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IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 741013

W. B. CHITTUM,
SHERIFF OF ROCKBRIDGE COUNTY
PERSONAL REPRESENTATIVE OF THE ESTATE OF
RICHARD B. MACGURN, DECEASED

v.

CHARLES A. POTTER, JR.
WILLIAM B. McCLUNG, TRUSTEE
WILLIAM B. McCLUNG

APPENDIX TO BRIEF

THOMAS C. SPENCER
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Lexington, Virginia 23350

and

WILLIAM O. ROBERTS, JR.
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Counsel for Appellant

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PART I: DOCUMENTS

AMENDED BILL OF COMPLAINT

Filed May 29, 1973

TO THE HONORABLE PAUL A. HOLSTEIN, JUDGE OF THE SAID COURT:

Comes now your Complainant, W. B. Chittum, Sheriff of Rockbridge County, Virginia, Personal Representative of the Estate of Richard B. Macgurn, For his Amended Bill of Complaint herein and says that your complainant, W. B. Chittum, Sheriff of Rockridge County, Personal Representative of the Estate of Richard B. Macgurn, hereby respectfully moves this Honorable Court for the Specific Performance of the hereinafter described contract by the respondent, Charles A. Potter, Jr.; and further prays for damages in the sum of TEN THOUSAND ($10,000.00) Dollars against the respondent, Charles A. Potter, Jr.,; your complainant further respectfully prays that should your Honor deny the remedy of Specific Performance, that the Chancellor continue His equity jurisdiction and award your complainant Judgment against the defendant, Charles A. Potter, Jr., in the sum of FIFTY THOUSAND ($50,000.00) Dollars which relief and sum or sums of money are justly due and owing your complainant by reason of and your complainant would respectfully represent unto your Honor the following facts and circumstances:

(1) That your complainant, duly qualified as the Personal Representative of the Estate of the said Richard B. Macgurn, deceased, in the Circuit Court of Rockbridge County on April 5, 1973, as will appear from the Qualification Certificate attached hereto and marked Exhibit "A".

(2) That on or about May 17, 1972, the respondent, Charles A. Potter, Jr., did by and through his attorney, William B. McClung,

make an offer in writing and signed by his said attorney to Richard B. Macgurn for the sale of certain real estate located in Rockbridge County, Virginia, and more particularly described as follows:

> Tract 1 - All of that certain tract or parcel of land with rights of way incident thereto, appurtenances thereunto appertaining and improvements thereon, containing 45 and 8/100 acres and known as the Sanford Farm, situate and lying on the southwestern side of Colliers Creek in BUFFALO MAGISTERIAL DISTRICT of Rockbridge County, Virginia, and bounded by the lands now or formerly owned by the heirs of H. R. Coleman, Sr., deceased, and others, and being a portion of that same real estate acquired by Charles A. Potter, Jr., by deed of Earl B. and Winifred B. Roberts, dated September 14, 1972, and of record in the Clerk's Office of the Circuit Court of Rockbridge County, in DEED BOOK 329 at Page 79.
>
> Tract 2 - All of that tract of land commonly known as the A. F. Black Homeplace adjoining the lands of the late H. R. Coleman and others in BUFFALO MAGISTERIAL DISTRICT of Rockbridge County, Virginia, and being referred to in the Will of the said A. F. Black which is recorded in the Clerk's Office of the Circuit Court of Rockbridge County, Virginia, in WILL BOOK 61 at Page 380 as containing 275 acres, but estimated to contain 225 acres, and being assessed on the Land Books for Rockbridge County, in the year 1971 as containing 231 acres and being a portion of that same real estate acquired by Charles A. Potter, Jr., by deed of Earl B. and Winifred B. Roberts, dated September 14, 1972, and of record in the Clerk's Office of the Circuit Court of Rockbridge County, in DEED BOOK 329 at Page 79.

(3) That subsequent to the aforesaid offer, negotiations were conducted between Mr. Charles A. Potter, Jr., and the said Richard B. Macgurn through the summer of 1972: That by letter of July 6, 1972, the respondent, William B. McClung, as attorney for Charles A. Potter, Jr., placed additional conditions upon the contract as a counter offer.

(4) That further negotiations regarding the settlement date for the Closing of the contract for the sale of the real estate sued upon herein transpired during the latter part of July, 1972.

(5) That on or about August 10, 1972, the respondent, Charles A. Potter, Jr., by and through his attorney and agent, William B. McClung, and his agent, William E. Tilson, renewed his counter offer of May 17, 1972, as explained in the aforementioned letter of his attorney, William B. McClung, dated July 6, 1972; that the said agents of the respondent Charles A. Potter, Jr., specifically instructed the said Richard B. Macgurn of the manner and wording of an acceptance of the said contract.

(6) That in strict compliance with the instructions of the said attorney and agents of the respondent,Charles A. Potter, Jr., the said Richard B. Macgurn did, by telegram dated August 10, 1972, accept the offer of the said Charles A. Potter, Jr.

(7) That this contract for the sale of real estate is in writing and all of the terms and conditions thereof are certain and the said contract is signed by the agent of the said Charles A. Potter, Jr.

(8) That the consideration for the conveyance of the aforesaid real estate according to the terms of the contract was FIFTY EIGHT THOUSAND ($58,000.00) Dollars.

(9) That subsequent to August 10, 1972, and at all times subsequent thereto during the lifetime of the said Richard B. Macgurn, the said Richard B. Macgurn was ready, willing and able to perform the said contract in all respects and did so advise the said Charles A. Potter, Jr., and his agents.

(10) That your complainant, W. B. Chittum, Sheriff of Rockbridge County, Virginia, Personal Representative of the Estate of Richard B. Macgurn for assets in the State of Virginia and Eugene L. Wolver, Personal Representative of the Estate of Richard B. Macgurn for Assets in the State of California, have at all times, since the death of Richard B. Macgurn, been ready, willing and able and do hereby offer to specifically perform the aforesaid contract in all respects according to the terms thereof; and the respondent, Charles A. Potter, Jr., has been so advised.

(11) That the respondent, Charles A.Potter, Jr., is the owner of record of the aforesaid real estate which he acquired by deed of Earl D. Roberts and Winifred B. Roberts of record in the Clerk's Office of the Circuit Court of Rockbridge County, in DEED BOOK 329 at Page 79.

(12) That the respondent, William B. McClung, Trustee, is the Trustee in a certain Deed of Trust, Dated 14, September, 1972, and recorded in DEED BOOK 329 at Page 82 in the aforesaid Clerk's Office, wherein the real estate which is the subject matter of this suit was conveyed to the said trustee to secure the payment of the sum of THIRTY SIX THOUSAND ($36,000.00) Dollars to the respondents, Earl D. Roberts or Winifred B. Roberts, or the survivor who are the holders of the said note and respondents hereto, and they are proper parties hereto.

(13) That the respondent, William B. McClung, Trustee, is the trustee in a certain Deed of Trust, recorded in DEED BOOK 329 at Page 85 in the aforesaid Clerk's Office, wherein the real estate which is the subject of this cause was conveyed to the said trustee in trust

to secure the payment of the sum of NINE THOUSAND ($9,000.00) Dollars to the holder of a promissory note of even date with the said Deed of Trust being made payable to the order of bearer and he is a proper party hereto.

(14) That the said William B. McClung, is the holder of the note described in Paragraph No. 13 and is a proper party hereto.

(15) That the respondent, Charles A. Potter, Jr., has at all times, since the contract was entered into, refused to comply with the terms of the said contract; has refused to go to settlement; has refused to convey the aforesaid real estate to your complainant and continues to refuse to do so notwithstanding your complainant's many requests for the said respondent's performance and the expression of your complainant's willingness to specifically perform the said contract.

(16) That as a result of the refusal of the respondent, Charles A. Potter, Jr., to perform the contract sued upon herein, your complainant has suffered damages for the delay of the conveyance of the said real estate and other costs incurred as a direct result of the breach of contract by the respondent, Charles A. Potter, Jr., as set forth herein.

WHEREFORE, your complainant, W. B. Chittum, Sheriff of Rockbridge County, Virginia, Personal Representative of the Estate of Richard B. Macgurn, hereby respectfully prays that this Honorable Court compel the respondent, Charles A. Potter, Jr., to specifically perform the aforesaid contract and to convey the real estate heretofore described herein to your complainant; that this Honorable Court determine the interests of the parties in and to the said real estate; that

your Honor Order the disbursement of proceeds of sale in the satisfaction of all liens against the said real estate; that your complainant be given a General Warranty Deed, free from any and all encumbrances not provided in the aforesaid contract, and that your complainant be awarded damages and Judgment against the respondent, Charles A. Potter, Jr., in the sum of TEN THOUSAND ($10,000.00) Dollars for the Breach of Contract set forth herein.

Your complainant, further respectfully prays that should this Honorable Court hold that the remedy of Specific Performance is not available to your complainant, he be awarded a Judgment against the respondent, Charles A. Potter, Jr., in the sum of FIFTY THOUSAND ($50,000.00) Dollars as a result of the costs, expenses and damages incurred by your complainant as a direct result of the respondent's breach and as a result of the appreciation in value of the aforesaid real property and the loss of the benefit of the bargain that your complainant would have enjoyed had the contract been performed according to its terms and conditions;

And your complainant further prays that your Honor grant unto your complainant such other relief as unto your Honor and in Equity shall seem meet together with his costs in this behalf expended, as your complainant will ever pray.

LETTER OF THE HONORABLE PAUL A. HOLSTEIN, JUDGE
DATED JUNE 14, 1974
ADDRESSED TO ALL COUNSEL OF RECORD

Filed June 14, 1974

With this letter you will find a copy of a decree entered this date. Your attention is invited to the facts found to be established

and supported by the evidence as set forth in the decree.

This suit is to compel specific performance of a contract to sell and convey certain real estate known as the "Earl Robert's Farm", and the burden is on the complainant to establish the contract.

There is no presumption of a contract, and the making of the contract or the representations on which the contract is based must be established by a preponderance of the evidence. The burden of proof to establish the existence of a contract is upon the party alleging a breach thereof. It is also held that the burden of proof that a proposal to sell land has been accepted rests upon the party claiming to have accepted the same.

To constitute a contract there must be an offer and also an acceptance. That is, an offer, to become a binding contract between the parties, must be accepted. The acceptance is always required to be identical with the offer, or there is no meeting of minds and no agreement. A party to whom the offer of contract is made must either accept it wholly or reject it wholly. A proposition to accept on terms varying from those offered is a rejection of the offer.

I find that the complainant has failed to establish the existence of a contract by and between Charles A. Potter, Jr. and the late Richard B. Macgurn.

From May 1, 1972 to August 7, 1972 Potter's offer to sell the subject property on certain terms and conditions remained unaccepted. It is settled law that an offer may be withdrawn at any time before its acceptance. In other words, an offer unaccepted creates no rights and is not binding upon the party making it, hence it follows that it may be revoked at any time before acceptance. I find that Potter had the right to

revoke his unaccepted offer on August 7, 1972 through his attorney and agent, William B. McClung.

Counsel for the complainant argue that the acceptance of Potter's offer of July 6, 1972 wired by Macgurn on August 10, 1972 established a binding contract. I do not agree.

I find that the acceptance wired by Macgurn on August 10, 1972 was ineffectual and not binding on Potter, for the reason that a party cannot accept an offer which has been withdrawn or which he has already rejected. The evidence clearly supports this finding:

> On July 21, 1972 Macgurn, through his attorney and agent, Eugene L. Wolver, rejected Potter's offer of July 6, 1972 made through his attorney and agent, McClung; and
>
> On August 7, 1972 Potter, through his attorney and agent, McClung, withdrew or revoked Potter's offer to sell the subject property; and
>
> On August 10, 1972, prior to Macgurn wiring acceptance, Potter's revocation was communicated by W. E. Tilson, agent for Potter, to Wolver, agent for Macgurn, and with the unauthorized suggestion that Macgurn wire acceptance in the words and form of a telegram drafted by McClung.

Your attention is invited especially to the testimony of Eugene L. Wolver as it appears on Page 116 of the transcript.

> By Wolver: "Your Honor,Mr. Tilson advised me that a—or stated to me—that a letter either was in the mail or shortly would be in the mail, a letter by Mr. McClung. The letter Mr. Tilson described is one which was rejecting the offer or withdrawing the offer."
>
> By the Court: "And the purpose, then,of the telegram was to accept before receipt of rejection letter?"
>
> By Wolver: "Exactly, Your Honor."

This testimony clearly establishes Potter's withdrawal or revocation of his offer to sell and was communicated to Macgurn prior to wiring his acceptance.

According to the law and the evidence in this case, it is my judgment that this suit should be dismissed at the costs of the complainant.

DECREE

Filed June 14, 1974

This cause, which has been regularly matured, set for hearing and docketed, came on this day to be heard upon the bill of complaint filed in the name of Eugene L. Wolver, personal representative of the estate of Richard B. Macgurn; the answer of the respondents, Earl D. Roberts and Winifred B. Roberts; the motion of the respondents, Charles A. Potter, Jr. and William B. McClung, to dismiss the suit on the ground that the said Eugene L. Wolver, the complainant, is a non-resident; the order overruling the motion to dismiss and permitting an amended bill of complaint to be filed; the Clerk's certificate of appointment of W. B. Chittum, Sheriff of Rockbridge County, as administrator of the estate of Richard B. Macgurn, who died August 30, 1972; and

Upon the amended bill of complaint filed in the name of W. B. Chittum, Sheriff of Rockbridge County, Virginia, representative of the estate of Richard B. Macgurn; the demurrer of the respondents, Charles A. Potter, Jr. and William B. McClung, to the amended bill of complaint; the decree sustaining the demurrer and striking the claim of the complainant for $50,000.00 alternative damages; the exhibits filed with the amended bill of complaint; the answer of the respondents,

Charles A. Potter, Jr., and William B. McClung, to the amended bill of complaint; and

Upon the motion of the respondents, Charles A. Potter, Jr., and William B. McClung, for summary judgment and a dismissal of the suit; the memorandum filed by the complainant in opposition to the motion for summary judgment; the decree overruling the motion for summary judgment; the discovery depositions of William B. McClung, W. E. Tilson and Charles A. Potter, jr.; and

Upon the testimony of James A. Tilson, W. E. Tilson, and Eugene L. Wolver, Charles A. Potter, Jr. and William B. McClung heard ore tenus on January 22, 1974; the transcript of evidence and incidents of trial recorded January 22, 1974; the memorandum of argument submitted by counsel for the complainant and filed March 5, 1974; the memorandum of argument submitted by counsel for the respondents, Charles A. Potter, Jr. and William B. McClung, and filed April 3, 1974; and the reply memorandum of argument submitted by counsel for the complainant and filed April 2, 1974.

UPON CONSIDERATION THEREOF AND IT APPEARING TO THE COURT THEREFROM AS FOLLOWS:

I.

This is a suit to compel specific performance of a contract to sell and convey certain real estate known as the "Earl Robert's farm" consisting of approximately 271 acres, situate and being in the Buffalo Magisterial District of Rockbridge County, Virginia.

II.

On March 10, 1972 the respondent, Charles A. Potter, Jr., acquired an option in writing to purchase the subject real estate from the

respondents, Earl D. Roberts and Winifred B. Roberts, for the sum of $41,000.00. This document was prepared by the respondent, William B. McClung, as the attorney for Potter.

III.

Sometime prior to May 1, 1972 McClung, as agent for Potter and with the authorization and direction of Potter, listed the farm for sale with the realty firm of W. E. Tilson and Son for the sum of $60,000.00 subject to a realtor's commission of ten percent. After having been shown the farm and the boundaries thereof by Potter, W. E. Tilson, as agent for Potter, showed it to Richard B. Macgurn, a prospective buyer and a resident of California. On May 1, 1972 Macgurn signed and submitted a written offer on a sales contract form provided by Tilson to pay $58,000.00 for the property, $3,000.00 of which was to be a down payment and held in escrow.

IV.

Macgurn's offer was submitted to Potter who then requested McClung to prepare a contract agreeeing to accept $58,000.00 for the property but rejecting the offer to deposit $3,000.00 as a down payment, and in lieu thereof demanding a deposit of $5,000.00; and further providing for the lease of the farm to Potter from April 15, 1973 to April 14, 1974 for the sum of $1,800.00. This unsigned contract was mailed by McClung to Tilson with his letter of May 17, 1972, which was forwarded by Tilson to Macgurn on May 18, 1972.

V.

By letter of June 8, 1972 written by E. L. Wolver, as attorney for Macgurn, to Tilson, Macgurn rejected the offer of Potter as proposed in the unsigned contract and in McClung's letter of May 17, 1972.

IV.

On July 6, 1972 McClung, in response to Wolver's letter of June 8, 1972, proposed a settlement date of October 15, 1972 with a one year lease to Potter for the sum of $1,800.00. By letter of July 21, 1972 Wolver advised McClung that Macgurn would not agree to the settlement date of October 15, 1972 but desired a closing or settlement date of April 15, 1973.

VII.

Pursuant to Potter's direction McClung advised Wolver by letter written and mailed August 7, 1972 that Potter declined to accept Macgurn's offer of $58,000.00 for the subject property.

On the same date McClung advised Tilson by letter to discontinue his efforts to sell the property. A copy of McClung's letter to Wolver accompanied McClung's letter to Tilson.

On August 10, 1972 Tilson telephoned Wolver and advised him that a letter was in the mail from McClung revoking Potter's offer to accept $58,000.00 for the subject property; and advised him further to have Macgurn wire acceptance of Potter's offer in the wording and form drafted by McClung.

Pursuant to Tilson's telephone conversation with Wolver, Macgurn wired acceptance on August 10, 1972.

VIII.

The respondent, Charles A. Potter, Jr. is now the owner of the subject real estate, having acquired title by deed from the respondents, Earl D. Roberts and Winifred B. Roberts, dated September 14, 1972 and recorded in the Clerk's office of this Court in deed book 329, page 79.

THE COURT FINDS THAT THESE FACTS ARE ESTABLISHED AND SUPPORTED BY THE EVIDENCE.

It is therefore ADJUDGED, ORDERED and DECREED as follows:

A.

The respondent, William B. McClung, was the attorney and duly authorized agent of the respondent, Charles A. Potter, Jr. in the proposed sale of the subject real estate, the "Earl Robert's Farm"; and

W. E. Tilson was also a duly authorized agent of Charles A. Potter, Jr. in the proposed sale of the subject real estate; and

Eugene L.Wolver, Jr. was the attorney and duly authorized agent of Richard B. Macgurn in the proposed purchase of the subject real estate.

B.

The written offer submitted by Richard B. Macgurn on May 1, 1972 to purchase the subject property for $58,000.00 of which $3,000.00 was to be deposited and held in escrow, was rejected by McClung, as agent for Potter, by letter of May 17, 1972; and

Potter's offer through his agent, McClung, to accept a deposit of $5,000.00 and a lease of the property from April 15, 1973 to April 14, 1974 for the sum of $1,800.00 was rejected on June 8, 1972 by Wolver, as attorney and agent for Macgurn; and

Potter's offer of July 6, 1972, through his agent, McClung, suggesting a settlement date of October 15, 1972, with a one year lease, was rejected by Macgurn.

C.

Macgurn's acceptance of Potter's offer of July 6, 1972 was ineffectual

and not binding on Potter, for the reasons that the acceptance was wired on August 10, 1972 after Potter's revocation of his offer to sell had been communicated to Macgurn through his agent, Wolver; that the acceptance was wired at the unauthorized suggestion of Potter's agents; and that Potter's offer of July 6, 1972, through his agent, McClung, had been rejected on July 21, 1972 by Macgurn through his agent, Wolver.

D.

The evidence fails to establish an existing contract between Charles A. Potter, Jr. and Richard B. Macgurn for the sale and purchase of the subject real estate, the "Earl Robert's farm"; and this suit to compel the specific performance of such contract be and the same is hereby dismissed at the costs of the complainant; and

It is further ORDERED that this cause be stricken from the docket and placed among the decided causes of this Court.

Entered June 14, 1974

NOTICE OF APPEAL
AND
ASSIGNMENTS OF ERROR

Filed July 15, 1974

W. B. Chittum, Sheriff of Rockbridge County, Representative of the Estate of Richard B. Macgurn, does hereby give his Notice of Appeal in this cause and will apply for a writ of error. In support thereof, the following errors are assigned:

1. The decision of the Court is contrary to the law and evidence in the case.

2. The Court erred in not finding that the respondent, William B. McClung, was a joint venturer with the other defendant,

Charles A.Potter, Jr., with the authority to bind Charles A. Potter, Jr., to a valid contract for the sale and purchase of a tract of real estate, which is the subject matter of this cause.

3. The Court erred in failing to find in the alternative that the respondent, William B. McClung, was acting as counsel for the other respondent, Charles A. Potter, Jr., and in such capacity had the authority to bind Charles A.Potter, Jr., to a valid contract for the sale and purchase of the subject real estate.

4. That the Court erred in finding that there was no valid offer and acceptance in writing signed by the party to be charged thereby or his agent.

A transcript of the record already has been prepared and is filed with the other papers in this cause.

EXCERPTS FROM THE TESTIMONY
TAKEN BY DISCOVERY DEPOSITIONS

Filed December 11, 1973

W. E. TILSON

(1)

Q. The question I'm asking you is "Did Mr. McClung ever tell you the nature or extent of his interest or ownership in this farm other than to tell you that he did put up the money to . . . for Mr. Potter to obtain the contract enabling him to buy it?

A. I don't believe he ever mentioned the amount of money that he had put up but I do feel that I'm honest in remembering that he had put up all the money. I feel my memory is right on that. That's my memory.

Q. Did he tell you who had signed the writing as purchaser of the farm?

A. No sir. No sir, not . . .

Q. Didn't he make it clear to you throughout that he was acting as Mr.Potter's attorney?

A. No sir. No sir, he was definitely the attorney but he was also interested in it financially and they were in it together.

Q. Did it occur to you that he was interested in it in order to obtain his attorney's fee in handling the matter for Mr. Potter?

A. No sir. I had the definite impression that he was in it to get an interest in the profit when we sold the farm, that he was to get his part of the property. There isn't any doubt in my mind about that.

Q. Did he ever indicate to you from the inception that Mr.Potter was not the owner or co-owner of this real estate?

A. I did not see the document. I believe that's the word Bill said but he may have said something else. It was that he had it right there in the safe and he would get his part of it, one way or another, that he had his interest in it and that it was in the safe and Charlie wouldn't get it unless Charlie did what was right. He didn't say just what was right but he said he damn sure wouldn't get this document that gave them the right to ask us to sell it unless he did what was right and honest and fair.

Q. Well, who did you list from the outset as the seller of this property as far as the listing was concerned?

A. Well, as I say, I think now the only written thing about the listing is on that thing there and when my son gave me this, he said "And

here, of course, are the owners."

Q. Now that information came to you from your son . . .

A. And as I said before, this is the paper that he gave me.

Q. All right, now do you know how long before May the first it was that this listing was made?

A. No sir, I do not.

Q. Is it prior to May the first that you went out and looked at the farm?

A. Yes sir.

Q. And who went with you?

A. Mr. Potter went with me. Yes, it was before May the first that he went out to show me the farm because that's the day that Mr. Macgurn made his offer of $58,000.00.

Q. All right, so sometime prior to May the first?

A. Prior to that I know but I do not know . . . It didn't mean anything to me at that time, Mr. Timberlake, about time, the date. It was just, we were doing business with straight and honorable gentlemen and we didn't figure we had to have a lot of this stuff. We knew it was a listing and that we were the ones they wanted to sell it and we got to work to do it and to do the best job we could. We did understand that they were going to make a nice profit on it and we did understand that Potter didn't want Mr. Earl Roberts to know that he was showing it. That's why I couldn't see the house.

(Page 6, line 3 through last line on page 7)

(2)

Q. Now, in Mr. McClung's letter of May 17th, 1972, Respondent's Exhibit

"3", it refers to Charles A. Potter, Jr., as being the seller of the property, does it now?

A. Yes sir.

Q. And isn't that also true of the proposed agreement of sale, Respondent's Exhibit "4" between Charles A. Potter, Jr. and Richard Macgurn?

A. That's right, he was acting as the attorney for the partnership.

Q. Well, what evidence do you have that there was any partnership?

A. I have no written evidence at all, it's just understanding it was their property, they had an agreement. He would put up the money and Charlie had the friend and they . . . the two of them wanted to sell the farm.

(Page 17, line 13 through line 25)

(3)

Q. Mr. Tilson, when you received the copy of this letter, Respondent's Exhibit "11", from McClung to Wolver, did you have any further contact with Mr. Charles A. Potter, Jr.?

A. Not directly with Charlie but with his attorney and partner, I did.

Q. All right, just tell me what contact that was?

A. When I got this letter, I went over to Billy and asked him what about it. And he said, Charlie's not only trying to get you, he's trying to get me and he shouldn't do that because I have the document in my safe until he plays fair with me and I get mine, he'll not get that document. And I said well, what shall we do. And he said, has Wolver received that letter. I said Billy this is the 10th, your letter is dated the 7th, but I just got mine about 15 minutes ago and he's in California and he couldn't have gotten your letter and

he said, "another one of those tapes staying on the dictaphone too long or some remark like that" . . . it was . . . and he will remember the statement, that it must not have gone out when it should. But I got mine on the tenth and I talked to him on the tenth and I said, "I don't know but he couldn't have gotten it but I will phone and find out and I said if he didn't get it "what?" He said if Mr. Wolver sends us, was his words a telegram stating that he accepts the counter offer made by Mr. Potter . . . made on the 17th and correspondence the 17th . .

Q. The 17th of what?

A. May. And . . . I want to get this just right, now he received a wire from Mr. Potter . . . Mr. Wolver with the . . . accepting the offer with the $2,000.00 and as explained in my letter . . .

Q. Of May 17th?

A. No, it was May the 6th. As explained my letter . . .

Q. Now, let's keep the record straight, I don't want you to look bad on this. You have reference, do you not, to this letter of May 17th, from McClung to you, which I believe we introduced as Respondent's Exhibit "3"? Look back through your file there. It's right near the top of your file.

A. Mr. Timberlake, this . . . got to get my dates right . . . Mr. McClung said that if he got a wire, the $2,000.00 deposited,making $5,000.00 as per the counter offer of this letter of May 17th and as explained in its letter of July 6th, before he got that letter of Charlie's withdrawing the offer, that that would be a legal contract and Charlie couldn't get out of it, it didn't make any difference what he did and I said, well, he couldn't have done it but I will

phone him and I said would you just write out something that I should tell Mr.Potter to wire if he wants it. I think they want it. And he . . .

(Page 26, line 8 through line 22 on page 27)

WILLIAM B. McCLUNG

(1)

Q. Was there any agreement between you and Mr. Potter as far as ownership of the farm was concerned?

A. No.

Q. You were acting only as his attorney?

A. I was to receive something of the proceeds of profit if the deal was consumated.

Q. What do you mean if the deal was consumated, if he got the lease or if it was sold?

A. If it was sold to a third party.

(Page 35, line 22 through line 30)

(2)

Q. At the time you listed the property with Mr. Tilson, did you give him a written . . . did you write on a piece of paper the terms of the sale?

A. On a legal sheet I outlined the terms of sale.

Q. Now, is that the Exhibit which has been filed by Mr. Tilson and marked Respondent's Exhibit "1"?

A. Yes, it is.

Q. Is everything showing on this Respondent's Exhibit "1", from the

figure "45" down through "no signs", is everything on there your writing with the exception of the telephone numbers?

A. It is.

Q. Now, can you tell my why the names Charles A. Potter, Jr. and William B. McClung were both written on that piece of paper?

A. So the Tilsons could contact either one of us concerning it.

Q. All right, is that what you told him at the time you wrote those figures on there, I mean those names, or did you tell him that it was both your all's property?

A. I believe that I told him both, that it was our property and he could contact either one of us.

(Page 39, Line 26 through line 12 on page 40)

(3)

Q. At that time, did you feel that you had an interest in this property?

A. Yes, I had an interest in either the property or the proceeds of the property.

(Page 49, lines 2 through 5)

(4)

Q. Were what . . . just were you're services? It was understood that you were to profit from the procceds of the sale, you were just selling out whatever interest you had in the deal for the sum of $4,000.00, is that right?

A. Whatever interest I had in the deal.

(Page 52, lines 28 through 32)

(5)

Q. Now, I recall you said earlier when you were testifying that originally you had no set agreement with Mr. Potter regarding what you were to get on the sale. That you were to get a percentage and I believe as you said that if the property was sold, you would get that percentage and if it was not sold, you would get nothing and, I think, you were also asked if you were going to share in the losses and, I think, you said you didn't anticipate any losses, is that right?

A. That's right.

Q. You were to get something if the property was sold and you would get nothing if was not sold?

A. That's right. Had the option not been exercised, then I would receive nothing.

Q. That is the option with Roberts?

A. Yes sir.

Q. And subsequently, you arrived at a figure of $4,000.00 which would be your interest in the property?

A. Yes sir.

(Page 56, line 10 through line 27)

(6)

Q. Mr. McClung, time and time during your examination taking this discovery deposition, reference has been made by counsel to your interest in this property. Will you please state clearly and unequivocally, for the record, whether or not you, at any time, ever

had any proprietary interest in this property?

A. No sir, I never had any legal interests in the property.

Q. Either legal or equitable as far as the ownership of the property was concerned?

A. The option was in Mr. Potter's name. The negotiations and so forth had to be approved by Mr. Potter and so forth. It was understood that I would receive some of the profit if there was profit in this property.

(Page 57, line 2 through 13)

(7)

A. Well, my fee was not one that would be arrived at on an hourly basis. It was one that was more on a contingency nature than anything else.

Q. But it was your feeling that you had some interest in the property if it were sold, you had, in effect, a ownership in the proceeds of any transaction that was consumated, isn't that true?

A. I had an interest in the profits.

(Page 60, line 2 through 9)

CHARLES A POTTER, JR.

(1)

Q. Well, when did you first tell Mr. McClung . . .

A. The Sunday . . . I . . . we went to Charlottesville to make the lease arrangement.

Q. At that time then it was clear that Mr. McClung had some interest, whatever it was, in this transaction?

A. Yes, sir.

Q. Now did you at any time between then and the first of May, 1972, have an agreement with Mr. McClung as to what that interest was?

A. No sir.

Q. It was just that he would get some percentage of the profit, if profit there was?

A. Yes sir.

Q. If there was any loss, was he to share it?

A. Well, I wasn't told that, no.

Q. You didn't anticipate any loss as he said?

A. We were hoping, yeah.

Q. You knew you had a good deal that there wasn't going to be any loss?

A. Well, at the time I went to sign this option on the property, it was high but, and this is about the time we had this land boom so to speak and I couldn't see it in my finances to swing a deal right at that time so I didn't know whether it was such a good deal or not, really.

Q. Did you then have discussion with Mr. McClung prior to May 1st, 1972, regarding listing this property for sale?

A. Yes, we just mentioned it, we just put it on the market to see what the real price would be.

Q. You all sat down and both agreed that it was a good thing to do to go ahead and sell it if you could get a good price for it, is that right?

A. Yes.

Q. And did you all both agree on $60,000.00 figure?

A. Yes sir.

Q. And did you tell Mr. McClung to go ahead and list it with Mr. Tilson for the $60,000.00 figure?

A. Yes sir.

Q. Did you list it with any other realtors?

A. No sir.

Q. And was there any signed agreement between you and Mr. Tilson on this listing?

A. No sir.

Q. All right and did . . . now at that time Billy was . . . still had some interest in it, he was also acting as your attorney, is that right?

A. Yes sir.

Q. And you authorized him to give the listing to Mr. Tilson?

A. Yes sir.

Q. Now, did you receive the original offer that Mr. Macgurn made for the $58,000.00?

A. Did I receive it prior to sending it to Mr. Macgurn?

Q. No, did . . . the original offer that Mr. Macgurn made that Mr. Tilson testified to earlier was made up on his contract form, it was signed by Mr. Macgurn offering to buy it for $58,000.00, did you receive that?

A. Just a copy, yes sir.

Q. And did you discuss that with Mr. McClung?

A. Yes sir.

Q. And as a result of your conversation with him, did you both agree that you would sell it for the $58,000.00?

A. Yes sir.

(Page 65, line 4 through last line on page 66)

(2)

Q. Did Mr. McClung any time after writing that letter on August 7th, discuss with you the possibility of a telegram of acceptance being received?

A. Yes sir.

Q. When did he have that conversation with you?

A. Well, he contacted me after the telegram was sent.

Q. Is that the first you knew about the telegram, after it had been sent?

A. Yes sir.

Q. You were not told that one might be coming or what would happen to you if it did come

A. No sir.

Q. Did Mr. McClung, at that time, try to persuade you to go ahead and sell the property?

A. Prior or before the telegram or after, I do not know, but I think it was after the telegram was received that we reached our agreement.

Q. At the time that you wrote the letter . . . told him to write the letter saying call the whole deal off on August 7th, at that time, did Mr. McClung raise the questions well, hey, how about my interest in this thing?

A. I told him at that time that I would treat him fair for his services and he would get a share of the profit, moneywise.

Q. Then, after the telegram was received on August 10th, by Mr. Tilson . . . excuse me just a second . . . all right after that telegram

was received, Mr. Potter, were you advised of the receipt of that telegram? You were told that the telegram had been received by Mr. Tilson and that . . .

