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Record No. 5065

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Supreme Court of Appeals
Richmond, Va.

In the Supreme Court of Appeals of Virginia at Richmond

CLIFTON B. ROGERS

v.

BENJAMIN HARRISON RUNYON, ET AL.

FROM THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

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

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5065

VIRGINIA:

In the Supreme Court of Appeals held at the Masonic Building in the City of Staunton on Thursday the 3rd day of September, 1959.

CLIFTON B. ROGERS, Appellant,

against

BENJAMIN HARRISON RUNYON, ET AL., Appellees.

From the Circuit Court of Prince William County

Upon the petition of Clifton B. Rogers an appeal is awarded him from a decree entered by the Circuit Court of Prince William County on the 21st day of March, 1959, in a certain chancery cause then therein depending wherein the said petitioner was plaintiff and Benjamin Harrison Runyon and others were defendants; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

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Filed November 2, 1957.

WORTH H. STORKE, Clerk
By .....

IN CHANCERY AMENDED BILL OF COMPLAINT.

To: The Honorable Judges of the Circuit Court of Prince William County, Virginia:

Your complainant, Clifton B. Rogers, pursuant to leave of Court first had and obtained, exhibits this his amended bill of complaint against Benjamin Harrison Runyon and Lillie T. Runyon, his wife; E. P. Robertson and Mamie R. Robertson, and H. Selwyn Smith, Substituted Trustee, and thereupon says as follows:

1. By deed of trust dated April 19, 1950, recorded in Deed Book No. 143, page 262 of the land records of Prince William County, Virginia, your complainant conveyed to J. Jenkyn Davies and H. Thornton Davies, Trustees, two certain tracts of land situated in Manassas Magisterial District, Prince William County, Virginia, the first parcel containing 67 acres, I rood and 25 poles, more or less, and the second parcel containing 99-5/8 acres, more or less, LESS and EXCEPT a parcel containing 9 acres, more or less. This conveyance was made in trust to secure the payment of an indebted-
page 29 } ness of $32,000.00, evidenced by deed of trust dated April 19, 1950, payable to the order of E. P. Robertson and Mamie R. Robertson in monthly installments of $50.00 and interest at the rate of 5% per annum.

2. The said H. Thornton Davies, one of the trustees under said deed of trust, departed this life and the defendant, H. Selwyn Smith, in his capacity as administrator of the estate of H. Thornton Davies, deceased Trustee, advertised the land conveyed by the aforesaid deed of trust for sale at public auction at the front door of the Court House Building at Manassas, Virginia, on Saturday, July 16, 1955, at the hour of 12 o'clock Noon, E. D. S. T. Pursuant to said advertise-

ment, the said H. Selwyn Smith, Administrator of the estate of H. Thornton Davies, deceased Trustee, went through the form of a sale and the land was purported to be crief off to one Luke Pollard for the sum of $33,000.00. It developed that J. Jenkyn Davies, the Co-Trustee of H. Thornton Davies, deceased Trustee, had not resigned his trust and the sale was, therefore, null and void. However, the said Luke Polland, who was the highest bidder at the purported sale, subsequently assigned whatever rights he had in said land as a result of the void sale to the defendant, Benjamin Harrison Runyon. The said Benjamin Harrison Runyon then deposited with the said H. Selwyn Smith the sum of $12,000.00 cash and executed a deed of trust for the residue of $21,000.00 to secure the payment of that amount to the defendants, E. P. Robertson and Mamie R. Robertson. The defendant, Benjamin Harrison Runyon, then entered into and upon the premises and occupied the same and is now in possession thereof.

3. While the advertisement of the abortive sale was running, your complaniant had conferences with the defendants, H. Selwyn Smith, E. P. Robertson and Mamie R. page 30 } Robertson, and it was agreed that if the sum of $2,500.00 should be placed in the hands of the defendant, H. Selwyn Smith, as close to the hour of sale as one hour prior thereto, it would be accepted, and the sale would be called off and your complainant could continue to make payments as provided for in the deed of trust and there would be no default. Pursuant to this agreement, your complainant secured a certified check for $2,500.00 payable to the defendant, H. Selwyn Smith, and tried to deliver it to him at his office on Friday, July 15th for this purpose, but he was out on both occasions, and your complainant advised the secretary that he wanted to see him, but he never succeeded in doing so. Your complainant then went to see his counsel, William W. May and left the check with him. Mr. May called Mr. Smith on the telephone and tendered the check and it was refused. At 10:30 o'clock on the following day, Saturday, July 16, the tender was again made to the defendant, H. Selwyn Smith, and was again refused. Your complainant further avers that the defendant, H. Selwyn Smith, substituted trustee was under a duty to advise the defendants, E. P. Robertson and Mamie R. Robertson that the tender of a certified check of $2,500.00 had been made pursuant to the agreement previously reached, but that the defendant H. Selwyn Smith in collusion with the defendant, Benjamin Harrison Runyon, took matters in his own hands and without consultation with the defendants, E. P. Robertson and Mamie R.

Robertson, arbitrarily refused to accept the certified check for $2,500.00 in violation of his duty to your complainant. Your complainant therefore avers that the defendant, H. Selwyn Smith, by this action, prevented the loan from being restored to good standing and enabled him to proceed with the second sale to the financial advantage of himself and the defendant Benjamin Harrison Runyon. Your complainant further avers that after the first sale took place he made repeated efforts to induce the defendant, H. Selwyn Smith, substituted trustee to extend him terms so that the loan
page 31 } could be put in good standing but that the said H. Selwyn Smith, without ascertaining the wishes of E. P. Robertson and Mamie R. Robertson demanded the payment of the loan in cash and proceeded to foreclose so that the defendant, Benjamin Harrison Runyon, could obtain title at the second sale.

4. Subsequent to the foregoing transaction, the said H. Selwyn Smith realized that the purported sale of July 16, 1955, was null and void and he thereupon had the Co-Trustee, J. Jenkyn Davcis, resign and then caused himself to be substituted as Trustee under said deed of trust. He thereupon again advertised the land conveyed by said deed of trust for sale at the front door of the Court House Building at Manassas, Virginia, on Saturday, October 8, 1955, at the hour of 12 o'clock noon, E. S. T. for *cash,* subject to 1955 taxes and a deposit of 10% to be required at the time of sale.

5. The defendant, Benjamin Harrison Runyon, was the highest bidder and the property was cried off to him for the sum of $33,000.00 cash. However, in accordance with a secret agreement entered into between the defendant, Benjamin Harrison Runyon, and H. Selwyn Smith, Substituted Trustee, and the defendants, E. P. Robertson and Mamie R. Robertson, terms were extended to the said Benjamin Harrison Runyon and the property was conveyed to him on the basis of the cash deposit of $12,000.00 he had previously made and the execution by him and his wife of a deed of trust on the property purported to be sold at the Trustee's sale securing the payment of $21,000.00 to the defendants, E. P. Robertson and Mamie R. Robertson.

6. Your complainant avers that within ten days following the abortive sale of July 16, 1955, the defendant, Benjamin Harrison Runyon, made the arrangement with the purchaser at that sale hereinbefore referred to, and that sub-
page 32 } sequently the said Benjamin Harrison Runyon went to see the defendant, E. P. Robertson, and requested Mr. Robertson not to bid on the property at the second sale and advised him that if the property did not

bring the amount of the trust, that he, Runyon, would make good the difference to Mr. Robertson and that Mr. Robertson could sue your complainant for the deficiency.

7. Your complainant further avers and charges that the sale and the deed of conveyance executed by the substituted trustee are null, void and of no effect, because the land was not sold in accordance with the advertisement, because complainant was not in arrears, and because the defendant, Benjamin Harrison Runyon, was guilty of a fraud upon the rights of your complainant by entering into a secret agreement with the defendant H. Selwyqn Smith to extend him credit in violation of the terms of the advertisement.

Wherefore, the premises considered your complainant prays that Benjamin Harrison Runyon and Lillie T. Runyon, his wife, E. P. Robertson and Mamie R. Robertson; and H. Selwyn Smith, substituted trustee, may be made parties defendant to this suit, and required to answer the same; that the deed from H. Selwyn Smith, substituted trustee, to Benjamin Harrison Runyon and Lillie T. Runyon, dated October 8, 1955, recorded in Deed Book 193 at pages 270 and 271, be set aside and declared to be null, void, and of no effect whatsoever; that complainant may be restored to the possession of said property, and be allowed to make up the arrears due under the said agreement; that the deed of trust from Benjamin Harrison Runyon and Lillie T. Runyon, his wife, to H. Selwyn Smith, Trustee, dated October 8, 1955, recorded in Deed Book 193 at page 272 and 273, be set aside and declared to be null and void, and that the note secured by the said deed of trust for $21,000.00, payable to the order of E. P. and/or Mary R. Robertson be surrendered to the Court, and that page 33 } the defendants E. P. Robertson and Mamie R. Robertson be enjoined from negotiating said note; that the said Benjamin Harrison Runyon be duly required to account to complainant for the rents, issues and profits from said land from the time he took possession thereof from July 16th, 1955; that all proper orders be entered, inquiries directed, and accounts stated, and that complainant may have all such other, further and general relief as the nature of the case may require.

