.
The Court: All right. You may proceed.

By Mr. Friedlander:
Q. Did you at our request examine certain properties in Fairfax County which are indicated by this plat, marked lot five according to that plat, referred to as lot five?
A. I did.
Q. And what sort of method did you use to appraise the value of that real estate?
A. That particular dwelling, the lot itself, I arrived at a value by comparable and adjusted to that particular lot.
On the structure I took the replacement cost less depreciation.

Q. And is that one of the standard methods of appraising a structure?

A. It is an accepted method.

Q. Now, was there difficulty in obtaining comparables for the building?

page 77 } A. That structure, that was a difficult problem in obtaining comparables. At this time I only know of one similar structure which has been sold for six to ten years.

Q. And, of course, the property was not then rented to tenants, was it? You couldn't use the capitalization approach based on rentals?

A. No, sir; that particular property is occupied.

Q. So the only method was the method you used?

A. Yes.

Q. Now, from your method and using your figures, can you tell the Court in your opinion the fair market value of that property?

Mr. Mackall: Your Honor, I would object unless there is some reason for it.

Mr. Friedlander: The question of damages. Under the law, if specific performance was not given, we would claim that we were entitled to damages and the damages would be the fair market value of the property as compared to the contract price.

Mr. Mackall: How has be been damaged this much?

Mr. Friedlander: Well, the bargain rule.

The Court: I will allow him to proceed.

By Mr. Friedlander:

page 78 } Q. Would you tell us?

A. The subject property, just a quick background on it, it's in McLean right off Dolley Madison Boulevard, Ballantrae Lane. It is less than four miles from the District line, very easy commuting to town.

It's a demand area and demand property. Just to give a little background on the property, the neighborhood of that particular property is very unique.

It's made up of high-valued properties. Some of them run up to several hundred thousand dollars in value.

This particular lot having a frontage of 270 feet roughly on Ballantrae Lane and a depth on the south side of 250 feet and a distance between the front point and the rear point projecting in a straight line about 325 feet, 325 contains an acre point five, approximately 65,340.

W. Lee Chanel

Easement on the side is a 25 feet wide ingress and egress to the rear lots. This particular lot has a very nice knoll on it where the structure is located right in the crest.

It has a good view, a very unusual view, particularly to the south. It has a great driveway appeal. The approach to the house is very nice.

page 79 } The lot is improved. To sum up the condition of the lot, I would say it's an excellent building site. It's very desirable.

In looking around the neighborhood to determine the value of the lot, there was the adjoining lot. There was an adjoining lot that sold—pardon me I'll check those dates—on the 9th of October, 1968.

That lot is a little smaller in acreage and it brought $24,500. It was purchased by Robert C. Berg. This particular lot adjoining does have a space on Dolley Madison Boulevard and for all intents and purposes joins Dolley Madison Boulevard.

It has a high traffic level of noise, high noise traffic. There are sales in the area. Across Dolley Madison Boulevard in the same neighborhood there are building sites slightly larger than the subject. One sold to Roland Thompson, two lots, approximately four years ago, $26,000 cash.

There was another sale approximately three years ago at an adjusted price of $26,000. That would be lot 7, 31-1 of the county tax map.

In looking at the sales and considering the area and in looking at the prices asked for land in the area,

page 80 } now, there are a few lots on the market.

There is one lot on a private way within the same bounds of the subdivision. I don't believe it's part of the recorded subdivision, but it came off the same tract of land without water and sewer, approximately one acre.

It's rather shallow. It sold for $29,500. I took these sales and asking prices and adjusted them coming up with a value of this particular lot of $30,000 as a building site.

The structure, the main building is brick, painted, of subdued modern construction. It is one story with a hip roof, one floor and no basement, on a slab with radiant heat, contains a foyer entrance hall with lavatory, flagstone floor and picture window.

The living room which is off the right of the foyer has a window wall and oversized marble fireplace and is a very attractive room.

It has an excellent view from that room. To the left of the

foyer is the kitchen-laundry room-breakfast room and family room combination with fireplace.

It has two resident bedrooms and master suite containing a dressing room and bath. There is a total of
page 81 } three baths in the house.

There is on the side of the house a utility room of approximately nine by nine containing the different utilities.

The house contains approximately 2,550 square feet. To the side of the house is an outbuilding which has two stalls and carport.

The carport contains about 1,200 square feet. I arrived at a square foot replacement cost of 23.80 per square foot.

The cost replacement of the house would be $60,690. The estimate, the incurable is 15 percent, $9,090; the curable, 10 percent, or $6,069.

The economic obsolescence, ten percent, $6,069, giving a total depreciation of $21,228, giving a value on this structure as it exists of $39,462.

Q. What was that figure again, $39,900?

A. $39,462.

Q. Thank you.

A. The outbuilding of 1,200 square feet having a reproduction value of $4.89 per square foot, the incurable, 10 percent, and the curable, 15 percent, 25 percent of the value being $1,467, giving a value of the outbuilding as
page 82 } it exists, $4,401. The value of the land, the structure as it exists and outbuilding as it exists having a rounded figure of $73,800.

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page 93 }

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Mr. Friedlander: That's the plaintiff's case, if Your Honor please.

Mr. Mackall: Your Honor, I would like to make a motion to dismiss this suit. I would like to present in sup-
page 94 } port of that the case of *Cranford* vs. *Hubbard,* 208 Va. 689.

It was the case decided by the Honorable Calvin Van Dyck. He was reversed and remanded in that case. It was a case, a suit for specific performance on a contract.

It said that the trial Court in its written opinion expressed the view that time was somewhat of the essence inasmuch as Mrs. Cranford changed the 180 days time for settlement to 90 days.

We conclude from the evidence that time, it was entirely of the essence and so agreed by the parties when the contract was executed.

This case—and it's the latest case in Virginia on the subject—time is of the essence.

All right. Your Honor, the testimony here is that the 26th of October was the deadline. The purchasers here did nothing on that day except go to an attorney's office.

They tendered no money, they signed no settlement sheet, no anything. And then to come in here and ask for a specific performance when they have not performed on that day, I frankly think, Your Honor, that on that alone, that this suit for specific performance—and I think that case
page 95 } that you have before you shows that we are right.

All of the parties knew that the 26th of October was the deadline. This was the date. The purchasers here didn't perform on that day.

They did not perform and I don't believe they can come in and ask this Court for specific performance. I think if Your Honor looks at that case thoroughly, I think you will find the law agrees with this point.

Mr. Friedlander: We have only this to say. We have a contract which gives the date of settlement, the 26th, or as soon as you are ready, and this certainly was available, but the defendant in this case had the deed in his possession.

He claims many reasons why he didn't sign the deed, but the point is, if they are claiming that settlement had to be made on the 26th or the contract was void, why didn't the contract say that?

Now, it is true that time is of the essence only when so contracted for or established by other facts. Time of the essence doesn't mean one day.

Time of the essence means a reasonable time. On Saturday you couldn't have recorded the deed. You couldn't have completed the transaction.
page 96 } Holding it open until Monday is certainly—there's certainly nothing wrong with that. The plaintiffs in this case at all times have tendered performance.

The gentleman they went to they had never known before. They went in his office as they were directed to settle and

did everything they were supposed to do and are ready to settle.

Because he changes his mind about the price, for other reasons, whatever they may be, he used the excuse that on the 26th on a Saturday, these people had not put a suitcase in this house.

If he doesn't—a lawyer knows that these things may be all right for an average person to do, but putting a suitcase in a house, that certainly wouldn't have been possession.

Certainly they couldn't move in the moment they were moving out. If he had time to make the deal like he was supposed to and was satisfied with the purchase price, then, of course, there would be no problems because immediately thereafter on Monday everything would have been settled.

Thank you.

The Court: Anything further?

page 97 } Mr. Mackall: I would like to say one thing. The tender of the deed is not necessary when they haven't performed and I think here—didn't I give you the Hubbard case?

The Court: Yes.

Mr. Mackall: I think that case clearly shows if you look at the contract deed, the last clause there.

The Court: Just a minute.

Mr. Mackall: We're talking about what's fair and they didn't perform. He doesn't have to tender the deed when they don't perform. They didn't perform.

Your Honor, I would also like to say there's no evidence here today that—I think the evidence is confusing on this, but there is no evidence today about the assumptability or anything of a trust.

This was a contingency in the contract and I don't think—

Mr. Friedlander: (Interposing) We have the reference to the deed book with the trust in it. I did forget that. I would like to reopen the case to put it in. It's in book 2886, page 723 to 725. That's the deed of trust.

page 98 } If we might reopen the case to put that in, we will bring the book up, because that shows there are no limitations on the assumption of the trust. It's assumable.

Mr. Mackall: I want to say this: I don't object to them bringing that book in here, but that's not going to prove that this trust was assumable and that this contingency was met.

I don't believe they have ever proved that, but I don't object to them opening up to bring the deed in here, but I don't

think they have proven the other point in this case, Your Honor.