A. I was . . . I received the telegram through my father.

Q. And at that time you knew that Mr. Macgurn did want to buy the property under those terms?

A. Yes sir.

Q. And there wasn't any questions in your mind that he was saying, I accept your original offer in toto—exactly-whatever you said you wanted, that's what I'll do and that . . . was that your understanding?

A. Yes sir.

Q. And at that time you did advise Mr. Macgurn either through your agent or his that you were unwilling to convey the property, isn't that true?

A. Yes sir.

Q. And you have, since that time, been aware that Mr. Macgurn or his personal representative were willing to go through with the contract and you've advised them that you would not, is that true?

A. Yes sir.

Q. All right now, are you still the owner of this farm?

A. Yes sir.

Q. And you recall when you took title to it?

A. September 17th or 20th of 1972.

Q. And did you buy it under the terms that indicated, $36,000.00 being financed and $5,000.00 being paid in cash?

A. Yes sir.

Q. And is there a deed of trust and note outstanding to the Roberts's to secure them for that $36,000.00?

A. Yes sir.

Q. And there's another deed of trust to Mr. McClung for $9,000.00, is that right?

A. Yes sir.

Q. And what does that $9,000.00 represent?

A. $9,000.00 represents $5,000.00 down payment and $4,000.00 proceeds.

Q. By $4,000.00 proceeds, you mean for his interest in the profit, is that right?

A. Yes sir.

(Page 71, line 8 through line 7 on page 73)

TRANSCRIPT OF THE EVIDENCE
TAKEN ON JANUARY 22, 1974

Filed February 6, 1974

PART II: TRANSCRIPT OF EVIDENCE

1 VIRGINIA: IN THE CIRCUIT COURT FOR ROCKBRIDGE COUNTY

2

3 W. B. CHITTUM, Representative of the Estate of Richard B.

4 Macgurn

5

6 V

7 CHARLES A. POTTER, JR., et al.

8

9

10 Transcript of proceedings in the above matter

11 heard at Lexington, Virginia, on January 22, 1974, the Honorable

12 Paul A. Holstein presiding.

13 The following testimony was recorded and

14 reduced to typescript by the undersigned reporter and is hereby

15 certified to be a correct and accurate transcript of said

16 proceeding.

17

18 SHENANDOAH REPORTING SERVICE

19 By:

20 Gail M. Hogg, Notary Public
Commonwealth of Virginia at Large

21

22 FOR THE COMPLAINANT: THOMAS C. SPENCER, ESQUIRE, and
WILLIAM O. ROBERTS, ESQUIRE

23

24 FOR THE RESPONDENTS: W. B. TIMBERLAKE, JR., ESQUIRE

25

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1 COURT: The case appearing on the docket of this Court
2 this morning is that of W. B. Chittum, Sheriff of Rockbridge
3 County, Virginia, representative of the estate of Richard B.
4 Macgurn, against Charles A. Potter, Jr., Earl D. Roberts, and
5 Winifred B. Roberts, and William B. McClung in his own right
6 and as trustee. I believe this is a suit for specific perform-
7 ance. Are you gentlemen ready to proceed?
8
9 MR. SPENCER: If Your Honor please, I think that we're
10 going to be able to work out a stipulation on all of the
11 Exhibits to be filed.
12
13 COURT: I reviewed this file yesterday, gentlemen,
14 including the depositions that were taken on November 5, 1973,
15 before Rita Goodhart, a Notary Public for the County of Rock-
16 bridge, State of Virginia. They were the depositions of Mr.
17 W. E. Tilson, Charles A. Potter, Jr., and Mr. William B.
18 McClung. They were taken at the law offices of Spencer &
19 Crawford, 31 West Washington Street, in the city of Lexington,
20 Virginia. The depositions were transcribed and were filed in
21 the Clerk's Office on December 11, 1973; and with the depositions
22 were filed Exhibits. I also considered the Exhibits filed by
23 the Complainant, and the Exhibits filed by the Defendants. So
24 I believe that I am fairly familiar with the particulars of
25 the case. Gentlemen, I don't think it is necessary for an

1 opening statement, unless you wish to make one.

2

3 MR. ROBERTS: I'd like to make a very brief one.

4

5 COURT: All right, Mr. Roberts. Now, you are one of
6 the counsel for the Complainant?

7

8 MR. ROBERTS: Yes, sir. May it please the Court, some-
9 time prior to May one, 1972, Mr. McClung and Mr. Potter obtained
10 a lease, or a lease option agreement, to purchase some property
11 in Rockbridge County from the then owners, Mr. and Mrs. Earl
12 Roberts. I believe prior to the time that they got a deed to
13 this property, it was turned over to W. E. Tilson and Son for
14 re-sale. On or about May one, 1972, Mr. Tilson obtained a
15 contract, signed by Richard Macgurn, which contract called for
16 a purchase price of fifty-eight thousand dollars ($58,000.00)
17 as opposed to sixty thousand dollars ($60,000.00), which was
18 the original listing price with the Tilsons, a down payment
19 of three thousand dollars ($3,000.00), and a closing date of
20 April fifteen, 1973. This offer was apparently rejected by
21 the sellers, and on May seventeenth, 1972, Mr. McClung drafted
22 another contract with escrow agreements which acknowledged
23 acceptance of the fifty-eight thousand dollar ($58,000.00)
24 purchase price but asked for an additional two thousand ($2,000.00)
25 down payment, and a closing date of April fifteen, 1973, but

1 with an additional clause in there that Mr. Potter be permitted
2 to rent the property until April fourteen, 1974, with an annual
3 rental of eighteen hundred dollars ($1,800.00). On June eighth,
4 1972, Mr. Wolver, who is counsel for Mr. Macgurn, a resident
5 of California, wrote to Mr. Tilson and rejected the offer made
6 by Mr. Potter and Mr. McClung, explaining that his client did
7 not wish to increase the amount of the down payment to five
8 thousand dollars ($5,000.00), and with an expression of an intent
9 to take possession of the property immediately. On July sixth,
10 1972, Mr. McClung responded to Mr. Wolver's letter and said
11 that he felt that the settlement could be worked out with a
12 closing date of October fifteen, 1972, with a rental of eighteen
13 hundred dollars ($1,800.00) from October fifteenth to October
14 fourteen, 1973. No mention was made in this letter of the
15 five thousand dollars ($5,000.00) which had been set forth in
16 the previous contract, proposed contract, written by Mr. McClung.
17 On July twenty-one Mr. Wolver wrote back to Mr. McClung and
18 stated that everything seemed to be fine, or words to this
19 effect, except that he wanted to revert to their original
20 closing date of April the fifteenth, which was in the contract.
21 Evidence will further show that on or about August
22 seven, by letter dated August seven, apparently not mailed until
23 a couple of days later, a letter was written to both Mr. Wolver
24 and to Mr. Tilson stating that the offer of fifty-eight thousand
25 dollars ($58,000.00) had been rejected; and, subsequently, on

1 or about August ten, and before this rejection letter had been
2 received by Mr. Wolver, Mr. Wolver sent a telegram accepting
3 the terms as set forth by Mr. McClung's letter of July six.
4 Since that date, there had been on deposit with Mr. Tilson's
5 firm a down payment of five thousand dollars ($5,000.00), and
6 Mr. Wolver is the executor of the estate of Mr. Macgurn, who
7 died on or about September one, 1972. Mr. Chittum, of course,
8 has qualified as administrator in this jurisdiction, and my
9 clients have since the date of the telegram been in a position
10 ready, willing, and able to purchase this property from the
11 two sellers, Mr. McClung and Mr. Potter.
12
13 COURT: Any of the other counsel for the Complainant
14 wish to make a statement at this time? Mr. Timberlake, I
15 believe you represent the Defendants?
16
17 MR. TIMBERLAKE: Your Honor, I am going to accept the
18 Court's suggestion and not embark on any elaborate opening
19 statement. I believe the Court knows the issues pretty well.
20 I might say this, however, more or less in reply to Mr. Roberts's
21 opening statement. The Court will note that the position
22 apparently taken by the Complainant in this case at the outset--
23 and I'll concede it's a necessary position for counsel to take,
24 and for them to establish--is that the owners of this property
25 in question were Messrs. Potter and McClung, and not . . .

1 Mr. Roberts referred time and time again in his opening state-
2 ment to Mr. Potter and Mr. McClung having bought this property
3 and Mr. Potter and Mr. McClung having undertaken to sell it;
4 and, of course, that is, we say that is diametrically counter
5 to what the evidence will show in this case. The evidence
6 will show that Mr. McClung, at no time, was an owner or co-
7 owner of this property.
8
9 COURT: He advanced the deposit, from the record, I
10 believe; he loaned Mr. Potter five thousand dollars ($5,000.00)
11 as a deposit, and he was to receive four thousand dollars
12 ($4,000.00) in the event the property was sold and a profit
13 was made. That was his only interest in it.
14
15 MR. TIMBERLAKE: That was entirely after this trans-
16 action, Your Honor. The evidence will show that Mr. McClung's
17 assistance as counsel was solicited by Mr. Potter prior to
18 May first of '72 to help him negotiate a lease and purchase
19 contract with the then owners of the property, and that after
20 Mr. McClung was able to negotiate that for Mr. Potter then
21 Mr. Potter, at Mr. McClung's suggestion, concluded that some
22 effort would be made to sell the property, and Mr. McClung--
23 there was an understanding between Mr. Potter and Mr. McClung--
24 that Mr. McClung's ultimate services, his services in the
25 wind-up of the matter, would be based, if the property were sold,

1 on some portion of any profit that was made. And that is,
2 the evidence is, will be clear and undisputed in this case, I
3 think, that that, and that alone, was Mr. McClung's status in
4 the matter.
5 And then, when Mr. Potter concluded not to sell to an
6 outsider but to acquire the . . . to exercise his right to pur-
7 chase himself and take title to the property, Mr. McClung then
8 did advance him, arrange for him to obtain the funds, that
9 were necessary to complete the purchase. I think that the
10 Court will readily see that there are several issues, very
11 material issues, in this case as to which we submit there can
12 be no conceivable question. One of them is that of the statute
13 of frauds. This is a suit for specific performance, or damage,
14 for the alleged breach of a contract by Mr. Potter to sell the
15 property to Mr. Macgurn. And I think that when the Court has
16 had an opportunity to review the evidence and consider the
17 matter, that it will be perfectly patent that if there were a
18 conceivable agreement, it was not in writing and signed by the
19 party to be bound; that is, Mr. Potter. Now, further than
20 that, Your Honor, we submit that the evidence will be perfectly
21 clear and manifest that there was never any agreement, signed
22 or unsigned by Mr. Potter, binding agreement to sell this
23 property. The evidence will show that the property was listed
24 for Mr. Potter by Mr. McClung with Mr. Tilson at sixty thousand
25 dollars ($60,000.00). That was prior to May the first of 1972.

1 That on or about May the first, 1972, Mr. Tilson interested this
2 Mr. Macgurn of California, who was here in connection with some
3 V.M.I. activities, in the farm, Tilson having been shown the
4 farm by Potter; and that Tilson filled out a contract, running
5 between Potter--not Potter and McClung, not between McClung
6 and the proposed buyer; but between Potter and Macgurn--for
7 the purchase of the farm for fifty-eight thousand dollars
8 ($58,000.00), and had Macgurn sign it, and submitted it to
9 McClung as Potter's attorney, and that McClung in turn submitted
10 it to Mr. Potter, the seller, and Mr. Potter was unwilling to
11 sell on the basis of this contract that had been filled out
12 by Mr. Tilson, and had Mr. McClung fill out, or draft, a con-
13 tract, unsigned by Potter, dated May the first but submitted to
14 Tilson on May the seventeenth, by which Potter assented to the
15 fifty-eight thousand dollars ($58,000.00) but imposed terms
16 as far as possession and time of closing and a five thousand
17 dollar ($5,000.00) deposit, down payment, rather than the
18 three thousand dollars ($3,000.00) that had been contemplated
19 in the offer made on behalf of Macgurn by Tilson. That was,
20 in turn, unsigned, submitted out to California to Macgurn, and
21 in July Macgurn's attorney, Mr. Wolver, writes this letter which
22 is an Exhibit saying, rejecting it, and saying if Mr. Potter,
23 Mr. McClung's client, Wolver says, is not willing to modify
24 the proposal contained in this drafted contract Potter prepared
25 by McClung, to the extent of taking three thousand dollars

1 ($3,000.00) down payment instead of five ($5,000.00) and in
2 other respects, to consider the matter closed, and any offer
3 withdrawn.
4 And then the evidence will further show that there was
5 a letter by McClung on behalf of Potter to Wolver suggesting
6 further negotiations. And when they were rejected, further
7 negotiations were rejected, on August the seventh, Mr. McClung,
8 at Mr. Potter's direction, writes Mr. Wolver and tells him
9 that Mr. Potter has decided not to sell the property, on any
10 terms. On August the tenth Macgurn wires that he is accepting
11 the proposal submitted on May the seventeenth to Tilson,
12 unsigned by Potter, never signed by Potter, and unequivocally
13 rejected by Macgurn in July. And that, Your Honor, is the
14 basis upon which these gentlemen now contend that Mr. Potter
15 is bound by contract to sell this farm to Macgurn, or Macgurn's
16 estate, and specific performance is asked.
17
18 COURT: Right there I would like to inquire. In reading
19 the depositions that were taken in November, I understood from
20 the testimony that Mr. Potter, through Mr. McClung, rejected
21 Macgurn's offer on August seventh, but that on August ten there
22 was an acceptance of the terms outlined in the letter of May
23 seventeenth. There is also evidence that Mr. Tilson called
24 Mr. Wolver and advised him that there was a letter in the mail
25 rejecting the contract. Is my understanding of that testimony

1 correct? I'm just referring to these depositions that were
2 taken in November. And there is also some testimony in the
3 depositions that Mr. McClung had made a suggestion how to get
4 around the rejection.
5
6 MR. TIMBERLAKE: There is evidence in there that Mr.
7 McClung suggested the language of the telegram that Tilson was
8 asking that Macgurn send him, and Mr. McClung, in his discovery
9 deposition, testified, and will testify today, that that
10 suggestion on his part was simply with the desire to reopen
11 negotiations and was without any authority or direction from
12 Mr. Potter.
13
14 COURT: Well, that's what puzzled me; I couldn't under-
15 stand why that was done if there was supposed to be a bona fide
16 rejection of Mr. Macgurn's offer.
17
18 MR. TIMBERLAKE: The undisputed evidence I think would
19 be, Your Honor, that the rejection was at the direction of
20 Potter and that the language of this telegram suggested by
21 McClung was absolutely unknown and unauthorized by Potter, and
22 that McClung's testimony is that he suggested that merely as
23 a means of reopening negotiations.
24
25 COURT: And yet he was also acting as the attorney fo

1 Mr. Potter.

2

3 MR. TIMBERLAKE: Not in that respect, Your Honor,

4 because both . . .

5

6 COURT: He had been acting as attorney for . . .

7

8 MR. TIMBERLAKE: Oh, he had been the attorney for Mr.

9 Potter, yes, sir.

10

11 MR. SPENCER: If Your Honor please, I have a list of

12 Exhibits here which represents the Exhibits that have been . . .

13

14 COURT: Are there additional Exhibits?

15

16 MR. SPENCER: No, Your Honor, but this includes the

17 originals to the extent that they are in the possession of

18 the Complainant. There are also copies of the letters that

19 we don't have the originals of, and Mr. Timberlake and counsel

20 for the Complainant have agreed to stipulate that these Exhibi

21 numbered One through Fourteen . . .

22

23 COURT: Well, how are they different from those alread

24 in the record?

25

1 MR. TIMBERLAKE: Your Honor, our only reason for this
2 suggested stipulation is that they were introduced in the course
3 of taking discovery depositions, and there is some question in
4 our mind as to whether they are Exhibits as they stand now . . .
5
6 COURT: Well, I thought I had ordered the filing of
7 the Exhibits. I certainly would consider that the Exhibits
8 already filed are part of the record.
9
10 MR. SPENCER: Your Honor, I thought this would be
11 simpler, just one straight numbering that would be . . .
12
13 COURT: And then you can refer to them in your examin-
14 ation of the witnesses?
15
16 MR. SPENCER: Yes, sir, we can refer to them by the
17 numbers that I have attached to these.
18
19 COURT: Do the numbers correspond with the Exhibits
20 already filed?
21
22 MR. SPENCER: No, they don't, Your Honor, because those
23 Exhibits, some have been by the Respondents and have their
24 numbers attached to them, and some of them by the Complainant
25 and have the Complainant's numbers attached to them. These

1 Exhibits represent the entire Exhibits in the case.

2

3 COURT: You feel there won't be any confusion with the

4 identification?

5

6 MR. SPENCER: No, Your Honor, in as much as those will

7 just stay with the discovery depositions and these . . .

8

9 COURT: These are part of the record. These Exhibits

10 here are filed pursuant to a decree entered by this Court, and

11 they are made a part of the record. Your Exhibits are lettered

12 A, B, C . . . well, let's refer to the original agreement of

13 May one. That's your Exhibit A in the record. The letter from

14 Mr. McClung to Mr. Tilson on May seventeen is identified as

15 Exhibit B. The agreement of sale of May one, 1972, is identi-

16 fied as Exhibit C. The escrow agreement dated May one, 1972,

17 is identified as Exhibit D. The memo of agreement dated May

18 one, 1972, is identified as Exhibit E. The letter from Mr.

19 Tilson to Mr. Macgurn dated May eighteen, 1972, is identified

20 as Exhibit F. The letter from Mr. McClung to Mr. Wolver dated

21 July six, 1972, is identified as Exhibit G. The copy of the

22 telegram is identified as Exhibit H. That is a telegram which

23 reads: "This is to inform you I have executed the contracts

24 forwarded to Charles Potter, Jr., pertaining to the Roberts'

25 farm at Collierstown, Virginia, and am forwarding a check for

1 two thousand dollars ($2,000.00) to be added to the escrow
2 account. Thus I am accepting his original counter offer as
3 forwarded to me and as explained in his attorney's letter of
4 July six, 1972, and am returning the same for his signature."
5 Signed Richard B. Macgurn. That is identified as Exhibit H.
6 Now, those are the Complainant's Exhibits.
7 And then there were, I believe, two Exhibits filed by
8 the Defendants. And I believe the first is the letter to Mr.
9 Tilson from Mr. Wolver dated June eight, 1972. And then a copy
10 of Mr. McClung's letter to Mr. Wolver dated August seven, 1972.
11 And I believe those were the only two Exhibits that were filed
12 by the Defendants according to this record.
13 So, now are there any additional Exhibits that you
14 want to tender and by stipulation enter into the record?
15
16 MR. SPENCER: There are, Your Honor.
17
18 COURT: Well, do you want to read them into the record?
19
20 MR. SPENCER: All right, Your Honor. The Complainants
21 will introduce, which is marked Exhibit Number One, what will
22 be shown to be a memorandum of listing given by Mr. McClung to
23 Mr. Jim Tilson at the time the property was listed. Exhibit
24 Number Two is the agreement that Your Honor referred to, I
25 believe, as Complainant's Exhibit A . . .

1 COURT: Excuse me, Mr. Spencer, there are numerous
2 Exhibits filed with the depositions.
3
4 MR. SPENCER: Yes, Your Honor; some of those . . . I
5 just thought it would be easier to refer to these . . . since
6 they are all here, both his and ours.
7 Exhibit Number Two is the agreement of sale constituting
8 the original offer made by Macgurn for the property. Exhibit
9 Number Three is the letter dated May the seventeenth, 1972,
10 from Mr. McClung addressed to Mr. Tilson, enclosing the contract
11 which had been offered by Mr. Macgurn and also sending copies
12 of Exhibits Five, Six, and Seven, being the new agreement.
13 Exhibit Number Four is a letter addressed to Mr. Macgurn from
14 Mr. Tilson dated May the eighteenth, in which he had forwarded
15 Exhibits Three, Five, Six, and Seven.
16 Exhibit Number Eight is a letter from Mr. Wolver
17 addressed to Mr. Tilson and dated June the eighth, 1972, in
18 which he sets down new terms and conditions for the contract
19 that had been proposed by Mr. McClung. Exhibit Number Nine is
20 a letter from Mr. McClung to Mr. Wolver, in which he acknowledges
21 receipt of the letter of June eighth and sets down additional
22 terms for the contract. Exhibit Number Ten is a letter dated
23 July the twenty-first, 1972, from Mr. Wolver to Mr. McClung,
24 in which he accedes to the terms of Mr. McClung's letter of
25 July the sixth and requests that the closing date be on April

1 the fifteenth.

2 Exhibit Number Eleven is a letter dated August the
3 seventh, 1972, addressed to Mr. W. E. Tilson, signed by Mr.
4 William B. McClung, enclosing Exhibit Number Twelve, being a
5 letter to Mr. Wolver withdrawing the offer. Exhibit Number
6 Twelve is the letter dated August the seventh, 1972, from
7 Mr. McClung addressed to Mr. Eugene L. Wolver withdrawing the
8 offers of Mr. Potter. Exhibit Number Thirteen is a legal page
9 in the handwriting of Mr. McClung setting out the terms of a
10 telegram which was subsequently sent by Mr. Macgurn to Mr.
11 Tilson dated August tenth, and that telegram is filed as Exhibit
12 Number Fourteen.

13 Are those Exhibits correct, Mr. Timberlake?

14

15 MR. TIMBERLAKE: What Exhibit is this letter, Wolver's
16 letter of June the eighth?

17

18 MR. SPENCER: That is the letter in which Mr. Wolver
19 says that the terms of the contract dated May the seventeenth
20 are not acceptable and that there are placed additional terms
21 on the contract.

22

23 COURT: I believe the record contains the original
24 letter. This record here. It is a letter of June eighth from
25 Mr. Wolver to Mr. Tilson.

1 MR. TIMBERLAKE: Now, I don't . . . this has never been
2 offered as an Exhibit.
3
4 MR. SPENCER: Yes, it has; in fact, twice. That copy
5 of the telegram has been introduced pursuant to a Court's
6 decree as an Exhibit, and I believe it was also introduced in
7 the discovery depositions.
8
9 MR. TIMBERLAKE: Well, now, I didn't recall anything
10 in the discovery depositions other than this legal pad memor-
11 andum.
12
13 MR. SPENCER: Maybe not. I know it was filed as an
14 Exhibit pursuant to the Court's decree to file the documents
15 that constituted the contract. But we'll be glad to follow
16 through if you don't want to stipulate to Exhibit Number Four-
17 teen.
18
19 COURT: That is Exhibit H in the record?
20
21 MR. SPENCER: Yes.
22
23 MR. TIMBERLAKE: Your Honor, I think that I would want
24 some proof as far as this is concerned, because it is not a
25 communication directed to my client, Mr. Potter, or to Mr.

McClung; it's ostensibly a telegram from Macgurn to Tilson.

MR. SPENCER: If Your Honor please, I will not include Exhibit Number Fourteen in the Exhibits that have been stipulated and, if Your Honor please, I would like to keep these to use with the witnesses as they are called.

COURT: Is that agreeable with you, Mr. Timberlake, as to these Exhibits?

MR. TIMBERLAKE: Yes, sir.

COURT: All right, by stipulation they are admitted into evidence and identified as related by Mr. Spencer in the record.

MR. TIMBERLAKE: Before we go into the taking of evidence, I would like to ask that the witnesses be separated.

(WITNESSES EXCLUDED.)

- - - - - -

Whereupon:

JAMES TILSON

a witness called by the Complainant, being of legal age and

1 duly sworn, testified upon his oath as follows:

2

3 Direct Examination by Mr. Roberts:

4

5 Q Will you please state your name?

6 A James A. Tilson.

7 Q Where do you live, Mr. Tilson?

8 A In Rockbridge County, Virginia.

9 Q And what is your profession?

10 A Farmer and realtor.

11 Q How long have you been in the real estate

12 business?

13 A Since 1951.

14 Q Did you on or about, sometime prior to May one,

15 1972, obtain a listing for the sale of two hundred and forty-

16 six acres, more or less, in Rockbridge County through a conver-

17 sation with Mr. McClung?

18 A I believe it's about two hundred and seventy-

19 six acres of the Roberts' farm, what was the Roberts' farm.

20 Q All right. Will you relate for the Court the

21 details, as well as you remember them, of that conversation,

22 and where it took place?

23 A It took place either in Bill McClung's office

24 or around the Court House. I think we walked down to Charlie

25 Potter, Sr.'s, office to check on who could best show us the

1 property, and wherein between there . . . at the time it was
2 being written down, I thought the Charles Potter we were talking
3 about was Charlie Potter, Sr.; by the time we were through, I
4 realized that it was Mr. Potter, Jr. And . . . but, somewhere
5 between Bill McClung's office and the Treasurer's Office.
6 Q All right. And what were the details of your
7 conversation with Mr. McClung at that time?
8 A As I remember them, Mr. McClung said that he
9 and Mr. Potter . . .
10
11 TIMBERLAKE: Your Honor, I would like for the
12 record to show that as far as any conversation
13 between Mr. McClung and Mr. Tilson is concerned,
14 that I object to it as hearsay in so far as it
15 applies to the Respondent Potter.
16
17 COURT: Your objection is so noted in the record.
18
19 A Would you repeat the question?
20 Q Will you relate the conversation between you
21 and Mr. McClung at that time?
22 A They had a property to sell, and Bill wrote
23 down on a legal pad the details of the acres and so forth; I
24 think it is a part of the record here. And I think I wrote
25 down, when I got back to the office, the aerial photographs and

1 made notes of who would show the property; in other words,
2 Charlie Potter would show Dad or myself the boundary lines.
3 In other words, we couldn't sell it until we knew where the
4 lines were, and that was the first thing, was for us to become
5 familiar with the property before we would go to work on it.
6 Q I show you this Exhibit Number One which was
7 related by Mr. Spencer. Is this the memorandum that was written
8 at that time?
9 A I think so, yes.
10 Q Will you read those portions of it that are in
11 Mr. McClung's handwriting?
12 A Apparently there were two tracts of forty-five
13 and two hundred and thirty-one acres, totaling two hundred and
14 seventy-six acres, the Earl Roberts' farm. The price was sixty
15 thousand ($60,000.00) gross, meaning they would pay our commission
16 out of that. Financing that must be assumed, thirty-six
17 thousand ($36,000.00) payable at three thousand ($3,000.00) a
18 year, and interest at six percent over a twelve year period.
19 Other financing available, nine thousand dollars ($9,000.00)
20 at seven and a half percent with terms up to ten years. And
21 then owners; I mean, Charles Potter, Jr., William A. McClung.
22 And then to . . .
23
24 TIMBERLAKE: I object to that statement. He
25 is not reading . . .

1 A "Owners" is not on here, Judge. In other words,
2 they were in control of the property.
3
4 COURT: Only read what is on there.
5
6 TIMBERLAKE: Now, don't say . . . Mr. Tilson,
7 you were asked to read what it says here; I
8 don't want any interpolation by you as to . . .
9
10 COURT: I think the objection is well taken.
11
12 TIMBERLAKE: . . . as to what you thought it
13 meant.
14
15 A "To see in house," and then there is an arrow
16 up to Charles A. Potter, Jr. "No signs." We weren't to put
17 signs on the property. And then I've got, in my handwriting,
18 I've got that it is on tax aerial photo 6T-19, and the aerial
19 photos in my office it's on 2FF-172 and 174. I've got the
20 phone numbers of Mr. Potter, how to get in touch with him, and
21 then the people in the house, the renters in the house, was
22 Maude Wilhelm and Hallie Hostetter. And then there is the word
23 "brother" above that that I don't understand.
24 Q Mr. Tilson, when you talked to Mr. McClung,
25 what terminology did he use to you?

1 TIMBERLAKE: Your Honor, I would like for the
2 record to show that the objection as to the hear-
3 say aspect as far as Mr. Potter . . .
4
5 COURT: Not be considered as evidence against
6 your client, Mr. Potter.
7
8 TIMBERLAKE: Yes.
9
10 COURT: Any statement made by Mr. McClung. Now,
11 you have one problem, though, in this case.
12 If, after it is established--if it is estab-
13 lished that Mr. McClung was acting as agent for
14 Mr. Potter, it may be a different . . . you may
15 be in a different position.
16
17 TIMBERLAKE: I would like for the record to
18 show that this is a continuing objection.
19
20 COURT: I understand that. I understand.
21
22 Q How did Mr. McClung present this to you with
23 regard to ownership of the property?
24 A It was my understanding that the two men con-
25 trolled the property . . .

TIMBERLAKE: I object to the witness's answer as being unresponsive to the question.

COURT: Your objection is well taken; I sustain your objection.

Q What did Mr. McClung . . .

COURT: You are asking the witness for a conclusion, his own interpretation.

ROBERTS: I am asking him what Mr. McClung said to him, in regard to the ownership . . .

COURT: All right, he cannot state what he believed or what his opinion was with regard to that statement.

A I do not remember Mr. McClung's exact words. I'm not going to pretend that I understand . . . that I remember his exact words. We wrote down, the writing on the paper was that Charlie Potter and McClung controlled the property.

TIMBERLAKE: I object to that, Your Honor, because it is counter to the writing from which

he just testified. He is interpolating; he's undertaking to . . .

COURT: Is that your interpretation of it?

A Yes, sir.

COURT: Well, I think the objection is well taken.

A From beginning to end, the two of them controlled the property; one couldn't act without the other.

COURT: Did you ever have a direct statement from Mr. Potter at that time that they were the given owners of this property?

A I did not talk to Mr. Potter. Mr. Potter showed the property lines to Dad, and then Dad showed the property thereafter because he knew the lines.

Q Did Mr. McClung tell you who wanted to sell the property?

A Both of them wanted to sell it.

TIMBERLAKE: I object to that as leading.

1 COURT: All right. Save your point, Mr. Tim-
2 berlake. Let's proceed, gentlemen.
3
4 Q Did Mr. McClung tell you who was selling the
5 property?
6 A It is my understanding that both of them were
7 selling the property.
8
9 TIMBERLAKE: Again I object to the answer as
10 not being responsive to the question, Your
11 Honor. This witness is undertaking, in reply
12 to questions as to what was said, to interpo-
13 late his understanding or belief, or conclusion.
14
15 COURT: Your objection as to that calling for
16 a conclusion by a witness, I think is well
17 taken. I think the Court has expressly ruled
18 that Mr. Tilson can only relate what was told
19 directly to him by Mr. McClung, and that would
20 only affect Mr. McClung's position in this
21 case at this time. I don't believe that you
22 can express your conclusion or opinion from
23 what Mr. McClung said.
24
25 A Well, Mr. McClung asked me and Dad to sell the

farm for him and Charlie Potter.

Q Did you ever talk to Charlie Potter, Jr., after your conversation with Mr. McClung?

A Me, no, sir.

Q You did not?

A No, sir.

Q Did you have any further transactions with regard to this particular piece of property?

A Very little, because Dad . . . Charlie Potter showed Dad the lines, and thereafter Dad knew the property better than I did; so if there was a date to show this property, Dad would take it, just like on other properties I would be the one because I knew it better.

Q That's all.

Cross Examination by Mr. Timberlake:

Q Mr. Tilson, as I understand, you cannot undertake to repeat to the Court what, the language that Mr. McClung used to you in this meeting that you speak of?

A That I can quote him verbatim, no, sir. I don't pretend to do that.

Q Did you have anything to do with the drafting of this Exhibit Two?

A The contract of May the first, I would say no,

1 that Dad probably dictated that to Viola.
2 Q And so far as you know, and so far as you can
3 testify, you had nothing to do, either in assisting your father
4 or in the dictation of this Exhibit Two?
5 A Normal procedure would have been that Dad would
6 have done it and I would have . . . he'd say, "How's this look?"
7 and I would have read it over and passed it back and said,
8 "Okay." But that would have happened only if I was in the
9 office, and I don't remember specifically that I did that, sir.
10 Q Do you remember seeing it?
11 A Well, I've seen it since. I'm not . . .
12 Q I mean seeing it at the time that Mr. Macgurn
13 signed it?
14 A I don't remember specifically, no, sir. I
15 mean Mr. Macgurn was in the office and we were getting the con-
16 tract, and this was good; I mean, everybody wanted the contract.
17 They wanted to sell, and we wanted to sell it. So everybody
18 was working together.
19 Q Were you aware of the fact that this contract
20 had been drawn and signed by Mr. Macgurn?
21 A Oh, yes. Yes, sir.
22 Q Were you aware of the fact that the contract
23 ran from Charles Potter, Jr., seller, to Richard Macgurn as
24 buyer?
25 A That they were selling it? You mean, as opposed

1 to not having Mr. McClung's name on it?

2 Q Were you aware of the fact that the contract

3 listed Charles Potter, Jr., as the seller?

4 A I don't remember specifically.

5 Q Mr. Tilson, did you have anything further to

6 do with the efforts to bring about a sale of this property

7 between Charles Potter, Jr., and Richard Macgurn, after May

8 the first, 1972?

9 A I think I was kept aware of the happenings,

10 but I would say that Dad and Mr. Macgurn and Mr. Wolver and

11 Bill McClung and, through Bill mostly, Charlie Potter handled

12 the deal from then on. I wasn't really in on it.

13 Q Well, then, to the best of your recollection,

14 you didn't participate in the transaction . . .