And, as in duty bound, your complainant will ever pray, etc.

CLIFTON B. ROGERS
By CHARLES PICKETT
Counsel.

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FINAL DECREE.

This cause came on again the 11th day of February, 1959, on the papers formerly read, the testimony of the parties and their witnesses heard *ore tenus,* the exhibits introduced and received in evidence, and was argued by counsel.

Upon Consideration Whereof, it being the opinion of the court that the evidence fails to make out a case entitling the complainant to the relief which he seeks, it is ADJUDGED, ORDERED and DECREED that the complainant's bill be, and the same hereby is dismissed at the costs of the complainant.

And it further appearing to the court that the defendants and cross complainants, E. P. Robertson and Mamie R. Robertson, in open court advised the court that they did not wish to pursue their cross-bill against the complainant and cross-defendant, Clifton B. Rogers, it is further ADJUDGED, ORDERED AND DECREED that the aforesaid cross-bill be and the same hereby is dismissed at the cost of said cross-complainants.

And nothing further remaining to be done in this suit it is ordered that the same be placed among the causes ended.

And to the ruling of the court dismissing the complainant's bill the complainant, by counsel, excepts.

And this decree is final.

March 21, 1959.

ARTHUR W. SINCLAIR, Judge.

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

The complainant, Clifton B. Rogers, in the above entitled suit, pursuant to Rule 5:1, Section 4 hereby gives notice of appeal and assigns the following errors alleged to have been committed by the Trial Court:

1. The Court erred in dismissing complainant's bill of complaint.
2. The final decree of the Court dismissing the complainant's bill is contrary to the law and the evidence.
3. The final decree of the Court in dismissing the complainant's bill is without evidence to support it.

CLIFTON B. ROGERS
By CHARLES PICKETT
Counsel for Complainant.

Filed April 15th, 1959.

WORTH H. STORKE, Clerk.

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Manassas, Virginia
February 28, 1959.

Mr. William H. Hansbarger
Attorney at Law
156 Hillwood Avenue
Falls Church, Virginia

Mr. Leonard L. Lonas, Jr.
Attorney at Law
Manassas, Virginia

Mr. Charles Pickett
Attorney at Law
200 South Payne Street
Fairfax, Virginia

Mr. H. Selwyn Smith
Attorney at Law
Manassas, Virginia

Re: Rogers *v.* Runion, et als.

Gentlemen:

This is to advise you of my opinion to deny to the complainant the relief which he seeks and to dismiss his suit.

The evidence falls far short of proving the exsitence of any secret agreement between Runion, the Robertsons and Smith or that any fraudulent scheme was perpetrated on the complainant by anyone. At most the evidence reveals that both of the sales of the real estate were advertised for cash and that after each sale an agreement was reached between the Robertsons and Runion for the extension of terms.

Admittedly Rogers was in default under the deed of trust at the time of both of the sales. He testified that after the first sale and before the second he asked Robertson if he could make up the deficiency owing and that he was advised by the latter that it would be acceptable if the approval of Smith was obtained. Robertson testified that the proposition of making up the deficiency was not discussed after the first sale. Regardless of this, Rogers did not testify that he made any offer of any money to either Smith or Robertson after the first sale.

Although the witness, E. R. Conner, qualified his testimony concerning the market value of the property, it page 78 } would appear that the property sold for its then fair market value. Robertson was of course satisfied when the bidding reached a point to discharge what he believed to be the balance owing on his debt. Latsios, the holder of a third trust on the property, attended both sales but failed to go beyond the high bid of Runion and thus lost his security. The complainant testified that he had Mr. Conner bid on the property at both sales to see that it brought all that it was worth.

I do not believe that the court would be justified in setting aside the sale on the evidence before it and for that reason the suit should be dismissed.

I have prepared a draft of a final decree which I request that counsel endorse and return if the contents of the decree are acceptable.

Very truly yours,

ARTHUR W. SINCLAIR.

cc: General Franklin P. Shaw
Manassas, Virginia.

* * * * *

Manassas, Virginia,
Wednesday, February 11, 1959.

The above-entitled matter came on for hearing before the

Honorable Arthur W. Sinclair, Judge of the Circuit Court, Prince William County, Virginia, at the Court House, Manassas, Virginia, commencing at 10:30 o'clock a. m., Wednesday, February 11, 1959.

Appearances: On behalf of the plaintiff: Charles Pickett, Esq.

On behalf of the defendants, Mr. and Mrs. Runyon: William H. Harnsbarger, Esq., and Leonard Lonas, Esq.

On behalf of the defendants, Mr. and Mrs. Robertson: Franklin P. Shaw, Esq.

Also present: H. Selwyn Smith, Esq.

page 2 } PROCEEDINGS.

The Court: Let all the witnesses who are going to testify in the Rogers *v.* Runyon case be sworn.

(Thereupon, nine prospective witnesses were duly sworn.)

Mr. Pickett: The reporter should be sworn at this point.

(Thereupon, the reporter was sworn.)

Mr. Pickett: If your Honor pleases, it has been stipulated by Mr. Lonas and Mr. Hansbarger but not by General Shaw —he was not in the courtroom at the time—that these documents could be admitted in evidence. They are photostatic copies of a deed of trust dated October 8, 1955, from the defendants Runyon and H. Selwyn Smith, trustee, securing the payment of $21,000.

Mr. Shaw: No objection.

Mr. Pickett: May I ask that be received?

The Court: It is admitted as Exhibit No. 1 by stipulation.

(The document referred to was marked Plaintiff's Exhibit No. 1 for identification and received in evidence.)

Mr. Pickett: Also, there is a trustee's deed dated October 8, 1955. from H. Selwyn Smith, substituted trustee, to Benjamin Harrison Runyon and Lillie T. Runyon.

Mr. Shaw: No objection to this.

The Court: It is admitted as Exhibit No. 2 by stipulation.

page 3 } (The document referred to was marked Plaintiff's Exhibit No. 2 for identification and received in evidence.)

Mr. Pickett: And also, a copy of the substituted trustee's account (handing the document to Mr. Shaw).

Mr. Shaw: No objection.

The Court: It is admitted as Exhibit No. 3 by stipulation.

(The document referred to was marked Plaintiff's Exhibit No. 3 for identification and received in evidence.)

Mr. Shaw: Your Honor, I would like to say this is an action which set aside a sale made October 1955 on the grounds set forth in the amended bill. One being that the debtor was not in default just filing that sale and the sale was made. Among the defendants are Mr. and Mrs. E. P. Robertson, and they in turn filed a cross bill against the complainant for recovery of the deficiency on their two notes secured by the deeds of trust of April and November 1950 for the aggregate sum of $33,500.

There has been no answer, no grounds of defense to that cross bill and, as I see it, there is no question to be determined in this action in that aspect of the case except the amount due the Robertsons.

Now, Mr. Pickett stated in court last week and
page 4 } admitted the indebtedness but the exact amount of
the indebtedness was not stated. The exact amount of deficiency is a matter to be determined by pure mathematics from one of the documents which was just made a stipulation concerning the trustee's accounting. And the notes which were surrendered erroneously as paid in full are, so far as we know, in the possession of the plaintiff, and on which all the payments made are listed.

Now, as computed in another action arising out of this same set of facts—part of the facts in this case—and that deficiency was computed at $1,543.08 as of 8 October 1955. Actually, the records in this case show that the interest was computed on one of the notes for one day in excess of the correct period. In other words, those figures were in error to the extent of nine cents, which would reduce the deficiency to $1,542.99 as of October 8, 1955, the date of the sale.

Now, as I say, this is a pure matter of mathematics. Counsel for the complainant will want to check those figures which were made by the assistant cashier in the Bank of Manassas, and I am confident they are correct. But I should like to be informed just where we stand on that situation? Mr. Pickett admits, there is no question about proving it. But the exact figures are to be determined.

Mr. Pickett: If the Court pleases, I made qualifying

statements when I was here before. I said as far as I knew there was no difference between them but I would
page 5 } have to consult with my client before making an stipulation or admission. You recall that?

Mr. Shaw: You admitted the indebtedness and said unquestionably that you would like to talk to your client. I think you are bound—

Mr. Pickett: I am advised that the Robertsons did not receive from the substituted trustee the amount of the indebtedness as to who owes it because the evidence will show that the defendants, Runyons, took possession of this property in July of 1955.

Mr. Shaw: You are mistaken.

Mr. Pickett: I am of the opinion they are responsible.

Mr. Shaw: The Robertsons are responsible for what Mr. Runyon did?