The Court: Well, there is no objection—

Mr. Friedlander: (Interposing) We will get the book. There's no limitation.

Mr. Mackall: It's a six-percent deed of trust, Your Honor. It's on record. I don't mind them opening up to bring this in, Your Honor.

The Court: Complete your argument. I will take the motion under advisement at this time. We will adjourn for lunch and give me a chance to read this. You can present that when we resume the case at 2:00 o'clock.

Mr. Mackall: All right, sir.

(Thereupon, the noon recess was taken, after which the following proceedings were had:)

page 99 } AFTERNOON SESSION
March 25, 1969
2:00 O'clock P.M.

The Court: The motion to dismiss is denied.

Mr. Mackall: Your Honor, the trust which I wanted is here.

Mr. Friedlander: I would like to have it marked.

Mr. Mackall: Your Honor, I would like to say for the record that the contract was contingent on the assumption of this trust.

Mr. Turney has testified that the trust was six percent, the existing trust was six percent, the contract was contingent on the assumption of a deed of trust at seven percent and there is no evidence before this Court that this contingency has been met or was met or ever was met.

The Court: Well, we will mark this.

(Thereupon, the document referred to above was marked Plaintiff's Exhibit No. 3 for Identification.)

Mr. Mackall: I would like to except to Your Honor's ruling on the trust. The fact that time is of the essence, I think we have proved that time is of the essence here and failure to perform on the part of the purchasers, and I
page 100 } would except to Your Honor's ruling at this point.

The Court: This one I am marking will be plaintiff's exhibit three, I believe it is. It will be received in evidence.

(Thereupon, the document referred to above was marked Plaintiff's Exhibit No. 3 in Evidence.)

Thereupon, JAMES A. SMITH, was called as a witness by and on behalf of the defendants, and after being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Mackall:
Q. State your name, please, sir.
A. James A. Smith.
Q. And what is your occupation?
A. I am a professional engineer and land surveyor.
Q. Where is your office located?
A. In McLean, Virginia.
Q. Now, Mr. Smith, did you prepare for Mr.
page 101 } Turney a preliminary plan of their land located at Ballantrae and Dolley Madison Boulevard?
A. Yes, sir; I did.
Q. And is this a copy of what you prepared? (Handing document to witness)
A. (Witness examines document) Yes, sir.
Q. Now, directing your attention to October 25, were you called about preparing something for a settlement that was supposed to take place?
A. Yes, sir.
Q. And who called you?
A. Mr. Stock.
Q. Mr. Stock?
A. Yes.
Q. And what did he ask you for?
A. He asked me for a legal description of the property.
Q. Of what property, sir?
A. The parcel with the house. This lot five. (Indicating)
Q. Lot five?
A. Yes.
Q. Now, did you prepare such a legal description?
A. Yes, sir.
page 102 } Q. And when was this done?
A. It was done Saturday morning, sir.
Q. And when did Mr. Stock call you, the night before?
A. Yes, sir.
Q. Did he say anything about time?
A. Other than he had to have it the next day.

Q. He had to have it the next day?
A. Yes.
Q. Now, did you prepare such a description and give it to Mr. Stock the next day?
A. Yes, sir.
Q. And was the description you gave him, did that come to 1.4—if I could see the deed.

The Court: Yes.
Mr. Friedlander: That's defendant's E.

By Mr. Mackall:
Q. Did it come to 1.434 acres?
A. May I?
Q. Yes, sir. (Handing document to witness)
A. (Witness examines document) It was 1.434.
Q. Did you give the description to Mr. Stock?
page 103 } A. Yes, sir.
Q. At that time did you tell Mr. Stock anything about the subdivision being illegal or anything else like that?
A. Yes, sir.
Q. What did you tell Mr. Stock?
A. I just made him aware of the fact that the piece of property like it was was illegal or did not conform to subdivision controls.
Q. And you told Mr. Stock this on October 26 when you gave him the description?
A. Yes, sir.
Q. Now, subsequent to this, did you see Mr. Stock later on that day?
A. Yes, sir.
Q. And who was with him?
A. Mr. Turney, sir.
Q. Now, what discussion took place between you and Mr. Stock as far as the area and the lot is concerned?

Mr. Friedlander: I understand the plaintiffs were not present here.
Mr. Mackall: Your Honor, Mr. Stock has testified that he was acting primarily as the agent for Mr. and
page 104 } Mrs. Smith and so informed them.
Mr. Friedlander: No agent—
Mr. Mackall: (Interposing) And that is, he would look after their interests and he so informed them at settlement.

That's in the record.

Mr. Friedlander: I disagree he said that. An agent cannot establish agency by a statement.

Another thing which is very pertinent here, I understood from Mr. Stock that he had been employed by the real estate broker and previously had handled settlements involving this property.

We never had seen him before Saturday morning. My only objection goes to the effect of what Mr. Stock may have said on my clients who were completely ignorant of any difficulties except that the deed was being prepared.

That's the purpose of the objection, Your Honor.

The Court: At this point in time, the plaintiffs in this case, had they had a conference with Mr. Stock?

Mr. Friedlander: Yes, sir.

The Court: This is after that?

Mr. Friedlander: Yes, sir.

The Court: I will allow you to proceed and will note your exception.

page 105 } Mr. Friedlander: Thank you, Your Honor.

By Mr. Mackall:

Q. What did Mr. Stock say at this time, Mr. Smith?

A. Well, Mr. Stock asked the question of me, why was it not 1.5 acres? And he also asked whether or not the 25-foot ingress and egress easement as shown on our plat was included within the square footage of the property, at which time I told him it was.

Q. All right. Now, what did Mr. Stock say about Mr. and Mrs. Smith accepting this 1.5 acres or the easement?

A. He said, "They are not going to settle."

Q. And what did he say about that? Why did he say that?

A. He said it was because the lot wasn't an acre and a half and because the road was included in the square footage of the property.

Q. Now, Mr. Stock said this in your office?

A. Yes, sir.

Mr. Mackall: No further questions.

Mr. Friedlander: I have one or two questions.

page 106 } CROSS EXAMINATION

By Mr. Friedlander:

Q. Would you look at the plat which has been marked plain-

tiff's number two and would you tell me if the discussion at this meeting between you and Mr. Stock and Mr. Turney did not involve whether or not this easement which appears on the plat as part of lot five was part of lot five or whether it was part of a different lot with an easement running to lot five?

Do you understand the question?

A. No, sir; I don't.

Q. Let me repeat it. Outlined in red on a plat that I presume was prepared by you—was it?

A. Yes, sir.

Q. Outlined in red there is a certain area which includes lot five, 1.5 acres, plus or minus.

A. Yes, sir.

Q. Included in that is an easement. Did you make the red outline up there? It is an easement or right of way. Do you see that? (Indicating)

A. Yes.

Q. Now, that easement or right of way would be included in the land conveyed, would it not?

page 107 } A. Yes, sir.

Q. And wasn't the discussion solely whether or not a prepared deed that Mr. Stock had made which had not included that easement as part of the conveyed property, whether he could include it as part of the conveyed property? Wasn't that the argument?

A. As far as I am concerned it wasn't, no, sir.

Q. Well, now, as far as you are concerned, that should—nothing was said about it?

A. I'm sorry. I can't hear you, sir.

Q. By that, you mean nothing was said about that or just—?

A. He merely asked me the question whether or not that 25-foot ingress-egress easement was included in lot 5.

Q. And subject to an easement on the other lots, is that right?

A. I don't recall that, sir.

Q. Wasn't that a valid easement?

A. Yes, sir; it was a valid easement.

Q. And no matter who owned the property, the other people could use it, is that right?

A. Yes, sir.

Q. So the discussion then, the question asked

page 108 } you is: "Should I in drawing the deed for Mr. Turney to sign include this easement area in the

deed subject, of course, to the easement?" Isn't that what he asked you?

A. No, sir.

Q. Isn't that what he asked you?

A. No, sir.

Q. Would you look at this description and see whether it includes the easement as part of the land being conveyed or does it give the property less the easement with the right of way over the easement? (Handing document to witness)

A. (Witness examines document) I'm not qualified to say, sir. I don't know.

Q. Read it. You have got a plat in front of you. You're an engineer.

Mr. Mackall: I don't think he understands the question.

By Mr. Friedlander:

Q. Well, now, are you able to tell the Court that as a result of the conference between you and Mr. Stock, he redrew a deed and the redrawn deed was this and that description is what you approved? (Indicating)

A. No, sir; I'm not able to tell the Court that.

page 109 } Q. What was the result of your conference? Did he get some information from you as to how the deed really should be drawn?

A. No, sir; he did not.

Q. Do you want to change that any? You're telling the Court that he didn't get information from you by which he redrew the deed to correct the description?

A. He may have redrawn the deed based on my information, but it was not my knowledge that—I can't testify he did.

Q. Well, what information did you give him which concluded that interview?

A. The information of how many square feet was needed to make the lot 1.5 acres.

Q. Well, didn't you talk to him about the description of the property at all?

A. At this meeting in my office with him?

Q. Yes.

A. No, sir.

Q. Did you ever tell him what the description should be?

A. I told him Saturday morning—rather I reminded him some word of that easement should be included,

page 110 } not to forget it.