15 A That's correct.

16 Q . . . after May the first, 1972?

17 A Well, now, see, the listing was about a month

18 or so before that. They had showed the property to three or

19 four different people. This writing . . . in other words,

20 Macgurn . . . we had showed the property and worked on it for

21 a month or two before we got this offer. And during that . . .

22 and since we got this offer, basically we were considering it

23 sold, and we didn't show it--as far as I know--after we got

24 this offer.

25 Q Well, Mr. Tilson, my question was this: Is it

1 correct, to the best of your knowledge and recollection, you
2 did not participate in any negotiations between, or having to
3 do with the sale of this farm, after May the first, 1972?
4 A I would say that that is probably true.
5 Q All right. That's all.
6
7 - - - - - -
8 Whereupon:
9
10 W. E. TILSON
11 a witness called on behalf of the Complainant, being of legal
12 age and duly sworn, testified upon his oath as follows:
13
14 Direct Examination by Mr. Spencer:
15
16 Q State your name, please, sir.
17 A W. E. Tilson.
18 Q Where do you live, Mr. Tilson?
19 A My farm in Rockbridge County.
20 Q What is your occupation?
21 A Real estate broker and farmer.
22 Q And how long have you been so employed?
23 A Over twenty years.
24 Q And is your real estate business in the city
25 of Lexington?

1 A Largely, yes, sir. My office is in Lexington.
2 Q Mr. Tilson, do you know the Respondents, Mr.
3 McClung and Mr. Charles Potter, Jr.?
4 A Very well, sir.
5 Q How long have you known them?
6 A Quite a number of years. Quite a number of
7 years.
8 Q Have you had prior business dealings with Mr.
9 McClung prior to this instance?
10 A Many of them.
11 Q And have you had prior business dealings with
12 Mr. Potter?
13 A I do not believe so.
14 Q Now, Mr. Tilson, I believe it has been estab-
15 lished that sometime prior to May the first of 1972 your real
16 estate firm, through your son, Mr. Jim Tilson, received a
17 listing of what is commonly referred to as the Roberts' farm
18 in Collierstown, Virginia. When did you first become aware of
19 that listing by your firm?
20 A I don't know that date. I do not know the date.
21 Q Was it prior to May the first of 1972?
22 A Definitely. Definitely prior to May the first,
23 yes, sir.
24 Q Now, after the listing was received, did there
25 come an occasion when Mr. Potter showed you the farm?

1 A Yes, sir.
2 Q And what was the purpose of that showing?
3 A To show me the lines of the property, in order
4 that I could show it properly to a client.
5 Q After you had been shown the lines by Mr. Potter,
6 did you show the property to prospective purchasers?
7 A Yes, sir.
8 Q And did you receive an offer from a prospective
9 purchaser?
10 A Yes, sir.
11 Q And who was that prospective purchaser?
12 A Mr. Richard Macgurn.
13 Q And where is Mr. Macgurn from?
14 A California.
15 Q And was he in Lexington at the time he made
16 this offer to you?
17 A Yes, sir, he was. He came to my office on
18 Saturday, April the twenty-ninth, and we showed Mr. Macgurn
19 and his son that property that Saturday. Mr. Macgurn went back
20 alone on Sunday, the following day, on the thirtieth. He came
21 to my office on May the first, 1972, and signed the contract
22 for fifty-eight thousand dollars ($58,000.00) and three thousand
23 dollars ($3,000.00) down payment, with a closing to be April
24 fifteenth, 1973.
25 Q Was that offer made in writing?

1 A It was made in writing, and I delivered it to
2 Mr. McClung.
3 Q Just a moment, Mr. Tilson; I am going to show
4 you Exhibit Number Two and ask you, is that the original offer
5 which Mr. Macgurn made for the purchase of this property?
6 A That is correct, sir.
7 Q All right. What did you do with this written
8 offer after it was signed by Mr. Macgurn?
9 A I took it to Mr. Bill McClung's office and
10 delivered it to him in his office.
11 Q Now, after you had delivered that written offer
12 to Mr. McClung, what was the next response you received from
13 either Mr. McClung or Mr. Potter regarding that offer?
14 A On May the seventeenth, 1972, Mr. McClung wrote
15 me returning the contract and enclosed a new contract with the
16 same price of fifty-eight thousand dollars ($58,000.00), with
17 a five thousand dollar ($5,000.00) down payment, and the
18 closing date to be April the fifteenth, 1973.
19 Q I am going to show you Exhibit Number Three
20 and ask you if that is the letter that Mr. McClung sent to you
21 on May the seventeenth?
22 A Yes, sir.
23 Q All right. Now, I am also going to show you
24 Exhibits Number Five, Six, and Seven, and ask you if those are
25 the documents which were enclosed in the letter from Mr. McClung

1 identified as Exhibit Number Three?

2 A I would say that I feel sure that was certainly

3 one of them.

4 Q That is Exhibit Number Five to which you are

5 referring, entitled Agreement of Sale?

6 A Yes, sir. Yes, sir, I would say this is

7 correct, as well as I can remember. Yes, sir.

8 Q It is your testimony then that Exhibits Five,

9 Six, and Seven were enclosed with Exhibit Three when forwarded

10 to you. Now, Mr. Tilson, is that correct? Is that your . . .

11 A As far as I remember, yes.

12 Q Now, Mr. Tilson, I am referring to Exhibit

13 Number Five, the Agreement of Sale, and referring to the last

14 page of it where it shows a signature Richard B. Macgurn. Was

15 that signature on the contract at the time it was given to you

16 by Mr. McClung?

17 A Given to me by Mr. McClung?

18 Q To refresh your memory, Mr. Tilson, where we

19 are in the proceedings is: You have taken now an offer from

20 Mr. Macgurn and signed by Mr. Macgurn and given to Mr. McClung.

21 A All right. This . . .

22 Q And Mr. McClung has written you a letter back

23 on May the seventeenth, in which he says that that written con-

24 tract signed by Mr. Macgurn is not acceptable and forwards to

25 you this contract that he has drawn up in his office. It has

1 Mr. Macgurn's signature on it as it is there, but it didn't
2 have his signature at the time that Mr. McClung delivered it
3 to you, did it?
4 A I don't see how it could have. This is not
5 the original contract, is it? May I see that letter again and
6 read it over. Is this the one that he sent with this contract?
7 Q That is correct. That is the proposed contract
8 that Mr. McClung returned to you on May the seventeenth.
9 A Yes, that's his signature on it.
10
11 TIMBERLAKE: I didn't hear his answer.
12
13 Q What was your answer?
14 A Yes, it has Mr. Macgurn's signature on it.
15 Q This is Macgurn's signature. What I'm asking
16 you is: His signature wasn't on it when Mr. McClung just typed
17 it up and brought it to your office, was it?
18 A Not the original.
19 Q All right, that's what I'm asking you. At that
20 time, Mr. Macgurn's signature was not on it?
21 A No, sir.
22 Q All right. Now, after you received Exhibits
23 Three, Five, Six, and Seven--being Mr. McClung's letter and the
24 enclosures--did you forward those to Mr. Macgurn?
25 A Yes, sir.

1 Q And did you send a letter to Mr. Macgurn in
2 which you enclosed those?
3 A I'm sure I did. I don't know just what . . .
4 Q I am showing you Exhibit Number Four, and ask
5 you is that the letter with which you enclosed those documents
6 in forwarding them to Mr. Macgurn?
7 A Yes, sir, I wrote that letter.
8 Q Now, after you forwarded those letters to Mr.
9 Macgurn, did you receive a response from Mr. Wolver, Mr. Macgurn's
10 attorney in California, dated June the eighth, 1972?
11 A Yes, sir, I got one dated June the eighth. He
12 wrote me a letter rejecting the offer, as he did not, at that
13 time, want to put up the extra two thousand dollars ($2,000.00),
14 and he wanted possession at once.
15 Q All right, now, is this Exhibit Number Eight
16 that letter which you received from Mr. Wolver, addressed to
17 you and dated June the eighth?
18 A Yes, sir.
19 Q All right. Now, after the letter of June the
20 eighth, did you receive a copy of a letter from . . . well,
21 first of all, what did you do with this letter, when you received
22 this letter from Mr. Wolver? What did you do with that? Did
23 you deliver that to anyone, anyone representing--or who was--the
24 seller?
25 A I don't remember whether I took that to Mr. McClun

1 or not. More than likely, I did, but I . . . we were so close
2 together in everything I did, I . . .
3 Q If you don't remember, you just don't remember.
4 Now, after that letter of June the eighth that you received
5 from Mr. Wolver, Exhibit Number Eight, did you . . . were you
6 aware of the negotiations that were continuing by mail between
7 Mr. Wolver and Mr. McClung, as contained in Exhibit Nine and
8 Exhibit Ten, being Mr. McClung's letter of July the sixth to
9 Mr. Wolver and Mr. Wolver's letter to Mr. McClung dated July
10 the twenty-first?
11 A I got all the correspondence; they both sent
12 me copies. Yes, I got this copy.
13 Q All right, sir, did you also receive a copy of
14 Exhibit Number Ten?
15 A My name is not on it as getting it, but . . .
16 yes, sir, I got a copy of that one.
17 Q Now, up until this time . . . I believe this
18 brings us up through July of 1972. Now, Mr. Tilson, up until
19 that time, had you had conversations with Mr. McClung regarding
20 this transaction?
21 A Daily.
22 Q And in those conversations, had Mr. McClung told
23 you who was selling this property?
24
25 TIMBERLAKE: I object to that, Your Honor, as

1 leading. I object to it as hearsay as far as
2 Mr. Potter is concerned.
3
4 COURT: In other words, your objection is the
5 same . . . I think the objection is well taken.
6
7 SPENCER: Would Your Honor hear argument on the
8 objection? I think, if Your Honor please, I
9 respect Mr. Timberlake's objection to its being
10 hearsay to Mr. Potter, until it is shown that
11 Mr. McClung was his attorney; but if, in his
12 dealings with Mr. Tilson, Mr. McClung had told
13 Mr. Tilson who was selling the property, then
14 I think that is admissible as to show for whom
15 Mr. Tilson was acting. He was acting . . .
16
17 COURT: The only probative value it would have
18 would be with regard to Mr. Potter's responsi-
19 bility in the transaction.
20
21 SPENCER: It will be shown, Your Honor, . . .
22
23 COURT: And that is the reason the objection
24 was made, and that is the reason why the Court
25 sustained the objection. What Mr. McClung may

1 have said as to the ownership of this property
2 or who was authorizing him to sell it, that
3 certainly would not be binding, at this time,
4 on Mr. Potter. There is no evidence in here
5 at this time that--no direct evidence--that
6 Mr. Potter, or that Mr. McClung was acting as
7 the duly authorized agent for Mr. Potter.
8
9 SPENCER: Your Honor, there is considerable
10 correspondence contained in these Exhibits, which
11 of course have not been read into the evidence,
12 although they have been introduced, which show
13 clearly that Mr. McClung was at least acting
14 as attorney for Mr. Potter, and that he was
15 handling these negotiations and writing the
16 correspondence directly to the seller's attorney
17 as well as to . . . I mean, to the buyer's
18 attorney . . .
19
20 COURT: Well, I would suggest that we proceed
21 and then, for the record, I will either accept
22 or disregard such testimony. The Court is
23 hearing this case, it is in equity, and I have
24 the right to accept or disregard testimony.
25

1 SPENCER: May we have this in the record for
2 the Court's later decision?
3
4 COURT: All right.
5
6 Q Did Mr. McClung tell you who was selling the
7 property?
8 A Mr. McClung said that he and Charlie Potter
9 wanted us to sell the farm and he had already . . . I had been
10 over there talking to him about the listing that he had given
11 Jimmy. And we talked about it dozens and dozens of times,
12 and . . .
13 Q Speak up a little bit.
14 A Excuse me. Billy talked to me many times about
15 this property, and he always said "we". He never said it was
16 Charlie Potter; he said "we want you to sell it." And later--
17 you haven't asked me the question; I don't know if I should
18 put it in or not--he did at one time tell me that he had the
19 document in his safe and that he had put up all the money, and
20 that they were going to sell it; and never did he say that he
21 indicated but what he was a partner in this transaction.
22 Q All right, sir. Now, Mr. Tilson, after July
23 of 1972, did you subsequently receive a letter from Mr. McClung
24 dated August the seventh, 1972, regarding this transaction,
25 which has been admitted and identified as Exhibit Number Eleven?

1 A Addressed to Mr. Wolver?
2 Q No, that is the letter addressed to you? Did you
3 receive that letter?
4
5 TIMBERLAKE: What date? Addressed to who?
6
7 SPENCER: August the seventh, 1972. To Tilson.
8
9 TIMBERLAKE: I don't see a letter addressed to
10 Mr. Tilson.
11
12 A May I read this letter out loud?
13 Q I want to know, first of all, did you receive
14 that letter . . .
15 A I did.
16 Q . . . in the regular course of mail from Mr.
17 McClung?
18 A Yes, sir.
19 Q All right.
20
21 TIMBERLAKE: Are you referring to a letter
22 addressed to Mr. Wolver?
23
24 SPENCER: I am not, sir. I am referring to a
25 letter addressed to Mr. Tilson and signed by

1 Mr. McClung.

2

3 A May I read it?

4

5 COURT: All right.

6

7 A "W. E. Tilson, c/o W. E. Tilson & Son Realtors,
8 South Main Street, Lexington, Virginia; Re: Richard B. Macgurn
9 and Charles A. Potter, Jr., Agreement of Sale. Dear Tex:
10 Enclosed herewith is a letter that I received from the attorney
11 for Mr. Macgurn and my reply for Charley. I am afraid that
12 what has happened here is that when it looked like we were going
13 to get the price that Charley and I agreed to take, that Charley
14 suddenly decided that he'd be better off to try to hold on to
15 the property, rather than buying it and selling it as we had
16 agreed upon. It appears to me that Macgurn's variance is of not
17 a great a nature to get around if Charley were going to live up
18 to what he had originally told me he was doing. This matter
19 has been embarrassing to me, personally, since Charley did not
20 act in good faith with me and has made it look like I have
21 misled you.
22 Therefore, until you receive a listing signed by both
23 Charley and myself, or however the property will be titled
24 when exercised by the options, please do not do any more work
25 on selling it or showing it.

1 With kind personal regards, I am, Sincerely yours,
2 William B. McClung." And I got a copy of the letter.
3
4 TIMBERLAKE: Of course, I think the Court will
5 recognize that my objection runs to all of
6 this testimony, as well as to this letter that
7 was just read.
8
9 COURT: Yes. That is not regarded as evidence
10 concerning Mr. Potter. It may relate to Mr.
11 McClung's position.
12
13 Q Now, Mr. Tilson, enclosed with that letter was
14 Exhibit Number Twelve, Mr. McClung's letter addressed to Mr.
15 Wolver. Was that enclosed? Did you receive that letter along
16 with Exhibit Number Eleven from Mr. McClung?
17 A Yes, I got a copy of this letter. I don't
18 remember whether it was enclosed in that letter or not, but I
19 did get a copy of the letter.
20 Q Do you recall on what date you received your
21 copy of this letter identified as Exhibit Twelve addressed to
22 Mr. Wolver and signed by Mr. McClung?
23 A Let's see the date on that. This is August
24 the seventh.
25 Q Do you remember the date that you received that

1 letter, your copy of that letter?
2 A I received that letter, the copy, on the morning
3 of the tenth.
4 Q All right, will you tell the Judge what that
5 letter said?
6 A This letter here? It is addressed to Mr. Wolver.
7 "Dear Mr. Wolver: I have and thank you for your letter of
8 July 21, 1972, with reference to the above-captioned matter.
9 Since your client neither wishes to settle this matter as pro-
10 posed in my last letter at an earlier date, or increase his
11 deposit here in accordance with the proposed contract that I
12 forwarded to you, Charles A. Potter, Jr., has declined to accept
13 his offer of $58,000.00 for the subject property.
14 With best wishes, I am, Sincerely yours, William B.
15 McClung." With a copy to W. E. Tilson.
16 Q As a result of receiving this letter as you
17 said on the morning of August the tenth, 1972, what did you do?
18 A I immediately phoned Mr. McClung and told him
19 I had gotten this letter and wanted to know what to do.
20 Q You telephoned him?
21 A Yes, sir, he telephoned me. I telephoned him.
22 I telephoned him after I got that letter.
23 Q Where was he?
24 A He was in his office.
25 Q All right, now . . .

1 A And he said to come on over. I went over to
2 Mr. McClung's office with the letter, and he said, "Has Mr.
3 Wolver gotten the letter?" I said, "Billy, he couldn't have
4 possibly gotten the letter, because I just got my copy, and
5 I'm in the same town, and he couldn't possibly have gotten it.
6 But I will phone him and find out."
7 Q Where was Mr. Wolver . . .
8 A That was in Mr. . . .
9
10 TIMBERLAKE: I object to all of that, Your
11 Honor, and I move it be stricken. Mr. Tilson
12 can't testify as to the mail service throughout
13 the country.
14
15 COURT: Well, he was just repeating about
16 receiving the letter on the tenth, and truly
17 he was expressing his opinion that Mr. Wolver
18 living in California could not have received
19 that letter by the tenth.
20
21 TIMBERLAKE: That is purely an opinion.
22
23 SPENCER: Your Honor please, the evidence is
24 not being introduced for that purpose, but only
25 the conversation that Mr. Tilson had with

1 Mr. McClung, and they both behaved and reacted
2 based on what they said and the statements that
3 they made to each other.
4
5 COURT: I am going to permit it to go in. Go
6 ahead.
7
8 Q Mr. Tilson?
9 A I told him I would phone Mr. Wolver and see if
10 he got it, and "Why?" He said, "If Mr. Wolver sends a contract
11 accepting my previous letter, referring to the letter, and
12 sending the two thousand dollars," he said, "There's no way
13 under God's green earth that Charlie could get out of that
14 contract, 'cause it would be a contract." I said, "Would you
15 write out the contract that Mr. Wolver should send back up
16 here to make it right?"
17 Q Mr. Tilson, you have said "contract" he should
18 send back; is that what you mean?
19 A It's a wire, a telegram. Telegram. The pro-
20 posed contract. And he wrote out this property here, and he
21 said he should send that as referring to my letter of the sixth;
22 and this is in his handwriting . . .
23 Q I show you Exhibit Number Thirteen.
24 A He wrote it out right in . . . I was at the
25 end of the table, Mr. McClung was over at his side, and he had

1 to shuffle around to find this paper. And this is the write-up
2 he did, and this is what I phoned Mr. Wolver.
3 Q And is that in Mr. McClung's handwriting?
4 A That is in Mr. McClung's handwriting.
5 Q You said that there is some reference to a form
6 of letter that Mr. McClung had . . .
7 A As I stepped out of the door, he said, "This
8 will refer to my letter of the sixth," I believe was the words
9 he said.
10 Q That was after he had given you this written . . .
11 A After he had given me that.
12 Q All right, now, after you left Mr. McClung's
13 office, did you, in fact, call Mr. Macgurn or Mr. Wolver in
14 California?
15 A I did. I got Mr. Wolver.
16 Q Now, after your telephone conversation with
17 the people in California, did you receive a telegram from Mr.
18 Macgurn on August the tenth?
19 A I did.
20 Q I am showing you Exhibit Number Fourteen, and
21 ask you if that is an accurate copy of the telegram that you
22 received?
23 A That is correct. Do you want me to read it?
24
25 TIMBERLAKE: Your Honor, I object to the reading

1 and introduction of this writing that this wit-
2 ness holds in his hand; he is in no position
3 to testify that this telegram was either sent
4 by or signed by Richard Macgurn. The only
5 thing he can testify to . . .
6
7 SPENCER: There will be further evidence that
8 that is . . .
9
10 COURT: Then you will have to wait until you
11 can qualify the telegram.
12
13 SPENCER: Your Honor please, we would like to
14 introduce it for the purpose of Mr. Tilson
15 saying that it is the telegram that he received.
16
17 COURT: But the objection made by Mr. Timberlake
18 is that Mr. Tilson doesn't know whether Mr.
19 Macgurn sent that telegram or not.
20
21 SPENCER: And we expect to show . . .
22
23 COURT: All right. Well, the objection is
24 sustained until you qualify the telegram.
25

1 Q After you had received that telegram on August
2 the tenth, Mr. Tilson, what did you do with it, with the orig-
3 inal wire?
4 A I took it to Mr. McClung.
5 Q And after that day . . .
6 A Wait a minute. I took it to Mr. McClung first,
7 and then I took it out to Mr. Potter.
8 Q Where did you take it to Mr. Potter?
9 A I took it to Mr. Potter, he was working on his
10 new house, out in Collierstown. I delivered it to him personally.
11 Q After you had received that telegram, did you
12 ever receive a demand from Mr. Macgurn and/or Mr. Wolver for
13 performance of the contract to sell this land?
14 A I don't quite get your question. It was a
15 contract . . . I'd have to go back in my files for the letters;
16 but it was just relative to the contract. I don't know just
17 how to answer your question, because I'm not going to say any-
18 thing that isn't honest.
19
20 TIMBERLAKE: I think the witness can be asked
21 if he had any further contact with either
22 Mr. Wolver or Macgurn . . .
23
24 SPENCER: I withdraw the question.
25

1 Q Mr. Tilson, after the telegram of August the
2 tenth, did you have any further contact with either Mr. Macgurn
3 or Mr. Wolver?
4 A I don't think so. I don't know. I cannot
5 answer the question, because I really don't know. We were
6 talkin' so much . . . and phonin' so much, I'm not . . .
7 Q I am going to show you a letter dated August
8 the fifteenth . . .
9 A I'm not going to make a statement that isn't
10 right.
11 Q I'm going to show you a letter dated August
12 fifteenth and ask you if you received that letter?
13 A Yes, sir, I got that letter. I don't know if
14 I have a copy in my files, but I should have. But I remember
15 reading the letter.
16
17 TIMBERLAKE: I don't think the letter itself
18 is proper evidence for either of my clients,
19 and I object to its introduction.
20
21 SPENCER: Do I understand that you are objecting
22 to the introduction?
23
24 TIMBERLAKE: Yes, sir.
25

1 SPENCER: I would ask the Court for a ruling
2 on the admissibility of this letter, Your Honor,
3 dated August the fifteenth, 1972, addressed to
4 Mr. Tilson, from Mr. Wolver, requesting the forms
5 of the contract, being introduced for the pur-
6 pose of showing that the purchaser was ready,
7 willing, and able to perform the contract.
8
9 COURT: Well, there is no question raised that
10 Mr. Wolver was acting as the attorney for Mr.
11 Macgurn, is there?
12
13 SPENCER: No, Your Honor. And Mr. Wolver is
14 present to testify.
15
16 COURT: All right. I'll admit it.
17
18 TIMBERLAKE: I object to it as self-serving
19 declaration, and as hearsay.
20
21 SPENCER: For the record, this is marked
22 Exhibit Number Fifteen, a letter from Mr. Wolver
23 to . . .
24
25 COURT: Does Mr. Tilson have the original?

1 A I don't think so. I remember getting the
2 letter, and I remember reading it, but I don't think I have it
3 in my files. I'll have to look through here.
4
5 COURT: Well, applying the second best evidence
6 rule, of course, the copy would be admissible;
7 but I would prefer if the original were
8 available.
9
10 SPENCER: The documents, Your Honor, Mr. Tilson
11 delivered to Mr. McClung, the reason that we
12 don't have the originals in our possession.
13 But he'll check his files and see if . . .
14
15 A No, sir, I don't seem to have that.
16 Q Do you have the original of this letter dated
17 August the fifteenth from Mr. Wolver addressed to you, Mr.
18 Tilson?
19 A No, sir, I don't seem to.
20
21 TIMBERLAKE: Your Honor, I would like to state
22 that all of my objections to the introduction
23 of this writing, which purports to be a copy
24 of a letter from Mr. Wolver, as attorney for
25 Mr. Macgurn, to Mr. Tilson, who is the real

1 estate agent that was undertaking to make this
2 sale, and I object to it on the grounds that
3 it is unsigned, that the best evidence rule
4 certainly calls for the production of the orig-
5 inal of the letter if there was a signed letter
6 such as that received by Mr. Tilson. I also
7 object to it as hearsay and self-serving declar-
8 ation by the Complainant or the Complainant's
9 attorney.
10
11 COURT: Well, if the original letter can be
12 produced, I would insist that . . . I believe
13 Mr. Tilson's testimony that he did receive the
14 original, and is unable to locate it, and you
15 are now offering the copy which Mr. Tilson
16 identifies as a copy of the original. And I
17 will admit it, but with the understanding that
18 if the original letter can be located I would
19 suggest that that replace the copy.
20
21 SPENCER: Yes, Your Honor.
22
23 A Your Honor, I tried to keep all of these copies,
24 but I must explain to you that I turned a lot of my files over
25 to my two attornies at different times, and I would get back

1 copies, and I'm not exactly pleased with what I have. That's
2 why I have to say that I know that I have gotten letters, but
3 I do not have it and I could not say what day I got it.
4
5 TIMBERLAKE: I would like for the Court to
6 direct the witness to name the gentlemen that
7 he refers to as his two attornies, having turned
8 the papers over to them.
9
10 A Mr. Roberts and Mr. Spencer.
11 Q Mr. Tilson, it has been shown in the evidence
12 the contract price for the sale of this property was fifty-
13 eight thousand dollars ($58,000.00). Will you tell the Court
14 whether or not the consideration of fifty-eight thousand dollars
15 was a reasonable value for this property at the time it was
16 sold?
17 A We would say in real estate parlance if a gentle-
18 man makes an offer and the buyer accepts it, that is a reason-
19 able price.
20
21 TIMBERLAKE: I object to that.
22
23 A I would say that is a reasonable price at that
24 time.
25

1 TIMBERLAKE: I object to that as being absolutely
2 unrelated to the issue . . .
3
4 Q Mr. Tilson, let me ask you, in terms of . . .
5
6 COURT: As an expert in the field of real estate
7 and your knowledge of this property, you can be
8 asked whether it was a fair price.
9
10 A It was a reasonable price at that time, the
11 time of the contract.
12
13 TIMBERLAKE: I object to that question and
14 answer as being irrelevant to the issues in
15 this case.
16
17 Q Mr. Tilson, do you know what the reasonable
18 rental value of this property would be for the period since the
19 date of the sale until now, on an annual basis, what would have
20 been the fair annual rental for that property?
21
22 TIMBERLAKE: I object to that, Your Honor, as
23 being irrelevant and immaterial.
24
25 SPENCER: Your Honor please, the Bill of

1 Complaint originally filed in this cause prayed
2 for specific performance and damages in the delay
3 of the conveyance, and also for damages in the
4 alternative of the specific performance remedy.
5 The Court held on a demurrer the portion of
6 the Bill of Complaint asking for damages in the
7 alternative be struck, but as I recall the
8 Court specifically held that any damages which
9 could be shown to have occurred because of the
10 delay in the conveyance, and would be adjunctive
11 to a remedy of specific performance, would be
12 allowed. We submit, Your Honor, that the
13 damages for the . . .
14
15 COURT: I sustained the demurrer as to the claim
16 for fifty thousand dollars ($50,000.00).
17
18 SPENCER: Yes, Your Honor.
19
20 COURT: In lieu of the permit to relief of
21 specific performance.
22
23 SPENCER: Yes, Your Honor.
24
25 Q What would be the fair rental value of . . .

1 COURT: I believe that you are claiming the
2 amount of ten thousand dollars ($10,000.00)
3 for delay of the sale?
4
5 SPENCER: Yes, Your Honor.
6
7 Q What, Mr. Tilson, would be the fair rental
8 value of the property . . .
9 A I would have to answer that just like I did
10 the price of the property; there was an agreement of eighteen
11 hundred dollars ($1,800.00) by the seller and by the buyer for
12 the rental of the property. I'd say it was worth rental would
13 be eighteen hundred dollars a year.
14 Q In your opinion . . .I want you to tell me, in
15 your opinion as an expert in the appraisal of real estate, is
16 the figure of eighteen hundred dollars ($1,800.00) that they
17 agreed on a reasonable amount for the rental of this property
18 on an annual basis at the time the contract, as of August the
19 tenth, 1972?
20 A Mr. Spencer, in renting property, there is
21 usually a clause stating to what use that farm will be put.
22 If a farm is going to be used as a cattle farm and not gardens
23 or things that would make it all be plowed up and washed away,
24 it would be a different thing. I assume that this was going
25 to be used just as a cattle farm, as it had been, and, therefore,

1 eighteen hundred dollars ($1,800.00) would be a reasonable rent.
2 Q Is that the most susceptible and best use of
3 that farm in its present state?
4 A Yes, sir, cattle farm. Yes, sir. In my judg-
5 ment, sir.
6 Q Mr. Tilson, throughout your efforts to sell
7 this property, did you have any additional conferences with
8 Mr. Potter, other than the one which you testified to when he
9 showed you the boundaries of the property?
10 A I don't remember, except I did when I took the
11 telegram out to him. I just gave him the telegram.
12 Q All right. At that conference when he showed
13 you the property, did Mr. Potter tell you who was selling the
14 property?
15
16 TIMBERLAKE: I object to that, Your Honor,
17 as leading.
18
19 COURT: All right, ask him if Mr. Potter made
20 any statement, and, if so, what it was.
21
22 Q Mr. Tilson, during any conversation with Mr.
23 Potter, did Mr. Potter make any statement to you regarding the
24 ownership of this property and, if so, what were they?
25 A I don't remember him ever saying; there's never

1 been anything in our minds at all except that we were dealing
2 with Mr. Potter and Mr. McClung, and that it was their property
3 and that they had the option and that they were partners. All
4 we knew that they were partners.
5
6 TIMBERLAKE: I object to that, Your Honor, as
7 being unresponsive and move that it be stricken.
8
9 COURT: I think the objection is well taken,
10 what he may have concluded from his negotiations.
11 He says he doesn't recall what was told him.
12
13 Q Mr. Tilson, to your knowledge, has anything
14 been removed from the property since the summer of 1972?
15 A Yes, sir.
16 Q What has been removed from the property?
17 A Timber.
18 Q Do you know how much timber has been removed?
19 A No, sir.
20 Q All right, sir. Will you please answer any
21 questions that Mr. Timberlake or the Court might ask you.
22
23 Cross Examination by Mr. Timberlake:
24
25 Q Mr. Tilson, I hand you this writing marked

1 Exhibit Two, which purports to be a sales contract of the
2 property in question, and is signed by Mr. Macgurn. Who pre-
3 pared that contract?
4 A It was prepared in my office, and the secretary
5 did the typing.
6 Q Who dictated it?
7 A I did. In Mr. Macgurn's presence on the first
8 of the month which was a Monday.
9 Q The first of May, 1972?
10 A It was a Monday.
11 Q All right, sir. And then, as I understand,
12 Mr. Tilson, on August the tenth, after you had received in the
13 mail the copy of the letter from Mr. McClung to Mr. Wolver
14 dated August the seventh, you made your telephone call to the
15 West Coast, and I have reference to this Exhibit Eleven, dated
16 August the seventh; I believe you testified you received a copy
17 of that letter on August the tenth?
18 A Right, sir.
19 Q And after you received a copy of that letter,
20 you made your telephone call to the West Coast?
21 A Correct.
22 Q And with whom did you talk?
23 A Mr. Wolver.
24 Q Sir?
25 A Mr. Wolver.

1 Q Mr. Wolver. And at that time, you gave to Mr.
2 Wolver the substance, or the language, of a telegram that you
3 desired Mr. Macgurn to send back; isn't that correct?
4 A Correct.
5 Q And the purpose and design of that requested
6 telegram was to bind Mr. Potter to the sale of that property,
7 was it not?
8 A That would be the only way we could consummate
9 it, yes.
10 Q And that was after you had received notice in
11 writing in the mail that morning that Mr. Potter was not going
12 to sell the property, wasn't it?
13 A I had received a letter which is already in
14 evidence, as I had testified a while ago, on the morning of the
15 tenth, before I went over to Mr. McClung's office, yes, sir.
16 Q Now, Mr. Tilson, from that time certainly, on
17 up to the present, you have been most interested and active in
18 forcing Mr. Potter to sell this property to Macgurn, have you
19 not?
20 A I would have been very derelict in my duty as
21 a realtor if I hadn't tried to consummate the sale . . .
22 Q All right, when you say you would be derelict
23 in your duty, are you referring to your duty to Mr. Potter?
24 A I am referring to a duty to Mr. McClung and Mr.
25 Macgurn, and to myself, to do the thing according to the proper

1 conduct of a realtor.

2 Q But not to Mr. Potter? Not through any duty

3 to Mr. Potter?

4 A Mr. Potter was one of the partners, and we

5 had not dealt . . .

6 Q Mr. Tilson, haven't you been advised by the

7 Court that you are not to refer to a partnership as to which

8 there is no proof of its existence?

9 A I apologize, Your Honor, if you did.

10

11 COURT: I did. I have ruled thus far the evi-

12 dence has not established that there was a

13 partnership at this time. So don't make any

14 reference to it.

15

16 Q You do not claim that in requesting this tele-

17 gram to be dispatched by Mr. Wolver that you were prompted by

18 a duty to Mr. Potter, do you?