Mr. Pickett: No. I think the Runyons are responsible to Mr. Rogers. He, in turn, would be liable to the Robertsons.

Mr. Shaw: The matter of the deficiency to the Robertsons, as I computed it, and I think is without any substantial error, is $1,542.99, as of October 1955—October 8th, to be exact. Now, I can't see that the Robertsons are concerned in any claim the complainant may have against Mr. Runyon.

Mr. Pickett: I think it is premature at this point. I would like to proceed with the evidence, if the Court please.

Mr. Shaw: I would appreciate it if you instruct the Court what we are to try in this respect. I don't want to
page 6 } take up too much time. What is necessary to make this computation available in the notes Mr. Rogers, evidently, has and in the trustee's accounting which is available here—and it has been stipulated to be correct—showing what was paid the Robertsons?

I think it can save a great deal of time in court if it is understood this indebtedness shown by these instruments is the amount the Robertsons are entitled to recover.

The Court: I think that may be true, but at this stage Mr. Pickett has the burden of going forward with his proof supporting the allegations of his original bill. The claim which the Robertsons have against Mr. Rogers, of course, is another matter.

Mr. Shaw: That is part of the case.

The Court: It is a case which Mr. Pickett has to defend but a case which Mr. Pickett is not interested in right at this minute. I think at the conclusion of Mr. Pickett's evidence on his original bill it would be proper to take this matter up then

E. P. Robertson.

Mr. Pickett:. I would like to call Mr. Robertson as my first witness, please.

Thereupon,

E. P. ROBERTSON,

was called as a witness by counsel for complainant and, having been previously sworn, took the stand, was page 7 } examined and testified as follows:

The Witness: I can't hear so good.

Mr. Pickett: If you don't hear tell me and I will try to assist you.

DIRECT EXAMINATION.

By Mr. Pickett:

Q. Please state your full name.

A. E. P. Robertson.

Q. Where do you live?

A. On Wellington Road, about two miles out.

Q. Manassas?

A. Yes.

Q. What is your age?

A. Seventy-six.

Q. Do you know Mr. Rogers here who is sitting beside me?

A. Yes.

Q. Have you had any business transactions with him?

A. Yes.

Q. How did that come about?

A. What?

Q. Did he buy a farm from you?

A. He bought a farm from me.

Q. At what price?

A. $40,000.

page 8 } Q. Was that in the year 1950?

A. I think it was. I'm quite sure.

Q. How much cash did he pay you?

A. I think it was eight.

Q. Eight thousand?

A. Eight thousand.

Q. And he gave you a deed of trust for the balance?

A. Yes.

E. P. Robertson.

Q. Payable at the rate of $50 a month with interest, is that right?

A. That's right.

Q. Did there come a time in 1955 when he was in arrears in his payments to you?

A. Yes.

Q. Did you employ Mr. H. Selwyn Smith in this matter?

A. Well, did you want me to tell you how that come about?

A. Yes, I would like you to.

Q. Well, Mr. Thornton Davies was on the deed of trust and he died. And Mr. Lonas told me I would have to get a court to appoint a man and I went to Judge Compton and found out whether I could afterward. I told him that Mr. Davies' son was still living and he was on the trust and he said I would have to see him. I went to Mr. Compton to find out where to locate him; I didn't know where he page 9 } lived. And I told him what I wanted and he said, "Take it down to Mr. Smith," that he was the administrator for Mr. Davies.

Q. Who told you that?

A. Judge Compton.

And I took the papers down there and he told me to take the deed of trust down and he foreclosed on it. Before the sale Mr. Rogers come out to my house and asked me if he paid all the back interest and everything up to date would I still let him go on with the place? Naturally, it's quite a good bit of interest there and benefit and I told him, "Yes." So he told me he would like to see Mr. Smith then and made an appointment.

Mr. Lonas: I would like to object. I believe he is referring to the so-called "first sale" of July at that point, and I am going to object now to any testimony that is introduced concerning the first sale. In paragraph 2 of the amended bill Mr. Rogers has alleged that the sale was null and void, and I think everybody agrees that it was, and it would appear to me any testimony referring to the first sale is inadmissible here and not material, and I think that is on the basis of the complainant's own pleading. For that reason I object to any testimony with reference to what I call the "first sale."

Mr. Shaw: I want to join in this objection, and I have a further objection upon this ground: Appa- page 10 } rently, the complainant is attempting, by an appeal, to allege a tender which would terminate his default in payment of his obligation secured by the deed of

trust. He alleges, in a statement to the witness, to the effect that there was an agreement to bring the payments up to date. In other words, they are attempting to show, for a basis for attacking the validity of the sale, that there was no default because of an agreement made that if the complainant would bring his obligations up to date the Robertsons would grant full indulgence And that, as I see it, is merely an agreement to do what he was already obligated to do not binding by law and something that has no effect whatever on the first sale, which is void anyhow, and certainly not in this proceeding.

Mr. Pickett: Are you appearing as counsel for the Runyons in this matter?

Mr. Shaw: I am appearing as counsel for the Robertsons.

Mr. Pickett: It has nothing to do with the Robertsons' claim against Mr. Rogers. I will connect it up. If your Honor please, I will connect it up with the second sale.

The Court: With that understanding I will overrule the objection.

Mr. Pickett: Would you read back the witness' last answer so he will know where he left off.

(The reporter read back the witness' last answer.)

page 11 } The Witness: I told him I would get in touch with Mr. Smith and he said he would get as far as Centreville but would not like to drive the truck any further, and I told him I would go over and get him, which I did, and we waited for about three hours and he come in and took the papers—or notes, whatever you call them—and figured up how much Mr. Rogers would have to pay him and told him if he had the $25. there an hour before the sale he would stop the sale.

By Mr. Pickett:

Q. You said $25. You meant $2,500?

A. Yes, $2,500.

Q. This was in Mr. Smith's office?

A. Yes.

Q. Was there any agreement to what his fee would be?

A. I think Mr. Rogers agreed to give him a note for $500.

Q. And the sale was to be called off then, is that right?

A. He said he would call it off if he had it there an hour before the sale.

Q. Did you have any discussion with Mr. Smith as to what

the terms of the sale would be, whether it would be all cash or credit?

A. I told him on the first sale I wanted all cash.

Q. All cash on the first sale?

A. Yes.

page 12 } Q. Now, did Mr. Smith tell you that Mr. Rogers had tendered him a cashier's check for $2,500 on the day before the sale?

A. No.

Q. He didn't tell you that?

A. I didn't see Mr. Smith for quite a few days before the sale. My son come by and waited for Mr. Rogers and he come and told my wife there wasn't going to be any sale and my son in Washington happened to be up on a visit and he come up and told me I better come down and see Mr. Smith, and I said, "No, I'm not going until the time of the sale," which I didn't. And I didn't know anything about that transaction at all.

Q. So Mr. Smith did not tell you—

A. He didn't bring—

Q. —that Mr. Rogers had complied with the agreement that had been reached?

A. Absolutely not.

Q. All you wanted was to get the back payments cleared up, isn't that right?

A. Correct.

Q. You wanted some money to be out on interest, on good security, didn't you? Is that right?

A. That's correct. There was quite a good bit of money there involved and if I got everything paid up to

page 13 } date I had a better chance to take care of myself. That's the way I figured it.

Q. On the day that you and Mr. Rogers met in Mr. Smith's office, Mr. Rogers was given figures showing how much was needed?

A. Mr. Smith asked him to figure out how much money he had to have. And, I think, the notes Mr. Rogers had in his pocket were from the bank.

Q. Would you recall the figures if I read them to you?

A. For the payments?

Q. Yes.

A. I think it was $2,500. And he was to pay him $500—give him a note for $500.

Q. In addition to the $2,500?

E. P. Robertson.

A. For his trouble.
Q. And you figured in that grass seed, didn't you?
A. Yes.
Q. For $60.85?
A. Yes.
Q. And also the 1954 taxes amounting to $194.73?
A. I couldn't swear to that.
Q. That would sound right though, wouldn't it?
A. Yes.
Q. Insurance premiums were calculated went there?
A. Yes.
page 14 } Q. And the cost of advertising the sale?
A. Well, he figured what it would take to pay everything up to date.
Q. And the past due payments of $50 a month—principal and interest that was past due? That was all taken into account, wasn't it?
A. I judge it was. I don't know what he was figuring—how Mr. Smith figured it up, but he was supposed to figure everything up to date.
Q. And you came to a figure of $2,500 to be paid to you?
A. Paid to Mr. Smith.
Q. For you?
A. Before the sale, and he would stop the sale.
Q. Well, then, what happened after that sale?
A. Well, I went down there several times to try to get my money and he kept saying they hadn't got it straight and later on he said it was in Judge Compton's hands and it went to Judge Compton. And finally I went down and he said, "Come on in, I have to break the news one time or another," and he said, "The deal didn't go through," and he said, "We have to sell it over again."
Q. Did you authorize him or request him to sell it over again?
A. I just took it for granted. He was my attorney and I left it up to him.
page 15 } Q. Did you discuss the terms of the second sale?