James A. Smith

Q. In other words, you told him to include this easement or the land on which the easement stood as being within the conveyance, is that right?

A. Yes, sir.

Q. And do you recall he had a deed with him which he was correcting?

A. No, sir; I don't.

Q. Did you ever get to see this corrected deed after Mr. Turney received it from Stock?

A. Not to my knowledge, sir.

Q. Now, do you recall this meeting very well, the meeting of October 26, 1968?

A. Yes, sir.

Q. And you have reviewed the events that happened since that time?

A. Yes, sir.

Q. And with whom did you review them?

A. Mr. Mackall.

Q. And how about Mr. Turney?

A. Yes, sir.

Q. How long have you known Mr. Turney?

A. About since August of '68, sir, and in that

page 111 } period I have been employed by him as an engineer.

Q. You have been employed by him as an engineer?

A. That's correct.

Q. That relates to this tract?

A. Yes, sir.

Q. And in the work that you did, did you lay out the subdivision?

A. Yes.

Q. What is illegal about it?

A. Pardon, sir?

Q. What is illegal about that subdivision?

A. About it as it stands now or the way we have it shown?

Q. The way you drew it.

A. Well, we have no way of doing—of cutting out lot two and three as it stands now.

Q. I think it might be better if the Court had this. You have a copy of this, don't you? (Indicating)

A. Yes, sir.

Q. Now, the lot which was being conveyed or which we claim should have been conveyed by deed is lot five outlined in red on plaintiff's exhibit two.

You also have that marked lot five on your

page 112 } exhibit, do you not?

James A. Smith

A. Yes, sir.

Q. Now, you also show an easement on this, do you not? (Indicating)

A. Yes.

Q. And that land on which the easement sets is included in lot five, is that correct?

A. Yes, sir.

Q. Now, which is the property that Senator Byrd bought, if you know?

A. Lot one, sir.

Q. Lot one?

A. Yes.

Q. And when he bought that lot, was that lot one as you had divided it or was it different?

A. It was as I have divided it, sir.

Q. Now, lot five, was that as you had divided it?

A. Yes, sir.

Q. Now, what lots have been changed from the way you originally subdivided it?

A. I don't know how to answer that question, sir.

Q. Well, is the question—

A. (Interposing) We originally laid it out in page 113 } several different ways.

Q. Now, how did you lay it out, in different lots?

A. The way we have it shown here. (Indicating)

Q. That's five lots?

A. Yes, sir.

Q. Is there anything wrong with the way it's laid out?

A. Yes, sir.

Q. What's wrong with it?

A. We would have to have a variance of this 25-foot road to provide access to lots 2 and 3.

Q. In other words, what you are saying, if you don't get some kind of a variance, you won't be able to use one or the other lots in the back?

A. If we didn't get the variance, that's correct, sir.

Q. Doesn't Mr. Turney still have land left on which a roadway could be built in to the other lots?

A. Yes, sir.

Q. So what you are saying actually, the illegality lies in the way it was subdivided and in the fact that you would have to divide another roadway into the rear lots?

A. Yes, sir.

page 114 } Q. Wasn't that the reason why Mr. Turney

James A. Smith

decided not to sell the property on Saturday the 26th?

A. I don't know, sir.

Q. Well, you told him that he couldn't sell it without furnishing another roadway, didn't you?

A. I don't know whether I did or not, sir.

Q. Now, think real hard and tell us: isn't it a fact in your discussion with Mr. Turney and Mr. Stock, your discussion centered around the fact that Mr. Turney would have to—or you divide other property for a roadway to the rear lots?

A. No, sir; I don't recall that.

Q. You don't recall that?

A. No, sir.

Q. Now, what was the discussion you had outside of the hearing of Mr. Stock saying that the Smiths had decided not to buy unless they got 1.5 acres? What else took place? What other discussion did you have?

A. Well, Mr. Stock told me that he was concerned because the lot wasn't an acre and a half and also because the road was on the property.

Q. Because the road was what?

page 115 } A. Because the 25-foot ingress-egress easement was on the property.

Q. Is that your memory of it?

A. Yes, sir.

Q. Your memory is not that the question was whether the land was included in the conveyance to Col. Smith?

A. Okay. Well, the fact that the 25 feet of roadway was included in the square footage of the property.

Q. Well, did you see the original deed which didn't include it?

A. No, sir; not to my knowledge.

Q. Well, didn't Stock show you what he had drawn up from your original description which was incorrect because it didn't include the 25-foot easement in this property? Isn't that what he showed you and corrected?

A. Not to my knowledge.

Q. Not to your knowledge?

A. No.

Q. Well, tell me, when you were there on Saturday, how long did the conference take?

A. Approximately an hour, sir.

Q. And while you were there, did you hear Mr. Turney say he wouldn't sign the deed or he would sign the deed?

A. Mr. Turney didn't say, sir, in my presence.

page 116 } Q. What did he say?
A. In my presence he didn't say, sir.
Q. When you left or he left your office, did he leave with Mr. Stock or did he wait until after Mr. Stock had gone?
A. He waited a few minutes after Mr. Stock had left, sir.
Q. And after Mr. Stock left, what did he say to you about whether he was going to make the deal or not?
A. He didn't say whether he was going to make the deal or not, sir.
Q. Did you have any discussion with him about whether he should sign the deed which he was to get that day or already had?
Did he say anything about that?
A. Yes, sir; he did.
Q. What did he say?
A. He said he didn't know whether settlement had taken place or not.

The Court: He said what?
The Witness: Pardon, sir?
The Court: He said what?
page 117 } The Witness: He said he didn't know whether settlement had taken place or not.

By Mr. Friedlander:
Q. Did he talk to Mr. Stock in your presence about whether settlement had taken place?
A. Yes, sir; he did.
Q. And didn't Mr. Stock tell him that he would have to finish it up on Monday, he had done everything he could do on Saturday?
A. I don't recall hearing those words.
Q. Did you hear anything about Monday, what was going to happen on Monday?
A. Monday? Nothing about Monday specifically.
Q. Well, what?
A. It was a later date. The date wasn't discussed, as far as I know.
Q. Mr. Stock was there about an hour?
A. Yes, sir.
Q. During this period, the only thing he said was the deal was off, the Smiths weren't going to settle?
A. No, sir; that's not all he said.
Q. Well, was there anything else that had to be said if the deal was off?

James A. Smith

page 118 } A. I don't know how to answer that question, sir.

Q. All right. Don't answer it. I withdraw it.

Now, tell me, when Mr. Turney said he didn't know whether there had been settlement or not, what deal was he talking about?

A. Lot five, sir.

Q. I thought Mr. Stock had said you couldn't make the deal if the lot wasn't 1.5.

Mr. Mackall: Is that a question?

Mr. Friedlander: Yes.

By Mr. Friedlander:

Q. Is that correct? Mr. Stock had said you couldn't make the deal if the lot wasn't 1.5?

A. Mr. Stock said his client wasn't going to settle.

Q. Why do you refer to the Smiths as his client? Wasn't Stock the settlement attorney?

A. Excuse me. Maybe it wasn't his client, but I assumed it was his client. He was handling the—.

Q. You're telling the Court that Mr. Stock represented to you and Mr. Turney that there could be no settlement unless the lot was 1.5? Is that what he said?

A. He indicated that, yes, sir.

Q. Did he say it?

page 119 } A. Yes, sir; he said it.

Q. Now, what else was necessary to be said because you couldn't deliver a lot 1.5, could you?

A. Yes, sir; I could.

Q. How could you do that?

A. Well, that's what our discussion centered on next.

Q. What?

A. I told him what I could do to make the lot an acre and a half.

Q. And what did he say about that?

A. Well, I told him as far as—he asked me originally why the lot didn't come out an acre and a half. And I told him our preliminary plan indicated 1.5 acres, plus or minus, and as far as I was concerned, 1.434 acres was an acre and a half, plus or minus, but if that was a point, I could move the lot line to include the extra 2,800 square feet necessary.

Q. Mr. Turney wouldn't agree to that, would he?

A. I don't know Mr. Turney. I don't know whether he would or wouldn't, sir.

Q. Didn't you ask him?

A. He said he saw no necessity for it, as far
page 120 } as he was concerned there had been no settlement.
Q. He knew there had been no settlement?
A. (Witness nods head)
Q. He knew, Mr. Turney knew there had been no settlement?
A. Well, he wasn't sure, sir.
Q. I thought before you said he didn't know whether there had been one or not.
A. That's right, sir.
Q. But now, is that what he said?
A. That's right, sir. He didn't know whether there had been a settlement or had not been a settlement.
Q. Well, what time of the day was this, sir?
A. After lunch, sir. About 1:00 o'clock, sir.
Q. And, tell me, did anybody have a copy of the deed in their possession?
A. They may have, sir. I don't know, sir.