19 A I don't know what duty it would be, except

20 that his . . . the person who listed the contract with us was

21 still very desirous of having it consummated; and I know in my

22 heart I did right. There wasn't any question about the pro-

23 priety of it; it was the proper thing to do, to do the best I

24 could for the persons--since you won't let me use the word

25 partner--that listed the property with us, and had worked so

1 hard for us, and still wanted it to be done; and it was just a
2 question of three against one as to the propriety of it. I
3 think that I was right, sir.
4 Q Well, I gather than that you do not claim that
5 you were performing any duty to Mr. Potter when, after receiving
6 notice in writing that Mr. Potter was not going to sell the
7 property, that you undertook to solicit sending this telegram?
8 You don't claim that was through any duty to Mr. Potter, do
9 you?
10 A I figure that when this property was listed
11 with us, we had the duty to sell it, and we worked hard, and
12 we did all we could, and it was possible for us to consummate
13 the sale legally and properly; we would not have been worthy
14 of our license to sell real estate if we had not exercised all
15 the normal, proper advice to consummate it that we had. And
16 we did have that advice, and we had that advice in writing
17 from the person who listed the contract, this property, with
18 us. He had the right to list it, and we would not have been
19 worthy of our license if we had not done everything in our
20 power, Mr. Timberlake, to go ahead and consummate a contract
21 that was a legal contract. There was nothing crooked about it.
22 Everything was done according to what I think was proper.
23 Q Mr. Tilson, Exhibit Number One is the listing
24 of this property, or the memorandum of its listing, is it not?
25 A Yes, sir.

1 Q You do not have any other writing than this as
2 a listing, do you?
3 A No, sir.
4 Q And did you ever produce a purchaser of this
5 Earl Roberts farm ready, willing, and able to pay a price of
6 sixty thousand dollars ($60,000.00) gross?
7 A No, sir.
8 Q Now, Mr. Tilson, you testified, I believe, that
9 on the same day you made this telephone call to the West Coast
10 and spoke with Mr. Wolver, you received a telegram which you
11 have identified as being . . . which you identified when you
12 testified in your direct examination.
13
14 COURT: You objected to the introduction of
15 that telegram, and I sustained your objection.
16
17 TIMBERLAKE: I am not going into the substance
18 of the telegram.
19
20 COURT: All right.
21
22 Q You received a telegram in response to your
23 call to the West Coast, did you not?
24 A Yes, sir.
25 Q And I believe you testified that after you

1 received it, later that day you delivered it to Mr. Charles
2 A. Potter, Jr.?
3 A I did, after phoning Mr. McClung and telling
4 him I had it. He said, "Take it to Charley," and I took it
5 to Charley, and I found him out near . . . working on his
6 house that he was remodeling.
7 Q And you are as positive as any other testimony
8 you have given in this case that you took that telegram out
9 and delivered it in person, that day, to Mr. Potter?
10 A Yes, sir.
11 Q Mr. Charles A. Potter, Jr.?
12 A Yes, sir, at the request of Mr. McClung; no
13 doubt about that.
14 Q All right. And then I believe you testified
15 that you received a letter from Mr. Wolver dated August the
16 fifteenth, enclosing certain documents?
17 A I don't remember the date. Let's get the
18 record, and read the record. I've got a lot of letters here.
19 I'm not going to answer that question; I don't know what you're
20 talking about.
21
22 TIMBERLAKE: Was that introduced, that letter?
23
24 COURT: An objection was made under the best
25 evidence rule, because a copy was, I believe,

1 introduced.

2

3 TIMBERLAKE: You accepted it subject to the

4 production of the original?

5

6 COURT: That is correct, yes.

7

8 Q Now, Mr. Tilson, I believe you testified that

9 you did receive a letter addressed to you dated August the

10 fifteenth, 1972, of which Exhibit Fifteen is a copy?

11 A Yes, sir.

12 Q And upon receipt of that letter and the signed

13 instruments enclosed with it, did you not go to Mr. Potter at

14 his residence? Didn't you take the letter, didn't you take

15 the letter and the signed instruments that came with that

16 letter, and go to see Mr. Charles A. Potter, Jr.?

17 A I don't remember that. I may have done it, but

18 I don't remember it. I know that we were dealing with Mr.

19 McClung, and we weren't dealing with Mr. Potter, except where

20 Mr. McClung said to go out and show it to Charley and get

21 Charley to sign it . . .

22 Q Show what?

23 A Anything that we'd happen to have. We showed

24 this to a lot of other people, and first to get Charley to

25 show you the lines of our farm, and . . . I didn't have many

1 contacts with Mr. Potter. We weren't dealing with Mr. Potter;
2 we were dealing with his partner, Mr. McClung.
3 Q Did you not, when you received this letter
4 dated August the fifteenth enclosing the signed contract which
5 Mr. McClung had prepared and submitted to you on June the
6 seventeenth, or with his letter of June the seventeenth, did
7 you not then go to Mr. Charles A. Potter's farm and talk with
8 him about the matter?
9 A I do not remember that. If I did, I'm not
10 going to deny it, sir, because this is two or three years ago
11 and I'm an old, worn-out man, and I can't remember all that
12 stuff; but I'm telling you the truth, I don't remember that.
13 If I did, if I remembered, you know I'd tell you. But I don't
14 remember it.
15 Q Well, I'm undertaking to refresh your memory
16 a little bit. Did you not take this letter dated August the
17 fifteenth enclosing the signed contract dated May the first,
18 1972, and go to Mr. Potter, Mr. Charles A. Potter, Jr., at
19 his residence and undertake to urge and persuade him to sign
20 the contract that had been signed by Mr. Macgurn?
21 A I don't remember any such visit.
22 Q Do you deny it?
23 A I do not deny it. I say I do not remember it.
24 I deny that I tried to urge him to do anything; but I do not
25 deny that I took any document to him, because I do not remember

1 that, sir, but I deny . . .
2 Q Did you not tell him at that time that he would
3 be sued if he didn't?
4 A No, sir, I did not.
5 Q Sir?
6 A I did not.
7
8 SPENCER: Your Honor please, I object to . . .
9
10 A I did not. How would I know whether he would
11 be sued?
12
13 SPENCER: Mr. Tilson, would you please hold up
14 just a moment while I address the Court? Your
15 Honor please, I object to this line of question-
16 ing. We are talking about the conduct of the
17 agent some two weeks after the contract had
18 been entered into. Even if the testimony
19 that Mr. Timberlake is eliciting from the wit-
20 ness were that he did urge him, it would be
21 irrelevant. It would certainly be Mr. Tilson's
22 duty to urge him to sign the contract. But
23 whether he did or didn't is immaterial to the
24 case. The contract is alleged to have been
25 reached no later than August the tenth, 1972,

1 and any conduct of Mr. Tilson's some week or
2 two later in delivering contracts to Mr. Potter
3 or something is irrelevant. And we would
4 object to this line of questioning.
5
6 TIMBERLAKE: Your Honor, I consider it highly
7 relevant in two respects. One, if he did take
8 a contract which is designated as Exhibit Five
9 and mailed to him with the letter of August
10 the fifteenth Exhibit Fifteen, and go to Mr.
11 Charles A. Potter, Jr., and urge him to sign
12 it, that is highly material as to whether or
13 not any conceivable contract binding upon Mr.
14 Potter existed prior to that. And it is also
15 highly material, Your Honor, to show Mr. . . .
16 this witness's bias, interest, and prejudice
17 in the matter. And I think on both of those
18 grounds this line of questioning is proper,
19 and the answers that may be elicited are highly
20 material.
21
22 COURT: Well, of course, if Mr. Potter had
23 signed, had executed the conveyance, we wouldn't
24 be in Court today. That's well understood.
25 I think your objection should be overruled,

1 Mr. Spencer. All right, you may proceed.
2
3 Q Do you deny, Mr. Tilson, that following receipt
4 of the letter of August the fifteenth, designated as Exhibit
5 Fifteen, you went with that letter and the contract prepared by
6 Mr. McClung dated May the first, 1972, and designated as Exhibit
7 Five, signed by Mr. Macgurn at that time--that is, at the time
8 you received this letter of August the fifteenth--do you deny
9 that you took those papers to Mr. Charles A. Potter, Jr., at
10 his farm and undertook to urge and persuade him to sign this
11 Exhibit Five?
12 A I do not deny that, but I specifically say I
13 do not remember taking that contract, because I took most every-
14 thing to Billy all the time, and when we got the wire back,
15 he said, "Take that on out to Charley." I do not remember him
16 having said take the contract to Charley. I know very, very
17 well I did not try to persuade Mr. Potter, or anybody else, in
18 any contract, to sign it if he didn't want to. When we have
19 contracts delivered to us, we try to take them to the sellers,
20 and then it is their business; it's not proper for us to try
21 to bulldoze them and get them to do it, and that we do not do
22 and that I did not do in this case.
23 Q Do you deny that you told Mr. Potter at his
24 farm, following your receipt of this letter of August fifteenth,
25 that if he didn't sign the contract, he would be sued?

1 A I did not say that. You know I didn't say that.
2 Q You deny that?
3 A I deny it.
4 Q All right, sir. Following that time, Mr. Tilson,
5 did you not go to Mr. William B. McClung, one of the Respondents
6 in this case, and undertake to get him to sue Mr. Potter on
7 behalf of the Macgurn estate to make the sale?
8 A You must repeat that question. I must not have
9 heard you. Could you repeat that?
10 Q Did you go to Mr. W. P. Coleman and undertake
11 to employ him to sue Mr. Potter?
12 A I did not.
13
14 ROBERTS: Objection, Your Honor, . . .
15
16 TIMBERLAKE: I think I am entitled to show this
17 witness's interest and bias in the matter.
18
19 Q You did not go to Mr. W. P. Coleman to see if
20 he would sue Mr. Potter?
21 A I went to see Mr. W. P. Coleman, one of my
22 very good friends, when it looked like this . . . I think Mr.
23 Coleman will tell you, and I wish he were here, that I came
24 down and told him some of the facts, and I said, "I know that
25 Charley is a neighbor of yours, and I don't imagine that you

1 would want to represent Mr. Macgurn, but I want you to know
2 that if there's any way that he could help, all right," but
3 I never told him that we wanted him to. He said, "You're
4 right." He said, "I wouldn't feel right going against Mr.
5 Potter, and I wouldn't feel right going against you, so you
6 can rest assured that I won't work with Mr. Macgurn and I won't
7 work with Mr. Potter."
8 Q All right, sir, then, after your conversation
9 with Mr. Coleman, did you go to see Mr. William A. Roberts
10 about bringing suit against Mr. Potter?
11 A I recommended Mr. Roberts to Mr. Wolver, and
12 Mr. Wolver came and we went together to see Mr. Roberts.
13 Q To employ him to bring suit against Charles
14 A. Potter, Jr.?
15 A To do what should be done to consummate the
16 sale, whether it was to bring suit or whatever was to be done.
17 Q That's all. I don't have any further questions.
18
19 Re-Direct Examination by Mr. Spencer:
20
21 Q Mr. Tilson, it has been suggested that you
22 employed counsel in this case. Are you paying anybody any
23 attorney's fees in this case?
24 A No, sir.
25 Q Have you employed any attorney in this case,

1 in any way?
2 A No, sir. No, sir.
3 Q All right, Mr. Tilson, when you received the,
4 right after you received the telegram back from Mr. Macgurn in
5 California that you testified, did you receive an additional
6 telegram, or an additional check, from him?
7 A Yes, but not the day of the telegram.
8 Q When did you receive that check, and how much
9 was it for?
10 A Two thousand dollars ($2,000.00) was deposited
11 up at the bank, with interest; but I don't know the date I got
12 it. The records will show that.
13 Q Do you still have any of Mr. Macgurn's money
14 in the escrow account?
15 A Five thousand dollars ($5,000.00), plus interest
16 from the date that they were put in.
17 Q All right. Now, Mr. Tilson . . .
18 A Three thousand at one time, two thousand the
19 last time.
20 Q Mr. Timberlake has raised several objections
21 to your testimony referring to Mr. Potter and Mr. McClung as
22 partners in this case. I want to ask you the events that
23 occurred in Mr. McClung's office on August the tenth--this is
24 before you sent the telegram. Was anything on that occasion
25 said to you by Mr. McClung to indicate what his interest in this

1 property was? And, if so, what did he say?
2
3 TIMBERLAKE: I object to that in so far as it
4 applies to Charles A. Potter, Jr.
5
6 COURT: I believe that I have already ruled
7 that the record is void of any evidence to estab-
8 lish a partnership between Mr. McClung and Mr.
9 Potter in this case, and . . .
10
11 SPENCER: Your Honor, we are trying to introduce
12 just that evidence, to show what . . .
13
14 COURT: Well, if you have evidence other than
15 the statement made by Mr. McClung, I have also
16 ruled that any statement made by Mr. McClung--
17 that is, in the absence of Mr. Potter--and
18 until the agency, if there is an agency, is
19 established, such evidence cannot be considered
20 against Mr. Potter. I have ruled that; that
21 is an earlier ruling that I made in this case.
22 Do you have any direct evidence from Mr. Potter,
23 by word of mouth or conduct, which would estab-
24 lish the partnership which you, by innuendo,
25 at least, you are saying that there was a

1 partnership. I can read from the questioning
2 of these witnesses, but thus far there is no
3 direct or competent evidence to establish it.
4
5 SPENCER: The evidence, Your Honor, on the re-
6 lationship between Mr. Potter and Mr. McClung
7 is, admittedly, circumstantial evidence; we
8 have no written agreement to introduce to the
9 Court to show that Mr. Potter and Mr. McClung
10 were partners. However . . .
11
12 COURT: I understand from the record in the
13 case . . . I have reviewed the record thoroughly,
14 and it is contended that Mr. McClung was the
15 agent for Mr. Potter in these negotiations.
16
17 SPENCER: Yes, Your Honor, and . . .
18
19 COURT: There is no allegation in the pleadings,
20 as far as I could observe or note, that Mr.
21 McClung is a partner of Mr. Potter in this case.
22 So in the absence of that, I don't see why you
23 should be permitted to pursue it.
24
25 SPENCER: If Your Honor please, the question

1 of agency in this case is a double-barreled
2 question. One, which Your Honor has just pointed
3 out, and we would submit that that has been
4 supported both by the conduct of the parties
5 and the evidence that is before the Court, as
6 well as written documents which show that Mr.
7 McClung is clearly acting as attorney for Mr.
8 Potter. The other question of it is what
9 authority does that attorney, in representing
10 Mr. Potter, have; if he is just an attorney,
11 what authority does he have. Now, if he is
12 not just an attorney, but is, in fact, holds
13 an interest in that property, then he had an
14 implied authority to bind that client or partner--
15 depending on what the Court rules that rela-
16 tionship was.
17
18 COURT: If he is a co-owner.
19
20 SPENCER: What we are trying to show, Your Honor,
21 is exactly what interest Mr. McClung had in the
22 property, in order for the Court to determine
23 what authority Mr. McClung had to bind Mr.
24 Potter. Now, it is true that it is alleged, and
25 as a matter of fact legal title is held in the

1 name of Charles A. Potter, Jr.; but I am sure
2 that Your Honor is aware, and there are cases
3 that support the fact, that an oral contract
4 entered into between an equitable owner and a
5 purchaser is an enforceable contract, and that
6 the silent partner, or the legal title holder,
7 cannot invoke the statute of frauds as a defense
8 to the enforceability of that contract. Now,
9 our position here, Your Honor, is that Mr.
10 McClung was, I think admitted by the parties,
11 an attorney for Mr. Potter throughout these
12 negotiations. Secondly, we can show through
13 the evidence--the documentary evidence which
14 is already in, Your Honor--we think supports
15 the proposition that Mr. McClung did have a
16 proprietary interest in this property. I would
17 also submit that the response to the question
18 last propounded to the witness as to statements
19 made by Mr. McClung on the morning of August
20 the tenth in his office will also submit the
21 proposition that he had a proprietary interest
22 in this property, and therefore the authority
23 to bind Mr. Potter, whether he be his partner
24 or his client, by his conduct. And for that
25 purpose, we would ask the Court to allow us to

1 introduce the evidence of the statements which
2 were made by Mr. McClung to Mr. Tilson in his
3 office.
4
5 COURT: According to the record in this case,
6 Mr. Potter singularly and solely acquired the
7 title to this property by deed from Mr. and
8 Mrs. Roberts on September fourteen, 1972, which
9 was subsequent to all of this transaction
10 between the parties. And up until that time,
11 according to the record further, my review of
12 the record is that when the property was pur-
13 chased in September, that the only interest,
14 as I saw it in the record, that Mr. McClung had
15 in the case was his agreement to finance the
16 deposit, the five thousand dollar ($5,000.00)
17 deposit, and that if the land were subsequently
18 sold and there would be a profit--not a loss,
19 but a profit--he would share in the profits to
20 the extent of four thousand dollars ($4,000.00).
21 Now, that was his interest, as I read from the
22 record. And I don't believe that you can go
23 beyond the averments in your Bill of Complaint.
24 You don't allege that he was a co-owner at all.
25 You allege that he was the agent of Mr. Potter.

1 Now, the thing, gentlemen, very frankly, that
2 disturbs me in this case, unless he were a co-
3 owner and was acting as the agent for Mr. Potter,
4 and this statement goes unrefuted in the record,
5 Mr. Tilson has testified that when he received
6 Mr. McClung's letter of rejection dated August
7 seven, 1972, on the morning of August ten, he
8 immediately called Mr. McClung by telephone
9 and was told to come to Mr. McClung's office.
10 And he quoted a statement that Mr. McClung made,
11 that Wolver couldn't have gotten the letter--
12 or, this was Mr. Tilson's statement--that
13 Wolver could not have gotten the letter. "And
14 I told him" (McClung) "that I would phone Wolver.
15 McClung said, 'If Wolver sends a contract and
16 two thousand dollars, there is God's no way
17 Potter can get out of this.'" Now, if he was
18 acting as the agent for Mr. Potter, it would
19 be an inconsistent position. Now, if he were
20 a co-owner, I'd agree that he had that right
21 to do that. But, up until this time, the evi-
22 dence is completely void of establishing that
23 he was a co-owner or had any proprietary inter-
24 est in this land at that time. All of the
25 transaction that, when title was acquired by

1 the conveyance on September the fourteenth,
2 1972. So I don't believe, Mr. Spencer, in
3 fairness to all the parties, I don't believe
4 that you can pursue on examination of Mr. Tilson
5 whether he knew that Mr. McClung was a partner
6 or a co-owner of this property. That did not
7 exist at the time.
8
9 SPENCER: If Your Honor please, the Court observes
10 the record which the Court has reviewed, and
11 the depositions that were taken by the Complain-
12 ants, of both the Respondents--Mr. Potter and
13 Mr. McClung--were taken for the purposes of
14 discovery. We did not agree to try the case
15 on the depositions, although requested by the
16 counsel for the Respondents to do so, for the
17 very reason that we didn't have all of our
18 evidence contained in the depositions. It is
19 true that those depositions, perhaps, do not
20 establish the partnership, but if now, upon
21 the trial of the case, we are precluded from
22 introducing that very evidence which would show
23 the interest that Mr. McClung had in the prop-
24 erty, then the Court, it appears to me, is
25 saying that by having taken those discovery

1 depositions, we are now precluded from estab-
2 lishing that relationship. If Your Honor please,
3 we have not read for the Court--and perhaps
4 this is unfair to ask the Court to rule on some-
5 thing when the Court has not had the benefit,
6 perhaps, of reading all of these documents which
7 have been introduced in the evidence today--
8 for example, evidence which is before the
9 Court on the proprietary interest of Mr. McClung
10 is contained in a letter dated August the
11 seventh which has been introduced as Exhibit
12 Number Eleven, a letter from Mr. McClung to
13 Mr. Tilson. He says: "Dear Tex: Enclosed
14 herewith is a letter that I received from the
15 attorney for Mr. Macgurn and my reply for
16 Charley. I am afraid that what has happened
17 here is that when it looked like we were going
18 to get the price that Charley and I agreed to
19 take, that Charley suddenly decided that he'd
20 be better off to try to hold onto the property
21 rather than buying it and selling it as we had
22 agreed upon. It appears to me that Macgurn's
23 variance is of not a great a nature to get
24 around if Charley were going to live up to what
25 he had originally told me he was doing. This

1 matter has been embarrassing to me personally,
2 since Charley did not act in good faith with me,
3 has made it look like I have misled you."
4 (emphasis added)
5 And this is particularly pertinent,
6 Your Honor: "Therefore, until you," Mr. McClung
7 addressing Mr. Tilson, says, "until you receive
8 a listing signed by both Charley and myself,
9 or however the property will be titled," this
10 letter being written at the time before Mr.
11 Potter took title, "when exercised by the
12 options, please do not do any more work on
13 selling it or showing it." (emphasis added)
14 Now, we submit, Your Honor, this is
15 in the evidence and does show a proprietary
16 interest of Mr. McClung. We would like to show
17 through Mr. Tilson's testimony, the corroborative
18 statements that were made by Mr. McClung
19 in his office which support the statements
20 made in this letter from Mr. McClung to Mr.
21 Tilson.
22
23 COURT: Mr. Spencer, you mention that the pur-
24 pose of the depositions were not to be considered
25 as evidence in this case, the discovery

1 depositions?

2

3 SPENCER: Yes, Your Honor.

4

5 COURT: You mean that discovery depositions
6 may not be considered as evidence in the case?

7

8 SPENCER: Your Honor, I don't suggest that the
9 discovery depositions cannot be taken as evi-
10 dence . . .

11

12 COURT: I would also invite your attention to
13 the . . . that the witnesses . . . the Notary
14 Public speaks of Mr. W. E. Tilson, Mr. Charles
15 A. Potter, Jr., and Mr. William B. McClung
16 were sworn and testified. And in Mr. McClung's
17 testimony there is no mention of a partnership.

18

19 SPENCER: I am not suggesting that the depo-
20 sitions can't be used or introduced in evidence,
21 Your Honor. I think the rules provide for the
22 use of them in a trial. I don't think it is
23 necessary that the parties introduce them;
24 they haven't thus been introduced as evidence
25 in the case. They are a part of the record as

1 discovery depositions . . .

2

3 COURT: Well, for the Court to acquaint himself
4 with the . . .

5

6 SPENCER: I'm not objecting to that. I have
7 no objection to that, Your Honor, but it would
8 appear to me to be improper for the Complainant
9 now to say, to be bound by the evidence that
10 he can introduce at the trial of the case in
11 chief by whatever evidence was taken in the
12 discovery depositions. Certainly they can be
13 used for impeachment purposes or introduced into
14 evidence, if one of the parties so choose; but
15 suppose we had witnesses who . . .

16

17 COURT: Well, can you frankly and sincerely
18 state for the Court that you have evidence that
19 can establish that Mr. McClung was a co-owner
20 with Mr. Potter of this land?

21

22 SPENCER: I would submit that the Exhibit just
23 read . . .

24

25 COURT: Well, that is by inference. But, I mean,

1 do you have any direct evidence?
2
3 SPENCER: No, Your Honor. As I have said, it
4 is strictly circumstantial evidence.
5
6 COURT: I would assume that if you had, you
7 certainly would have before this stage of the
8 case, that some averment or some effort, by
9 pleading or otherwise, would have been made to
10 establish the co-ownership.
11
12 SPENCER: Very definitely it would have, Your
13 Honor, and it is strictly circumstantial evi-
14 dence, and as Your Honor suggests, this document
15 is, by inference, is circumstantial evidence at
16 that. Additional testimony, which would support
17 that circumstantial evidence would be the testi-
18 mony of Mr. Tilson.
19
20 COURT: I want the record also to be clear that
21 I am not charging anybody with impropriety or
22 any misconduct. I just stated that if Mr.
23 McClung was a co-owner, then I think he had a
24 right to tell Mr. Tilson, to dictate the form
25 of the telegram to be used so that the contract

1 when mailed back would be a binding contract.
2 But if he were acting only as the agent for
3 Mr. Potter, then I would say his position as
4 agent for Mr. Potter, who had rejected the con-
5 tract, would be inconsistent. That is what I
6 state for the record. I'm not charging Mr.
7 McClung or anybody else in this case with any
8 misconduct or impropriety. That is clear.
9
10 SPENCER: If Your Honor please, I think it is
11 clear also from the depositions of the Respond-
12 ents in the case, that I am not sure that Mr.
13 Potter and Mr. McClung knew exactly what their
14 relationship was. I think that the problem
15 that we have before the Court today is not an
16 allegation that, on our part certainly, that
17 Mr. Tilson has done anything wrong. I don't
18 know whether Mr. Timberlake suggested that or
19 not, but we are not suggesting that Mr. Potter
20 or Mr. McClung did anything intentionally wrong,
21 unless the evidence supports that. And that is
22 for the Court to decide. But we would submit,
23 Your Honor, that based on those depositions,
24 and the evidence before the Court, that I doubt
25 that they really knew what their relationship

1 was. The depositions say he was going to get
2 part of it, and he wasn't, and then he writes
3 a letter saying you can't list it unless I sign
4 it. I think it would be proper for the Court
5 to hear all of the circumstances and the evidence
6 surrounding the conduct of the parties to deter-
7 mine exactly what the relationship between
8 Mr. Potter and Mr. McClung is.
9
10 COURT: Well, I am going to permit you to ask
11 the question, but I would reserve the right
12 later, if I feel that it's improper, after
13 hearing Mr. Tilson's statement, to strike it
14 from the record.
15
16 SPENCER: Very well, Your Honor.
17
18 TIMBERLAKE: Your Honor, I would like, before
19 you move formally on that, I would like . . .
20
21 COURT: I apologize, Mr. Timberlake.
22
23 TIMBERLAKE: Yes, sir. I would like to call
24 your attention to the fact that the rule is
25 very . . . now, the only allegation as far as

1 Mr. McClung's relationship to Mr. Potter, as
2 the Court has pointed out, is that of an agent,
3 as well as attorney. And the rule is clear--
4 extremely clear--and it is set forth in Michie's
5 Jurisprudence Volume 1A, page 531, under Agency,
6 under the heading "To Bind Principal"--and it
7 says this, with numerous annotations:

8 "An agent cannot prove the scope of
9 his agency by his own declaration.
Nor can the existence of an agency be
10 established against the principal by
any statements or declaration of the
11 alleged agent."

12 And that is exactly what is being sought in
13 response to this question that has been pro-
14 pounded.

15 COURT: Of course, declarations alone cannot
16 establish agency. It must be accompanied by
17 certain acts, conduct . . .
18
19 TIMBERLAKE: And, Your Honor, the authorities
20 hold that statements of the agent as to the
21 existence or extent of the agency are not
22 admissible as far as binding the alleged prin-
23 cipals.
24
25 COURT: They must be accompanied by some act to

1 indicate the authority vested in the agent by
2 the principal, or acquiesence, for instance,
3 on the part of the principal. It must be accom-
4 panied by something other than just the mere
5 declarations of agency, coupled with the fact
6 that the Court holds that such declarations
7 are inadmissible in evidence. I didn't know
8 what Mr. Spencer expected to show by Mr. Tilson,
9 whether there was any subsequent conduct in
10 addition to any declaration made, I didn't
11 know; that's the reason I reserved the right
12 to strike it from the record.
13
14 Q Mr. Tilson, my question to you was: On the
15 morning of August the tenth of 1972 . . .
16
17 TIMBERLAKE: We would like the record to show,
18 Your Honor . . . are you admitting this, or
19 are you just letting it . . .
20
21 COURT: For my own information.
22
23 Q On the morning of August the tenth, 1972, when
24 you were in Mr. McClung's office, did Mr. McClung make any
25 statements to you indicating his interest in the property?

1 TIMBERLAKE: I don't think that is proper.
2
3 COURT: If he made such a statement, ask him
4 what the statement was. You are calling for
5 a conclusion by Mr. Tilson.
6
7 Q And, if so, what was the statement?
8 A Mr. McClung--I've got to get my memory just
9 right on this, so I won't misquote it--said that Charley was
10 not only trying to, I believe he said, "get you; he's trying
11 to get me, too, because I am in this just as he is, and I have
12 the document in the safe and I put up . . ." I don't believe
13 he said five thousand. "I put up the money. Charley didn't
14 have the money. I had the money. Charley was a good friend
15 of Mr. Roberts. Charley had the property, and I had the money;
16 and he's not going to get me."
17
18 COURT: When was that?
19
20 A It was on the tenth of August, the day that he
21 helped me with the wire.
22
23 COURT: I believe the record indicates that the
24 conveyance to Mr. Potter was made by deed of
25 September fourteenth.

1 A This was on August the tenth.
2
3 COURT: I will state for the record that I don't
4 believe that is competent evidence to establish
5 any ownership in the property, and I will so
6 order that it be stricken from the record.
7
8 SPENCER: Please note our objection.
9
10 COURT: Yes, sir.
11
12 Q That's all we have for this witness.
13
14 Re-Cross Examination by Mr. Timberlake:
15
16 Q Mr. Tilson, in response to a question propounded
17 to you a moment ago, I believe you testified that you are not
18 paying any fees . . .
19 A That's right, sir.
20 Q . . . paying any fees or expenses of the Com-
21 plainant pursuant to employment of counsel in this case, and
22 that you have no financial interest in the outcome of this
23 suit, is that right?
24 A We always get a commission, Mr. Timberlake, for
25 selling property. Our job is to get the property listed, get

1 a buyer and a seller; and that's what we have done in this
2 place, and we have got it consummated; and, of course, our
3 interest is the commission in it, outside of having done a
4 good job, which we were required to do. And we do contend that
5 we are entitled to the commission in this property, regardless
6 of what happens today.
7 Q You take the position that if the Court rules
8 that this is not a sale of the property by Mr. Potter to the
9 Macgurn estate, that you are entitled to commissions?
10 A Yes, sir. We have done our job and if there
11 has been . . .
12 Q Even though you didn't effect a sale?
13 A We did all we . . .
14 Q Even though the Court holds that this is not
15 a sale?
16 A That's our contention. That's what will have
17 to be decided, sir.
18 Q And, of course, it will be perfectly manifest
19 that if the Court holds that this is a binding sale, that you
20 would be entitled to commissions; isn't that correct?
21 A We think we are entitled to the commission any-
22 way, Mr. Timberlake; and we shall pursue it.
23 Q I have no further questions.
24
25 - - - - - -

1 Whereupon:

2

3 EUGENE L. WOLVER, JR.

4 a witness called on behalf of the Complainant, being of legal

5 age and duly sworn, testified upon his oath as follows:

6

7 Direct Examination by Mr. Spencer:

8

9 Q State your full name, please?

10 A Eugene L. Wolver, Jr.

11 Q And where do you live, Mr. Wolver?

12 A In the city of Hidden Hills, California. Hidden

13 Hills is a city adjacent to Los Angeles, California.

14 Q And what is your occupation?

15 A I am an attorney at law.

16 Q And how long have you been an attorney?

17 A Nineteen years.

18 Q And what is the nature of your practice?

19 A Our firm's practice is the general practice;

20 my particular area of emphasis within the firm is business law,

21 but it also encompasses other areas of law.

22 Q Are you familiar with the decedent, Mr. Richard

23 Macgurn?

24 A Yes, I was familiar with Mr. Macgurn.

25 Q How long had you known Mr. Macgurn?

1 A I knew Mr. Macgurn from the date that he moved
2 into his home which was adjacent to my residence in Hidden
3 Hills. That would have been . . . oh, my best recollection,
4 1965, 1966.
5 Q Were you employed by Mr. Macgurn as his attorney?
6 A Yes, I was.
7 Q How long have you been so employed?
8 A I commenced representing Mr. Macgurn in the
9 year 1972. I believe the first such representation would have
10 been in the month of March or April; possibly May, but I
11 believe March or April.
12 Q All right, Mr. Wolver, did there come a time
13 when Mr. Macgurn employed you to represent him in the negoti-
14 ations for the purchase of real estate in the state of Virginia?
15 A Yes, sir.
16 Q And what was your first contact with Mr. Macgurn
17 regarding that?
18 A On June the eighth, 1972.
19 Q And on that date did you and Mr. Macgurn have
20 a discussion about the current status of negotiations?
21 A We had such a discussion, yes, sir.
22 Q I am going to show you, Mr. Wolver, Exhibit
23 Number Five, which has been identified as an Agreement of Sale
24 dated May the first, 1972, and ask you if, on that date, you
25 saw that agreement?