Mr. Lonas: I am going to renew my objection. I don't believe Mr. Pickett has made any indication that he can tie this in with the second sale, and I am going to again make a motion that all this evidence be struck concerning this first sale. I don't know how he is going to tie it in with the second

sale. The witness has tesitfied that the sale was null and void at this point.

The Court: If he can't tie it in, of course, it will be stricken, but Mr. Pickett is still examining the witness. He should have an opportunity to continue.

By Mr. Pickett:

Q. Did you have any discussion with Mr. Smith with reference to the second sale as to whether or not it was to be for cash or terms?

A. I don't remember anything about like that at all.

Q. Did Mr. Smith inform you that Mr. Runyon had made a deposit with him of $12,000?

A. Yes, and he said he offered it back to Mr. Runyon.

Q. Did you understand that that deposit was going to apply on the purchase price when Mr. Runyon bought it at the second sale?

A. I don't know anything about that.

Q. Didn't you want to sell it for all cash at the
page 16 } second sale?

A. Well, I wanted cash in the first sale and I didn't make any change in the second.

Q. But you really didn't want your money except what was past due?

Mr. Shaw: I object to that.

The Court: Objection sustained.

By Mr. Pickett:

Q. Did Mr. Latsios come to see you before the second sale?

A. Yes.

Q. What did he propose to you?

A. He wanted—see, I had two trusts against Mr. Rogers and he wanted to buy the second trust and I wouldn't agree to it so I took it down to Mr. Compton's office one night and he also said to me about it again there and I objected. Then he said he would buy the place and pay the cash for it, and I wouldn't like to say what I told him back.

Q. Well, do you remember when the first sale was advertised it took place on Saturday, did it not?

A. I think it was, yes.

Q. Do you remember Sunday a week later that Mr. Runyon came to see you?

E. P. Robertson.

A. It was sold on Saturday, and Sunday a week—not the next Sunday but the next Sunday—Mr. Polland had been down there several times.

page 17 } Q. Mr. Polland was the purchaser of the first sale?

A. The man who bought it the first time. And he was talking to me and he said—I knew that he was going to pay cash; I was told so—"What are you going to do with your money when you get it?" I said, "I want to loan it out." He said, "Maybe I can help you," and he looked down toward the road and he said, "You know that fellow down there?" It was so far I couldn't tell who it was until when he got close and I saw it was Mr. Runyon, and I didn't know he knew him, and Mr. Runyon come over to talk for a short period. Mr. Polland went over by the machine shed and he called me and Mr. Polland said, "I have sold the place to Mr. Runyon and he wants to know if you will loan him $21,000 on the place?" And it surprised me so that I sold it that quick. I didn't answer right away and then I said, "Yes, I'm not uneasy about $21,000 on the place."

Q. So then, you agreed that Mr. Runyon could buy it and you would take back a trust of $21,000 and $12,000 in cash?

A. Yes.

Q. That is exactly what happened, wasn't it, at the next sale?

A. At the next sale?

Q. Mr. Runyon got it for $12,000—

A. He didn't know he was going to get it.

Q. He did get it?

page 18 } A. After he bought it he come out my place and wanted to know about it and I told him I didn't want to let it go at 5 per cent and he said, "It would be 5 per cent or nothing." And I thought with that amount I better let it stay at that price.

Q. But you had agreed with Mr. Runyon on the Sunday a week after the first sale—

A. First sale.

Q. —that you would let him have a deed of trust of $21,000 on the place?

A. Yes, sir.

Q.And $12,000 in cash to you, is that right?

A. Yes, sir.

Q. That is exactly what happened at the second sale, wasn't it?

A. I think that was what happened.

E. P. Robertson.

Q. Didn't you take back the $21,000 deed of trust from him?

A. I didn't get it. I didn't see it.

Q. How much cash did you get off the sale?

A. The first one?

Q. No, the second sale?

A. Well, I can't tell—

Q. How much was he supposed to pay?

A. Well, I'll tell you the truth, I never found out page 19 } how much was due me.

Q. I know those figures are kind of hard to remember, you have to have them before you. But what he bid was $33,000?

A. $33,000.

Q. And he gave you a deed of trust or note for $21,000?

A. I didn't get anything. It hadn't been settled for and Mr. Smith was taking care of it for me and I didn't see anything until he come out to settle up with me along—I think it was November sometime.

Q. What did you get then in the form of paper from him? Didn't you get a note for $21,000?

A. Yes.

Q. It was executed by Mr. Runyon?

A. Yes.

Q. The balance was cash except for the deductions and so forth that were taken out, is that right?

A. Yes.

Q. Now, were you willing at all times for Mr. Rogers to take up the back payments?

Mr. Shaw: I object to that, your Honor. I don't think Mr. Robertson's willingness has any bearing in this case.

Mr. Pickett: That is not adverse to General Shaw's client.

Mr. Shaw: Your Honor, this should be set aside and the deal be unscrambled. If you tell the Court that you page 20 } are not claiming any relief from Mr. Robertson I will be very happy.

Mr. Pickett: We don't pray for any relief.

Mr. Lonas: I will object on the same grounds for Mr. and Mrs. Runyon. What Mr. Robertson had in his mind concerning all this is not admissible.

Mr. Pickett: I want to show the trustee abused his discretion.

The Court: It is the question of what he communicated to someone, if anything. Objection sustained.

E. P. Robertson.

By Mr. Pickett: Did you advise Mr. Smith at all times that you were willing to call the sale off if you were brought up to date?

A. Nothing like that was talked about afterwards.

The Court: I didn't understand you. You say that it was not talked about afterwards. After the first sale?
The Witness: Not after the first sale.

By Mr. Pickett.
Q. Now, you know Mr. Anderson, don't you?
A. Yes.
Q. Did he come to see you before the second sale, on behalf of Mr. Rogers?
A. He come to see me—I'm trying to think if it was the first or last sale.
Q. I am talking about the last sale, in September page 21 } of 1955?
A. Yes. He come to see me. I think now, it was the last sale.
Q. You told him, didn't you, that if Mr. Rogers made up all the payments that were due you would call the sale off?
A. Yes, sir.
Q. Now, did Mr. Runyon come to you before the second sale and tell you not to put in a bid?
A. Yes, he come. I was—my wife and I was sitting in the car and he come over and we got out of the car and he and I walked back of the car and he said to me, "Don't you bid," and he said, "If you don't come up to bid I'll pay the difference." I couldn't do that, so I walked on across the Court House grounds and Mr. Smith was over there.
Q. This was on the day of the sale?
A. The day of the sale. And Mr. Runyon said something about it again and I turned around and walked away and I said, "I don't like that." And Mr. Smith said, "No,"—he said that it's up for sale, something like that.
Q. Why didn't Mr. Runyon want you to bid on it?
A. I don't know.

Mr. Lonas: I object.
The Court: He said he didn't know.

By Mr. Pickett:
Q. Did he say anything about your having a right to sue

E. P. Robertson.

Mr. Rogers for any difference?
page 22 } A. No.
Q. Didn't he tell you that?
A. I don't remember any of that.
Q. Now, the second sale was advertised for all cash, wasn't it?
A. Yes, I think it was.
Q. Did you bid at the second sale?
A. No.
Q. Who did bid?
A. Now I couldn't tell you, but Mr. Conner was there and Mr. Capoletti, but somebody was holding that second with the bidding, I don't know who they were. I don't know whether it was Mr. Conner or who.
Q. Did Mr. Smith tell you or did you ask Mr. Smith how big a bid was necessary for you to come out whole?
A. On the first I did; the first sale.
Q. How about the second sale?
A. The second sale I was not because I thought it would be taken care of. I thought $33,000 would take care of it. He told me $33,000 or $32,500 would take care of it.
Q. Do I understand he told you that $32,500 would take care of everything due at the first sale?
A. The first sale.
Q. And that sale was in July?
A. Yes, sir.
page 23 } Q. And the second sale was in October?
A. Yes.
Q. So you thought from what he told you that $33,000 would be enough to pay you off?
A. Yes.
Q. Therefore, it wasn't necessary for you to bid any higher?
A. That's correct.
Q. Now, did Mr. Runyon tell you before the second sale that if he didn't buy it at that sale that he was going to tie the land up in litigation or suit to hold it up for three years?
A. I don't know just how he had it but he said it would be in court—may be in court for three years before we got it all straight.
Q. If it happened that he didn't get it?
A. I don't know what he meant by that.
Q. Did you mean if he didn't buy it?

Mr. Hansbarger: I object.

E. P. Robertson.

The Court: Objection sustained. He didn't know what he meant.