Mr. Friedlander: I have no other questions.

REDIRECT EXAMINATION

By Mr. Mackall:
Q. Mr. Smith, you said something, or he asked you, about something being said about what would take place the next week.
page 121 } A. Yes, sir.
Q. What did Mr. Stock say that would take place next week?
A. There was some discussion about the contract.

Mr. Friedlander: I think, if the Court please, in view of the witness' testimony, he ought to give the substance of what was said instead of trying to give his editorial comments of what was said.
The Court: I thought he said he didn't hear anything about it being discussed.
Mr. Mackall: About what was going to happen next week. There wasn't anything said about Monday specifically.
The Court: He didn't know anything about Monday.
Mr. Mackall: Yes. The question was, "Was there anything said about what would happen next week?"
The Witness: Yes.
The Court: Go ahead.

James A. Smith

By Mr. Mackall:
Q. What was that, Mr. Smith?
A. That the contract from—if the contract could be signed, it could be signed next week and dated back.
Q. Dated back?
page 122 } A. Yes, sir.

Mr. Friedlander: A contract be signed and could be—
The Witness: (Interposing) Not the contract, but the—whatever papers they have to sign. I don't know what they are.

By Mr. Mackall:
Q. They could be signed next week and dated back?
A. Yes, sir.
Q. Now, is the 1.434 acres that you came up with, is that the exact lot lines that you followed, the 1.5 plus or minus?
A. Yes, sir; it is.
Q. It is the same general configuration?
A. Yes, sir; it is.
Q. Now, this lot one has never been approved by Fairfax County, has it?
A. Lot one, sir?
Q. Yes, sir.
A. Yes, sir; it's been approved by them.
Q. All right. Lot one has been approved?
A. Yes, sir.
Q. Has lot five ever been approved by Fairfax
page 123 } County?
A. No, sir.
Q. And could Fairfax County require you in order to get this lot five approved, require you to put in a fifty-foot road to give access to the adjoining not only to the Turney's land, but the Lebowitz's land?

Mr. Friedlander: We object to this. It is immaterial. They contracted to sell something. If they can't sell it, that's one thing, but if they have to sell it on terms, that's another.
We do object to it.
The Court: I will allow him to give the answer. Go ahead.

By Mr. Mackall:
Q. Could Fairfax County require you in order to get this lot approved to put in a 50-foot road, not only through this one, but to get back to the adjoining land owner?

A. Yes, sir.
Q. Has the zoning office in Fairfax County indicated to you that they do want this?

Mr. Friedlander: This certainly is inadmissible.
The Court: I will certainly sustain that ob-
page 124 } jection.
Mr. Mackall: All right.
Excuse me a minute, Your Honor.

By Mr. Mackall:
Q. Let me ask you: to record the deed to lot five, do you have to have county approval?
A. Yes, sir.
Q. And has the county ever approved lot five?
A. No, sir.
Q. One other question. How far is this building from the side line?
A. Twenty feet, sir.
Q. What?
A. Twenty feet.
Q. Twenty feet from the side line?
A. Yes, sir; the side lot line.
Q. Would you identify the building you are talking about?
A. It's what we show as an outbuilding on lot five, the extreme most rear portion of it.
Q. All right, sir. Thank you.
A. From there to there. (Indicating)

Mr. Mackall: All right. No further questions.

page 125 } RECROSS EXAMINATION

By Mr. Friedlander:
Q. I'm very much interested, Mr. Smith, in this: are you telling the Court that no one could convey that lot on the description as given in the deed which has been marked as defendant's exhibit E, that that would be nonconveyable, that they wouldn't take a deed to that property in Fairfax?
A. It's in violation of the subdivision control ordinance of Fairfax County, sir.
Q. Mr. Turney couldn't give a deed like this? Is that what you are saying, in your opinion?

Mr. Mackall: I think that calls for a legal conclusion.

James A. Smith

The Court: I believe that calls for a legal conclusion as to whether he may—

Mr. Friedlander: (Interposing) All right.

By Mr. Friedlander:

Q. Let me ask you, sir: did you tell Mr. Turney all these things before he made the contract of the 25th or afterwards?

A. I don't know the date of the contract, sir.

page 126 } Q. The 25th. October 25th was Friday. Now, didn't you tell or did you tell Mr. Turney all these things you have told us about the condition of the property and the fact it wasn't properly divided?

Did you tell him that before Friday the 25th of October, 1968?

A. Yes, sir.

Q. So when he signed that contract, he already knew these things you are telling us about?

A. I don't know when he signed the contract.

Q. He signed the contract October 25, 1968.

The Court: Show the witness the contract.

By Mr. Friedlander:

Q. Now, I'm showing you plaintiff's exhibit number one. (Handing document to witness)

Now, to further help you in your time, the meeting you talked about was Saturday the 26th. If you look at the contract you will see it's indicated the 25th, that's the day before.

Now, it's your testimony, is it not, that you had told Mr. Turney all these things prior to the 25th?

A. Yes, sir.

Mr. Friedlander: We have no further questions.

page 127 } The Court: Wasn't this lot number one approved by the authorities of Fairfax County?

The Witness: Yes, it was.

The Court: When was it?

The Witness: May I look at the—?

The Court: Yes, sir; you may. When was it approved by Fairfax County?

The Witness: My records indicate that it was reviewed by the county and approved on 10-7-68, sir.

The Court: 10-7?

The Witness: Yes, sir.

The Court: I didn't understand.

The Witness: 10-7-68; October 7.

The Court: So it was in fact approved a few days before this contract was entered into on the 25th?

The Witness: Yes, sir.

The Court: Of October?

The Witness: Yes.

The Court: It's your testimony he was aware of the limitations and requirements requisite of the subdivision ordinance of Fairfax County at that time?

The Witness: Yes, sir.

Mr. Mackall: Now, Mr. Smith, was anything said about a variance?

page 128 } The Witness: Yes, sir.

Mr. Mackall: And what was said about a variance from the county? What was said to Mr. Turney? This is before October 25.

The Witness: We were attempting to get a variance for this 25-foot ingress-egress easement to provide access to lots 2 and 3. We had not obtained the final verdict or solution or the answer.

Mr. Mackall: Now, did you subsequently receive an answer from the county?

The Witness: Yes, sir.

The Court: Did I understand that at the time the contract was signed that the seller was trying to obtain a variance, at that time, on October 25, 1968?

The Witness: Yes, sir; we were.

The Court: You were endeavoring to obtain the variance at the very time the contract was entered into?

The Witness: Yes.

Mr. Mackall: Did you subsequently receive this letter from the county? (Handing document to witness)

The Witness: (Examining document) Yes, sir.

Mr. Mackall: Your Honor, I would like to offer this.

Is this the letter you received, sir?

page 129 } The Witness: Yes, sir.

The Court: Do you have any objection to this letter?

Mr. Friedlander: No objection.

The Court: It will be received then.

Mr. Friedlander: I think to make the letter sensible the witness should show the Court the way it was divided at the time the letter went in.

I think you only had two lots, isn't that right, lot number two and lot one?

The Witness: Yes, sir; two sites.

James A. Smith

Mr. Friedlander: Would you show the Court the two sites? Exhibit E, Your Honor.

The Court: It will be F.

(Thereupon, the document referred to above was marked Defendant's Exhibit F in Evidence.)

Mr. Friedlander: In order for the letter to be clear to the Court, the Court would have to see what was before the board at that time.

There were just two lots.

page 130 } The Witness: That was this. (Indicating)

Mr. Mackall: It's not that one. It's the other one, sir.

Mr. Friedlander: Which one is this? (Indicating)

The Witness: This is a plat showing the conveyance for one lot.

Mr. Friedlander: At that time lot two which consisted of all the rest of the land—

The Witness: (Interposing) Yes, sir.

Mr. Friedlander: (Continuing)—that was in existence on October 25, wasn't it?

The Witness: Yes.

Mr. Friedlander: I think the Court should see this.

The Court: Well, I'm confused at this point as to which plats you are talking about. Are you talking about the plat just introduced here?

Mr. Friedlander: The letter doesn't refer to that at all. The letter refers to this. (Indicating)

Mr. Mackall: No, sir.

Mr. Friedlander: Well, you have to read it, too, and see it. It refers to lot one and the balance of the land. The only subdivision you had was lot one which was ap-

page 131 } proved.

Mr. Mackall: That was approved long before this letter was ever written. This letter was written on the rest of the land.

Mr. Friedlander: This looks like October 4, 1968, that you approved lot one and here the rest of the ground is lot two. (Indicating)

Mr. Mackall: This was to get the other thing approved by the county, the other four lots, Your Honor. The one lot was already approved.

It's on the preliminary lot one and this is to get the other four approved.

The Court: I understand.

Mr. Mackall: This is in reply to that.

Mr. Friedlander: I think if you would look at this, if the Court please, you will see a very unusual situation.