1 A Yes, sir, I did.
2 Q And at that time, had that contract been signed
3 by Mr. Macgurn?
4 A No, sir.
5 Q Now, as a result . . . well, let me also show
6 you Exhibit Number Six and Number Seven, the Escrow Agreement
7 and the Memo of Agreement, and ask you if those documents were
8 shown to you on that day by Mr. Macgurn?
9 A Yes.
10 Q And you will notice Mr. Macgurn's signature now
11 shows on this copy of Exhibit Number Six. Had that been signed
12 as of that date?
13 A No, sir.
14 Q Now, as a result of your conversation with Mr.
15 Macgurn on June the eighth, 1972, when viewing those documents,
16 what did you do, Mr. Wolver?
17 A I, pursuant to Mr. Macgurn's instructions and
18 our conversation, dictated a letter to be sent to Virginia
19 regarding the subject matter.
20 Q I show you Exhibit Number Eight, being a letter
21 addressed to Mr. W. E. Tilson over your signature, and ask you
22 if that is an accurate copy of the letter which you sent to
23 Mr. Tilson?
24 A It is.
25 Q Now, would you explain to the Court what were

1 the primary variances between your letter and the proposed con-
2 tract which Mr. McClung had forwarded?
3
4 TIMBERLAKE: I object to that, Your Honor,
5 because I think the writings speak for them-
6 selves. Both writings are in . . .
7
8 SPENCER: We'll just refer to the documents,
9 Your Honor.
10
11 Q After June eighth and your posting of that
12 letter, Mr. Wolver, what was your next contact regarding this
13 transaction? And with whom?
14 A Without referring to my records, Mr. Spencer,
15 my recollection is my next contact was a correspondence that
16 I received from Mr. McClung.
17 Q I am going to show you Exhibit Number Nine,
18 being a letter from Mr. McClung dated July the sixth, and ask
19 you if that is that letter?
20 A Yes, it is.
21 Q Did you discuss the contents of that letter
22 with Mr. Macgurn?
23 A Yes, I did.
24 Q And as a result of that conversation, what did
25 you do?

1 A I sent a reply letter to Mr. McClung, which
2 reply letter was ultimately sent, I believe was dated July the
3 twenty-first, 1972.
4 Q I show you Exhibit Number Ten, being a letter
5 from you addressed to Mr. McClung and dated July the twenty-
6 first, 1972, and ask you if it is that letter?
7 A Yes, it is.
8 Q All right, now, Mr. Wolver, this letter states:
9 "This is to acknowledge the receipt of your letter of July 6,
10 1972. I have discussed its contents with our client, who ad-
11 vises me that inasmuch as your client had originally desired
12 a closing or settlement date of April 15, and since he had
13 not heard to the contrary, he made his plans accordingly.
14 Therefore we wish that the settlement date be as contracted
15 and agreed upon, i.e. April 15, 1973. In all other respects
16 your letter is satisfactory. Trusting that this will suffice
17 for your purposes and enclosing for your convenience an addit-
18 ional copy of this letter for forwarding to your client if so
19 desired. We remain."
20 Now, what authority, number one, did you have to act
21 for Mr. Macgurn?
22
23 TIMBERLAKE: I object to that, Your Honor. I
24 don't think that an agent can testify as to
25 the extent and nature of his authority.

1 COURT: You mean if you are acting as my attorney
2 you don't have the right to write a letter in
3 my behalf?
4
5 TIMBERLAKE: No, sir; that wasn't the question.
6
7 COURT: All right, repeat the question.
8
9 SPENCER: The question, Your Honor, was what
10 authority, if any, did Mr. Wolver have to act
11 on behalf of Mr. Macgurn.
12
13 COURT: Well, ask him what his relationship
14 with Mr. Macgurn was and, from that, what authorit
15 he had.
16
17 Q What was your relationship with Mr. Macgurn?
18 A I was Mr. Macgurn's attorney at law and, in
19 addition thereto, I had his written power of attorney.
20 Q What were the terms of that power of attorney?
21 A It was a general power of attorney to act for
22 him in his behalf.
23
24 TIMBERLAKE: I call for production of that,
25 Your Honor. I think that is the best evidence.

1 COURT: Do you have that?

2

3 A I do not have that written power of attorney,
4 Your Honor. On Mr. Macgurn's--I've forgotten what trip it
5 was, but it was in August--I gave that power of attorney back
6 to Mr. Macgurn; it was not found in his effects, so I presume
7 he destroyed it.

8

9 TIMBERLAKE: I object to any testimony in the
10 absence of the instrument itself.

11

12 COURT: I am going to overrule your objection.

13

14 Q Now, Mr. Wolver, in this letter you state that
15 "we wish that the settlement date be as contracted and agreed
16 upon." What was meant by the inclusion of that in the letter?
17 A Mr. Spencer, it was my position, and that was
18 the intent set forth in my letter . . .

19

20 TIMBERLAKE: Your Honor, I think the letter has
21 to speak for itself. I don't think it is proper
22 evidence for this witness to testify as to what
23 was intended in the letter.

24

25 COURT: Well, I think the letter clearly

1 expresses what was intended at the time.
2
3 SPENCER: I think, Your Honor, there is the
4 question before the Court as to whether or not
5 this letter dated July the twenty-first, 1972,
6 constitutes an acceptance of the offer that,
7 at that point, was outstanding.
8
9 COURT: Well, the letter speaks for itself.
10
11 SPENCER: Your Honor, I would suggest that
12 what we are dealing with here is whether or not
13 there was a meeting of the minds, and that cer-
14 tainly there is competent evidence for the
15 Court to know what was in his mind at . . .
16
17 COURT: You can't go beyond the written terms
18 of the contract, the written contract.
19
20 SPENCER: I'm not attempting to, Your Honor.
21 I'm attempting to explain what was meant . . .
22
23 COURT: I think the letter speaks for itself.
24
25 SPENCER: Do I understand, then, that the Court

1 is saying I cannot ask the question as to what
2 was meant by . . .
3
4 COURT: As to the intent of the letter?
5
6 SPENCER: As to what was meant by the use of
7 the words: "Therefore we wish that the settle-
8 ment date be as contracted and agreed upon."
9
10 COURT: Well, I would think that clearly indi-
11 cates what it meant right there. The settle-
12 ment date was regarded as April--was the date
13 in April?
14
15 SPENCER: April the fifteenth, 1972.
16
17 COURT: April fifteenth, 1972.
18
19 SPENCER: Your Honor, what I am trying to show
20 for the Court is that a letter dated July the
21 sixth, 1972, was already in evidence. Mr.
22 McClung, as attorney for Mr. Potter, wrote to
23 Mr. Wolver saying your letter of June the eighth
24 is no good, we are not going to do that, but
25 here is what we can do. Mr. Wolver then, by

1 letter dated July the twenty-first, which is
2 the letter in question right now, says, "Okay,
3 we accept everything you say in your most recent
4 offer, but we wish . . ."
5
6 COURT: That is a follow-up of the telegram
7 which you say was an acceptance of this counter-
8 proposal, was it not?
9
10 SPENCER: We have two acceptances.
11
12 COURT: All right.
13
14 SPENCER: One is this letter dated July the
15 twenty-first, which Mr. Wolver himself wrote
16 and composed, on the instructions of his client.
17 And my purpose for going into this is to show
18 that it was the intent of the purchaser in
19 writing this letter to accede to all of the
20 terms of the contract, of the offer as out-
21 standing at that point by the seller.
22
23 COURT: Read the letter into the record.
24
25 SPENCER: "This is to acknowledge the receipt

of your letter of July 6, 1972. I have discussed its contents with our client . . ."

COURT: Now that was prior to the rejection of the contract?

SPENCER: That is correct, Your Honor.

COURT: All right. Go ahead.

SPENCER: " . . . who advises me that inasmuch as your client had originally desired a closing or settlement date of April 15, and since he had not heard to the contrary, he made his plans accordingly. Therefore we wish that the settlement date be as contracted and agreed upon, i.e. April 15, 1973. In all other respects your letter is satisfactory. Trusting that this will suffice for your purposes and enclosing for your convenience an additional copy of this letter for forwarding to your client if so desired." Now, Your Honor, my purpose in going into this evidence is so that it would not be argued as an objection to this being considered an acceptance of the outstanding offer at that

1 time, that there was a requested variance.
2 There is case law which uses the very word
3 "wish", the statement that you "wish" for some
4 variation which, accepted as is, is an uncon-
5 ditional offer. I would submit to Your Honor
6 that it is pertinent for the Court to know
7 whether or not, when this offer was made, or
8 this acceptance was made, the party making it
9 meant to be simply expressing a wish that the
10 settlement date be at some other time, or
11 whether it was a demand and a condition in order
12 for a contract to be . . .
13
14 COURT: Is that the letter that Mr. McClung
15 makes reference to in his letter to Mr. Wolver:
16 "I have and thank you for your letter of July
17 21, 1972 . . ."
18
19 SPENCER: Yes, Your Honor.
20
21 COURT: " . . . with reference to the above-
22 captioned matter. Since your client neither
23 wishes to settle this matter as proposed in my
24 last letter at an earlier date, or increase
25 his deposit here in accordance with the proposed

1 contract that I forwarded to you, Charles A.
2 Potter, Jr., has declined to accept his offer
3 of $58,000.00 for the subject property."
4 That was the letter which, in essence,
5 rejected the contract . . .
6
7 SPENCER: That was a withdrawal of the offer.
8
9 COURT: Withdrawal or rejection of the contract.
10 And now you are offering that letter to explain
11 that perhaps Mr. McClung was in error in his
12 interpretation of the letter; isn't that what
13 you are doing?
14
15 SPENCER: Exactly.
16
17 COURT: I won't permit it, because I think that
18 letter . . . I think that is a very important
19 phase of this case.
20
21 SPENCER: I agree, Your Honor, and I think
22 that . . .
23
24 COURT: Well, I don't think you can go beyond
25 the written terms of that letter.

1 SPENCER: Please note our objection.
2
3 COURT: All right.
4
5 Q Now, after writing this letter of July the
6 twenty-first, 1972, Mr. Wolver, did you subsequently . . . what
7 was your next contact regarding this case, and with whom?
8 A Again without referring to my records, and just
9 my recollection, Mr. Spencer, I believe the next contact that
10 I had regarding this case was a telephone call that I received
11 from Mr. Tilson.
12 Q And, at that time, who--as you understood it
13 at the West Coast--whose agent was Mr. Tilson?
14 A Mr. Tilson was the agent . . .
15
16 TIMBERLAKE: I object to that, Your Honor.
17
18 SPENCER: Your Honor please, the evidence is
19 clear that Mr. Tilson had a listing for this
20 property and was the agent to sell it.
21
22 TIMBERLAKE: This man's understanding doesn't
23 create any agency.
24
25 COURT: Mr. Wolver was acting as the attorney

in fact for Mr. Macgurn, and also his attorney; so he had to know the relationship of Mr. Tilson with regard to the people that he was dealing with. And I don't know why he cannot be permitted to testify his acceptance of Mr. Tilson as the agent for Mr. Potter. That can be argued that . . . if you contend that Mr. Tilson was not the agent for Mr. Potter, that can be argued. But I think he has a right to testify how he accepted Mr. Tilson in his dealings on behalf of Mr. Macgurn.

TIMBERLAKE: I except to the Court's ruling.

Q As whose agent did Mr. Tilson hold himself out to you at that time?

A During the telephone conversation of the--that I am just testifying about?

Q Yes.

A As the agent for Mr. Potter, and as the agent for Mr. McClung.

Q Now, at that time, did Mr. Tilson give you instructions as to how to accept the outstanding offer from the seller?

A Yes, sir.

1 TIMBERLAKE: Objection to the question; there
2 is no proof of an outstanding offer, Your Honor.
3 All of the proof is that the offer, if this
4 writing of May the first prepared by Mr.
5 McClung and submitted to Mr. Macgurn through
6 Mr. Tilson constitutes an offer, Mr. Wolver's
7 own letter of June the eighth rejects that
8 offer.
9
10 COURT: I believe Mr. Tilson has already testi-
11 fied that he called pursuant to his conference
12 with Mr. McClung on the morning of August
13 tenth, that he called Mr. Wolver and suggested
14 the form of telegram, or informed Mr. Wolver
15 that there was a letter in the mail--or evi-
16 dence to that effect--rejecting the contract,
17 but for Mr. Wolver to send the following tele-
18 gram, which would then, in effect, destroy
19 the rejection and make the contract binding.
20 And I believe what you are asking now is what
21 Mr. Wolver . . . what he did then, and that is
22 pursuant to what Mr. Tilson had suggested.
23
24 SPENCER: Yes, Your Honor.
25

1 COURT: And that is already in the record, and I am
2 going to permit Mr. Wolver to testify what he
3 did pursuant to what Mr. Tilson told him. That's
4 already in the record, Mr. Timberlake.
5
6 Q All right, pursuant to what Mr. Tilson told
7 you . . .
8
9 TIMBERLAKE: I wasn't objecting to that, Your
10 Honor.
11
12 Q Pursuant to what Mr. Tilson told you on the
13 phone, what did you do?
14 A The ultimate action, Mr. Spencer, was a tele-
15 gram was sent dictated by me over my home telephone, in the
16 presence of Mr. Macgurn. And the telegram was billed, pursuant
17 to instructions of Mr. Macgurn in my presence, to his home
18 telephone.
19 Q All right, now, is this the telegram that you
20 sent in compliance with Mr. Tilson's instructions?
21 A This is a copy of that telegram.
22 Q Are those the words contained in the telegram
23 which you sent?
24 A Yes, sir.
25

1 TIMBERLAKE: Do you want to read that into the
2 record?
3
4 SPENCER: I introduce a copy of the telegram
5 as Exhibit Number Fourteen. It is a photo-
6 static copy. The first words appearing at
7 the top of that form are: "WU AGT LEX" The
8 telegram is addressed to W. E. Tilson, Realtor,
9 "Phone and deliver, Lexington, Virginia" The
10 telegram's contents are: "This is to inform
11 you I have executed the contracts forwarded by
12 Charles Potter, Jr., pertaining to the Roberts'
13 farm at Collierstown, Virginia, and am for-
14 warding a check for $2,000.00 to be added to the
15 escrow account. Thus I am accepting his orig-
16 inal counter offer as forwarded to me and as
17 explained in his attorney's letter of July 6,
18 1972, and am returning the same for his signa-
19 ture." Signed, Richard B. Macgurn.
20
21 Q Now, after the sending of this telegram, Mr.
22 Wolver, do you know whether or not Mr. Macgurn executed the
23 written contract which had been forwarded to you by Mr. McClung?
24 A Yes, I do.
25 Q Did he execute that contract?

1 A Yes, he did, in my presence on that morning.
2 Q And do you know what was done with the contract
3 after he executed it?
4 A Mr. Macgurn was going to mail the contract,
5 together with two thousand dollars, to Mr. Tilson.
6 Q Was the two thousand dollars mailed with the
7 contract to Mr. Tilson?
8 A So I was advised by Mr. Tilson, and by Mr.
9 Macgurn.
10 Q Now, when you received the telephone call from
11 Mr. Tilson on August the tenth, 1972, asking that you do some-
12 thing further in order to make an acceptance, were you and/or
13 Mr. Macgurn surprised; and, if so, why?
14
15 TIMBERLAKE: I object to that.
16
17 COURT: Objection sustained.
18
19 SPENCER: Please note our objection to Your
20 Honor's ruling to the admissibility of the re-
21 sponse to the last question.
22
23 Q Mr. Wolver, did you ever receive a letter from
24 Mr. McClung dated August the seventh, 1972, and addressed to
25 you, which has been filed in evidence as Exhibit Number Twelve?

1 And, if so, when?

2 A Yes, I received this letter. It was received

3 in my office in the afternoon of August the eleventh, 1972.

4 The afternoon mail being courtesy of the U.S. Mail, it is not

5 necessarily consistent, Your Honor, but at or about two o'clock

6 in the afternoon; sometimes as late as three o'clock.

7 Q All right, now, Mr. Wolver, at all times subse-

8 quent to your letter of July the twenty-first, 1972, which has

9 been introduced as Exhibit Number Ten, has Mr. Macgurn--or was

10 Mr. Macgurn--during his lifetime, ready, willing, and able to

11 perform the contract which he had entered into for the purchase

12 of real estate in the state of Virginia?

13 A Yes, sir.

14 Q When did Mr. Macgurn die?

15 A Mr. Macgurn, to the best of my recollection,

16 died on August the thirtieth, 1972.

17 Q Now, since the date of Mr. Macgurn's death,

18 has anyone qualified as the executor or administrator of his

19 estate?

20 A Yes, sir; I have.

21 Q And approximately when did you qualify as such?

22 A I qualified as the special administrator for

23 the purpose of continuing Mr. Macgurn's business--which was the

24 United Match Company, Inc., a California corporation--and for

25 the conducting of his other business affairs, within a week of

his death. Subsequently, letters of testamentary were issued and my best recollection was it was during the month of September. I may be in error; in may have been the early part of October. But it would have been approximately within a month to a month and a half after the date of his death.

Q Now, Mr. Wolver, since the date of your qualification as the personal representative of Mr. Macgurn's estate, have you, on behalf of the estate, been ready, willing, and able to perform this contract?

A Yes, sir.

Q Are you now ready, willing, and able--and offer--to specifically perform this contract?

A Yes, sir.

Q Have you made demands on the Respondents for performance of the contract? Either as attorney for Mr. Macgurn in his lifetime, or as the personal representative of his estate since his death?

A Yes, sir.

Q Did you do so in writing, Mr. Wolver?

A Yes, sir.

Q Do you recall the date . . .

A Also orally.

Q Do you recall to whom you made that demand?

A Yes, sir.

Q To whom was it?

1 A Mr. Tilson.
2 Q I am going to show you a letter dated Septem-
3 ber the first, 1972, addressed to Mr. Tilson, and ask you if
4 that contains your demand, is that the letter to which you
5 refer.
6 A Yes, sir.
7
8 TIMBERLAKE: I object to this letter being
9 introduced, Your Honor, on the grounds that it
10 undertakes to argue the issues that are now
11 in litigation. And it is a communication not
12 to the Respondent, Mr. Potter, or even to his
13 attorney, Mr. McClung.
14
15 SPENCER: The purpose of this letter as being
16 offered, Your Honor, is to show that a demand
17 was made.
18
19 COURT: Let me ask the witness a question before
20 I rule on this. Mr. Wolver, the telegram that
21 was read into the record, which was sent with
22 Mr. Macgurn's authorization: "This is to in-
23 form you that I have executed the contracts
24 forwarded by Charles Potter, Jr., pertaining
25 to the Roberts' farm at Collierstown, Virginia,

1 and am forwarding a check for $2,000.00 to be
2 added to the escrow account. Thus I am accepting
3 his original counter offer as forwarded to me
4 and as explained in his attorney's letter of
5 July 6, 1972, and am returning the same for
6 his signature." Now, as I understand from the
7 testimony thus far, this telegram was sent
8 immediately following or subsequent to Mr. Til-
9 son's telephone call to you?
10
11 A Yes, Your Honor.
12
13 COURT: And I would like to inquire whether,
14 at that time, you were informed that a letter
15 of rejection was in the mail?
16
17 A Your Honor, Mr. Tilson advised me that a--or
18 stated to me--that a letter either was in the mail or shortly
19 would be in the mail, a letter by Mr. McClung. The letter Mr.
20 Tilson described as one which was rejecting the offer or with-
21 drawing the offer.
22
23 COURT: And the purpose, then, of the telegram
24 was to accept before receipt of the rejection
25 letter?

1 A Exactly, Your Honor.

2

3 COURT: All right. Now, I think, gentlemen,
4 Mr. Macgurn is now deceased and Mr. Wolver is
5 his personal representative, and there is evi-
6 dence thus far that Mr. Macgurn, during his
7 lifetime, was ready and willing to perform his
8 portion of the contract, or his obligation under
9 the contract, and Mr. Wolver now is about to
10 testify as to whether or not he, as personal
11 representative of the estate of Mr. Macgurn,
12 is ready and willing to perform the part of
13 the contract on behalf of the beneficiaries of
14 the estate. I'm going to permit that question
15 to be asked.

16

17 TIMBERLAKE: I wasn't objecting to that question,
18 Your Honor.

19

20 COURT: Well, what were you objecting to?

21

22 TIMBERLAKE: I was objecting to the introduction
23 of that letter.

24

25 COURT: Well, this is corroborative evidence.

1 Is the original of this letter available?
2
3 TIMBERLAKE: I'm not objecting to it being a
4 copy, Your Honor. I am objecting to it as,
5 on the grounds that it is an argumentative, self-
6 serving dissertation of what this gentleman
7 conceives to be the law. It was mailed the
8 second day after Mr. Macgurn's death, and before
9 this man had even qualified as personal repre-
10 sentative, according to his own testimony, and
11 obviously on his own. Because he testified
12 that Mr. Macgurn died on August the thirtieth,
13 and the letter is dated September the first.
14
15 COURT: At the time of this letter, you had not
16 qualified as personal representative?
17
18 A No, Your Honor, I had not. Under the terms of
19 the will, a holographic will of Mr. Macgurn, which had been
20 dictated by me and written in the handwriting, of course, of
21 the decedent, I was therein named as the executor, Your Honor.
22 The first thing that we did, because of the time factor in
23 California, and because of the urgency of Mr. Macgurn's affairs
24 and to be able to continue them, was to be qualified as special
25 administrator. At the time of the sending of the letter of

1 September the first, I do not believe that I had, as of that
2 date, qualified as special administrator, but did do so within
3 a matter of several days thereafter.
4
5 COURT: This letter was then written in what
6 capacity?
7
8 A Your Honor, it was written in the capacity of
9 first, as the attorney for the Macgurn estate, before qualifying
10 as the executor of the Macgurn estate, and in the capacity of
11 a fiduciary to be appointed executor of the Macgurn estate.
12 I certainly anticipated, Your Honor, that I would be so
13 appointed. Mr. Macgurn was deceased at the time of the dictation
14 and transmittal of that letter.
15
16 COURT: Your letter does stake out the position
17 of the estate with regard to the proposed liti-
18 gation in the event that there was a refusal
19 on the part of the owner to convey this property?
20
21 A It certainly was intended to do so, Your Honor.
22
23 COURT: Well, without the introduction of that,
24 we can well understand that this was the ulti-
25 mate, this suit that was brought for specific

1 performance . . . I don't see where any useful
2 purpose can be served by the introduction of
3 this letter, except to, perhaps, invite error;
4 and I would suggest that we not tender that
5 letter.
6
7 SPENCER: For the record, I would object, just
8 so that it can't be asserted that we didn't
9 introduce whatever we had to show that a demand
10 for performance was made.
11
12 Q Mr. Wolver, correct me if I'm wrong; I believe
13 you have already testified about the, about whether or not the
14 estate is making a commitment now and has remained ready, willing
15 and able . . . have you already testified to that?
16 A I have, and I said that the estate is, was, and
17 will be.
18
19 TIMBERLAKE: I didn't catch that answer, Mr.
20 Wolver.
21
22 A I said the estate has been always ready, willing
23 and able, and is now ready, willing and able to perform its
24 part of the obligation.
25

1 TIMBERLAKE: That is, in accordance with the
2 terms of the writing dated May the first, 1972,
3 signed by Mr. Macgurn?
4
5 A As explained by the letter of Mr. McClung of
6 July the sixth, 1972.
7
8 TIMBERLAKE: Well, which, Mr. Wolver? The
9 terms are different . . .
10
11 SPENCER: Just a moment. Your Honor, I haven't
12 concluded the direct examination.
13
14 TIMBERLAKE: Excuse me.
15
16 COURT: Gentlemen, it is too early in the day
17 to lose patience.
18
19 Q Do you have, in your possession or knowledge,
20 any additional pertinent facts to this suit which you wish, as
21 the representative of Mr. Macgurn's estate, to introduce into
22 evidence?
23 A Well, that does open the floodgates.
24
25 COURT: Yes, it does. I was going to make that

very same observation. I am sure that the Court is well acquainted with the aim or the purpose, or the objective, of this suit. And I know that Mr. Wolver, as the personal representative and as the attorney for the estate, cannot express any more for the Court's information than I already know as to your position in the case, Mr. Wolver. But I think what Mr. Spencer is driving at, if you might have something that might be of assistance to him in his astuteness of counsel in the case perhaps.

A I presumed that was the thrust, Your Honor, of Mr. Spencer's inquiry. If I may refresh my recollection, Your Honor, by a summary that I have prepared from my day sheets, to see if there is anything in addition. I believe it would be, perhaps, Your Honor, pertinent and of evidentiary nature to go into the matter of my letter to Mr. Tilson of August the fifteenth, which letter, I believe, has been admitted into evidence.

COURT: It has been admitted into the evidence.

A I, of course, can go into detail of Mr. Tilson's telephone conversation with me, which gave rise to the telegram.

1 I know, Your Honor, first-hand knowledge, of the removal of
2 timber from the property. In fact, I took photographs of that
3 removal, which I have brought with me to Court today for the
4 Court's review if we reach that point in the trial that it
5 becomes pertinent. If I may review my file, I will see if
6 there is anything in addition in the files, Your Honor.
7 The only other thing that I would believe might be of
8 some weight or consideration to the Court--I do not . . . as
9 an attorney, unfortunately, it is very hard to divorce oneself
10 when one is a witness from one's knowledge of the law and evi-
11 dentiary rules--the only other area, Your Honor, that would
12 strike me as perhaps somewhat material would be the intent or
13 the state of mind of the decedent in consummating or wishing
14 to consummate this transaction. But, of course, there again,
15 the, I presume, best evidence is the written documentation
16 itself. Other than those areas that I have described that I
17 could go into more detail, I believe, Your Honor, that we have
18 fairly well covered the water by the documentation that is in
19 evidence and the testimony of the witnesses to this point.
20 Q Just on this point of your letter of August
21 fifteenth, Mr. Wolver, you did send this letter to Mr. Tilson,
22 is that correct?
23 A Yes, sir.
24 Q And what did you enclose with that letter?
25 A I enclosed with that letter a Memo to Agreement

1 and the Escrow Instructions, which documents previously had been
2 sent to Mr. Macgurn and given to me. These documents had been
3 sent to Mr. Macgurn together with a contract, and a letter of
4 Mr. McClung's to Mr. Tilson. They were sent to Mr. Macgurn
5 by Mr. Tilson under cover letter of May the eighteenth, and
6 were handed to me by Mr. Macgurn, the decedent, on June the
7 eighth; all of the documents were.
8 Q And prior to the sending of this letter, do
9 you know whether or not--this letter being Exhibit Number
10 Fifteen--do you know whether or not Mr. Macgurn had returned
11 the contract to Mr. Tilson?
12 A Mr. Macgurn took the contract with the stated
13 purpose of sending it to Mr. Tilson, together with the check
14 for two thousand dollars. Mr. Macgurn subsequently told me
15 he had, and Mr. Tilson confirmed that fact by a telephone con-
16 versation I had with him . . .
17
18 TIMBERLAKE: Your Honor, I think you are going
19 right directly into hearsay again, but I don't
20 think it is highly material in that Mr. Tilson
21 had already testified that he received this
22 letter from Mr. Macgurn containing these instru-
23 ments that we are talking about. I think it
24 is improper testimony, but it doesn't add any-
25 thing.

1 Q Had the contract been executed by Mr. Macgurn
2 before it was forwarded?
3 A Yes, sir, it was executed in my presence.
4 Q The Memo of Agreement which you enclosed with
5 your letter of August the fifteenth, had that Memo of Agree-
6 ment been executed by Mr. Macgurn at the time that you forwarded
7 it . . . I'm sorry, the Escrow Agreement, Exhibit Number Six?
8 A Yes, sir, that was executed in my presence,
9 I believe on August the fifteenth. I can state with certainty
10 that it was on August the fifteenth, 1972, executed in my
11 presence by the decedent.
12 Q Now, would you tell the Court the substance
13 of the conversation that you had with Mr. Tilson the day he
14 called you around August the tenth, just prior to your sending
15 the telegram?
16
17 TIMBERLAKE: I object to that, Your Honor.
18
19 COURT: I think that's already in the record.
20
21 SPENCER: I would like to show that this gentle-
22 man on the West Coast had the conversation with
23 Mr. Tilson, who was at that time acting as agent
24 for the seller and called and told him what to
25 do. I think it is pertinent that this man testify
as . . .

1 COURT: Well, hasn't he already testified in
2 answer to the question propounded by the Court
3 that he was told by Mr. Tilson, a form of tele-
4 gram was suggested by Mr. Tilson, and he was
5 told by Mr. Tilson that a letter of rejection
6 was in the mail and had not yet been received
7 by Mr. Wolver, written by Mr. McClung . . .
8 I believe all of that is already in the record.
9 And that, prior to receiving the letter of
10 rejection which I believe that Mr. Wolver fur-
11 ther testified he received on the afternoon of
12 August the eleventh, that all of this then
13 transpired. What he did was subsequent to the
14 telephone conversation with Mr. Tilson. Now,
15 if there is anything to be added to that . . .
16
17 SPENCER: I would like to add to that, if I
18 may, Your Honor; but I believe that that is
19 already in the evidence.
20
21 Q Mr. Wolver, you responded to a question of
22 the Court that the purpose of sending the telegram on August
23 the tenth was so that it might be posted prior to the receipt
24 of the letter revoking the offer? I believe you responded that
25 that was true?

1 A Yes, sir.

2 Q Now, were you given any instructions by a
3 representative of the seller as to whether or not the revo-
4 cation of the offer would be effective before you posted that
5 telegram?

6

7 TIMBERLAKE: I object to that, Your Honor. I
8 object to any instructions that Mr. Tilson may
9 have given this man as to the legal effect . . .

10

11 COURT: Well, Mr. Wolver, after eighteen or nine-
12 teen years in the practice of law, I would
13 certainly accept him as an astute lawyer, cer-
14 tainly knowing the law of contracts. And I
15 don't think it was necessary for Mr. Tilson to
16 explain to Mr. Wolver what the law was. You
17 are objecting for the reason that Mr. Tilson
18 had no right to tell Mr. Wolver what the legal
19 effect would be, or might be, of sending a tele-
20 gram of acceptance prior to the receipt of a
21 letter of rejection, is that it?

22

23 TIMBERLAKE: Well, I probably shouldn't have
24 objected. It just adds to and compounds the
25 part that Mr. Tilson played in trying to take

1 this man's farm away from him.

2

3 COURT: Well, that can be argued.

4

5 SPENCER: Your Honor please, the purpose of
6 the evidence is to show there was not a com-
7 munication of revocation of the offer by the
8 telephone call from Mr. Tilson to Mr. Wolver.

9

10 TIMBERLAKE: He said there was.

11

12 SPENCER: Your Honor, he said that Mr. Tilson
13 told him that there would be a letter coming,
14 that it either had been posted or it would be.

15

16 COURT: Now you are drawing a very delicate
17 line of demarcation there, I think. On notice
18 that there was a letter or word of rejection
19 to be received by him . . .

20

21 SPENCER: Your Honor, my point . . . the reason
22 that I want to introduce this . . . this evi-
23 dence, is that if the agent for the seller,
24 after having posted a revocation, then calls
25 the purchaser and says, "Here is what you do

1 to avoid the revocation," and the purchaser
2 complies with those instructions, then he effec-
3 tively avoids the effect of the revocation.
4
5 COURT: Even though it may be contrary to the
6 principal's desire or intent?
7
8 SPENCER: That is certainly in question, Your
9 Honor. If Mr. Tilson was acting without auth-
10 ority, then that's certainly another question
11 for the Court. But if, in fact, the agent for
12 the seller, told by him that the revocation
13 has been made but, "If you do this before you
14 receive it, then you've got an acceptance,"
15 I submit, Your Honor, that no communication
16 of the revocation of the offer has been made.
17
18 TIMBERLAKE: You are making Mr. Tilson look
19 worse and worse by pursuing this. He has
20 already . . .
21
22 SPENCER: Mr. Timberlake, I am here to protect
23 nobody, but to pursue my client's best interest
24 in the suit.
25

1 COURT: All right, let's proceed, Mr. Spencer.
2 Go ahead.
3
4 SPENCER: Can the witness answer the question,
5 Your Honor?
6
7 COURT: All right.
8
9 A As I understand the question, Your Honor, with-
10 out having to resort to a rewinding of the tape, the pending
11 question is whether or not I was instructed or told the conse-
12 quence or the effect of sending this telegram. Was I told to
13 send a telegram, and what was the purpose or what effect it
14 would have?
15
16 COURT: I believe that is the substance of the
17 question.
18
19 A Right. I was told by Mr. Tilson that Mr. McClung
20 had told him for me to send a telegram.
21
22 TIMBERLAKE: Your Honor, I object to that
23 answer as absolute manifest hearsay, Your Honor.
24
25 COURT: Well, that is in the evidence that it

1 was, so far, from Mr. Tilson's testimony, that
2 Mr. McClung did tell Mr. Tilson, and formed
3 the telegram, the language of the telegram.
4 So it's not any new evidence.
5
6 TIMBERLAKE: No, sir, but it's hearsay.
7
8 COURT: Well, it may be hearsay, but it's al-
9 ready in the evidence.
10
11 A May I complete my answer, Your Honor?
12
13 COURT: Yes, sir.
14
15 A And that if I sent the telegram before I was
16 in receipt of the letter of withdrawal or revocation or rejection,
17 that a binding contract would be thereby effected. And that I
18 should send the telegram posthaste.
19
20 COURT: Gentlemen, this seems to be the very
21 crux of this case, along with several others.
22
23 Q Mr. Wolver, will you please answer any questions
24 that the Court or Mr. Timberlake may have?
25
TIMBERLAKE: I have no questions, Your Honor.

1 Whereupon:

2

3 CHARLES A. POTTER, JR.,

4 a Respondent, having been called to testify as an adverse wit-

5 ness by the Complainant, being of legal age and duly sworn,

6 testified upon his oath as follows:

7

8 Direct Examination by Mr. Roberts:

9

10 Q Please state your name?

11 A Charles Potter, Jr.

12 Q Where do you live?

13 A Lexington, Rockbridge County.

14 Q When did you get the deed to this property from

15 Mr. and Mrs. Earl Roberts?

16 A September the eighteenth--seventeenth or

17 eighteenth-- of '72.