By Mr. Pickett:

Q. Do you know whether he went to Richmond in connection with this matter? Did he ever tell you anything about that?

page 24 } A. No, sir.

Mr. Pickett: That is all.

Mr. Lonas: Your Honor, I will renew my motion to strike all the evidence pertaining to the first sale on the grounds that it has not been tied in with the second.

The Court: I am going to deny the motion at this time. Are there any further questions of Mr. Robertson?

Mr. Shaw: Your Honor, I would like to make the request that in the event Mr. Pickett doesn't require, or any of the parties do not require, any further testimony from either of the Robertsons, that in view of the fact Mr. Pickett says he is not claiming any relief against them, that they be permitted to leave. Neither one is in good health, and if we need them later in connection with the cross bill they can be contacted.

Do you intend to call Mrs. Robertson?

Mr. Pickett: No.

Mr. Lonas: I am going to ask a few questions now.

CROSS EXAMINATION.

By Mr. Lonas:

Q. Mr. Robertson, I am talking about the second sale, not the first sale; the second. Now, as I understand your testimony, Mr. Runyon came to you just prior to the sale down here at the Court House and he suggested that you not bid?

A. Yes.

Q. Is it your testimony you told him that you

page 25 } wouldn't have anything to do with that? Is that right?

A. That's correct.

Q. Now, is it also your testimony that prior to the second sale you had not agreed with Mr. Runyon about the extension of credit, about the $21,000 note, or anything?

A. No.

Q. Now, this check for $12,000 which he had given after the

first sale, that only related to the first sale and had nothing to do with the second sale, is that correct?

A. I don't know what was given or anything.

Q. You never saw it?

A. No.

Q. Now, was it after the second sale that you agreed with Mr. and Mrs. Runyon that you would extend them credit to the extent of $21,000?

A. That was after the second sale.

Q. You hadn't agreed to that before the second sale?

A. No.

Mr. Lonas: That is all.

The Court: Mr. Pickett, any further questions?

Mr. Pickett: No further questions.

The Court: All right, you may be excused.

(Witness excused.)

Mr. Pickett: I would like to call Mr. Anderson to the stand, please.

page 26 } Thereupon,

P. W. ANDERSON,

was called as a witness by counsel for complainant and, having been previously sworn, took the stand, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Pickett:

Q. Mr. Anderson, will you please state your name.

A. P. W. Anderson.

Q. Are you a banker?

A. Yes, sir.

Q. How long have you been a banker?

A. Fifty years.

Q. Are you with any of the banks in Manassas at the moment?

A. I am vice-president of the National Bank of Manassas.

Q. Prior to your connection with the National Bank of Manassas what bank were you connected with?

P. W. Anderson.

A. President of the Marshall National Bank and Trust Company, in Marshall.

Q. In Fauquier County?

A. That is right, sir.

Q. Now, you know Mr. Rogers, here?

A. Yes, sir.

Q. Directing your attention to September of page 27 } 1955, did you have any conversation with Mr. Rogers relative to his farm which was then being advertised for sale under a deed of trust?

A. I can't say, sir, that I had a conversation with him particularly with reference to the sale of the farm. I was particularly interested with the outcome of that sale because the bank that I represented then had a chattel on many of the properties then and the sale of that farm would possibly jeopardize my position, and I was interested in the sale of the farm to that extent, sir.

Q. Well, did you talk to him about it?

A. I did.

Q. As a result of that conversation what did you do?

A. (The witness made no response.)

Q. Did you see anybody else?

A. I went to see Mr. Robertson in the afternoon after meeting Mr. Rogers here in town to discuss the matter with him.

Q. What did you ask Mr. Rogers, if anything?

A. I asked him his opinion.

Q. Whose opinion?

A. Mr. Robertson's. I asked him, in his opinion, what was going to happen to Mr. Rogers and his farm, and Mr. Robertson said he didn't know that, he had agreed if Mr. Rogers would bring his note up to date as to prin- page 28 } cipal and interest that he would let him retain the farm. That pleased me and that is as far as I went with it, sir.

Q. Did you communicate that information to Mr. Rogers?

A. I informed him of that information.

Q. Can you fix the month in which this incident occurred?

A. September '55.

Q. Do you know when the sale was advertised to take place? I don't mean the day but the month?

A. October, following my visit.

Mr. Pickett: That is all.

P. W. Anderson.

CROSS EXAMINATION.

By Mr. Hansbarger:

Q. Mr. Anderson, when you talked to Mr. Robertson in September, and testified that he had said that the sale—or all that he wanted from Mr. Rogers was to bring up the payments, there was an agreement to that effect. Do you know when this agreement existed?

A. Which agreement?

Q. The agreement to bring up the payments? Do you know exactly when that agreement existed?

A. No, sir, I don't know anything about that agreement.

Q. You don't know whether it existed at the time you talked to Mr. Robertson at all, and he could have referred back to an agreement prior to the first sale?

A. I don't know that at all.

page 29 } Q. You don't know anything about the agreement at all?

A. I knew a first sale had been had, but the terms or agreements I knew nothing about that.

Q. You did not know as to what period of time this agreement related to, or could you gather this from Mr. Robertson's conversation?

A. I understood it related to that moment of time.

Q. Did he say that?

A. He didn't say that, but he left me under that impression. If Mr. Rogers promptly took care of the difference there there would be no sale to continue on as it was.

Q. As far as you know, personally, it could have related to the first sale?

A. Nothing was said about the first sale. I don't know anything about the first sale.

Mr. Hansbarger: All right, thank you.

RE-DIRECT EXAMINATION.

By Mr. Pickett:

Q. Do you know whether you then had a talk with Mr. Smith about it?

A. I don't recall discussing the matter with Mr. Smith, sir.

Q. Your mind is a blank about that?

A. I don't recall.

Q. You don't know whether you did or didn't?
page 30 } A. I wouldn't say either way.

Mr. Pickett: That is all.
The Court: You are excused, Mr. Anderson.

(Witness excused.)

Mr. Pickett: Mr. Laws.

Thereupon,

H. LAYTON LAWS,

was called as a witness by counsel for complainant and, having been previously sworn, took the stand, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Pickett:
Q. Please state your name.
A. H. Layton Laws.
Q. What is your occupation?
A. Auctioneer.
Q. You are a licensed auctioneer, are you not?
A. Yes.
Q. Can you tell us whether or not you cried the two sales of the Robertson property that has been referred to this morning?
A. Yes, sir, I did.
Q. What was the highest bid received at the first sale and who made that bid?
A. It was $33,000 and it was made by Mr.
page 31 } Polland. His initials I do not remember.
Q. What were the terms of the sale?
A. The terms were to be 10 per cent deposit the day of the sale, and the amount was cash upon tender of a deed. However, it was advertised—I read it as it was advertised in the paper, but it was to be cash and 10 per cent deposit.
Q. Was that deposit made that day, to your knowledge?
A. Yes, sir.
Q. By Mr. Polland?
A. Yes.
Q. $3,300?
A. Yes, sir. He gave me a check for it.

H. Layton Laws.

Q. At the second sale what was the highest bid received?
A. The same amount, $33,000.
Q. Who was the bidder then?
A. That was Mr. Runyon.
Q. Was any deposit made that day?
A. If there was I did not see it. It was out in front of the Court House that day.
Q. Were the terms of the sale in the second sale the same as in the first sale?
A. Well, all I can say there is that I read it as it was advertised in the paper, and it was advertised to be 10 per cent deposit at the time of sale and the balance in cash. It was advertised as a cash sale.

page 32 } Q. How many bids did Mr. Runyon make?
A. Well, that would be hard to say, offhand. He made several bids and, in fact, he tried to keep bidding. He bid against himself even.
Q. What happened about that?
A. I told him the second time that he was the high bidder, and he was still wanting to bid more.
Q. How much did he bid in?
A. He was asking $500 more.
Q. Did he bid $33,500?
A. He tried to several times.
Q. You mean he made that bid?
A. Yes. He wanted to bid against his own bid.
Q. And you told him he was the high bidder?
A. That's right.

Mr. Pickett: That is all.

CROSS EXAMINATION.

By Mr. Lonas:
Q. Were there other bidders at the stand?
A. Yes.
Q. Was Mr. Rogers there?
A. Yes, sir.
Q. About this deposit. There could have been a deposit made and you hadn't known about it at the sale?
A. As I said, it was not made here in front of the

page 33 } Court House. If there was a deposit made it was not made here as on the first sale.

Mr. Lonas: That is all.

E. R. Conner.

The Court: You are excused.

(Witness excused.)

Mr. Pickett: Mr. Conner.