Mr. Smith signed it. It has a variance granted on September 27, 1968, by Fairfax County eliminating the dedication and construction of a service drive along Dolley Madison Boulevard, provided no access will be allowed to any lot they had in the subdivision from Dolley Madison Boulevard, and then they struck out "subdivision" and put in
page 132 } this resubdivision.

I don't know what—

Mr. Mackall: (Interposing) I could explain that. This was approved and when this was approved—this was in October—they waived a service road along Dolley Madison Boulevard.

Is that correct, Mr. Smith?

The Witness: Yes, sir.

Mr. Mackall: This was approved and you ran in to get the rest of the land approved like it is on that plat?

The Witness: Yes, sir; like it is on this one. (Indicating)

Mr. Mackall: Like it is on this one? (Indicating)

The Witness: Yes.

Mr. Friedlander: What is that one?

Mr. Mackall: That's a copy of an exhibit that is in there.

Mr. Friedlander: Did you ask Mr. Smith when they created the easement?

Mr. Mackall: When they created the easement? It's never been created, Mr. Friedlander.

The Court: Do you have any further ques-
page 133 } tions of this witness?

Mr. Friedlander: I have no other questions.

Mr. Mackall: I have no further questions.

The Court: You may step down. Call your next witness.

(Witness excused)

Thereupon, CONRAD R. HARPER, was called as a witness by and on behalf of the defendants, and after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Mackall:

Q. State your name, please, sir.

A. Conrad R. Harper.

Conrad R. Harper

Q. What is your occupation?
A. Real estate broker in McLean, Virginia.
Q. Now, Mr. Harper, did you have Mr. Turney's house listed for sale?
A. Yes, sir; we did.
Q. Now, did there come a time when a contract was negotiated between—you were negotiating a sale between Mr. Smith and Mr. Turney?
page 134 } A. Correct.
Q. And what significance did October 25 have as far as this contract was concerned?
A. October 25 was the date—
Q. (Interposing) October 26, I mean.
A. Okay. October 26 was a very significant date in that it was a magic date as far as Mr. Turney's tax situation was concerned and he insisted in this case that we settle on October 26 in order for him to qualify for a tax deferment.

Mr. Friedlander: I presume this is a result of his conversation with Mr. Turney and therefore it should be stricken so far as we are concerned.
The Court: I assume he doesn't know of his own personal knowledge this to be a fact, but what was relayed to him by Mr. Turney.
Mr. Mackall: All right.

By Mr. Mackall:
Q. What did you tell the Smiths about this October 26 deadline?
A. I told them in order for this contract to be accepted and settled, that settlement would have to be on October 26.
Q. Did this enter into your dealings with the Smiths, this October 26 date?
page 135 } A. Yes, sir; it did.
Q. In what way?
A. Well, in that we agreed in the process of negotiating the contract with the Smiths that settlement would take place on October 26.

Mr. Friedlander: Is the witness now stating what the contract said or is the contract in evidence? The contract doesn't say that.
Mr. Mackall: I think the circumstances—he is leading up to why the 26th date is in here, why it is important.
The Court: I understand.

By Mr. Mackall:

Q. Did your negotiation with the Smiths concerning price have anything to do with the October 26 date?

A. Yes, sir; Mr. Turney's consenting or agreeing to a price, the price of $65,000 was contingent on settlement being on October 26.

Q. And were the Smiths aware of this?

A. Yes, sir; they were.

Q. Did you tell them about the October 26
page 136 } deadline?

A. Yes, sir; they were agreeable to it.

Q. Now, Mr. Harper, were you aware that something, that the county had to approve something in this thing?

A. I was aware there was a subdivision approval that was in the process at the time.

Q. All right. And did you feel that—

Mr. Friedlander: (Interposing) We don't think what he felt would be pertinent. We object to that.

Mr. Mackall: Okay.

By Mr. Mackall:

Q. Did you negotiate a higher price to start with?

Mr. Friedlander: We don't think this is admissible.

The Court: I'm going to rule that is immaterial.

Mr. Mackall: All right, sir.

By Mr. Mackall:

Q. Did you talk to Mr. Smith about the 25-foot road and why it was necessary?

A. Yes, sir; the 25-foot easement.

Q. You did talk to Mr. Smith about this?

A. Yes, sir.

Q. And did you ever tell him that the easement, you know, the variance was pending or anything like that
page 137 } before the county?

A. Yes, sir; he was aware of that.

Q. He was aware of that?

A. Yes.

Mr. Mackall: No further questions.

Conrad R. Harper

CROSS EXAMINATION

By Mr. Friedlander:

Q. What do you mean, he was aware of the pendency of easement?

A. Well, the pendency of the variance with respect to the subdivision.

Q. How did you make him aware of that?

A. Well, we went over the plat and he was concerned about the fact there was a 25-foot easement on the property he was buying and he wanted a provision at one point to the effect that it would be vacated if another means of access was made available to the other lot.

Q. Mr. Turney wouldn't agree to that?

A. That's right.

Q. So you signed the contract and the contract represented the final terms between the buyers, did it not?

A. That was my understanding at the time.

page 138 } Q. You prepared the contract?

A. Yes, sir.

Q. I show you what has been marked plaintiff's exhibit number one and ask you if that is the final agreement between the parties. (Handing document to witness)

A. (Witness examines document) Yes, sir.

Q. Now, at the time you had Mr. Turney sign it, did he say that he wanted to put anything else in it before he signed it?

A. No, sir.

Q. Did he examine it?

A. Yes, sir.

Q. He did make one change, didn't he? He didn't want to give up the drapes so he made an allowance of $500. Do you recall that?

A. Yes, sir; that was negotiated over the telephone.

Q. Between Mr. Turney and Col. Smith?

A. And myself.

Q. And yourself?

A. Yes.

Q. Is there anything in the contract that was the subject of any question? I mean, is it written wrong?

page 139 } Did you make a mistake when you drew it?

A. Well, I think there is some question technically as to what type of a loan it was.

Q. Well, actually, wasn't it clearly understood there was an existing loan which was $48,000 at the Riggs Bank and Mr. Smith was going in to arrange with the Riggs Bank to

release the other lots except the one he was buying and assume the mortgage and get the other lots released? Wasn't that an oral understanding you had?

A. The oral understanding was he had a discussion with the loan officer at Riggs Bank.

Q. Take it one at a time.

Mr. Mackall: Let him answer the question. Your Honor, he asked him a question and I think the witness is entitled to answer it.

The Court: Let him answer.

Mr. Friedlander: He's jumping the gun ahead of time so it won't be clear.

The Witness: Yes, sir; he reported to me he had a conversation with the loan officer at Riggs Bank and that the Riggs Bank's officer would approve the $48,000 loan, which was the current balance on Mr. Turney's loan, at seven percent.

page 140 } By Mr. Friedlander:

Q. And release the other lots?

A. Yes, sir.

Q. Now, there was no problem about that then, was there?

A. Not at this point.

Q. So it came down, this was all done, he did that before he signed the contract, didn't he—Smith?

A. Yes, sir.

Q. So he wouldn't sign this contract until he was sure he could reply that he checked it first before signing?

Mr. Mackall: I object to that. He wouldn't know that.

The Court: Objection sustained.

By Mr. Friedlander:

Q. Now, there came a time when everybody signed the contract, this is, both sides?

A. Yes, sir.

Q. And you had been the agent on the deal?

A. Yes.

Q. And you were representing the seller to some extent in selling perhaps and the purchaser in buying?

A. Well, we had the property listed for sale.

page 141 } Q. So you were actually getting your commission from the sellers?

A. That's correct.

Conrad R. Harper

Q. Now, did there come a time when in accordance with the contract settlement was set for Saturday the 26th?

A. Yes, sir.

Q. Who arranged a Saturday settlement on the 26th?

A. I made the arrangements with Mr. Stock to be in his office Saturday morning.

Q. At that time did Colonel and Mrs. Smith know Mr. Stock?

A. I don't honestly know whether they had any direct communication with him or not.

Q. Didn't you have to tell them where to go?

A. Yes, sir.

Q. Did you take them?

A. No, sir; I did not.

Q. You met them there?

A. No, sir.

Q. You were not there?

A. No, sir.

Q. Didn't you appear at all at that settlement?

A. No, sir.

page 142 } Q. Isn't it customary for real estate brokers to be at the settlement of the contract?

A. Yes, sir.

Q. Was there some reason why you didn't appear?

A. I wasn't notified as to the exact time and assumed the attorney would call me when the parties were in his office since his office is just two doors from ours.

Q. Two doors from yours?

A. Yes, sir.

Q. Were you in your office Saturday?

A. Yes, sir.

Q. Did you call him at all Saturday?

A. I talked to him early Saturday morning.

Q. What did he tell you then?

A. He indicated the Smiths would be in sometime late that morning.

Q. Now, did you ever participate in any renegotiations after that time?

A. Well, I wouldn't say it was a renegotiation. I had conversations with Mr. Turney and Mr. Stock on Saturday and then the conversation with the Smiths Sunday night—I believe it was—and we had a meeting it was either Monday or Tuesday night with the Smiths and Mr. Tur-
page 143 } ney and Mr. Stock.