18 Q This was subsequent to all of the negotiations

19 that have been taking place . . .

20 A Yes, sir, after that.

21 Q Is that correct?

22 A Yes, sir.

23 Q At the time these negotiations were taking

24 place, you had no deed?

25 A No, sir.

1 Q What sort of instrument did you have?
2 A I had an option to purchase the property with
3 a rental. I had been renting the property for several years.
4 Q Whose name was that option in?
5 A The option was in my name.
6 Q Your name only?
7 A Yes, sir.
8 Q Where are the copies of it?
9 A I had a copy, the Roberts had a copy, and Mr.
10 McClung had a copy in his files.
11 Q Were all of these copies executed?
12 A Yes, sir.
13 Q Since the date of August the tenth, 1972, have
14 you taken any timber off of this property?
15 A Yes, sir.
16 Q Did you sell it?
17 A Yes, sir.
18 Q For how much?
19 A Approximately sixty-five hundred dollars ($6,500.00
20 Q Sixty-five hundred dollars for the sale of tim-
21 ber. Mr. Potter, what was your arrangement with Mr. McClung
22 with regard to the sale of this property?
23 A There was no arrangement until after I had
24 executed my right to purchase the property.
25 Q In other words, you had no arrangement, no

1 pre-arrangement with him whatsoever?

2 A Not until my option expired.

3 Q Who agreed upon the listing for sixty thousand

4 dollars ($60,000.00)?

5 A Both together.

6 Q You both agreed on sixty thousand dollars?

7 A Yes, sir.

8 Q Who agreed on the listing, or on the acceptance

9 of the offer from Mr. Macgurn at the figure of fifty-eight

10 thousand dollars ($58,000.00)?

11 A I did, sir.

12 Q Did Mr. McClung concur in that?

13 A Yes, sir.

14 Q In other words, it was a decision that both of

15 you made?

16 A No, sir, not in that respect, no, sir.

17 Q I refer to your deposition on page 66. After

18 the offer of fifty-eight thousand dollars had been received,

19 you were asked: "And did you discuss that with Mr. McClung?"

20 And you answered: "Yes, sir." Question: "And as a result of

21 your conversation with him, did you both agree that you would

22 sell it for the $58,000.00?" And your answer again was: "Yes,

23 sir." Is that correct?

24 A Yes, sir.

25 Q Was Mr. McClung to share in any profit of this

1 sale?

2 A Yes, sir.

3 Q Was this agreed prior to August tenth, 1972?

4 A No, sir.

5 Q It was not agreed?

6 A No, sir.

7 Q And if Mr. McClung has stated in his deposition

8 that there was an agreement that he was to share prior to that

9 time, then you are saying that he is incorrect?

10 A I am saying that there was no deal set up on

11 how much of the profit he was to share. He was to get a per-

12 centage of the profit, and he knew that to that effect. But

13 no deal was set up exactly to the terms.

14 Q All right, but he was to share in the profit

15 of the property, and that was agreed upon between you prior

16 to August tenth, 1972?

17 A Yes, sir.

18 Q All right. Would you say it is unusual for an

19 individual who is either purported to be or about to become

20 or is the owner of real estate to share in the profit of sale

21 with an uninterested third party?

22 A Yes, sir.

23 Q All right, that's all.

24

25

1 Cross Examination by Mr. Timberlake:

2

3 Q Mr. Potter, let's pursue that matter a little
4 bit. What was Mr. McClung's relationship with you and with
5 this property from the time that you first discussed the property
6 with him up until your purchase of it, your execution of the
7 option, exercise of your option?
8 A I had talked to the Roberts from time to time
9 about buying the property, and I had told them if they sold
10 I would like to have a chance at it.
11 Q How long had you been renting this property?
12 A Approximately five years.
13 Q And you alone had been renting it?
14 A Yes, sir.
15 Q And you had been operating it as a farm . . .
16
17 SPENCER: Objection. He is clearly leading the
18 witness. The witness was called as an adverse
19 witness.
20
21 TIMBERLAKE: Well, I can cross examine this wit-
22 ness.
23
24 COURT: Listen, you called him as your adverse
25 witness. This is cross examination.

1 SPENCER: Your Honor, he is an adverse witness,
2 but he is a party, and this is his counsel who
3 is examining. He has no right to cross
4 examine . . .
5
6 COURT: Not at this stage of . . . It is my
7 understanding, Mr. Spencer--I may be wrong--
8 but when one side calls a witness as an adverse
9 witness, that person is bound by that witness's
10 testimony. Even though he may be the client of
11 the attorney who then takes over on the exam-
12 ination, it is still cross examination, and a
13 leading question is proper.
14
15 SPENCER: Note our objection.
16
17 COURT: All right, you may object, but that's
18 always been my understanding of procedure.
19
20 A At this time I had been leasing it along with
21 my grandfather. I was going to school. It was a partnership
22 basis.
23 Q I see. And now what, if anything, took place
24 in regard to this property and in regard to your relationship
25 or connection with this property either in late 1971 or early

1972?

A Well, the Roberts contacted me saying they were, they would like to sell the property, and I asked Bill if he would go along with me to consummate the sale.

Q Go along where?

A To Charlottesville, to see the Roberts.

Q In what capacity?

A In the capacity of my attorney.

Q All right.

A So we went to Charlottesville one Sunday afternoon, talked to the Roberts on the property, and after we returned, on our way back, it was talked that we would draw up an option with my rental on the property for another year. And Bill did this and sent it to the parties, and it was signed and executed by them and by myself.

Q And when you say Bill did this, you mean Mr. McClung . . .

A Yes, sir.

Q . . . as your attorney . . .

A Mr. McClung.

Q . . . prepared the document?

A Yes, sir.

Q And who were the parties to this lease and option agreement?

A Earl D. Roberts, Winifred B. Roberts, and myself.

1 Q They as owners and you as lessee . . .
2 A Yes, sir.
3 Q . . . and optionee?
4 A Yes, sir.
5 Q And at what stage, if ever, did you make any
6 arrangements with Mr. McClung in regard to his compensation as
7 attorney?
8
9 ROBERTS: I object to that phraseology.
10
11 COURT: What are your reasons, Mr. Roberts?
12
13 ROBERTS: The witness has already testified
14 that Mr. McClung was to share in the profits
15 of the sale.
16
17 COURT: Objection overruled.
18
19 Q At what stage of this procedure, if any, did
20 you make any arrangement for the compensation of Mr. McClung
21 as your attorney?
22 A When I decided to keep the property for myself.
23 Q That was . . .
24 A That was August the seventh.
25 Q August the seventh. Before that, did you have

1 any arrangement or understanding with Mr. McClung as to his
2 compensation in serving you as your attorney?
3 A Mr. McClung knew he would get paid for his
4 services.
5 Q And had you discussed or arranged with him the
6 basis of his payment?
7 A No, sir.
8 Q Either any plan or the manner in which he was
9 to be paid?
10 A No, sir.
11 Q At what stage did any understanding arise about
12 his receiving a share of the profits?
13 A Prior to the closing in September, with my
14 purchasing of the property.
15 Q I'm not talking about what percentage; I'm
16 talking about at what stage of your relationship with Mr. McClung
17 was there an understanding that he would be compensated out of
18 the profits?
19 A At that time. At the sale . . . when I decided
20 against selling the property and decided that I would keep it
21 for myself, after August the seventh.
22 Q Well, did you, or did you not, have any under-
23 standing with him before that as to whether or not he would
24 share in some manner in the profit, if any, in the event of the
25 sale of that farm?

1 A No, sir, it was just extremely an open deal.
2 Q What do you mean by open deal?
3 A There were no terms whatsoever.
4 Q I'm not talking about terms; I'm talking about
5 whether or not on any basis he would be compensated?
6 A No, sir, there wasn't any, any talk at all,
7 any conversation.
8 Q Well, at the time the property was listed with
9 Mr. Tilson, was that at your authorization and direction?
10 A Yes, sir.
11 Q And, at that time, was there any understanding
12 or arrangement between you and Mr. McClung as to his being paid
13 out of the proceeds of sale of the farm?
14 A No, sir, there was none.
15 Q And that is true, whether or not any percentage
16 had been agreed upon or not?
17 A Yes, sir. No percentage had been agreed upon.
18 Q Well, I'm not talking about whether any percentage
19 was . . . was there or not any understanding that he would
20 receive some share. I'm not talking about how much of a share.
21 A Yes, sir, he did receive a share. But there
22 was no . . .
23 Q When was that understanding reached?
24 A That understanding was reached after August the
25 seventh.

1 Q As to exactly what he would receive?
2 A Yes, sir.
3 Q I'm not talking about what exactly he would
4 receive; I think you misunderstand my question. My question
5 is: At what stage, if ever, before August the seventh, was
6 there an understanding between you and Mr. McClung that he
7 would receive something--I'm not saying how much--in the event
8 of . . . from the profit?
9 A He knew he would receive money for his services,
10 yes, sir.
11 Q Out of the profit?
12 A Out of the profit.
13 Q You hadn't determined, and hadn't agreed with
14 him, on what portion of the profit . . .
15 A No, sir.
16 Q . . . he would receive in payment for his services
17 prior to August the seventh?
18 A No, sir. That's right.
19 Q Now, Mr. Potter, I believe you testified when
20 examined by Mr. Roberts that since you have acquired title to
21 this property, on or about September the eighteenth, 1972, that
22 you have cut and sold some sixty-five hundred dollars ($6,500.00)
23 worth of timber?
24 A Yes, sir.
25 Q And what, if anything, else, has been either

1 sold or added to this farm since that time?
2 A Nothing has been sold. The entire farm has
3 been fertilized. I have painted some of the roofs and repaired
4 some fences.
5 Q Do you have any idea of what that represents
6 in dollars and cents?
7
8 SPENCER: Objection, Your Honor. The Respondent
9 is trying to introduce number one, we would
10 suggest, Your Honor, is going beyond the scope
11 of direct examination or cross examination by
12 the witness and to the extent that Mr. Timber-
13 lake does so makes him his own witness and he
14 would be bound by that evidence. Number two,
15 he is attempting to establish the value of
16 enhancements done to the property by the Respon-
17 dent during the period of time in which it is
18 alleged that he wrongfully refused to convey.
19 In this proceeding, there is no suit by Mr.
20 Potter pending against anyone. There is no
21 claim in the pleadings of any set-off against
22 the damages because of enhancement of the value
23 of the property. And we would submit, Your
24 Honor, that it would be grossly improper for
25 the Respondent to introduce evidence as to any

1 enhancement.

2

3 COURT: How much timber was cut, did you gentle-
4 men inquire?

5

6 SPENCER: Yes, Your Honor, to show the damages
7 that had been done to the property since Mr.
8 Potter had wrongfully been holding it. Of
9 course, anything he might introduce regarding
10 those damages, well, I think that would be
11 pertinent. But I don't believe that in this
12 case he would be entitled to any set-off against
13 those damages, even if proven, if the Court
14 held that he were liable for them; number one,
15 because there are no pleadings to support set-
16 offs or counter-claim, and number two, because
17 it was during the period of time in which it
18 was being wrongfully withheld, then he wouldn't
19 be allowed to benefit from his efforts to
20 enhance the property, during the period of time
21 that it was being wrongfully withheld.

22

23 COURT: Well, really, there is no harm to be
24 done then in admitting the evidence, since no
25 claim is being made for any enhancement.

1 SPENCER: I do submit, Your Honor, that it is
2 irrelevant.
3
4 COURT: Oh, I agree with you. But I don't see
5 where any harm can be committed by it. You
6 may reply to the question.
7
8 A I would say approximately three thousand dollars
9 ($3,000.00) worth.
10 Q Approximately three thousand dollars worth.
11 That's all.
12
13 Examination by the Court:
14
15 Q I would like to ask this young man a few questions
16 if I may. Somewhere in his discovery depositions . . .
17
18 TIMBERLAKE: Your Honor, may I just inject
19 this. Of course, I tried to limit myself in
20 my cross examination of this witness to the
21 matters just dealt with when he was called as
22 an adverse witness.
23
24 COURT: Do you propose to call him as a witness?
25

TIMBERLAKE: I propose to call him on his own behalf.

COURT: Then I won't ask any questions now.

Re-Direct Examination by Mr. Roberts:

Q Mr. Potter, I just want to clarify what I have interpreted to be an inconsistency in what you have told me and what you have told Mr. Timberlake. I asked you, and I believe in almost these same words, prior to August ten, 1972, was there some agreement that Mr. McClung was to share in the profit of the sale of this property?

A Yes, sir.

Q All right. Thank you. That's all.

- - - - - -

TIMBERLAKE: Your Honor, for the purpose of the record, I would like to move that this suit be dismissed on the grounds that there has been a failure on the part of the Complainant to prove a binding contract between the seller and buyer of this farm, this Roberts farm, and on the further grounds that, even conceding for

1 the sake of argument that there is a contract,
2 that it is in violation of . . . or unenforce-
3 able because of the statute of frauds. And I
4 won't undertake to argue it at this stage and,
5 if the Court would see fit to take the motion
6 under advisement, I will proceed; but I wanted
7 the motion in the record.
8
9 COURT: All right.
10
11 - - - - - -
12 Whereupon:
13
14 WILLIAM B. McCLUNG
15 a Respondent, being of legal age and duly sworn, testified upon
16 his oath as follows:
17
18 Direct Examination by Mr. Timberlake:
19
20 Q Will you please state for the record your full
21 name, age, residence, and occupation?
22 A My name is William B. McClung; my age is twenty-
23 nine; my occupation is attorney at law; my residence is Rock-
24 bridge County, Virginia.
25 Q And how long have you been engaged in the practice

1 of law in Lexington and Rockbridge County?
2 A Since 1969.
3 Q Now you, I believe, are one of the main
4 Respondents in this suit, both as trustee and as an individual,
5 is that correct?
6 A I am.
7 Q Mr. McClung, you, of course, know and are
8 acquainted with Mr. Charles A. Potter, Jr., also a Respondent
9 in this case?
10 A Yes, sir, I am.
11 Q How long have you known Mr. Potter?
12 A I would say eight to ten years.
13 Q Now, in the year 1971, late '71, did you have
14 occasion to have any contact or relationship with Mr. Potter
15 in reference to this Roberts farm that is in controversy in
16 this suit?
17 A Yes, sir.
18 Q Will you please state to the Court how this
19 relationship arose and what the relationship was?
20 A Charley Potter, Jr., came to me and stated that
21 he and his grandfather had been leasing the Earl Roberts farm
22 in the Collierstown vicinity for a number of years, that through
23 contact with the Robertses he had discovered that they were
24 desirous of selling this land and were not interested in con-
25 tinuing the rental relationship that had existed previously.

1 At that time, Charley and I discussed the possibility of his
2 renting the property with an option to purchase this land, the
3 terms of it, and so forth like that. And he asked me to travel
4 to Charlottesville with him and talk to the Robertses concerning
5 the property.
6 Q And in what capacity did he want you to go with
7 him?
8 A As his attorney.
9 Q Did you go to Charlottesville with him?
10 A Yes, sir. One Sunday afternoon Charley and I
11 went to Charlottesville.
12 Q Do you know approximately when that was?
13 A I believe it was in the early part of 1972, or
14 the latter part of 1971; I think it was early 1972. It was
15 within a month or two of the execution of the agreement for
16 lease and option.
17 Q And who did you and Mr. Potter speak with in
18 Charlottesville?
19 A We met with Earl and Winifred Roberts.
20 Q Where?
21 A At their home on Rugby Road.
22 Q And what developed from that meeting?
23 A From that meeting, there was discussion of sale
24 price and an attempt at trying to reduce the purchase price and
25 trying to work out some agreement under which it could be

1 purchased. The day that we were there, there were no conclusions
2 reached; but subsequent to that date.
3 Q Were any conclusions reached that day?
4 A No, sir.
5 Q All right, then, what was the next step in
6 your representation of Mr. Potter?
7 A Well, the next step was that Charley and I
8 talked about the purchase price and about how to finance it
9 and so forth like that. The Robertses wanted forty-one thousand
10 dollars ($41,000.00) for the property, of which five would be
11 paid down in cash at the time of purchase, and would only sell
12 it under the condition that they finance the balance of the
13 purchase price, which was thirty-six thousand dollars ($36,000.00)
14 over a twelve year period, payable in principal amounts of
15 three thousand dollars ($3,000.00) per year and I believe interest
16 at the rate of six percent thereon. And at the time that we
17 returned from Charlottesville, and subsequent to that, Charley
18 and I discussed this price and believed it to be too high at
19 that time. We didn't see the way that we could, you know, take
20 care of the finance on that. And in discussing it further
21 with Charley, I suggested that he obtain a lease on the property,
22 setting forth the terms under which he would lease it for a
23 period of I believe it was one year, if I remember correctly,
24 and that during that period of time that he would have the
25 option to purchase this property at the price, and upon the

1 terms, which the Roberts had stated. And to effect this, I
2 prepared an agreement of rental for him, including the option
3 provision, and forwarded it to the Roberts and, with one minor
4 change in the agreement, they accepted it and signed it and
5 returned it to me. And I gave, I guess, a copy of it to Charley.
6 Q Did you . . . do you know how many copies of
7 this lease-option agreement were prepared and signed?
8 A No, sir.
9 Q Do you recall whether or not Mr. Potter executed
10 the agreement and, if so, was that before or after the Roberts
11 executed it?
12 A He executed it prior to my mailing it to the
13 Robertses.
14 Q Did you mail it directly to the Roberts, or
15 to some legal representative?
16 A I mailed it directly to the Robertses.
17 Q Mr. McClung I ask you if this writing that I
18 now hand you is the lease and option agreement that you just
19 referred to in your testimony?
20 A Yes, it is.
21 Q I notice on the second page that it is executed
22 by Charles A. Potter, Jr., Earl D. Roberts, and Winifred B.
23 Roberts. Is that correct?
24 A That is correct.
25 Q I also notice that Paragraph Eight as originally

1 written is scratched out and there is inserted in its place:
2 "The tenant shall clip or brushhog pastures," with the initials
3 "C.A.P." Is that the alteration that you referred to?
4 A Yes, sir, that was the alteration requested
5 by the Roberts.
6
7 TIMBERLAKE: Your Honor, I would like to offer
8 this as an Exhibit, as Respondent's Exhibit
9 One, I suppose it would be.
10
11 COURT: Any objection, gentlemen?
12
13 SPENCER: I don't have any objection.
14
15 COURT: All right, it is received and admitted
16 into the evidence and identified as Defendant's
17 Exhibit Number One.
18
19 Q All right, Mr. McClung, this agreement as to
20 which you have just testified, which has been introduced into
21 the evidence as Respondent's Exhibit One, is dated March the
22 tenth, 1972. Will you please state what, if anything, trans-
23 pired after the execution of this agreement in so far as your
24 relationship with, or representation of, Charles A. Potter, Jr.,
25 is concerned?

1 A Well, subsequent to receiving the agreement
2 from the Roberts in Charlottesville, I met with Jim Tilson and
3 listed the property with Jim Tilson for the sale price of
4 sixty thousand dollars ($60,000.00).
5 Q Is that the listing agreement that, I believe,
6 has been introduced as Exhibit One?
7 A It was a legal sheet that I believe was testi-
8 fied to earlier.
9 Q Now, at whose instance and direction did you
10 make this listing?
11 A In discussing it with Charley, we together
12 arrived at the price that we thought the property had the poten-
13 tial of bringing. And with his concurrence, and at his request,
14 I gave the listing to Tilson. The listing was signed by me;
15 it was not signed by Charley; he was not present at the time.
16 I wrote his name on it, and then signed the listing.
17 Q I see. At that time, did you have any fixed
18 agreement or understanding in so far as your compensation for
19 services rendered Charles A. Potter, Jr., is concerned?
20 A For helping Charley from the inception through
21 the conclusion, I was to receive a compensation from the profits
22 from a sale of this property.
23 Q Do you recall the date on which you met Mr.
24 James Tilson and authorized the listing of this Roberts farm
25 with Tilson and Company?

1 A No, sir, only that it was some time subsequent
2 to the date of that lease agreement with the Robertses.
3 Q All right. Now, there is in evidence a writing
4 styled Agreement of Sale and designated as Exhibit One in this
5 proceeding, with reference to the Roberts farm, and signed by
6 Richard B. Macgurn. Are you familiar with that?
7 A Yes, sir.
8 Q When, and under what circumstances, did you
9 first see it?
10 A Tex Tilson brought me that contract after, I
11 believe, he had phoned and told me that he had Mr. Macgurn
12 here looking at the property, and brought me that contract for
13 the sum of fifty-eight thousand.
14 Q All right, after you received that, did you
15 have any contact in regard to it with Charles A. Potter, Jr.?
16 A Yes, sir, I called him.
17 Q And what transpired after you called Charles
18 Potter, Jr.?
19 A He and I discussed the contract and the price
20 and so forth, and Charley wanted the sixty, but I felt that it
21 was close enough to what he was asking for it to be, you know,
22 a sincere offer for the property. However, it did not contain
23 any requirements as to the leasing of the property to Charley
24 for any period of time, nor did it contain anything to it
25 about the necessity of the financing provided by the Roberts

1 being assumed.

2 Q As a result of that conference with Mr. Potter,
3 I will ask you whether or not you drafted a writing headed
4 Agreement of Sale marked Exhibit Number Five?

5 A Yes, sir, I did.

6 Q Will you state whether or not that was drawn
7 and submitted with the authorization and at the direction of
8 Mr. Potter?

9 A Mr. Potter and I discussed again the sale price,
10 the fifty-eight thousand dollars ($58,000.00). We discussed
11 that it would be necessary for the purchaser to assume the
12 financing since this was a requisite of the sellers. We dis-
13 cussed also again, you know, the terms concerning when possession
14 would be given, when closing would take place, and so forth
15 like that. And we came to some agreement as to what Charley
16 would do in selling the property, what the terms exactly would
17 be; and I reduced them to writing. Charley read the contract
18 which you have submitted to me, and stated that he would be
19 willing to do that. Now, he did not execute that contract.
20 The contract was given to Mr. Tilson for forwarding to Mr.
21 Macgurn for his execution of that simultaneously with two
22 other agreements that were drawn at the same time. One was a
23 Memorandum, or an Escrow Agreement, setting forth how the five
24 thousand dollars ($5,000.00) was to be held . . .

25 Q That would be Exhibit Six?

1 A Yes, sir.
2 Q And then you said there was another agreement;
3 is that Exhibit Seven?
4 A Yes, sir. This was a Memo of Agreement between
5 Charley and Mr. Tilson concerning the commission that was to
6 be paid and the fact that Mr. Tilson would contribute four
7 hundred dollars ($400.00) toward the rental of the property.
8 Q Both Exhibit Six and Exhibit Seven, I take it,
9 then were incidents to this Exhibit Five?
10 A Were . . . I beg your pardon?
11 Q Were incidents to, and a part and parcel . . .
12 A Well, all three of them were necessary.
13 Q And did I understand you to say that you then
14 submitted these writings--Exhibit Five, and Exhibit Six, and
15 Exhibit Seven--to Mr. Tilson, to be forwarded to Mr. Macgurn?
16 A I believe I submitted those to Mr. Tilson to
17 forward to Mr. Macgurn. I don't believe at this time that I
18 corresponded directly with Mr. Macgurn or his attorney.
19 Q Will you state whether or not these three
20 writings were transmitted by you, through the letter that I
21 just hand you and which is designated Exhibit Three?
22 A Yes, sir, that is the letter that I transmitted
23 the contracts to Mr. Tilson with.
24 Q Will you state whether or not at that time, or
25 subsequently, you were authorized by Mr. Potter to do anything

1 other than submit these three writings to Mr. Macgurn?
2 A At that time I was authorized by Mr. Potter to
3 submit those three writings. I was not authorized to make any
4 other deals with Mr. Macgurn.
5 Q After you had submitted these three writings
6 to Mr. Tilson to be submitted to Mr. Macgurn, I will ask you
7 whether or not you received, either directly from Wolver and
8 Wolver or through Mr. Tilson, this letter of June the eighth,
9 1972, which is designated Plaintiff's Exhibit Number Eight--
10 I mean, Exhibit Number Eight?
11 A I don't recall whether I received that directly
12 or whether it was showed to me by Mr. Tilson. I would assume
13 that it was shown to me by Mr. Tilson. I am familiar with the
14 contents of that letter.
15 Q Now will you state, Mr. McClung, whether or not,
16 after receiving this letter or a copy thereof you conferred
17 further with Mr. Potter?
18 A I don't recall a specific conversation at this
19 time with Mr. Potter. I would assume that I did confer further
20 with him, since this rejected the proposition that I had asked
21 them to make.
22 Q Subsequent to being furnished a copy of this
23 letter to which we have just referred, I will ask you if you
24 drafted and mailed the letter that I hand you, which is dated
25 July the sixth, 1972, and is marked Exhibit Number Nine?

1 A Yes, sir, I did.
2 Q Did you make any other reply to this letter of
3 June the eighth except this letter of July sixth, Exhibit Num-
4 ber Nine?
5 A I do not recall any.
6 Q I will ask you whether or not this Exhibit
7 Number Ten, being a letter of July twenty-first, from Wolver
8 and Wolver, is a reply to the letter about which you have just
9 testified, Exhibit Nine?
10 A What is your question concerning this letter?
11 Q Is this letter that you now hold in your hand,
12 which is Exhibit Number Ten, is that the reply that you
13 received to Exhibit Nine?
14 A Yes, sir.
15 Q All right, I hand you Exhibit Twelve, and ask
16 you whether or not that is your reply to Exhibit Ten?
17 A Yes, it is.
18 Q I ask you whether or not the letter that I
19 have just handed you of August the seventh, 1972, marked
20 Exhibit Twelve, was written and mailed by you with the author-
21 ization and at the direction of Mr. Potter?
22 A It was written and mailed at the direction of
23 Mr. Potter.
24 Q And what was the next . . . this letter of
25 August the seventh, 1972, marked Exhibit Twelve, shows on its

1 face that a copy was mailed to W. E. Tilson in care of W. E.
2 Tilson & Son. Is that correct?
3 A Yes, it is.
4 Q What was the next communication--either verbal
5 or in writing--that you had with either Mr. Macgurn or Mr. Wolver
6 or Mr. Tilson on their behalf?
7 A I had no future correspondence, that I recall,
8 with either Mr. Wolver or Mr. Macgurn. I mailed that, a copy
9 of that letter to Mr. Tilson at the same time the letter was
10 mailed to Mr. Wolver, the attorney for Mr. Macgurn. At that
11 time I also mailed Mr. Tilson a letter which was not mailed
12 to Mr. Wolver or Mr. Macgurn.
13 Q That would be Exhibit Eleven, the letter that
14 you mailed to Mr. Tilson?
15 A Yes, sir. I mailed that either . . . I believe
16 it was the date that was marked on the letter, which would have
17 been the seventh. And one morning shortly thereafter--whether
18 it was the next day or a couple of days after that, I don't
19 recall--I received a call from Mr. W. E. Tilson asking me to
20 explain my letter to Wolver; you know, about Mr. Potter breaking
21 off negotiations. Which I did.
22 Q All right. What transpired following the tele-
23 phone call that you had from Mr. Tilson?
24 A Well, in the telephone call, Mr. Tilson stated
25 that he was going to call Mr. Wolver, or Mr. Macgurn, one or

1 the other, and that he was going to try to get them to send a
2 telegram accepting the contracts that I had drawn up earlier
3 and forwarded out there in accordance with Charley's wishes.
4 Q That was those contracts mailed by you on May
5 the seventeenth?
6 A Yes, sir. And at that time he asked me what
7 to say, what this telegram should say. And we discussed the
8 fact that the sale was, had fallen through, or was falling
9 through, and that, I explained to him that Charley had never
10 received any contracts back from Mr. Macgurn or his attorney
11 signed by them as were delivered to Mr. Tilson and forwarded
12 out there, that they had been delivered to Mr. Tilson sometime
13 in the spring of '72, and this was now late in the summer . . .
14 that no progress was evidently being made. Mr. Tilson expressed
15 the desire, with which I concurred, to try to see something,
16 a sale develop of this property. And I related to Mr. Tilson
17 that Charley had instructed me to cut off negotiations for the
18 property, and that was the purpose of my letter, that perhaps
19 if Mr. Macgurn would send Charley a telegram stating that he
20 would sign those contracts and accept this deal as was set out
21 in those contracts, maybe Charley would go through with the
22 deal. And, in furtherance of Mr. Tilson's and my conversation,
23 shortly after our conversation, he came to my office, where we
24 discussed the contents of the telegram again.
25 Q Did you . . . well, there's been a memorandum

1 introduced as Exhibit Thirteen, a longhand memorandum; did
2 you . . . is that in your handwriting?
3 A Yes, sir, I prepared this and gave it to Mr.
4 Tilson.
5 Q And that was in the course of this discussion
6 that you were just speaking of?
7 A Yes, sir.
8 Q Had you, at that time, conferred with Mr. Potter
9 or received any authorization or instruction from him to
10 depart from the substance of your letter of August the seventh
11 to Eugene L. Wolver, Jr. . . .
12 A No, sir.
13 Q . . . terminating negotiations?
14 A No, sir.
15 Q I gather from your testimony at this point,
16 Mr. McClung, that you were still anxious to see a sale made
17 between Potter and Macgurn?
18 A Yes, sir, I was. Mr. Tilson had spent some time,
19 you know, working on the thing and the way he was to be compen-
20 sated for his services would be through a commission for a
21 sale of the property. And we had had some long negotiations
22 concerning the sale of it, which I felt really precipitated
23 the withdrawal of Charley's offer at that time. But that was
24 his decision, and I couldn't . . . although I was unhappy about
25 it, as is evidenced by my letter of the same date to Mr. Tilson,

1 that was still his decision.

2 Q What was the next contact that you had with

3 any of the parties involved in this series of negotiations

4 after you had drafted in longhand this, the language to be used

5 in the telegram for Mr. Tilson?

6 A I believe the next contact I had was a phone

7 call from Mr. Tilson stating that he had talked with Mr. Macgurn

8 and he was going to send the telegram. And then, I think per-

9 haps the same day, later on in the afternoon, Mr. Tilson I

10 believe came to my office with a copy of the telegram, or the

11 telegram, or someone from his office came. I believe that I

12 saw it either that day or, you know, some time relatively

13 shortly after our conversation.

14 Q Did you, following that, have any communication

15 with Mr. Potter?

16 A No, I told . . . whoever brought the telegram

17 to me, I told them to take it to Charley Potter and talk to

18 Charley, that I had no authority to do anything.

19 Q Now, at that time, Mr. McClung, did you have

20 any fixed or firm agreement as to your compensation in relation

21 to this property?

22 A Charley and I never discussed a dollar amount

23 for my compensation for helping him.

24 Q After the . . . were you later informed by Mr.

25 Tilson of the receipt by him of the signed contract, the contract

1 signed by Mr. Macgurn, that you had prepared and submitted on
2 May the seventeenth?
3 A Sometime after that--I don't recall whether
4 they were brought to my office, or, you know, what the circum-
5 stances were--but sometime after that, I was made aware of the
6 fact that someone--either Mr. Macgurn personally, or someone
7 in his behalf--had sent to Mr. Tilson these contracts that
8 we spoke of earlier, executed by Mr. Macgurn at that time.
9 Q And what, if anything, did you do?
10 A I did nothing, that I recall. As far as any
11 further contact with Charley, you know, in negotiating on
12 this, Charley had made it clear that he wasn't going to sell
13 the property; and so there wasn't any point in my trying to
14 negotiate any further.
15 Q Did you or not participate or assist, or repre-
16 sent Mr. Potter, in the exercise of his option to purchase?
17 A Yes, sir, I did.
18 Q In September?
19 A Yes, sir. Following this, on his behalf, I
20 notified the Roberts that under the provisions of the lease
21 and option agreement he was exercising his right to purchase
22 the property. And the purchase of the property by him was
23 consummated shortly after that.
24 Q At that time did you enter into any agreement
25 or understanding with Mr. Potter as to the compensation, if any,

1 you would receive?

2 A Yes, sir, I did.

3 Q What was the agreement that you then had with

4 him?

5 A The agreement that I had with Mr. Potter, or

6 Charley, Jr., the Respondent, was that I would advance the

7 five thousand dollars ($5,000.00) necessary to close the trans-

8 action. For my assistance to him during the course of this

9 transaction and for advancing this money, I would receive the

10 sum of four thousand dollars ($4,000.00). That neither the

11 four nor the five would be paid, you know, at the time of

12 closing, but I would advance this money for him interest-free

13 for one year from the date of closing, and that, subsequent

14 to that, I would work out some kind of financing satisfactorily

15 with him where he could repay me.

16 Q And in what manner did you put that agreement

17 into effect?

18 A I received a note from him, a non-interest

19 bearing note, for nine thousand dollars ($9,000.00) dated what-

20 ever the date of the deed was, which I believe was about the

21 time of the closing of this transaction; and I secured the pay-

22 ment of this note with a lien of the deed of trust against the

23 Roberts property, which was subsequent in nature to the lein

24 of the Roberts securing their purchase price in the amount of

25 thirty-six thousand ($36,000.00).