Thereupon,

E. R. CONNER,

was called as a witness by counsel for complainant and, having been previously sworn, took the stand, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Pickett:

Q. Mr. Conner, everybody here knows you but for the sake of the record I will ask you to please state your name?

A. E. R. Conner.

Q. Your residence?

A. Manassas.

Q. You know Mr. Rogers who is sitting beside me?

A. Yes.

Q. You have heard reference made to two sales of his farm here this morning.

A. Yes.

Q. Can you tell us whether or not you attended either or both of those sales?

page 34 } A. Both of them.

Q. Before the first sale did Mr. Rogers have conversations with you about trying to save his place?

A. I think he did, yes.

Q. Tell us what transpired between them?

A. I bid on the sale up to a certain amount until I thought it was getting high.

Q. What did you and Mr. Rogers talk about before the sale?

A. I told him I would back him up in the sale if the place didn't go too high. He said he wanted to save it due to the money on it.

Q. Did he tell you the amount that was due to Mr. Robertson?

A. I think he did.

Q. Did you agree to back him up to the amount he owed Mr. Robertson?

A. I agreed to back him up. I told him for myself I thought it was too high—was buying it to sell it again.

Q. I don't think you understood my question. Did you agree to back him up to the extent of the amount he owed to Mr. Robertson?

A. Yes, I believe I did.

Q. And you were fully financially able to do that?

A. I thought so, but not for sure.

page 35 } Q. Did you bid at the first sale?

A. Yes, sir.

Q. How much did you bid?

A. I think 25 or 26 thousand dollars.

Q. Did you bid at the second sale?

A. I think so.

Q. Do you recall the amount of your top bid then?

A. I think it was thirty thousand, or maybe over.

Q. Now, please tell the Court whether the fact that the place was to be sold for all cash had any effect on your bidding?

A. Well, it would have, of course. I think any large place, if you can get terms on it, it would bring a little more than if you sold it for cash.

Q. Are you able to express an opinion as to the value of that property in October of 1955?

A. Well, I think it sold for what it was worth at that time.

Q. You don't think it was worth any more than that?

A. Well, it could have been. I know what it's worth now. It's considerably more now.

Mr. Lonas: I will object to that testimony.

The Court: Do you mean to the last part of his testimony?

Mr. Lonas: I will withdraw the objection.

Mr. Pickett: I think that is all, sir.

page 36 } The Court: All right, Mr. Conner, you are excused.

(Witness excused.)

The Court: Let's take a recess for five minutes.

(A short recess was taken.)

Mr. Pickett: I would like to call Mr. May, if the Court pleases.

Thereupon,

WILLIAM W. MAY,

was called as a witness by counsel for complainant and, having been previously sworn, took the stand, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Pickett:

Q. Mr. May, for the sake of the record will you please state your name and profession.

A. William W. May, attorney at law.

Q. You practice law here in Manassas?

A. I do.

Q. How long have you been at the bar of this Court?

A. Since 1946.

Q. Now, were you consulted by Mr. Rogers in connection with his difficulties at the farm that we have been discussing here this morning?

A. Yes, I was.

Q. I believe you filed one or two suits on his be-
page 37 } half in connection with this, did you not?

A. I filed one suit and I almost filed a second one. I asked for an injunction which was denied and the suit was not filed.

Q. Did that relate to the second sale or the first sale?

A. The injunction related to the first sale.

Q. Directing your attention to the second sale which took place in October 1955, did Mr. Rogers ask you to do anything on his behalf to prevent that sale from taking place?

A. Mr. Rogers was quite anxious to prevent the sale from taking place and he conferred with me frequently between the first and the second sale. But I didn't have anything to do in the sale proceeding.

Q. Going back to the first sale—

Mr. Lonas: For the purpose of the record I would like, at this point, to renew my objection to all testimony regarding the first sale.

The Court: The objection is noted and it is overruled.

By Mr. Pickett:

Q. I believe the first sale was advertised to take place on July 16, 1955. I will ask you if you can recall any event that took place on the day before the sale?

A. Well, I think it was on the day before that Mr. Rogers

William W. May.

page 38 } first came to me, and he had a certified check for $2,500—certified or cashier's, I'm not certain— and he said he had been trying to see Mr. Smith but Mr. Smith wasn't in his office, and they had an understanding that a sale that was then advertised for the following day would be called off if he could bring up the principal and interest to date and that he was to have the check for Mr. Smith, and he asked me to take over on his behalf and get the check in Mr. Smith's hands.

Q. What did you do?

A. He handed me the check and I called Mr. Smith and told him Mr. Rogers was there and he had a check for $2,500 and we were ready to pay it off and asked that the sale be cancelled. And Mr. Smith, as I recall, said that any understanding—and I don't know, I think there was some difference in the amount of the check; it may have been a few dollars short; it wasn't the exact amount. But any understanding which had been had about bringing the interest up to date, and the principal, was limited to some date prior to that. It seems to me it was—I couldn't recall the date, but it was two or three days, or four or five days before that date, and he couldn't accept the check at that time.

Q. I show you a photograph of a cashier's check drawn on the order of the Burke & Beckert Bank and Trust Company for $2,500 bearing the date of July 15, 1955, payable to the order of H. Selwyn Smith, and ask you if you

page 39 } can identify this photograph as being a copy of the cashier's check that you have referred to as being given to you by Mr. Rogers (handing the check to the witness)?

A. I couldn't definitely say that is the same check, but I do notice it is dated July 15th and it is a cashier's check for $2,500, and I am sure that I had such a check and I don't recall the bank that it was drawn on, and I have no reason to doubt it is a copy.

Q. It coincides with your recollection of what took place?

A. It does.

Mr. Lonas: I will object to it, your Honor, for the reason previously stated. It is not material to this case.

The Court: You have no objection other than that?

Mr. Lonas: No.

The Court: Objection overruled.

Mr. Pickett: I offer this in evidence as Plaintiff's Exhibit No. 4.

William W. May.

(The cashier's check referred to was marked Plaintiff's Exhibit No. 4 for identification and received in evidence.)

Mr. Pickett: I have no further questions.
Mr. Lonas: No questions.
Mr. Pickett: Oh, yes, I beg your pardon. I did
page 40 } forget something.

By Mr. Pickett:
Q. Did you institute a suit for Mr. Rogers against Mr. Runyon for the value of the hay crop?
A. Yes, I did.

Mr. Lonas: Your Honor, again I am going to object to this suit on the hay crop for the same reason that it is not material to this suit, and I want to object to anything in connection with that.
The Court: What is the materiality of this, Mr. Pickett?
Mr. Pickett: Well, if we come to have an accounting, and we had asked him for an accounting for the rents issued and profits from the farm in question, because the evidence will show that following the first sale Mr. Runyon entered and took possession of the farm and has been in possession ever since—up to this point.
The Court: Of course, if an accounting should be ordered I feel quite sure there would have to be additional testimony. I am going to sustain the objection at this time.
Mr. Pickett: That objection is conditionally sustained depending on the accounting?
The Court: If an accounting is ordered Mr. May's testimony with the accounting will be permissible.
Mr. Pickett: All right, then, that is all.

(Witness excused.)

page 41 } Mr. Pickett: If your Honor pleases, during the recess Mr. Conner indicated to me he would like to correct his testimony on a certain aspect and I would like to recall him and let him make any remark without any questions from me.
The Court: Do you have any objection?
Mr. Lonas: No, we have no objection.

Thereupon,

E. R. CONNER.

was recalled to the stand by counsel for complainant and, having been previously sworn, testified further as follows:

The Witness: A while ago he asked me about the value of that farm, and I meant the farm as a buying and trading proposition for myself. Now, if you want the figures on the farm, the buildings, I sat down and went over this carefully and made out the price of the buildings and land, everything. If you want I can read it to you.

Mr. Lonas: Your Honor, I am going to object again getting in that phase. He gave an over-all value on it. He wants to change that and he is going into another matter now.

The Witness: That is my own buying and selling proposition. When I buy a farm I spend a little money and sell it at a profit.

Mr. Pickett: You like to buy low and sell high, don't you?

The Witness: That's right.

page 42 } Mr. Pickett: I would like you to state to the Court what you think the fair market value of that was in October 1955?

The Court: The fair market value without the breakdowns.

The Witness: There are only about five figures here. Twenty-six cow barn, cost of building it $15,600; $2,000; land at $200 an acre; house and other buildings $8,000; and depreciation $1,000; leaving a balance of $40,600.

Mr. Hansbarger: I want to ask a question. In the first sale—you said you bid at the first sale?

The Witness: Yes.

Mr. Hansbarger: What was your highest bid at the first sale?

The Witness: I think $26,000.

Mr. Hansbarger: What was your highest bid at the second sale?

The Witness: A little over $30,000. I think approximately thirty-one or thirty-two.

Mr. Hansbarger: And you were willing to back Mr. Rogers, I believe you testified, for the amount that he owed on the property?

The Witness: Yes.

Mr. Hansbarger: Do you know what that was?