Q. And were you ever present at any meeting

in which Mr. Turney suggested that if they increased the price, he would sell it?

A. I think he indicated that he might reconsider.

Q. Did he ever say, "If you increase the price to such an amount, you tell us the amount" and he would sell? Think for a moment and tell us.

A. I think he said he would consider renegotiating the contract at a higher figure.

Q. Didn't he say $70,000? Wasn't that the figure he said he would sell for?

A. He may have. I don't specifically recall.

Q. Well, now, you were present during the time when this discussion took place, were you not?

A. Yes.

Q. You were there?

A. Yes.

Q. Were you still the agent of the deal?

A. Correct.

Q. Well, now, let me ask you about this: did the Smiths ever tell you they wouldn't go through with the deal if they didn't get 1.5 acres?

page 144 } A. No, sir.

Q. Even on that Sunday night when you talked to them or Saturday or whatever it was, you never heard them say that, did you?

A. No, sir.

Q. Did you ever hear Mr. Stock say it to anybody?

A. No, sir.

Mr. Friedlander: No further questions.

REDIRECT EXAMINATION

By Mr. Mackall:

Q. Mr. Harper, at this meeting, subsequent was there something said about dating papers back?

A. Yes, sir; there was.

Q. And what was Mr. Turney's reaction to this?

A. Mr. Turney refused to be a party to that on the ground that he felt it was a fraud.

Q. A fraud?

A. Yes, sir.

Q. On whom?

A. Well, a fraud on the Internal Revenue Service.

Q. Now, the Smiths gave you this contract on the 25th signed on that date, is that correct?

Conrad R. Harper

A. That's right.

page 145 } Q. You took it to the Turneys after a phone call you put in—who wrote in the word "allowance" here?

A. That's my handwriting.

Q. That is your handwriting?

A. Yes, sir.

Q. And that was written in after the Smiths signed the contract?

A. That's correct.

Q. And did the Smiths ever acknowledge this contract or anything after that time, initial it or approve this change?

A. No, sir; I didn't see the Smiths after that until the following Monday or Tuesday.

The Court: I understand you contacted the Smiths by phone and they consented to this change by phone?

The Witness: Yes, sir; that's correct.

The Court: All right.

Do you have any further questions?

Mr. Mackall: Yes.

By Mr. Mackall:

Q. Was there anything said about post-sale approval of this variance?

A. No, sir.

page 146 } Mr. Mackall: No further questions.

Mr. Friedlander: No other questions.

The Court: Mr. Harper, after the contract was signed, you made contact again with Mr. Stock, as I understand it.

The Witness: Yes, sir.

The Court: About making settlement on Saturday the 26th?

The Witness: Yes, sir.

The Court: Was Mr. Stock the settlement attorney?

The Wtiness: Yes, sir.

The Court: He understood it was going to be him, Mr. Stock was going to be the settlement attorney?

The Witness: Yes, sir.

The Court: And also the Smiths knew Mr. Stock was going to be their settlement attorney?

The Witness: Yes, sir.

The Court: Was there any discussion that you would substantially make the settlement on the 26th, but there may be some loose details that would have to be wrapped up later?

The Witness: Well, I think we all were aware

page 147 } that the instructions from the lending institution were not in hand, yes, sir.

The Court: This was recognized from the outset, wasn't it?

The Witness: Well, it wasn't recognized, Your Honor, until such time as we submitted the offer or prepared the offer and submitted it to the Turneys because we hoped to be able to get to that stage later in the week, and by the time we got the offer submitted to the Turneys, it was about midnight, I believe, or close to 1:00 o'clock in the morning on the morning of the 26th, and it was the previous day, the 25th, that Mr. Smith had been in contact with Riggs and had gotten a loan approval.

The Court: So it was recognized by all parties that there would be some loose details probably at the settlement on Saturday morning the 26th, as far as the exact financing was concerned?

The Witness: Yes, sir; I would say that's true.

The Court: But for all intents and purposes then they would make the settlement?

The Witness: Yes, sir.

The Court: Recognizing that maybe some details would be smoothed out at a later date?

page 148 } The Witness: Yes, sir.

The Court: That's all the questions I have.

Mr. Mackall: No further questions.

The Court: Any further questions, Mr. Friedlander?

Mr. Friedlander: No questions.

The Court: Call your next witness.

(Witness excused)

Mr. Mackall: Mr. Middleton, Your Honor, is coming. Tom Middleton is coming as an expert.

The Court: Are there any other witnesses in the meantime?

Mr. Mackall: No, sir; I want to put him on now. I have another expert coming at 1:00 o'clock also.

The Court: Let's take about a five minute recess at this time.

(Thereupon, a short recess was taken, after which the following proceedings were had:)

page 149 } Thereupon, THOMAS J. MIDDLETON, was called as a witness by and on behalf of the de-

Thomas J. Middleton

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

DIRECT EXAMINATION

By Mr. Mackall:

Q. State your name, please, sir.

A. Thomas J. Middleton.

Q. And what is your occupation?

A. I am an attorney, a partner in the firm of Bauknight, Prichard, McCandlish and Williams in Fairfax.

Q. Is most of or the majority of your work devoted to tax practice?

A. It is.

Q. And have you ever won any awards in the tax field?

A. Yes, sir; I was voted the outstanding student in the college of William and Mary when I attended.

Q. Have you ever—

Mr. Friedlander: (Interposing) We will admit his qualifications.

The Court: All right.

page 150 } By Mr. Mackall:

Q. Mr. Middleton, I want to draw your attention to section 1034 in Nonrecognition of Gain on the Sale of a Residence, and ask you if this would apply, assuming October 26, 1968, was the deadline, and if the purchasers went to settlement on that day, signed no papers, put up no money, and if the seller signed a deed and gave it to the settlement attorney, would the seller be entitled to the nonrecognition of the gain under section 1034 of the Internal Revenue Code?

A. Section 1034 of the Internal Revenue Code requires that within a year before or after the sale of the principal residence that the sale or exchange of the new residence must occur and if October 26 is the deadline, then passage of title must occur by that day, and based on what you are saying here, my opinion is that there is no passage of title and therefore there would be no recognition of gain.

I mean, the gain would be recognized, the recognition would be lost because the day had passed.

Q. The day had passed?

A. The day had passed and the period would have expired.

* * * * *

page 160 } Thereupon, JACK R. TURNEY, JR. a defendant, was recalled as a witness by and on behalf of the defendants, and after having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION

By Mr. Mackall:

Q. Now, Mr. Turney, we have talked about this tax problem. Would you tell the Judge your position as far as your nonrecognition is concerned and how it affected you personally?

A. I don't believe I understand your question.

Q. Well, how much money were you saving by this coming under 1034?

A. In dollars, I was saving approximately $6,000. I had placed a demand note and thinking—at a time when I thought the whole property was going to be sold and the bank that I had placed that with was anxious to be paid off as fast as they could because the interest rate was lower than most of their interest rates at the time.

I figured if I could avoid the—

Mr. Friedlander: (Interposing) I wonder if we might object to the narrative form of the testimony. You
page 161 } don't get very much of a chance to object with this narrative testimony, but I don't think what he thought at the time would be helpful to the Court.

The Court: Let him go ahead and testify.

By Mr. Mackall:

Q. Go ahead.

A. In trying to arrange the cash, my cash position, I felt that it was important to try to defer the capital gains on the property.

At the time when we started all this about reducing the price for that, I had a chance to gain $10,000 or $11,000 because I had a valid offer on the adjacent lot, lot four, and all three lots—lot one sold, lot five which was here, and this one which was there, (indicating), they all would have come within my time limit of one year, but as the week wore on, that wore out and I only had $6,000 to work with at the end.

Q. All right. Now, what did you tell Mr. Smith about what had to be done as far as settlement was concerned?

Jack R. Turney, Jr.

A. I explained to him that we had to have the money now. We had to have the deed in escrow and the money would have to be in escrow if they couldn't get all the details

page 162 } as to how much the prorate would be and so forth, that we had to have the settlement sheet signed, that we had to have every determinable matter finished to the extent that time permitted, that there had to be the substance of the transaction.

I said that I had been told by my tax attorney that the cases also made it very important in determining whether you came within that or not, that the purchaser must make some affirmative ostensible overt act of possession and he suggested taking a key and putting some clothes in there.

And I said that would be an excellent idea. And we agreed to do that. We discussed it twice on the phone, at his office during the week we discussed it and—

Q. (Interposing) This conversation on the phone, was that about this allowance?

A. It was about the entire offer. I had never at any time agreed to a $65,000 purchase price and didn't until about 1:00 o'clock when I—when Mr. Harper did some big talking to me.

And the drape thing came into it. I was also concerned and expressed concern about the assumability of the loan since it was a different loan, mine was six per-

page 163 } cent and this was seven percent.