1 Q And I believe you took a deed of trust, second
2 deed of trust, to secure this nine thousand dollars ($9,000.00)?
3 A Yes, sir, I did.
4 Q And is that trust securing your nine thousand
5 dollars the deed of trust referred to in the Amended Bill of
6 Complaint from Potter to William B. McClung as trustee, recorded
7 in Deed Book 329, Page 85, securing nine thousand dollars to
8 the holder of a promissory note of that date?
9 A Yes, sir, the note was made payable to the order
10 of bearer.
11 Q And that deed of trust, as I understand, is
12 junior to, or subordinate to, a deed of trust of the same date
13 to you as trustee from Potter securing thirty-six thousand
14 dollars ($36,000.00) to Earl D. or Winifred B. Roberts?
15 A Yes, sir.
16 Q That being the deed of trust recorded in Deed
17 Book 329, Page 82?
18 A It was recorded immediately preceding the
19 recordation of the deed; I am not aware of the Deed Book Number
20 and Page Number.
21 Q Subsequent to August the seventh, 1972, will
22 you state whether or not you had any conversation with Mr.
23 W. E. Tilson in regard to suit against Mr. Potter?
24 A He asked me to represent Mr. Macgurn here
25 locally in enforcing the contract.

1 Q The claimed contract?
2 A Pardon?
3 Q In enforcing the claimed contract?
4 A Yes, sir.
5 Q And what was your response to Mr. Tilson?
6 A I told him there wasn't any way I could do that.
7 Q Sir?
8 A I told him that there was no way that I could
9 do that.
10 Q Mr. McClung, did you, at any time, have any
11 authorization from Mr. Potter to bind him to a contract of
12 sale . . .
13
14 ROBERTS: I object to that.
15
16 Q . . . of this Roberts farm?
17
18 ROBERTS: That is a matter for the Court to
19 rule on.
20
21 COURT: Objection overruled.
22
23 A No, sir. My authority was to negotiate for
24 him and make a deal subject to his approval.
25 Q I believe that's all.

1 Cross Examination by Mr. Roberts:

2

3 Q You say that your first contact with Mr. Potter
4 regarding the Roberts farm property was in the capacity as an
5 attorney and you went to Charlottesville to see Mr. and Mrs.
6 Roberts; is that correct?
7 A Charley asked me to help him either purchase
8 this property for himself or to purchase it for resale, and
9 asked me to go to Charlottesville with him to talk to the
10 Roberts concerning it.
11 Q Now, you say when you got back to Lexington
12 you had a discussion with Mr. Potter, and I believe you used
13 the term "we" couldn't see any way to finance the purchase of
14 the property? Is that correct?
15 A That is right.
16 Q Why do you use the terminology "we?"
17 A I often use the terminology "we" when I am
18 discussing something that, you know, with a third party, per-
19 taining to a person with whom I am either associated with on
20 a business nature, such as a partnership as has been alluded to
21 here, or as a client basis, too.
22 Q Why did you--and I believe you used the word
23 signed both names, to that yellow sheet when you discussed the
24 listing with Mr. Tilson? I believe you said you signed both
25 names to it?

1 A He could talk to either one of us concerning
2 it.
3 Q Did you intend to sign your name as an owner?
4 A Pardon?
5 Q Did you intend that you signed your name as
6 an owner?
7 A No, I did not have an ownership right in the
8 property.
9 Q Mr. Tilson testified that he had done quite a
10 bit of work with you, and you had done quite a bit of work for
11 him prior to this. Was there any necessity for you to put your
12 name on that agreement?
13 A No. Jim asked me to sign the agreement, and
14 I signed it.
15 Q You signed both names?
16 A I wrote . . . yes, I put both names on it.
17 Q All right, now, sometime between the time you
18 first went to Charlottesville and talked to the Robertses, and
19 you came back and communicated with Mr. Potter and said "we"
20 couldn't find a way to finance the purchase from Roberts, you
21 apparently came up with some plan for acquisition of the property;
22 is that correct?
23 A Primarily a plan for selling the property at
24 the time the option would be exercised.
25 Q In other words, you entered into, or you drafted

1 an option between the Robertses and Mr. Potter for the specific
2 intention of reselling the property?
3 A Yes, sir, there was this possibility.
4 Q As a matter of fact, the option date is March
5 ten, 1972, and on May one--roughly one and two-thirds months
6 later--Mr. Tilson brought you a signed contract from Mr.
7 Macgurn?
8 A I'm not familiar with the dates. He brought
9 me a signed contract from Mr. Macgurn, but . . .
10 Q You do not recall the date you talked with
11 Jim Tilson?
12 A No, sir; I believe it was sometime subsequent
13 to the date that the option was obtained.
14 Q All right. I believe you said that, again,
15 that "we" arrived at a listing price of sixty thousand dollars
16 ($60,000.00)?
17 A Yes, sir, I did.
18 Q I assume that you mean you and Mr. Potter?
19 A Yes, primarily myself; that's what I thought,
20 you know, would be a good price for it. And he was relying
21 on my opinion.
22 Q I believe you stated in your depositions that
23 since you did plan to resell this property as quickly as you
24 can, and that you had no deed at the time, that you were to
25 share in the profits?

1 A Yes, sir.
2 Q And you told Mr. Timberlake on direct examin-
3 ation that you had no specific dollar agreement as to what
4 your share would be at that time?
5 A That's right.
6 Q Did you have a percentage arrangement?
7 A We had no arrangement as to the division of
8 the proceeds, until after I wrote the letter on August the
9 seventh of that year.
10 Q How did you arrive between you and Mr. Potter
11 at the conclusion that you were going to share in the profits?
12 What discussion took place between you?
13 A Would you repeat the question, please?
14 Q What discussion took place between you and Mr.
15 Potter that indicated to both of you that you would share in
16 the profits?
17 A We discussed this when we returned from Char-
18 lottesville the first day.
19 Q And what was that discussion?
20 A It was a discussion that if we made some money,
21 we would share in the profits.
22 Q In other words, it was a joint agreement between
23 you and Mr. Potter, as far as the resale of the Roberts property
24 was concerned?
25 A It was joint in the sense that Charlie had

1 leased the property and Charley could get the option on the
2 property; he was familiar with the Roberts, I had no connection
3 with the Roberts; and he thought that I could be of assistance
4 in helping him with the sale of the property.
5 Q All right, so you had a joint venture, in which
6 you were going to share in the profits?
7
8 TIMBERLAKE: I object to that question, because
9 it is putting words in the witness's mouth.
10 The witness has not testified he had a joint
11 venture.
12
13 COURT: Objection sustained.
14
15 Q Was it anticipated that the greater the purchase
16 price, or the resale price, of this property, the greater would
17 be your share?
18 A Well, we arrived at the price of sixty thousand
19 which less six thousand dollars commission, and the purchase
20 price of forty-one thousand, would have left, you know, a certain
21 dollar amount of profit. Now, there was no discussion of any
22 other greater price; that was the greatest price that we antic-
23 ipated to start with, was sixty thousand dollars gross.
24 Q So you were going to share in the difference
25 between forty-one and sixty thousand?

1 A That's right.

2 Q And you had no specific agreement percentage

3 wise, is that correct?

4 A That's right.

5 Q And I believe that Mr. Potter has already testi-

6 fied, and you have so stated in your deposition, that mutually

7 you agreed on the fifty-eight thousand dollars ($58,000.00)

8 which was subsequently offered by Mr. Macgurn, that you con-

9 curred that this was close enough to what you were asking for

10 the property?

11 A That, subject to those additions concerning the

12 time of closing and the lease back of the property, the increase

13 of the escrow price, that that price would be a fair price for

14 the property.

15 Q Let's go to the closing of the transaction for

16 a moment.

17

18 TIMBERLAKE: I can't hear you.

19

20 Q I said we are going to go to the closing of the

21 transaction just for a moment. Your compensation, apparently,

22 or your share of what ultimately was not a sale turned out to

23 be four thousand dollars ($4,000.00).

24 A That's correct.

25 Q Is that correct?

1 A That's right.

2 Q And in addition to that, you put the five

3 thousand dollar ($5,000.00) down payment that went to the

4 Robertses?

5 A That's right.

6 Q And I assume the remainder was financed with

7 the Robertses and your deed of trust?

8 A. That's right.

9 Q Can you tell me how much time you put into this

10 work between the time you first went to Charlottesville until

11 the transaction was consummated with the Robertses and Mr.

12 Potter?

13 A No, sir.

14 Q Do you have any idea at all?

15 A No, sir. I have no idea at all.

16 Q Would you say that a four thousand dollar

17 ($4,000.00) fee was rather high for this area for a fifty-eight

18 thousand dollar ($58,000.00) real estate transaction?

19 A If all it included was examining the title, it

20 would be.

21 Q All right.

22 A It also included advancing five thousand dollars

23 ($5,000.00) of my own money, secured by a second lien, without

24 interest, and advancing any costs or anything that I had incident

25 to this.

1 Q In other words, part of this four thousand
2 dollars ($4,000.00) was, how would you term it, as advance
3 interest; or would you call it finder's fee, or . . .
4 A It was a fee that we agreed upon for my assist-
5 ance in this matter. We didn't break it down . . .
6 Q Including the loan of the five thousand dollars
7 ($5,000.00)?
8 A Including everything.
9 Q All right.
10 A And that's it.
11 Q But you had no interest figure in this four
12 thousand dollars ($4,000.00)?
13 A No, sir; no interest figure in the four or the
14 five.
15 Q What was Mr. Tilson's commission to be?
16 A Ten percent of the sale price on the listing
17 of sixty thousand dollars ($60,000.00).
18 Q And this would bring the net to the seller or
19 sellers of what figure?
20 A According to . . . if it were sold, if a con-
21 tract had been secured, for the purchase price on the listing,
22 it would have been fifty-four thousand dollars ($54,000.00)
23 gross sale, after the deduction of the commission. It's ten
24 percent commission.
25 Q Ten percent commission from fifty-eight would

leave less than fifty-four.

A Fifty-eight? I was referring to sixty. Ten percent of sixty would have left fifty-four.

Q What was ten percent of the fifty-eight?

A Ten percent of fifty-eight's fifty-eight.

Q All right, and what is that going to leave after the commission is deducted from the fifty-eight gross?

A If you will furnish me with a pad and a pencil, I will . . .

Q Do you agree that it would have been a net of fifty-two two?

TIMBERLAKE: Your Honor, I object to this line of questioning as being irrelevant.

Q Do you agree that the net . . .

A The net after a sale price of fifty-eight, minus five thousand, eight hundred, would have been fifty-eight thousand minus five thousand eight hundred.

Q I've got a net of fifty-two two.

A That sounds . . .

Q The difference between that and the forty-one thousand ($41,000.00) would have been approximately eleven thousand, two hundred dollars ($11,200.00).

A That's right.

1 Q Less any other expenses that might have been
2 involved with recording, the four thousand dollars ($4,000.00)
3 was pretty close to fifty percent of the full net, correct?
4 A It's not close to the ten percent fee of the
5 gross sale.
6 Q No, but it is approximately one half of the
7 profit?
8 A It's half of eight thousand dollars ($8,000.00).
9 Q All right. Now, you signed the original listing
10 with Mr. Tilson and the contract came back on May one signed
11 by Mr. Macgurn and then on May seventeen, by letter and an
12 additional contract, you accepted the fifty-eight thousand
13 dollars ($58,000.00) with some additional terms in that con-
14 tract and two escrow agreements, is that correct?
15 A I discussed the fifty-eight thousand dollars
16 ($58,000.00) with Charley. The other two contracts listing
17 the fifty-eight thousand dollars were signed by Mr. Macgurn
18 and sent back here.
19 Q And you subsequently received a letter from
20 California that these terms were not acceptable, is that correct?
21 A Yes, sir, I received a letter from Mr. Macgurn's
22 attorney, Mr. Wolver, that they were not acceptable.
23 Q But this deal did not terminate at that point?
24 A No, sir.
25 Q You subsequently wrote a letter dated July six,

1 I believe, which reopened negotiations with Mr. Macgurn or
2 through his attorney; is that correct?
3 A Negotiations continued after that date.
4 Q And this is the original of that letter?
5 A The letter that I wrote Mr. Macgurn subsequent
6 to his refusal of the terms of the contract?
7 Q That's right. This is the letter to Mr. Wolver
8 on July sixth . . .
9 A Right.
10 Q . . . which reopened negotiations?
11 A Well, negotiations had been continuing and still
12 were continuing.
13 Q All right. So far as the sale of the property
14 was concerned, it was still on?
15 A There were negotiations for the sale of the
16 contract still continuing.
17 Q All right. You put a settlement date in there
18 of October fifteenth, 1972, which was in variance with the
19 original contract of May seventeenth?
20 A You'll have to show me the documents. "Settle-
21 ment will be held on October the fifteenth, 1972."
22 Q Subsequent to that you received a letter from
23 Mr. Wolver which accepted your terms virtually, with the exception
24 of the October fifteenth date.
25

TIMBERLAKE: Mr. Roberts, are you testifying? It sounds to me as if you are.

ROBERTS: I didn't object to your direct examination of this witness, and it was all leading. He is being cross examined now; I can . . .

TIMBERLAKE: Well, you are just making categorical statements; you are not questioning this witness.

COURT: You can ask him if he received it.

Q Did you receive this letter?

A I received that letter.

Q Did it virtually accept the terms, with the exception of that date?

A The letter was not . . . did not contain contracts signed by Mr. Wolver, nor was it in explicit agreement with the contracts that had been sent to Mr. Wolver.

Q But it did accept your terms with the exception of the closing date?

A If you will hand me the letter . . .

Q This is the original.

A This letter states that: "In all other respects

1 your letter is satisfactory." It mentions nothing about him
2 having signed any contracts or returning any contracts to me.
3 Q Did you communicate that letter to Mr. Potter?
4 A Throughout this period of time, I had discussions
5 with Mr. Potter relative to the negotiations that were contin-
6 uing. I do not specifically remember discussing that letter
7 with Mr. Potter.
8 Q You don't recall any specific conversation
9 with him regarding that letter?
10 A No, sir.
11 Q What brought about your letter to Mr. Wolver
12 on August seven and the cover letter copy of Mr. Wolver's
13 letter going to Mr. Tilson?
14 A The preceding day, or sometime shortly before
15 that letter--or maybe the day of that letter--Charley came to
16 my office and said he was tired of negotiating and hanging
17 on with Mr. Macgurn in California, and that he was going to
18 purchase the property himself and was not going to sell it to
19 Mr. Macgurn. And he asked me to so notify Mr. Macgurn's attorney
20 and Mr. Tilson.
21 Q Of course, you have seen both letters of August
22 seventh, one to Mr. Tilson and one to Mr. Wolver, right?
23 A That is correct.
24 Q In this one, you say Charles A. Potter, Jr.,
25 has declined to accept the fifty-eight thousand dollars ($58,000.00)

1 A That's right.
2 Q And a copy of this letter went to Mr. Tilson?
3 A Yes, sir.
4 Q I show you this letter of August seventh which
5 was addressed to Mr. Tilson. This is a cover letter with
6 which the copy of Mr. Wolver's letter was sent?
7 A That's right.
8
9 COURT: What connection does that have with
10 the copy of the letter to Mr. Wolver?
11
12 ROBERTS: In Mr. Wolver's letter, he stated
13 that Charles A. Potter, Jr., "has declined to
14 accept" the fifty-eight thousand dollars
15 ($58,000.00).
16
17 COURT: Is there any inconsistency with the
18 letter to Mr. Tilson?
19
20 ROBERTS: Yes, sir.
21
22 Q Would you read this letter, please?
23 A "Enclosed herewith is a letter that I received
24 from the attorney for Mr. Macgurn and my reply for Charley.
25 I am afraid that what has happened here is that when it looked

1 like we were going to get the price that Charley and I agreed
2 to take, that Charley suddenly decided that he'd be better off
3 to try to hold onto the property rather than buying it and
4 selling it as we had agreed upon. It appears to me that Macgurn's
5 variance is of not a great a nature to get around if Charley
6 were going to live up to what he had originally told me he
7 was doing. This matter has been embarrassing to me personally,
8 since Charley did not act in good faith with me and has made
9 it look like I have misled you.
10 Therefore, until you receive a listing signed by both
11 Charley and myself, or"--it says "however"; it should, I assume,
12 be whoever--"the property will be titled when exercised by the
13 options, please do not do any more work on selling it or
14 showing it.
15 With kind personal regards, I am, Sincerely yours,
16 William B. McClung."
17 Q Mr. McClung, in the letter to Mr. Wolver, you
18 said that Charley Potter had declined the fifty-eight thousand
19 dollars. In this letter you say "the price that Charley and
20 I agreed to take." How do you explain the fact that you have
21 put yourself into this agreement?
22 A Throughout the negotiations, I worked closely
23 with him, not just as . . . he would not come in and say, "Well,
24 I'm not going to take fifty-eight thousand." We would discuss
25 this matter, and I would tell him whether I thought it was a

1 good price or not a good price. He was relying on my advice
2 concerning it; and it was something that we had agreed upon.
3 Q Apparently you didn't feel that the response
4 of Mr. Wolver received in July with the insertion of the orig-
5 inal closing date was a material point, as you stated in this
6 letter. You didn't think it was a great variance?
7 A No, not of a great variance.
8 Q Now, more important, I would like to know why,
9 in your last paragraph of your letter prior to your closing,
10 in your instructions to Mr. Tilson, you say: "until you receive
11 a listing signed by both Charley and myself . . ." Why do you
12 use that terminology?
13 A On that listing that I had given Mr. Tilson,
14 I signed that listing; if he had produced a purchaser willing
15 and able to purchase that property on the terms that were set
16 forth on that legal sheet, then, whether Charley had gone
17 through with this deal or not, I would have been obligated for
18 the commission. So . . .
19 Q Why would you have to sign the listing if you
20 were acting as an attorney for Mr. Potter? Couldn't Mr. Potter
21 go to any real estate agent that he wanted to go to and sign
22 his own listing?
23 A Yes, sir.
24 Q Why did you then say to Mr. Tilson to only
25 accept a listing that was signed by "Charley and myself?"

1 A Because I . . . before he worked on selling the
2 property again, I wanted Charley's signature on the listing,
3 so that I would not personally be held responsible.
4 Q And also yours? Why yours?
5 A I had signed the other listing. I did not have
6 to sign the listing; Mr. Potter could have gone to Mr. Colonna
7 or someone else and listed this property.
8 Q But you specifically told Mr. Tilson that he
9 was not to do anything further with this property unless he
10 got a listing signed by both of you. Why both of you?
11 A Mr. Tilson could have gone to Mr. Potter and got-
12 ten a listing.
13 Q But you asked him not to without your signature?
14 A That's right.
15 Q Also in that letter you say: "or however the
16 property will be titled when exercised by the options." Now,
17 I am going to ask you whether options is a typographical error
18 or not?
19 A There was a singular option.
20 Q Singular option. So the "options" as plural
21 in this letter is incorrect?
22 A Yes, sir.
23 Q Was anybody involved in this property other
24 than you and Mr. Potter, either as principal and agent, princi-
25 pals, or anything . . .

1 A No, sir.

2 Q Then why was there any question about who was

3 going to take title?

4 A Mr. Tilson should receive his listing from who-

5 ever had title to the property.

6 Q Well, if Mr. Potter is the only one who has

7 the right to exercise the option, why would there be any question

8 as to whose name the final title was going to be placed in?

9 A Because the deed had not been written, had not

10 been signed by the Roberts, nor had the property been paid for

11 by Mr. Potter.

12 Q Was Mr. Potter married?

13 A No.

14 Q Was there any contemplation that he would put

15 it in anybody else's name other than his own?

16 A I did not know what his contemplation was at

17 that time.

18 Q When you wrote this, did you contemplate that

19 possibly you might acquire the property yourself?

20 A I may have contemplated it.

21 Q No further questions.

22

23 Examination by the Court:

24

25 Q Mr. McClung, I believe you did state that you

1 held no ownership interest in this real estate?

2 A No, sir; the lease and option agreement were

3 in Charley's name. In response to Mr. Roberts's last question,

4 I said I may have contemplated it. I was to receive something

5 from the gross profits of the sale, which, according to the

6 Court . . .

7 Q Four thousand dollars ($4,000.00)?

8 A Yes, sir, that is what it purported to be . . .

9 Q And if there had been a loss, you would not

10 have received anything?

11 A No, sir, I wouldn't; but . . . well, no situ-

12 ation was anticipated where there would be a loss, at that time.

13 Now, with Charley purchasing the property himself and so noti-

14 fying me, I wrote this letter. I did not know what the ultimate

15 outcome would be as to how I would be compensated, whether I

16 would be compensated or not, at that time.

17 Q And I believe you also testified that your

18 authority to act as his attorney and agent was only to negoti-

19 ate with his approval?

20 A Yes, sir. I mean, I had the authority to list

21 the property. If he . . . if something had come along and he

22 had reneged on the sixty thousand dollars ($60,000.00), then

23 I would have been left holding the bag of six thousand dollars

24 ($6,000.00) commission. That was why my concern in my last

25 letter to Mr. Tilson was expressed at that time.

1 Q In other words, when he ordered you, or suggested
2 to you, or directed you to reject or revoke this transaction,
3 you considered that as his direction?
4 A Yes, sir; I had no right to purchase the prop-
5 erty. I had no other alternative.
6 Q Thank you.
7
8 ROBERTS: In view of that, may I ask him a
9 couple more questions?
10
11 Cross Examination Continued by Mr. Roberts:
12
13 Q I believe you told Mr. Timberlake that around
14 the time of August seventh or August tenth, you still felt
15 that this was a good deal and that you wanted to consummate
16 this contract, is that correct?
17 A I still felt it was a good deal. I disagreed
18 with Charley's decision, but that was his decision.
19 Q And I believe that Mr. Potter said, when I
20 examined him this morning, that it was at this stage--August
21 ten or thereabouts--that it was ultimately decided what your
22 compensation would be?
23 A It was subsequent to my having written this
24 letter to Mr. Tilson. I'd say it was somewhere in the neighbor-
25 hood of five to seven days after the telegram had been received

1 here that Charley came to my office and discussed the matter
2 with me. It was about a week after that before we talked about
3 it.
4 Q Would you say that you and Mr. Potter at that
5 time had opposing views about the sale of the property?
6 A Yes, sir.
7 Q Would it be safe to assert that you probably
8 had a falling-out at that time?
9 A No, sir. At that time Charley and I discussed
10 the matter, and we discussed the fact that there was an offer
11 for the property from which a substantial profit would be
12 realized, that in his purchasing it that there would be no
13 expenses or anything, that I would be cut out of the deal.
14 And I expressed my displeasure over this. And we arrived on
15 some compensation for me.
16 Q And you were out?
17 A Pardon?
18 Q And you were out?
19 A I was never in, in the sense you are asking
20 me that I got out.
21 Q Well, you got your share?
22 A I got paid for my efforts.
23 Q Now, did you get paid before September, when
24 this option was exercised?
25 A I did not . . .

1 Q Or was it all part of the same closing?
2 A At the time of closing, Charley executed a note
3 to me and a year and two or three months or a month after that
4 I received some actual money. I received a note at the time
5 of the closing, for the money that I had advanced as well as
6 what he agreed to pay me.
7 Q This option was dated March ten, and during
8 this year period Mr. Potter had an option to purchase?
9 A I haven't got the option in front of me, but
10 it was my understanding that it was a year's option.
11 Q If he had a year to buy the property, why did
12 he exercise his option in September rather than the following
13 March?
14 A On my advice.
15 Q This was about a month after the August tenth
16 telegram?
17 A It was shortly afterwards.
18 Q Shortly after that. You had a conversation with
19 Mr. Tilson on or about August ten, when he called your office
20 apparently to confer with you as to what might be done to con-
21 summate this sale; do you recall that conversation?
22 A Yes, sir.
23 Q Do you recall making any reference to any instru-
24 ment that you had in your safe?
25 A No, I referred to the option that I had in my

file.

Q Did you say words to this effect, that as long as you had that paper in your safe, or that instrument in your safe, that you were all right?

A To whom, referring to . . .

Q To Mr. Tilson.

A I don't recall that.

Q That's all.

TIMBERLAKE: I have no further questions.

- - - - - -

Whereupon:

CHARLES A. POTTER, JR.

a Respondent, being of legal age and duly sworn, testified upon his oath as follows:

Direct Examination by Mr. Timberlake:

Q Mr. Potter, I believe you have heretofore testified today, and at that time you gave your name and age and residence and occupation?

A Yes, sir.

Q What is your occupation?

1 A Farmer.

2 Q And I believe it is a fact that over a period

3 of some years prior to 1972 you had operated this Roberts farm

4 as the lessee?

5 A Yes, sir.

6 Q Or renter?

7 A Yes, sir.

8 Q Now, what led you, in late 1971, to undertake

9 to negotiate further with the Robertses in regard to that farm?

10 A I had conferred with them from time to time

11 about the property and they said they weren't at this time ready

12 to sell, but I told them if and when they were, I would like to

13 have a chance at the property. So, at this time, I was just

14 getting out of school and I thought maybe that I would go into

15 farming and thought something about getting some more land.

16 Q And that led you to go to see the Robertses

17 about this property?

18 A Yes, sir.

19 Q Did you have any meeting with them in regard

20 to this matter prior to the time that you took Mr. McClung

21 along as your attorney?

22 A Yes, sir, several occasions, at their home in

23 Charlottesville.

24 Q In this immediate time period?

25 A Probably six to eight months prior.

1 Q And I believe that as a result of your . . .
2
3 ROBERTS: Your Honor please, I am going to object
4 to the leading of the witness.
5
6 Q Is it a fact that in late 1971 or early 1972
7 you, accompanied by Mr. McClung, went to Charlottesville and
8 met with the Roberts?
9 A Yes, sir, that is true.
10 Q And what was the purpose of that trip?
11 A The purpose of that trip was to talk about the
12 price of the property and what settlement could be reached,
13 if any, on the property.
14 Q And for what reason did you take Mr. McClung?
15 A Well, in previous meetings with them, I had
16 seen that there were legal terms that I wasn't quite familiar
17 with, and I thought maybe I would be better by having Bill
18 as an attorney to go with me.
19 Q And did any agreement, written agreement, result
20 from the trip that you and Mr. McClung made to Charlottesville?
21 A That day there was nothing said. We just
22 vaguely talked about the terms of the sale, the interest, and
23 agreements of this type. On the way home we talked about the
24 possibility of setting up an option to buy the property along
25 with the rental of the property. This was so done.

1 Q And that led to the agreement with Mr. McClung
2 produced as Respondent's Exhibit One?
3 A Yes, sir.
4 Q That agreement, Respondent's Exhibit One, was
5 drawn up and signed by the Roberts and by you; then what steps,
6 if any, did you take in regard to either the sale or the con-
7 tinued rental of this Roberts farm?
8 A Well, at that time, the closing, and the amount
9 of money that it would take to make the purchase of the property,
10 I couldn't see fit in my finances to handle the deal. So I
11 thought maybe we could have a resale of the property and see
12 maybe really what its value was worth, and see if it was really
13 worth the price that we were going to have to pay.
14 Q To what extent did Mr. McClung figure in the
15 decision to try to sell it and the fixing of a price?
16 A Mr. McClung and I talked on various prices,
17 and we both reached . . . Bill thought that sixty thousand was
18 a reasonable price for the property. And this was the price
19 that we both agreed on.
20 Q And following your agreement to sell this prop-
21 erty, if you could effect a sale at sixty thousand dollars
22 ($60,000.00), what authorization, if any, did you give Mr.
23 McClung to act for you?
24 A He was strictly working as my attorney.
25 Q Was the property listed with any real estate

1 agents?

2 A Mr. Tilson.

3 Q And was that with your authorization?

4 A Yes, sir.

5 Q And are the terms of this listing which is set

6 forth in Exhibit Number One the terms that you agreed to?

7 A Yes, sir.

8 Q Did you make that listing, or did someone make

9 if for you?

10 A Mr. McClung made it.

11 Q After this property was listed with Mr. Tilson

12 under the terms contained in Exhibit One, what contact did you

13 next have with Mr. Tilson?

14 A I had no further contact with Mr. Tilson until

15 one day he came out to the house with a gentleman to show the

16 property to, and asked me if I would show him the boundaries

17 of the property. This was my first contact with Mr. Tilson.

18 Q And was that before or after May the first,

19 1972? Was that before or after this writing?

20 A Before this writing; I would say before this

21 writing.

22 Q And that writing is dated May the first?

23 A Yes, sir. So it would be before the first of

24 May.

25 Q Is that Exhibit Two? Would you state whether

1 or not this Exhibit Two, styled Agreement of Sale and signed by
2 Richard B. Macgurn, came to you or was brought to your attention?
3 A It was brought to my attention.
4 Q By whom?
5 A Mr. McClung.
6 Q What did you do about this offer contained in
7 Exhibit Two?
8 A This offer . . . I went to Mr. McClung's office
9 on his request--he called me, or I had a letter from him saying
10 he had an offer on the property, and he wanted to meet me in
11 his office; and I went to his office--we talked about the property
12 and the terms which were listed on this paper were not in
13 accordance with what I wanted in the original setting out to
14 sell the property. It didn't have the terms of the sale of
15 the Roberts to assume their loan, and also I wanted the rental
16 of the property for approximately a year. So, from that, we
17 drew up a contract.
18 Q According to this Exhibit Two, Mr. Macgurn
19 offered to put up three thousand dollars ($3,000.00) in trust
20 as a down payment. Did you agree to that?
21 A Well, we figured if they had come down two
22 thousand dollars ($2,000.00) on the sixty thousand dollars
23 ($60,000.00) that we could increase our escrow two thousand
24 dollars, increasing it to five thousand dollars ($5,000.00).
25 Q All right. Now, Mr. Potter, it is in evidence

1 that after this Exhibit Two was submitted to you that Mr. McClung,
2 by letter to Mr. Tilson of May the seventeenth, submitted the
3 form or draft of an agreement of sale which is Exhibit Number
4 Five, along with a commission agreement for Mr. Tilson and
5 an escrow agreement; and I hand you Exhibit Five and ask you
6 if the terms set therein met with your approval?
7 A Yes, sir. I read this over in Mr. McClung's
8 office after we had talked about it earlier and rough drafted
9 it, after Mr. McClung had wrote it up and had it typed on the
10 legal form, I read it over and approved it at that time.
11 Q Were you willing to execute it, or sign it,
12 at that time?
13 A No, sir, I was not.
14 Q Why?
15 A Figuring the distance between California and
16 Virginia was of great a distance that it would kind of tie me
17 up if I had any future plans with the land, having a contract
18 floating around with my name on it.
19 Q You were not willing to bind yourself at that
20 time, until or unless it was signed by . . .
21 A Signed.
22
23 SPENCER: Your Honor, that is a leading question.
24
25 COURT: Yes, it is.

1 TIMBERLAKE: I will withdraw the question.
2
3 Q Now, Mr. Potter, after this offer was proposed
4 as contained in Exhibit Five, was delivered to Mr. Tilson to
5 be sent out to Mr. Macgurn, were you informed of Mr. Macgurn's
6 acceptance or rejection of it through this letter of June
7 eighth, Exhibit Number Eight?
8 A Yes, sir, I was.
9 Q Did you then, or thereafter, agree at any time
10 to . . .
11
12 ROBERTS: I am going to object to this; it is
13 going to be leading, I can tell by the way it
14 is going.
15
16 Q Well, did you or not thereafter agree to any
17 change in the form or terms of the proposal contained in this
18 Exhibit Five, dated May first, 1972?
19 A No, sir.
20 Q Were you informed of this letter of July twenty-
21 first, Exhibit Number Ten, from Mr. Wolver to Mr. McClung?
22 A No, sir, I can't recall seeing this letter.
23 Q It is in evidence that on August the seventh
24 Exhibit Number Twelve, a letter, was written by William B.
25 McClung to Eugene L. Wolver. Will you read that please, sir?

1 You don't have to read it out loud. Would you state whether
2 or not that letter was written with your authority and at your
3 direction?
4
5 ROBERTS: I am going to object to that, Your
6 Honor. That's a leading question. I think the
7 witness can testify as to what conversation he
8 had with Mr. McClung.
9
10 COURT: By what authority was this letter
11 written? Gentlemen, we are spending too much
12 time with these objections to leading questions.
13 We are reaching a late hour, and I would suggest
14 that we move along. You can ask him by what
15 authority . . .
16
17 Q By what authority was that letter written?
18 A My authority.
19 Q Your authority?
20 A Yes, sir.
21 Q Now, Mr. Potter, after you authorized the writing
22 of that letter dated August the seventh, Exhibit Number Twelve,
23 what was the next thing that you heard in regard to the negoti-
24 ations with Mr. Macgurn?
25 A This telegram.

1 Q That is the telegram that has been introduced
2 into evidence as having been sent by Mr. Macgurn on August
3 the tenth to Mr. Tilson?
4 A Yes, sir.
5 Q And when, and where, and under what circumstances
6 did you see that telegram?
7 A I got home that night, and it was probably fairly
8 late, and my father had that telegram laying on the desk next
9 to the telephone. He had brought it with him from town.
10 Q Mr. Tilson didn't bring it to you?
11 A No, sir.
12 Q Are you positive of that?
13 A Yes, sir.
14 Q As anything else you have testified to?
15 A Yes, sir.
16 Q You say your father brought it?
17 A Yes, sir.
18 Q You are aware of the fact that Mr. Tilson testi-
19 fied that he brought it?
20 A Yes, sir.
21 Q Did Mr. Tilson at any time thereafter come to
22 see you?
23 A Yes, he did.
24 Q When, approximately?
25 A Probably about four or five days after this

1 telegram, maybe a week.