The Witness: I think he put in a bid after I bid, I don't remember, around thirty-three, something like that.

page 43 } Mr. Pickett: He didn't answer your question. I don't think he understood it.

Mr. Hansbarger: He answered it as far as I am concerned.

Mr. Pickett: Would you read that last question to him.

(The reporter read the pending question.)

Mr. Pickett: The question was, did he tell you how much he owed?
The Witness: How much he owed on the property?
Mr. Pickett: How much he owed Mr. Robertson?
The Witness: (The witness made no response.)
Mr. Pickett: The question Mr. Hansbarger asked you is how much did he owe Mr. Robertson?
The Witness: I think $33,000.
Mr. Pickett: You thought it was $33,000?
The Witness: Somewhere in there.
Mr. Pickett: That is all.
Mr. Hansbarger: No further questions.
The Court: All right, Mr. Conner, you are excused.

(Witness excused.)

Mr. Pickett: Mr. Latsios.

Thereupon,

CHRIST LATSIOS,

was called as a witness by counsel for complainant and, having been previously sworn, took the stand, was examined and testified as follows:

page 44 } DIRECT EXAMINATION.

By Mr. Pickett:
Q. Would you please state your name?
A. Christ Latsios, C-H-R-I-S-T L-A-T-S-I-O-S.
Q. Where do you *life,* Mr. Latsios?
A. Alexandria.
Q. Do you know the farm that Mr. Rogers owned in Prince William County?
A. Yes.
Q. Did you attend either or both of the sales?
A. Yes, sir.
Q. Which? Both?
A. Both. The first and second one.
Q. What interest did you have in that farm?
A. Well, I have mortgage on it—third mortgage on it. $5,000.
Q. Did you ever attend any conferences before the first sale?

Christ Latsios.

A. With who?
Q. With Mr. Smith or Mr. Robertson or Mr. Rogers?
A. Not with Mr. Smith.
Q. Not with Mr. Smith?
A. No.
Q. With Mr. Rogers?
A. Mr. Rogers, yes, sir.
page 45 } Q With Mr. Robertson?
A. Yes, I did with Mr. Robertson, too, the first sale.
Q. Please tell the Court what Mr. Robertson had to say?

Mr. Lonas: For the purpose of the record I will renew my objection about the first sale.
The Court: Overruled.
The Witness: On the first sale I asked Mr. Robertson we have somebody to buy the farm and I asked Mr. Robertson if I pay him all the second mortgage and interest, everything, and then if he holds the first mortgage I try to buy the farm. Mr. Robertson said he want all cash, and I was out. I was not able to pay all cash.

Q. Where did that conversation take place?
A. Down his house.
Q. Before the sale?
A. Before the sale.
Q. Did he say anything about an arrangement he had with Mr. Rogers?
A. Well, yes, he said—he said Mr. Rogers say he think he is going to have the payments at the time and is going to keep the farm. He said Mr. Rogers was there the night before, he saw him and he talked with him and Mr. Rogers promised to him he was going to have the payments, all the back payments and interest, and Mr. Robertson say, Rogers—he can stay if he pays the payments.
page 46 } Q. Now, the trustee's accounting a copy of which has been introduced in evidence here today, shows you received a sum of $100 on account of your third deed of trust, is that correct?
A. That is correct, yes.

Mr. Pickett: That is all.
Mr. Lonas: No questions.

(Witness excused.)

Benjamin Harrison Runyon.

Mr. Pickett: Would your Honor indulge me for a few minutes about the next witness I want to call? I won't be long.

The Court: Yes.

Mr. Pickett: I would like to call Mr. Runyon, if your Honor pleases, as an adverse party.

Thereupon,

BENJAMIN HARRISON RUNYON,

was called as an adverse witness by counsel for complainant and, having been previously sworn, took the stand, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Pickett:

Q. Would you please state your name?

A. Benjamin Harrison Runyon.

Q. Your residence?

A. Bailey's Crossroads, Virginia.

page 47 } Q. You are one of the defendants to this suit?

A. Seems like it.

Q. Mr. Runyon, you bought this farm at a trustee's sale in July 1955?

A. I did not. I bought it from Mr. Polland.

Q. Were you present at that sale?

A. No, sir.

Q. You bought it from Mr. Polland?

A. Yes.

Q. Did he give you anything in writing?

A. He did. He gave me an agreement.

Q. Where is that agreement?

A. I don't have it at the present time.

Q. Has it been destroyed?

A. I did.

Q. What was the date of it?

A. Near as I can remember it was July 19.

Q. Did you pay him anything for it?

A. I took $12,000 with Mr. Brown in Alexandria, attorney, to handle it until the thing was settled and he—we have the check here showing that I put it up.

Q. Are you referring to Mr. Sam Brown, a lawyer in Alexandria?

Benjamin Harrison Runyon.

A. I don't have his initials. Mr. Lonas has the page 48 } check there.

Q. What was his connection with the matter?

A. We had an agreement through him he was going to handle the case, he was going to make the settlement between Mr. Polland and I.

Q. You say you have a check here?

A. Yes, sir.

Mr. Hansbarger: Would you like the check, Mr. Pickett?

Mr. Pickett: Yes.

(Mr. Hansbarger hands the check to Mr. Pickett.)

Mr. Pickett: You have no objection to my using it?

Mr. Hansbarger: No.

By Mr. Pickett:

Q. Is that the check that you referred to (handing the check to the witness)?

A. Yes, that is the check.

Q. Now, that is a check of yours payable to Kabler & Brown, Trustees. What was that for?

A. That was the deposit on the place.

Q. Who were they representing?

A. They were representing Mr. Polland and myself.

Q. Both of them?

A. Yes, sir.

Mr. Pickett: I would like to offer this, if your Honor pleases, in evidence as Plaintiff's Exhibit No. 5.

The Court: Exhibit No. 5.

page 49 } (The check referred to was marked Plaintiff's Exhibit No. 5 for identification and received in evidence.)

By Mr. Pickett:

Q. Did they ever give this money back to you?

A. Yes.

Q. When?

A. Sometimes afterward. I couldn't tell you the exact date.

Q. What month?

A. In July.

Benjamin Harrison Runyon.

Q. In July?
A. I think so, last July.
Q. Now, Mr. Polland made a deposit of $3,300, hadn't he?
A. Yes.
Q. With Mr. Smith?
A. Yes.
Q. What happened to that?
A. I gave Mr. Polland a check for $3,300 in place of the one he gave Mr. Smith.
Q. Was that check cashed and used by Mr. Polland?

Mr. Lonas : Mr. Pickett, here is the check if you would like it (handing the check to Mr. Pickett).

page 50 } By Mr. Pickett:
Q. Is this the check you are talking about (handing the check to the witness)?
A. Yes, sir.

Mr. Pickett: I offer this as Plaintiff's Exhibit No. 6.

(The check referred to was marked Plaintiff's Exhibit No. 6 for identification and received in evidence.)

By Mr. Pickett:
Q. Did he ever return the $3,300 to you?
A. No, sir. He had no right to return it to me.
Q. You paid him that for his part in this?
A. No, sir, I gave it to him in place of the check he gave Mr. Smith.
Q. So that you, in effect, then substituted yourself in place of Mr. Polland? Is that right?

Mr. Hansbarger: Objection, your Honor.

By Mr. Pickett:
Q. You stood in his shoes after that?

Mr. Hansbarger: Objection, your Honor.
The Court: Objection sustained.

By Mr. Pickett:
Q. Now, did you pay any money to Mr. Smith's hands?
A. I did.

Benjamin Harrison Runyon.

Q. How much?
page 51 } A. $8,700.
Q. Have you got a check for that?
A. Well, I don't have it with me, no, sir.
Q. Was that at the same time these checks were issued?
A. No, sir.
Q. What date was that?
A. Well, I couldn't give you the exact date, sir, I don't know.
Q. Well, was it in July?
A. Yes, sir.
Q. And that remained in his hands until after the second sale?
A. Yes, sir.
Q. Now, following the transaction you had with Mr. Polland, did you execute a deed of trust and note for $21,000 payable to the order of Mr. Robertson?
A. I did.
Q. Was that deed of trust recorded?
A. I think so.
Q. Then, after the second sale in October 1955, did you execute another deed of trust for $21,000 and a note payable to Mr. Robertson?
A. I only executed one. I don't know just how it was done. Not two.
Q. The one you executed, then, was dated in
page 52 } July?
A. I didn't say it was dated in July.
Q. It was before the second sale?
A. Yes.
Q. I believe you have since paid that note off, haven't you?
A. Yes.
Q. Now, do you recall being on the farm or seeing, rather, Mr. Robertson on the Sunday a week after the first sale?
A. I saw Mr. Robertson after the first sale, but I couldn't tell you what day it was.
Q. But it was shortly after the first sale?
A. Within two weeks.
Q. Where did you see him?
A. Well, on the farm. That is about the only thing I can tell you, the house or barn, somewhere there.
Q. At that time did he tell you that he was willing to take a deed of trust to secure him $21,000?
A. I did not ask him. Mr. Polland asked him what he

Benjamin Harrison Runyon.

was going to do with his money and he said he was going to loan it out, and Mr. Polland said, "How about loaning Mr. Runyon $21,000 and I will get out of the deal and he is going to buy the place?" And Mr. Robertson said, "All right," he was safe at $21,000. And he did do that.