I mentioned it to Mr. Smith that we would have to take care of these loose ends the next morning at the settlement, but that we could take care of those at that time and get it down to the absolute minimal delay.

Q. Now, what conversations, what was your first conversation with Mr. Stock on the 26th?

A. Mr. Stock on the 26th?

Q. Yes.

A. I called him about 9:15 and asked him if there were any matters he wanted to ask me about. He said, no, he was not ready.

I urged upon him the urgency of the thing, we had to get the substance of the settlement finished that day, and I said, "What time shall I come?"

He said, "The Smiths are coming about 10:00, 10:30. I will call you when they get here."

I said, "Fine. That's what I want because I have to see them and work out these little things that we didn't work out over the phone."

Jack R. Turney, Jr.

I called him again at 10:00 o'clock. The Smiths had not arrived. I called again at 10:30. He told me at that time they were there, but they had run into a snag
page 164 } and for me not to come up, that he would call me when he was ready for me.

He said the papers weren't ready. He didn't call and 11:30 came and I called him again. Then that is when he first told me that the Smiths had left and then came over to the house at my urging when he told me they hadn't signed anything, put any money up or done anything.

Q. What did he tell you then?

A. When he came over?

Q. Yes, sir. When he came over, what did he tell you then?

A. He told me first they had refused to sign or put any money up because the land wasn't exactly an acre and a half.

He told me that they had—and they had a terrible argument about whether the easement road was in the property or outside the property.

He then showed me my settlement sheet and the way he had written it up, he had me paying all the interest, all the mortgage payments and all the taxes until final clearance of their loan problem and recordation of the deed.

I told him that this might take months of my
page 165 } bearing the expense of the Smiths' things.

He said, "That's what the contract means."

I said, "If that's what it means, none of us who were parties to it knew that because we all had agreed everything was going to cut off on the 26th."

He told me then that they thought—I asked him if they had put up any money and he said no. I asked if they had signed anything.

He said no. I asked him if anybody signed anything. He said no. I asked if any steps had been taken in the settlement. He said no.

And at that time I lost my temper and I scolded him rather strongly. When he said, "There is no problem about that, we can do it any time and date it back to the 26th," I said, "You can't do that.

"That's—I can't represent to the IRS that I consummated a transaction on the 26th when I didn't."

He said, "Then, we will date them all back so all the documentary evidence will show the 26th and nobody will ever know."

Jack R. Turney, Jr.

And I said, "I will know and I won't do it." The, we went over to the Smiths. I said, "It looks to me like I have got to work out the things with the Smiths," but the
page 166 } first thing to do was go to the engineer Smith's and get the property description straightened out.

And there he repeated in front of Engineer Smith the things he had said to me about what the George Smiths had said.

I finally persuaded him that the easement land was included in the property. We even tried to figure out how we would reshape the additional land, reshape the lots in order to add some more, for me to catch George Smith and work out a settlement with him and with Harper.

I was going to take Harper along and have Harper act as escrow agent and so forth. I said, "We are going to have to forget about adding—redrawing the drawings because I won't have time on Saturday."

So we went over to Stock's office and there he whited out on the deed the words "together with" in front of the description of the easement and substituted "subject to."

I forgot one other thing he told me.

He told me for the first time that the Fairfax County subdivision ordinance forbade the sale being before the approval.

When I first heard of it—and it was not from
page 167 } a lawyer, it was from a layman who had a good bit of experience in this and it was very foolish of me to listen to him—I had thought that the—you could sell the land in a subdivision without prior approval, but could cure it, particularly when you had the application on file.

We had the application on file throughout this week. The application as I recall was filed, oh, several weeks before, and we had hoped that we would have the approval long before this.

That was—Stock was the first one that told me that the ordinance forbade the sale, that it required the prior approval to make the sale.

And that was the first time I knew of that.

The Court: Agreed to the sale or couldn't record the deed?

The Witness: I don't think—I think the conversation was in terms, Your Honor, of couldn't make the sale.

I know he did say—he said, "Your contract is illegal and I wouldn't permit you to go to settlement on the 26th in any event."

And I said, "Well, I think you are stretching things from what you tell me," but what he told me was, "You page 168 } cannot make the sale at that time," because we were in violation.

We would be in violation of the easement. I think that's the end of my conversation.

Oh, one other thing. When I left him I told him that I was going to try to find Smith and see—I was going to try to get hold of Harper.

I had called Harper and he had been out and I was going to see if we could catch Smith. We called—when I first talked to Stock on the phone before he came over to my house, I called the motel where the Smiths had been staying, but they had checked out and Stock told me that they had gone on to Sweet Briar.

When he came over he told me they had already left for Sweet Briar, but at the time I left Stock, I was sick with the shock of the thing and I told him that I was going to try to get a hold of Harper, that I was going to try to get Harper to go with me down to Sweet Briar and see if by any chance we could catch him and work out the mechanics of this thing in time to do it.

At that point we all—my wife and I were nearly exhausted. We had packed and moved in two days and we were just—we had put in such a pitch to try to close this page 169 } thing on the 26th as we had all agreed we would, and I hated to give up even in the middle of the afternoon.

And when I left his place I intended to try and catch Smith and work out details and give Harper the checks and I would sign a deed and then we would try to get all these things cleared after we had the thing at least in escrow, so these other things if they fell through would work as conditions subsequent instead of conditions preceding.

By Mr. Mackall:

Q. Mr. Turney, what type of lawyer are you?

A. A poor one.

Q. I mean, where do you practice?

A. I am a commerce attorney. I deal in ICC work.

Q. ICC?

A. Exclusively.

Jack R. Turney, Jr.

Q. You don't do any real estate practice, do you?
A. I should say not.
Q. Now, Mr. Turney, did you see Mr. Harper later on that day?
A. Yes, I finally caught up with Mr. Harper when he brought a man over to see lot four and I told him the bottom had fallen out, that the Smiths had failed to
page 170 } settle and Stock had said they weren't going to settle and that apparently they had blown up over what land was included and how much money was to be paid.
So Harper and I discussed what in the world we could do then. And we even considered trying to call him in Sweet Briar, but we had no idea what hotel he would be at.
We knew his daughter was there and we realized they weren't there yet, they had several hours of driving to do.
I mentioned to my wife that we might—

Mr. Friedlander: (Interposing) I'm not quite sure this would be—
The Witness: (Interposing) Harper was there the whole while. This is exactly what happened. I suggested that we might try to catch him by calling the state police to stop them.
And she told me she thought that would be foolish. And we finally gave up. I told Harper that it just looked like the whole thing was off and that he was—unless he heard from me to the contrary tomorrow, to tell Smith that he breached it or rescinded it, if there was a contract, and that I ac-
acquiesced in the breach and that the contract
page 171 } was terminated.

CROSS EXAMINATION

By Mr. Friedlander:
Q. Do you deny that Mr. Smith the engineer told you long before or prior to October 25, 1968, that your subdivision was illegal?
A. Oh, not long before. Mr. Smith told me at the time we filed the application for approval that we had to have the approval.
And he told me that the ordinance required such an approval. He told me that—he entered the—
Q. (Interposing) I was trying to get an answer to my question. It would be much quicker if you would just answer my question.

Jack R. Turney, Jr.

Did you before October 25, 1968, learn from Mr. Smith the engineer that your subdivision was illegal?

Mr. Mackall: He's trying to answer and I think he doesn't have to give a yes or no.

The Court: I will let the answer stand. Go ahead.

By Mr. Friedlander:

Q. Did you learn from Mr. Smith the engineer prior to October 25, 1968, that the subdivision was

page 172 } illegal?

A. No, I did not. I learned it required an approval.

Q. You heard Mr. Smith testify here today, didn't you?

A. Yes.

Q. Now, is it a fact that when you signed the contract on the 25th of October, 1968, that you read the contract?

A. I couldn't answer that yes or no without an explanation, Mr. Friedlander. I was—I had been working about 16, 18 hours and I was exhausted.

The two agents came over, Mr. Harper and another one who had—Mr. Harper and another one who had gotten into the act.

They had an argument as to whose client was whom. When that was over—

Q. (Interposing) What I wanted to—

A. (Interposing) Let me finish the answer, please.

It was well after midnight. We had, I think, two drinks while they were there. I looked at the purchase price and the assumability and the contingencies that he had.

I did not read—I would say I did not read any of the printed matter.

page 173 } Q. You did sign it?

A. I did sign it.

Q. All right, sir. Now, after you signed the contract, did you then expect to complete the entire sale and record the deed on Saturday?

A. At the time I signed the contract I did not think we had a contract. I expected to settle with the Smiths the loose ends that could be settled that I discussed with Mr. Smith on the phone.

Q. Well, tell me now: did you plan to say anything to them about getting the deed recorded on Saturday?

A. No, I figured that was the settlement attorney's problem.

Jack R. Turney, Jr.

Q. Did you plan to have the first trust completed on Saturday?

A. I had hoped we would. The bank had already arranged—so they told me—to try to get the material there to them—to Stock on Saturday—and I fully hoped that they would.