2 Q And what took place at that time . . . or where

3 did he see you?

4 A He came over to our other farm, and he had with

5 him the contract signed by Mr. Macgurn; and he said at that

6 time that Mr. Macgurn had signed the contract and was ready to

7 go through with the deal. However, I had authorized Bill to

8 send the letter of August the seventh, that I was no longer

9 ready to go through with it.

10 Q All right. And did . . . was there any discussion

11 about your signing the contract?

12 A Mr. Tilson told me that this fellow was dead

13 set on this place and that if I didn't sign this contract, that

14 I was probably going to be sued, and there wasn't anything he

15 could do to get me out of it.

16 Q And what?

17 A There wasn't anything he could do to get me

18 out of it.

19 Q If you didn't sign the contract?

20 A If I didn't sign the contract.

21 Q You are certain that that conversation took

22 place?

23 A Yes, sir.

24 Q Between you and Mr. Tilson?

25 A Yes, sir.

1 Q What was your reply?
2 A I told him that I was not going to sign the
3 contract and he would have to show it to Bill, my attorney.
4 Q Did you have any further contact with Mr.
5 Tilson, or Mr. Wolver or Mr. Macgurn?
6 A No, sir.
7 Q Other than being sued?
8 A Yes.
9 Q What plan or arrangement, if any, did you have
10 to compensate or pay Mr. McClung for his legal services through-
11 out this matter?
12 A If there was a sale of the property at the
13 amount that I had agreed on, Billy would receive his proceeds
14 from the profit of the sale.
15 Q Was any amount . . .
16 A No amount was reached.
17 Q . . . or percentage . . .
18 A No, sir.
19 Q . . . agreed to?
20 A No, sir.
21 Q That was just left to your decision in the event
22 of the sale?
23 A Yes, sir.
24 Q At what time, and under what circumstances,
25 did you work out a fixed dollar and cents amount of his

1 compensation?

2 A Not until after the refusal that I told him to

3 write up on August the seventh. It was probably a week to

4 ten days after that that I met with him in his office on the

5 matter.

6 Q And you reached an understanding at that time?

7 A Yes, sir.

8 Q I believe that's all.

9

10 Cross Examination by Mr. Roberts:

11

12 Q Mr. Potter, you said that you had some prelim-

13 inary associations with Mr. and Mrs. Roberts prior to the

14 time that you and Mr. McClung went over there, is that correct?

15 A Yes, sir.

16 Q And you said that the reason that you took

17 Mr. McClung over there was because there were some legal terms

18 which were being used that you didn't understand?

19 A Yes, sir.

20 Q Did Mr. and Mrs. Roberts have an attorney

21 present?

22 A No, they didn't.

23 Q Are either Mr. or Mrs. Roberts an attorney?

24 A No, sir.

25 Q Do you recall any specific legal terms that

1 were being used that you didn't understand?

2 A Mr. Roberts had told me that he would like to

3 have his accountant look at it so they could figure out what

4 the yearly payments would be, so he could work it with his in-

5 come tax and things of this type. His accountant was to look

6 at the deed.

7 Q Those were the legal terms that you didn't

8 understand?

9 A Yes, sir.

10 Q I believe you stated, in response to one of

11 Mr. Timberlake's questions, that in order to determine whether

12 or not the forty-one thousand dollars ($41,000.00) was a good

13 option price, that you would put the property on the market

14 for sale, to see whether you could get an offer for sixty

15 thousand dollars ($60,000.00). Is that correct?

16 A Yes . . .

17 Q And I believe you stated the same thing in

18 your depositions. Now, did you offer this property for sale

19 in good faith, or were you just trying to find out whether the

20 forty-one thousand dollars ($41,000.00) was a good figure for

21 you to pay for it and you knew you could get rid of it later

22 for that? Did you offer this property in good faith or not?

23 A I think so.

24 Q You think so?

25 A Yes, sir.

1 Q You are not certain?

2 A It's in good faith.

3 Q It was in good faith? Now you are certain.

4 You were actually, at the time you went to the Robertses--

5 and I believe you stated that you had been thinking for some

6 time about getting some more land--but as soon as you got that

7 option, you offered that property for resale? Right?

8 A Yes, sir.

9 Q And the reason you put it up for sale was to

10 see whether the forty-one thousand dollars ($41,000.00) was a

11 good figure?

12 A One reason, yes, sir.

13 Q And I believe you stated also--and you used the

14 terminology in giving your deposition of "we"; and I assume

15 that means you and Mr. McClung--agreed that sixty thousand

16 dollars ($60,000.00) would be submitted; correct?

17 A Yes.

18 Q And I believe you also stated that you agreed

19 that the fifty-eight thousand dollars ($58,000.00) would be

20 a good figure; correct?

21 A Yes, sir.

22 Q Now, a great deal has been presented here today

23 about Mr. McClung's share in this property. Did you and Mr.

24 McClung have any specific conversation, that you can recall,

25 about his interest in this property?

1 A No, sir.
2 Q None whatsoever? So, beginning with the first
3 ride to Charlottesville right through the letter of August
4 seventh, you and Mr. McClung had really no conversation about
5 his interest in the property?
6 A I told Bill he would have a proceeds of the
7 profit of the sale, for his services.
8 Q So he was to share in the profits of the sale?
9 A That's right.
10 Q And this was understood between you with not
11 much more negotiation than that?
12 A That's all.
13 Q Is that correct?
14 A Yes.
15 Q I asked you this morning if that was unusual
16 to offer a third party that sort of a deal, and you said yes,
17 you thought it was unusual? All right.
18 A But we were working with friends.
19 Q You said that Mr. McClung was acting with your
20 authority. What was that authority? What specific directions
21 did you give to Mr. McClung?
22 A I gave him directions to advertise the property
23 for sale.
24 Q Any others?
25 A Yes.

1 Q What?

2 A I gave him the authority and told him what I
3 wanted to specify in the contract for the sale of the property,
4 the rental, the things of this type; in other words, specified
5 in the contract.

6 Q You said not three minutes ago that you and
7 Mr. McClung were the ones that decided on the sixty thousand
8 dollars ($60,000.00); now you tell me that you were the one
9 that decided. Which is it?

10 A I gave a lot of thought to the matter. Bill
11 knew a lot more about it than I probably did, and what he said
12 I considered valuable.

13 Q Well, this was about the extent of your directions
14 to him. And you know that on his testimony that he signed
15 this yellow pad sheet with your name and his name when he turned
16 it over to Mr. Tilson?

17 A Yes, sir.

18 Q Then you said when you got the contract back
19 from Mr. Macgurn for fifty-eight thousand dollars ($58,000.00),
20 with a three thousand dollars ($3,000.00) down payment, you
21 used the promoun "we" figured we would increase our escrow to
22 five thousand dollars ($5,000.00). That figure was, again,
23 reached between you and Mr. McClung?

24 A Yes, it was.

25 Q What happened between you and Mr. McClung after

1 June the eighth when Mr. Wolver's letter came back rejecting
2 the terms of the agreement drafted by Mr. McClung and sent in
3 the letter of May the seventeenth?
4 A May I see the letter you are speaking of?
5 Q That is the letter to Mr. Tilson from Mr.
6 Wolver, dated June eighth.
7 A Yes, I do remember going to Bill's office about
8 this, particularly speaking of number 4 in here: "Our client
9 desires no cedar trees cut. Our client agreed and desires
10 that the brush be cleared by seller but not destruction or
11 removal of" any valuable timber cut. And in our contract,
12 original contract, we were speaking of cedar trees, small cedar
13 trees, brush. I do remember that letter.
14 Q But you did have a conversation with Mr.
15 McClung regarding that?
16 A Yes, sir.
17 Q You remember that?
18 A Yes, sir.
19 Q I believe you told Mr. Timberlake, when he
20 showed you Mr. McClung's letter of July sixth, that you had
21 not authorized any changes from that May seventeen contract;
22 is that right?
23 A We did speak in terms of writing a letter to
24 clear up that term we are now speaking of.
25 Q Okay, so when you said that the letter of June

1 sixth, written by Mr. McClung, was not written with your author-
2 ity in response to Mr. Timberlake's question, that is not
3 correct, is it?
4 A Which letter of June sixth? The letter of July
5 sixth?
6 Q The letter from Mr. McClung dated July sixth,
7 addressed to Mr. Wolver.
8 A What was the question you asked again?
9 Q I asked you if you told Mr. Timberlake, on
10 direct examination, that that letter was written without your
11 authority, because you had not directed any changes in the May
12 seventeenth contract?
13 A That was one change that I had directed.
14 Q You had directed?
15 A Yes, sir.
16 Q And so you did authorize the writing?
17 A Yes, sir. To the best of my memory.
18 Q All right. And I believe that you said that you
19 saw the response written by Mr. Wolver to that letter?
20 A Is this the same letter? I don't recall seeing
21 this letter.
22 Q You don't recall seeing that letter?
23 A No, sir.
24 Q You didn't discuss it with Mr. McClung at all?
25 A I don't remember it.

1 Q You don't remember it?
2 A No, sir.
3 Q He may have shown it to you?
4 A He may have mentioned it to me in our conversa-
5 tions from time to time, yes, sir.
6 Q All right, you now have an offer for fifty-
7 eight thousand dollars ($58,000.00) and according to this
8 letter from Mr. Wolver dated in July, all of your terms have
9 been met with the exception of the closing date. What happened
10 between that date and August seventh when you contacted Mr.
11 McClung and told him you wanted out?
12
13 TIMBERLAKE: I don't think that question correctly
14 states the facts, Your Honor. That letter
15 doesn't set forth at all . . .
16
17 ROBERTS: I'll rephrase the question.
18
19 TIMBERLAKE: . . . that Mr. Potter's terms
20 have been agreed with. The five thousand dollar
21 ($5,000.00) down payment . . .
22
23 COURT: The closing date of the sale, and
24 possession . . . I think there were other con-
25 ditions, and in fairness to this witness, you

1 should state those conditions.

2

3 Q Between the date of that letter from Mr. Wolver
4 and August the seventh, what happened between you and Mr. McClung?
5 A I don't understand your question.
6 Q Well, did you have any conversations with Mr.
7 McClung between that date in July and August seventh?
8 A Yes, we did. Yes. That's when I authorized
9 Bill to call off negotiations.
10 Q And this was approximately what date?
11 A That was on . . . I can't remember. It was
12 prior to the seventh.
13 Q All right. And did Mr. McClung, at that time,
14 advise you that you had a good deal?
15 A I can't remember if that was brought up or not.
16 Q Well, it seems to me that you and Mr. McClung
17 from sometime in the late winter or early spring, when you first
18 went over to see the Robertses right up through August seven
19 or August ten, had been pretty much unconcerned about the mon-
20 etary arrangement between you and Mr. McClung?
21 A Yes, sir, it had been very loose.
22 Q Very loose. Now, all of a sudden, within I
23 believe you said a week or ten days of August the seventh, you
24 and Mr. McClung came to a financial arrangement?
25 A Yes, sir.

1 Q Did you have a falling-out?
2 A No, sir.
3 Q Disagreement?
4 A No, sir.
5 Q Did Mr. McClung want to go through with the
6 transaction?
7 A He stated that he felt bad about the situation;
8 and I realized that Billy was in a bind, but at that time I
9 was the one that had the final decision to make.
10 Q You heard him testify regarding his letter
11 addressed to Mr. Tilson on August seventh, with reference to
12 who was going to take title to this property. Did you and
13 Mr. McClung have any discussion about that?
14 A Will you re-state the question, please?
15 Q Did you and Mr. McClung have any discussion
16 that you can recall with regard to the statement that he read
17 at that point out of the letter of August seven to Mr. Tilson,
18 which says: "Therefore, until you receive a listing signed
19 by both Charley and myself, or however the property will be
20 titled when exercised by the option . . ."?
21 A I had no knowledge of that letter.
22 Q Why would Mr. McClung say something like that?
23 A I have no idea.
24 Q That's all, Mr. Potter.
25 - - - - - -

1 Whereupon:

2

3 WILLIAM B. McCLUNG

4 a Respondent, having been re-called, testified upon his con-

5 tinuing oath as follows:

6

7 Re-Direct Examination by Mr. Timberlake:

8

9 Q Mr. McClung, you were in the Courtroom this

10 morning when Mr. Tilson testified that on August the tenth,

11 1972, he came to your office and discussed with you the letter,

12 your letter of August the seventh terminating negotiations

13 with Mr. Macgurn?

14 A Yes, sir, I was present.

15 Q Do you recall Mr. Tilson stating that you indi-

16 cated for him or wrote out for him the form of a proposed

17 telegram that he was going to have Macgurn send?

18 A Yes, sir.

19 Q Do you recall Mr. Tilson testifying that you,

20 after giving this suggested language that you wrote out, saying

21 that you stated that if Macgurn sent that telegram before he

22 received the letter--or Mr. Wolver received your letter of

23 August seventh--that there would be no way in the world that

24 Charley Potter could get out of selling that property?

25 A I recall Mr. Tilson testifying that.

1 Q Did you make any such statement to Mr. Tilson?
2 A No, sir, I did not.
3 Q Are you positive?
4 A I am positive.
5 Q That's all.
6
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SPENCER: If Your Honor please, after consultation with Mr. Timberlake, counsel for the Respondent, we have agreed, subject to the approval of the Court, to have the record transcribed and submit memorandums to the Court and reserve argument on the record until that time, particularly in light of the lateness of the hour. I request the Court's approval of that.

TIMBERLAKE: I discussed that and I assented to everything other than I wasn't aware that we had discussed having the record transcribed. I'd like to consult my clients on that. I take it it would be at our joint expense?

COURT: From what I have heard today, and from my review of the record, the feeling is pretty

1 strong in this case, and the opinion is so far
2 divided, that I, at this time, it is my consid-
3 ered opinion that there, in all probability,
4 may be an appeal, or an effort made to appeal.
5 So, with that in mind, I would recomment and
6 suggest, and even direct, that a transcript of
7 the testimony in the instance of this trial
8 be transcribed and that there be three copies
9 made, the cost to be divided evenly; or ulti-
10 mately let the costs, let the entire expense
11 for the record, the transcript, be made a part
12 of the costs.
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PART III: EXHIBITS

EXHIBIT 1

Filed January 22, 1974

Tax aerial 6T-19 Aerial Photos 2ff-172 and 174

45
231
276 Acres

Earl Roberts Farm

Price $60,000 Gross

Financing that must be Assumed

$36,000 payable at $3,000/

Yr + interest at 6%

over 12 year period

Other financing available

$9,000 at 7 1/2% with

terms up to 10 years

Charles A. Potter, Jr.

William B. McClung

463-3629 Charles P.
463-3639

to see in house

No Signs

Brother
House - Maude Wilhelm & Hallie Hostetter

EXHIBIT 2

Filed January 22, 1974

THIS AGREEMENT of sale made this 1st day of May 1972, between Charles Potter, Jr. (hereinafter known as the seller) and Richard B. Macgurn of Los Angeles, Calif. (hereinafter known as the buyer).

WITNESSETH: That for and in consideration of the sum of $3,000.00 by cash in hand, paid, receipt of which is hereby acknowledged, the buyer agrees to buy and the seller agrees to sell for the sum of $ 58,000.00 all of that certain piece, parcel or lot of land described as follows, to-wit: the 276 acre farm, known as the Earl Robert's farm on both sides of Highway 251 approximately eight miles from Lexington, Rockbridge County, Virginia. No timber to be cut before settlement date.

The purchase price to be paid as follows: $3,000.00 in trust with W. E. Tilson & Son, to be used in the purchase of $3,000.00 certificates of deposit from the Lynchburg Federal Savings and Loan Assoc.,interest therefrom to be paid the buyer on settlement date, the balance of $55,000.00 to be paid as follows: $19,000.00 cash on settlement date, balance of $36,000.00 to be paid over a period of 12 years, $3,000.00 annually plus interest at 6%, secured by first mortgage deed of trust.

The seller agrees to convey the above property with a general warranty deed with the usual covenants of title; title insurance to be furnished by Lawyer's Title of Richmond; same to be prepared at the expense of the seller. Conveyance to be made subject to all recorded conditions and restrictions on the land herein described upon acceptance

by buyer.

All taxes, insurance and rents are to be pro-rated as of date of delivery of deed, deed to be delivered and settlement made on or before April 15, 19 73.

Possession upon settlement date.

If upon examination the sellers cannot convey a marketable title to the above property, the seller will at his expense cure the defect or defects appearing in the title. In the event the defect or defects cannot be cured within a reasonable period of time from and after the date the deed is to be delivered, this agreements, at the option of the buyer, shall be come null and void, and the amount paid herewith by the buyer refunded to the buyer.

Should any of the buildings on the real estate subject hereto be destroyed or materially damaged by fire or wind before the deed is delivered, this contract shall remain in full force and effect, and the purchase price shall be abated to the extent of the insurance paid the seller from the insurance policy or policies carried by the seller. The buyer may also protect his interest with additional insurance.

EXHIBIT 3

Filed January 22, 1974

May 17, 1972

Mr. W. E. Tilson, Realtor
South Main Street
Lexington, Virginia

Dear Mr. Tilson:

Enclosed herewith you will find the Contract that Mr. MacGurn has signed making an offer to Charles A. Potter, Jr., for the Earl Roberts Farm in the Collierstown vicinity. As we discussed earlier, the sales price that Charles wanted out of the property was $60,000.00 with a closing to be held within a reasonable time and with him to retain possession until his crops were harvested next Spring. However, he has agreed to reduce the price to $58,000.00 and have the closing on April 15, 1973, rather than at an earlier date, and in addition thereto, is agreeable to Mr. MacGurn receiving the interest on the money that is held in escrow between the date it is deposited and the date of settlement. Due to the sale price in the amount of $58,000.00, the delayed length of closing and the fact the purchaser is a resident of California, Charles feels that the deposit in the nature of $3,000.00 is inadequate and that Mr. MacGurn should certainly be willing to show his good faith by increasing this amount to $5,000.00. As stated above, he would receive the interest on this amount for the time it is held in escrow.

Charles has been to my office on several occasions and discussed these matters with me, and feels that the enclosed contracts are fair to the parties concerned and has assurred me that upon the contracts being returned signed by Mr. MacGurn and with the deposit made payable

to you, he will execute the contracts. Since the contract acknowledges receipt of the deposit, he feels they should be executed by Mr. MacGurn prior to his signing them. As I am sure you are aware, in the event Charles signed them first and something happened between the time they left here and returned here from California, he would be in an awkward position to deal with anyone else.

Should you have any questions concerning this, do not hesitate to call me, or if you wish, feel free to call Charles.

With best wishes, I am

Sincerely yours,

William B. McClung

cc: Charles A. Potter, Jr.

WBMc/clh

EXHIBIT 4

Filed January 22, 1974

May 18, 1972

Mr. Richard B. MacGurn
625 South Kingsley Drive
Los Angeles, California 90005

Dear Dick:

I am so very sorry it has taken so long to get this contract worked out however I hope the enclosed letter addressed to me from Attorney William B. McClung will meet with your approval and that you will not object to depositing $2,000.00 more with you getting interest therefrom.

It is certainly nice to do business with people like you and I trust you will call upon us for any favors we can do for you here, in a business way or otherwise. We value friendship so much with people like Dick MacGurn.

Most Sincerely Yours,

W. E. (Tex) Tilson

WET:M

Enclosure

EXHIBIT 5

Filed January 22, 1974

AGREEMENT OF SALE

THIS AGREEMENT OF SALE made and entered into this 1st day of May, 1972, by and between CHARLES A. POTTER, JR., of Rockbridge County, Virginia, hereinafter referred to as Seller; RICHARD B. MACGURN of Los Angeles, California, hereinafter referred to as Buyer; and W. E. TILSON, hereinafter referred to as Agent.

§§ W I T N E S S E T H §§

That for and in consideration of the sum of Five Thousand Dollars ($5,000.00) by cash in hand deposited with the Agent, the receipt of which is hereby acknowledged, the Buyer agrees to buy and the Seller agrees to sell for the sum of Fifty Eight Thousand Dollars ($58,000.00) all of that certain tract or parcel of land situate and lying in BUFFALO AND KERR'S CREEK MAGISTERIAL DISTRICTS of Rockbridge County, Virginia, in the vicinity commonly referred to as Collierstown, and containing 276 acres, more or less, fronting on Secondary State Roads #672 and #251, approximately 8 miles from Lexington.

The purchase price to be paid as follows:

$ 5,000.00	In Trust with W. E. Tilson, Agent, to be used in the purchase of $5,000.00 Certificate of Deposit from the Lynchburg Federal Savings and Loan Association
$ 17,000.00	Cash on date of settlement
$ 36,000.00	To be paid by the assumption of a loan payable over a twelve (12) year period at $3,000.00 per annum, plus interest on

the unpaid balance at 6% per annum secured by a First Lien of a Deed of Trust.

The Seller agrees to convey the above-described real estate with improvements thereon, rights-of-way incident thereto and appurtenances thereunto appertaining by Deed of General Warranty with the usual covenants of Title, the same to be prepared at the expense of the Seller. Conveyance to be made SUBJECT to recorded conditions and restrictions which may affect the land herein described, and SUBJECT to the lien of a first deed of trust above-described. The Seller convenants that subject to the conditions herein referred to that the title to the property to be conveyed unto the Buyer can be insured by Lawyers Title Insurance Company of Richmond, Virginia.

All taxes, insurance and interest payments are to be prorated as of the date of delivery of deed; the same to be delivered and settlement to be made on or before April 15, 1973. The Buyer agrees and covenants that he shall lease unto the Seller the real estate herein referred to from the date of April 15, 1973, unto the date of April 14, 1974, for the sum of Eighteen Hundred Dollars ($1800.00), the same to be paid one-half (1/2) at the commencement of the lease period and one-half (1/2) six months from the commencement of such period. During the period of such lease the Seller shall maintain the property herein referred to in a condition consistent with good horticultural practices.

The Seller agrees to finish cutting cedar trees from the hill on the south side of Secondary State Road #251.

If upon examination of the title the Seller cannot convey a marketable title to the above property subject to the aforestated conditions, the Seller will at his expense cure the defect or defects

appearing in the title and in the event the defect or defects cannot be cured within a reasonable period of time this Agreement, at the option of the Buyer, shall become null and void and the amount paid herewith by the Buyer shall be refunded to the Buyer.

It is understood by the parties hereto that time is of the essence in this contract and that failure to perform on or before the date herein set forth for settlement, unless the same shall be caused by a valid defect in title or by some fault of the Seller, the money so deposited with the Agent shall be forfeitted unto the Seller.

The Seller acknowledges that W. E. Tilson is the sole procurring cause of this Contract and as the result thereof is entitled to a commission to be paid by the Seller upon the closing of the sale herein referred to upon the terms and conditions above set forth.

The Seller agrees and covenants to obtain fire insurance upon the buildings on the aforedescribed real estate and that should any of the buildings subject hereto be destroyed or materially damaged by fire before the deed is delivered, this Contract shall remain in full force and effect and the purchase price shall be abated to the extent of the insurance paid to the Seller from such policy or policies.

This Contract shall be binding upon and enure to the benefit of the heirs, assigns or personal representatives of the parties hereto.

EXHIBIT 6

Filed January 22, 1974

ESCROW AGREEMENT

THIS ESCROW AGREEMENT made and entered into this 1st day of May, 1972, by and between CHARLES A. POTTER, hereinafter referred to as Seller; W. E. TILSON, hereinafter referred to as Agent; and RICHARD B. MACGURN, hereinafter referred to as Buyer.

§§ W I T N E S S E T H §§

That whereas, by Sales Contract of even date herewith the Buyer has deposited with the Agent the sum of Five Thousand Dollars ($5,000.00) to be applied toward the purchase price of certain real estate which is described in such Sales Contract; and, whereas, according to the terms and provisions of such Sales Contract the aforementioned sum is to be deposited in The Lynchburg Federal Savings and Loan Association of Lexington, Virginia; and whereas, it is agreed by the parties hereto that the interest on such money shall be paid unto the Buyer; and whereas, it is agreed that such funds shall be deposited in the name of W. E. Tilson, Escrow Agent for Richard B. MacGurn and Charles A. Potter, Jr.,; and whereas, the Agent agrees that at the time of settlement he shall pay such funds unto the Seller as part payment for the real estate the subject of the aforesaid Sales Contract, or in the event marketable title cannot be delivered, return the same unto the Buyer, or in the event the Buyer fails to perform the obligations incurred under such Contract, pay such sum unto the Seller to compensate him for the losses incurred in the event the Buyer breaches such Contract.

EXHIBIT 7

Filed January 22, 1974

MEMO OF AGREEMENT

THIS AGREEMENT made and entered into this 1st day of May, 1972, by and between CHARLES A. POTTER, JR., hereinafter referred to as Seller; and W. E. TILSON, hereinafter referred to as Agent.

§§ W I T N E S S E T H §§

Whereas by Sales Contract of even date herewith by and between the Seller and Richard B. MacGurn, the Seller has agreed to sell unto the said Richard B. MacGurn a 276 acre farm commonly known as the Earl Roberts Farm in Rockbridge County, Virginia, and has agreed to pay unto the Agent a real estate commission for procurring a Contract on the said property, the parties hereto do hereby Agree and Covenant as follows:

1. That upon settlement of the sale heretofore referred to in accordance with the terms and conditions of such Contract, the Seller will pay unto the Agent the sum of Five Thousand Eight Hundred Dollars ($5,800.00) representing Ten Per Cent (10%) of the sale price of such property.

2. The Agent shall pay unto the said Richard B. MacGurn the sum of Four Hundred Dollars ($400.00) which represents a portion of the rent to be paid by the Seller unto the said Richard B. MacGurn for a one year lease commencing on April 15, 1973, and ending on April 14, 1974.

EXHIBIT 8

Filed January 22, 1974

June 8, 1972

Eugene L. Wolver, Jr.

Mr. W. E. Tilson
W. E. Tilson and Son
Box 1156
Lexington, Virginia 24450

Re: Richard B. Macgurn - Charles A. Potter, Jr.
Agreement of Sale

Dear Mr. Tilson:

As legal counsel for Richard B. Macgurn, we have reviewed with him the proposed contract of purchase by and between he and your principal Charles A. Potter, Jr. After reviewing the proposed agreement of purchase and the accompanying letter of seller's attorney, Mr. William B. McClung, we find both to be in variance with our client's understanding as follows:

1. He will not pay more than $3,000.00 down payment;
2. He did not desire that the escrow close in April of 1973. Quite to the contrary, he is willing to have the escrow closed immediately. Delay in closing of escrow seemingly is the seller's wish and desire and, predicted upon the delay of escrow, seller seeks an increase in the amount of down payment. This reasoning position is untenable and unacceptable.
3. Our client would prefer to take possession immediately and not rent the property. He did indicate willingness to lease the property to the seller for one year at $1,800.00. I candidly feel this was

foolish inasmuch as the costs of ownership (i.e. interest, taxes, etc.) exceed that sum. Having indicated this, he is willing to stand by his commitment provided that the seller remains committed to those items which were in our client's understanding; and

4. Our client desires no cedar trees cut. Our client agreed and desires that the brush be cleared by seller but not destruction or removal of what is, in his opinion, valuable timberland and certainly aesthetically pleasing.

If the above is not acceptable to the seller, kindly consider the matter closed and our client's offer withdrawn and return to our client the money heretofore deposited with you---to wit, the sum of $3,000.00.

We have enclosed for your convenience a copy of this letter which you may forward to the seller's attorney if you so choose.

Trusting that we may anticipate your prompt reply, we are,

Very truly yours,

WOLVER and WOLVER

By

ELWJr:djc
Enclosure

cc: Mr. Richard B. Macgurn

EXHIBIT 9

Filed January 22, 1974

July 6, 1972

Eugene L. Wolver, Jr., Esquire
Wolver & Wolver, Attorneys at Law
Suite 715 Walker P. Story Building
610 South Broadway
Los Angles, California 90014

Re: Richard B. Macgurn and
Charles A. Potter, Jr.
Agreement of Sale

Dear Mr. Wolver:

W. E. Tilson has brought me a copy of your letter of June 8, 1972, addressed to him with reference to the above captioned matter. There has been some confusion in this matter as it was the seller's desire in selling this property to retain possession of it until he had harvested his crops and sold the cattle he had on the property. This was a condition of sale rather than a request of the seller subsequent to the sale.

After reading your letter and talking with the seller I believe that we can work out the following:

1. The settlement will be held on October 15, 1972.

2. Mr. Potter will lease the property from Mr. Macgurn for a period of one year from October 15, 1972, to October 14, 1973, for the sum of $1800.

3. Brush will be cleared by Mr. Potter during the interim period prior to settlement and during his lease period which is consistent with good horticultural practices. The cedar trees referred to earlier

are those less than 10 feet in heighth found in pasture areas which are customarily a nuisance to horticultural uses to the land. Mr. Potter realizes that he is not to cut any marketable timber and will not do so.

If this is satisfactory with your client please advise me.

With best wishes I am,

Sincerely yours,

William B. McClung

WBM/am
c.c. Charles A. Potter, Jr.
W. E. Tilson

EXHIBIT 10

Filed January 22, 1974

July 21, 1972

Eugene L. Wolver, Jr.

William B. McClung
Attorney at Law
Lexington, Virginia

Re: Richard B. Macgurn & Charles A. Potter, Jr.
Agreement of Sale

Dear Sir:

This is to acknowledge the receipt of your letter of July 6, 1972. I have discussed its contents with our client, who advises me that inasmuch as your client had originally desired a closing or settlement date of April 15, and since he had not heard to the contrary, he made his plans accordingly. Therefore we wish that the settlement date be as contracted and agreed upon, i.e. April 15, 1973. In all other respects your letter is satisfactory. Trusting that this will suffice for your purposes and enclosing for your convenience an additional copy of this letter for forwarding to your client if so desired.

We remain,

Very truly yours,

WOLVER and WOLVER

by

ELWJr:amm

EXHIBIT 11

Filed January 22, 1974

August 7, 1972

Mr. W. E. Tilson
c/o W. E. Tilson & Sons Realtors
South Main Street
Lexington, Virginia

Re: Richard B. Macgurn and Charles A. Potter, Jr.
Agreement of Sale

Dear Tex:

Enclosed herewith is a letter that I received from the attorney for Mr. Macgurn and my reply for Charley. I am afraid that what has happened here is that when it looked like we were going to get the price that Charley and I agreed to take, that Charley suddenly decided that he'd be better off to try to hold onto the property rather than buying it and selling it as we had agreed upon. It appears to me that Macgurn's variance is of not a great a nature to get around if Charley were going to live up to what he had originally told me he was doing. This matter has been embarrassing to me, personally, since Charley did not act in good faith with me and has made it look like I have misled you.

Therefore, until you receive a listing signed by both Charley and myself, or however the property will be titled when exercised by the options, please do not do any more work on selling it or showing it.

With kind personal regards, I am

Sincerely yours,

William B. McClung

Enc.

EXHIBIT 12

Filed January 22, 1974

August 7, 1972

Eugene L. Wolver, Jr., Esquire
Wolver and Wolver
Attorneys at Law
Suite 200 Van Nuys Building
210 West Seventh Street
Los Angeles, California 90014

RE: Richard B. Macgurn and Charles A. Potter, Jr.
Agreement of Sale

Dear Mr. Wolver:

I have and thank you for your letter of July 21, 1972, with reference to the above-captioned matter. Since you're client neither wishes to settle this matter as proposed in my last letter at an earlier date, or increase his deposit here in accordance with the proposed contract that I forwarded to you, Charles A. Potter, Jr., has declined to accept his offer of $58,000.00 for the subject property.

With best wishes, I am

Sincerely yours,

William B. McClung

cc: W. E. Tilson
c/o W. E. Tilson & Sons
S. Main Street
Lexington, Virginia

WBMc/clh

EXHIBIT 13

Filed January 22, 1974

To: W. E. Tilson, Realtor

Lexington, Va.

This is to inform you that I have executed the contracts forwarded by Charles Potter, Jr. pertaining to the Roberts Farm at Collierstown, Virginia, and am forwarding a check for $2,000 to be added to the escrow Account. Thus, I am accepting his original counteroffer as forwarded to me and am returning the same to you for his signature.

/S/ MacGurn

EXHIBIT 14

Filed January 22, 1974

WU AGT LEX

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PMS W E TILLSON, REALTOR, PHONE AND DLR

LEXINGTON VIG

THIS IS TO INFORM YOU I HAVE EXECUTED THE CONTRACTS FORWARDED BY CHARLES POTTER JR PERTAINING TO THE ROBERTS FARM AT COLLIERSTOWN VIRGINIA AND AM FORWARDING A CHECK FOR 2000.00 TO BE ADDED TO THE ESCROW ACCOUNT THUS I AM ACCEPTING HIS ORIGINAL COUNTER OFFER AS FORWARDED TO ME AND AS EXPLAINED IN HIS ATTORNEYS LETTER OF JULY 6 1972 AND AM RETURNING THE SAME FOR HIS SIGNATURE

RICHARD B. MACGURN.

2000.00 6 1972