I expected to have that done.

Q. Why didn't you put in the contract a statement "If the thing isn't completely settled on Saturday, there is no deal" if that's what you say was agreed to?

page 174 } A. Mr. Harper wrote into the contract October 26 and that had been such a keystone to every conversation that anybody had had about this whole transaction and that had been such a hectic week and it never occurred to me to put in anything that Smith and I had said at 1:00 o'clock before I signed that we would both be there.

I felt because of the assumability provision that if he should die that night or not show up, that he had—that I had no valid claim against him, and I felt that that being true, there probably wasn't a contract, but I never—it never occurred to me at all to think of the possibility of his not showing up when I was signing the contract on the very day that we said we were going to settle.

Q. If I could just get a question answered. Did you think you had a contract or not?

A. I did not.

Q. You thought you did not?

A. I did not.

Q. You have been advised since by your counsel that you have a contract, have you not?

A. I can't answer that.

Q. All right.

page 175 } A. I don't know.

Q. All right. You can't answer it.

Now, you keep talking about the savings on taxes. You never could make a savings by the use of this section. You would only defer the tax for some period of time.

A. It was a deferment that I thought would ultimately result in a savings.

Q. How had you planned to keep from paying the taxes ultimately?

A. Well, there are two ways to do that: one is that in the sale of your second property, your gains that you pay—all it does is affect the basis of the second property.

Q. That's right.

A. And the gains that you pay then may or may not be the gains that you have now.

Secondly, I might be old enough so that I could do it on an ordinary income basis more cheaply than at the capital gains basis.

Third, it might not happen until I passed away and then I wouldn't care, my estate would take care of it.

Q. You were talking about deferring the payment of taxes rather than savings?

page 176 } A. Subject to what I have just said.

Q. Right.

A. It might turn out to be a saving.

Q. And so that I won't be mistaken, you are saying you did not know the illegality of this lot at the time you signed the contract?

Of course, you deny that Smith told you, the engineer told you about it before you signed?

A. Smith did tell me about it, but what he told me—

Q. (Interposing) Before?

A. Yes, before I signed it, but what he told me—what Smith told me was not that the thing was illegal. What he said was, "You have to have approval."

And he discussed with me how it worked for retroactive approval, that if you make the sale and the approval comes down, then you are out and the thing is clear.

And that's what I understood the situation to be until Stock, he was the first one that said, "This approval has to precede the subdivision."

Mr. Friedlander: No further questions.

Mr. Mackall: No further questions.

The Court: Mr. Turney, did you consider Mr.

page 177 } Stock to be representing you or not?

The Witness: No, I did not.

The Court: Was he going to prepare the deed for you?

The Witness: He was preparing the deed for the settlement, Your Honor. Mr. Stock had made it very clear that he was taking care of the Smiths, not me.

The Court: Well, wasn't he also representing you in the actual preparation of your settlement statement, the preparation of the deed to you and any monies and so forth being paid to him and he would disperse to you?

The Witness: He would have been the escrow agent for the transaction and the settlement attorney for the transaction. I suppose that that would include me in that sense.

The Court: Did you consent that Mr. Stock was to prepare the deed for you?

The Witness: Yes, sir.

Jack R. Turney, Jr.

The Court: Did you consent that he was going to also prepare settlement statements for you?

The Witness: If I accepted it—as I understood it, Your Honor, I don't know anything about real estate transactions,

page 178 } I have demonstrated that, I guess, but as I understood it, he is in the position of representing the title company, the bank, the buyer, the seller, the broker and everybody else in the sense that he represents the whole transaction.

The Court: He was representing all parties who had come to the settlement?

The Witness: In that sense, yes, Your Honor.

The Court: That's all the questions I have.

(Witness excused)

The Court: Call your next witness.

Mr. Mackall: That's our case, Your Honor.

Mr. Friedlander: We have no rebuttal.

The Court: You have no rebuttal to offer?

Mr. Friedlander: That's right, sir.

The Court: Are you ready to proceed with arguments?

Mr. Friedlander: We will be very brief. If the Court please, we think that the contract on its face provides for the relief we seek because it's not ambiguous, it's clear.

We have tendered it continuously and still do. The defense as I see offered here was that somebody who represented all

page 179 } the parties in the transaction made some statements to the vendors and under the statements made, they elected not to execute the deed.

It does not appear to me whether or not the tax savings was made or not made is of moment here. I think the only thing of moment here is that we went to the settlement.

We did as we were directed to do. We always intended to settle and we were prepared to settle and were ready to settle, but were advised by someone who represented everybody that it could be done on Monday and would be better on Monday because the papers would then be ready.

We never learned that this gentleman, the vendor, did not intend to settle. We are prepared to take the property as is legal or illegal and with the covenants of record as we contracted to.

We don't believe for one minute that this conveyance if made will not be a legal conveyance, in spite of the testimony given in this court.

We do say to the Court that any settlement made should contemplate adjustments as of the date of settlement and not as of the date that the contract provided for
page 180 } settlement because otherwise we would have to compute the items such as loss of rent and so forth, but if we take the date of actual settlement, if the specific performance is awarded, I think we cover the entire situation of this: they get the money they contracted to get except for one item, because of their delay, if the Court please, there is a possibility that the seven-percent loan in order to release the other land will now be seven and three-quarters or seven and a half.

We are perfectly willing to take the property subject to the existing mortgage and leave the loan as a lien against the other land—we will pay it, but if they want us to remove—which we are not contract bound to do, but which we are willing to do—remove the lien of this mortgage on the surrounding land and there is a difference in the interest rates, we think that that additional interest whatever it may be should be their responsibility and that we should be responsible for only seven percent.

That's the plaintiff's position.

Mr. Mackall: Your Honor, I don't think there is any evidence as far as the seven or seven and a half percent or anything like that and I don't think that's before the Court as far as this is concerned.

page 181 } Your Honor, let me say this: all of these people including the Smiths have testified about how important this October 26 date was.

We brought an expert in here and he testified this was the last day and he has given his opinion as to the tax law, that if this deed wasn't signed and delivered to Mr. Stock on that day he wouldn't have gotten his non-recognition in the gain.

He had informed the Smiths about this numerous times. We are here in a court of equity, Your Honor, and everybody knew about this.

All they had to do, they could have put up some money with him. He had a settlement sheet prepared there. He could put up the $17,000.

He could put up the amount over the first trust. All he had to do was put some money in escrow with that attorney.

This had been mentioned to him. He did not accept the deed as was shown to him on that day. The deed that was subsequently given to Mr. Turney was changed.

It was not the same deed that Mr. Smith had seen that day. Now, Your Honor, when you look at this thing, tax is a big thing and everybody knew about that tax
page 182 } issue.

The evidence is in about the suitcase and the key and putting it in the house on that day. They didn't do it.

The evidence is that he got a mover for double time, paid him double time to move out of that house. He said he got out of there on October 26. And what happened then?

He goes up to Mr. Stock's office. Mr. Stock had told the Smiths that since Mr. Turney was a lawyer, "I will look after your interests."

They go up to him and Mr. Stock didn't get them to sign that note, didn't get them to sign that trust, didn't get them to sign even the settlement sheet.

The we find that Mr. Smith won't go through with it because of the 1.5.

They had already left town. What should Mr. Turney have done? What should he have done? Your Honor, I think he was right. I think the culprit here is Mr. Stock.

Frankly, if the people had put up the money—they did none of these things, and Mr. Stock, sure, he was settlement attorney, but he had advised these people

page 183 } that he would look after their interests since Mr. Turney was an attorney.

He probably went a little further than he had the authority to and negotiated a little more trying to get them 1.5 acres, trying to get rid of the easement for them.

This is after they had left town. Your Honor, I feel that time was of the essence in this contract. The 26th was the day.

Everything was geared to that day. I frankly think that the purchasers have not established that on the 25th or any time that that loan with—that Riggs was letting them assume that loan.

There's no evidence here today that the loan is assumable by Riggs. Your Honor, I also would like to say, let's look at the mutuality of the obligation.

Could Mr. Turney have brought about specific performance? Could he have? This is very important because if one party is bound, then the other party has to be bound.

There is a contingency there and there is no evidence today about that. I'm talking about the loan now. The word "allowance" in there, there's something about a

page 184 } deduction of the $500 or something.

The contract is really not clear. I don't believe that he could bring in specific performance on the contract itself.

Your Honor, I think this would be entirely unfair when Mr. Turney had done all of these things to create specific performance against him in view of all of the circumstances.

I just don't feel that it is at all equitable here. That's what the Court has to determine, what did he do wrong?

He didn't do anything wrong. Mr. Stock didn't get these people to do what they had agreed to do and they also didn't go back to the house at all that day which was an important thing. This had been brought out to them.

The Court: Mr. Friedlander, do you have anything further?

Mr. Friedlander: No, sir.

The Court: I will take this under advisement and give you my decision within a few days.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk

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