Q. That was agreeable with you?

A. Yes.

page 53 } Q. When did you take possession?

A. Well, I took possession shortly after the first sale.

Q. And you have been in possession ever since?

A. Yes, sir.

Mr. Pickett: That is all, sir.

CROSS EXAMINATION.

By Mr. Hansbarger:

Q. Mr. Runyon, how old are you?

A. Going on seventy-one years old.

Q. Now, Mrs. Runyon is also named as a defendant here. Did she have anything to do with any of these transactions at all, to your knowledge?

A. No, sir, none whatsoever.

Q. After the first sale but prior to the second sale, other than the occasion that you mentioned with Mr. Polland and Mr. Robertson being agreeable to lend you $21,000, did you ever enter into any agreement with Mr. Robertson relative to extending you credit if you bought it at the second sale?

A. No, never mentioned it.

Q. This note that was executed after the first sale and in accordance with the agreement agreeable with Mr. Robertson, where did that note remain from the time it was executed until the time that it was dated?

A. I could not tell you. I never entered it at all. I guess it was in Mr. Smith's office.

page 54 } Q. Do you recall or do you know the date of the note?

A. No, sir.

Q. You don't know the date at all?

A. No, sir, I do not.

Q. Now, the agreement whereby Mr. Robertson agreed to take back a trust insofar as the second sale is concerned, when was that made?

Benjamin Harrison Runyon.

A. There was never any agreement made, but the one time. Nothing was brought up.

Q. Nothing was ever said before that?

A. No, sir.

Q. Now, Mr. Robertson has testified when you approached him prior to the second sale on one occasion, and I believe you have heard that testimony this morning. Would you explain to the Court just exactly what transpired relative to that occasion?

A. In reference to what, sir?

Q. In reference to the conversation that Mr. Robertson has testified to where you approached him and it was suggested—at least that you asked him—not to bid.

A. I told Mr. Robertson I was not going over $33,000 and if he wanted to bid it was all right with me, it didn't make any difference. What I had up I was going to pay and I wasn't going any higher, and I didn't. I did not try to bid any higher than $33,000. The only bids had were thirty-
page 55 } one; thirty-one five; thirty-two; thirty-two five; and thirty-three. I bid the even bids and somebody else bid the $500. I think that was Mr. Robertson.

Q. Do you know what Mr. Robertson's high bid was?

A. Thirty-two five, and I bid thirty-three, and that was it. I told them that was all I was going.

Q. Did you have any agreement prior to the second sale and relative to the second sale with Mr. Smith whereby Mr. Smith agreed to extend you any credit at all?

A. No. No agreement.

Q. As far as you are concerned at the second sale you bid in at thirty-three and it was cash at that point to you?

A. Yes.

Q. You were prepared, were you not had it not been for a subsequent agreement between yourself and Mr. Robertson to obtain financing from some other source?

A. Mr. Polland was willing to put it up, and he said as long as he was willing to put it up it was all right.

Q. Now, from the time of the first sale until the time of the second sale did you have any conversations with Mr. Rogers relative to the foreclosure?

A. Between the two sales?

Q. Yes, relative to the foreclosure?

A. Not between the two sales, no.

page 56 } Q. Did Mr. Rogers come to you or tell you or did you know at the time of the first sale that Mr.

Benjamin Harrison Runyon.

Rogers presented a certified check for $2,500 to Mr. Selwyn Smith?

A. No, sir.

Q. Did Mr. Rogers come to you at any time to tell you that?

A. The only time I saw Mr. Rogers was after that, after the second sale. He came out and got what stuff he had there and said, "I'm through." There was a stove out at the house and he—

Q. He got the equipment off the premises?

A. Yes.

Q. Was there anything that belonged to Mr. Rogers, to your knowledge, other than that?

A. That is all I know of. He got the dairy equipment out that was there.

Q. But it was all gone when it was over?

A. He came after the second sale and took it out.

Mr. Hansbarger: That is all I have.

RE-DIRECT EXAMINATION.

By Mr. Pickett:

Q. Mr. Runyon, weren't you saying that Mr. Rogers came and got the equipment after the second sale? Wasn't it after the first sale?

page 57 } A. It could have been after the first sale. He said he was through at one time or other. He got the dairy equipment and stove out of the house and said, "I'm through with the place."

Q. How did it happen that you didn't pay all cash for this property as it was advertised and as you bid?

Mr. Hansbarger: If the Court please, that is one of the issues for the Court to determine.

The Court: He can testify as to the circumstances.

By Mr. Pickett:

Q. All right, you may answer.

A. Well, as I told you before, Mr. Polland went down and asked Mr. Robertson what he was going to do with the money and Mr. Robertson said he was going to loan it out and Mr. Polland said, "How about loaning Mr. Runyon $21,000 and I'll get out of the deal altogether," because he wasn't getting

anything out of it, he was turning it over to me as a friend.

Q. That was before the second sale?

A. Yes.

Q. You relied on this understanding when you bid on the second sale?

A. Nothing was ever taken down. We signed a note for $21,000 and also gave Mr. Smith a check for $8,700, and I had to give Mr. Polland a check for $3,300, and that covers the whole sale.

page 58 } Q. All of that was done before the second sale?

A. Well, it was done.

Q. I said, before the second sale?

A. All right, he had the money.

Mr. Pickett: That is all.

(Witness excused.)

Mr. Pickett: If your Honor please, I only have one more witness.

The Court: Suppose we adjourn for lunch and be back here at 1:30.

(Whereupon, at 12:30 o'clock p. m., the hearing in the above-entitled matter was recessed to reconvene at 1:30 o'clock p. m., this day.)

page 59 } AFTERNOON SESSION.

1:45 p. m.

The Court: All right, proceed.

Mr. Pickett: Mr. Rogers, will you please take the stand.

Thereupon,

CLIFTON B. ROGERS,

was called as a witness by counsel for complainant and, having been previously sworn, took the stand, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Pickett:

Q. Please state your name and address.

Clifton B. Rogers.

A. Clifton B. Rogers, Springfield, Virginia.

Q. Mr. Rogers, when did you purchase this farm and what price did you pay for it?

A. April 19, 1950; $40,000.

Q. How was that purchase price evidenced? How much cash did you pay?

A. I gave Mr. Robertson a check for $8,000 cash and I secured a first trust, a balance of $32,000.

Q. How was that payable?

A. Payable at $50 a month on the principal and interest at 5 per cent.

The Court: Including the interest?

The Witness: Plus interest at 5 per cent.

page 60 } By Mr. Pickett:

Q. Did you get behind in your monthly payments?

A. Yes, sir.

Q. What year was that in?

A. I was behind as early as '53. Mr. Robertson in '51, when his second trust was concurred in, he loaned me $1,500 second trust in November 1950. And in '53 when we had the drought I run into additional expenses in order to take care of the cattle and keep them up, so I got behind with Mr. Robertson on my note. I talked to him several times and he said, "As long as you try I will go along with you." And that is what I did until up at the time I held the sale of my cattle on April 15, 1955, and I advertised the farm for sale at that time with the privilege of bidding in the end if it didn't bring the price that I asked for it.

That sale was held and I sold my cattle and my machinery —part of it. The other part I retained to operate the farm until I could sell it.

Q. Well, then, was it advertised for sale under the trust?

A. After I negotiated this sale with Mr. Duvall for a total of $37,000, in searching the title, Mr. Compton discovered there was a judgment filed against the property for $15,000 from the Demery estate, which he could not deliver the farm until the 1st of June 1955 to Mr. Duvall with a

page 61 } clear title.

I went to see several people about getting the money to pay this judgment off and in the meantime, while I was doing that, Mr. Duvall picked up his deposit from Mr. Compton—which he had $5,000 on deposit—and decided he

wouldn't go through with the deal. And after Mr. Duvall picked that deposit up that is when, I think, Mr. Robertson went to see Mr. Smith as to what he should do, and I think he was advised by Mr. Smith that the only way anyone could get a clear title to the farm would be to foreclose on it and sell it at that time.

Then, when I found out Mr. Smith had advised Mr. Robertson to foreclose on the farm I went to see Mr. Robertson and asked him would he accept the money from me to bring my payments up to date if he would go along and let me keep the farm? And, at that time, he told me all he was interested in was the money due him, that he wanted to keep his money invested and it was as safe in the farm there than anywhere else.

So I asked him if he would have a conference with Mr. Smith and make arrangements so that he could be at the office with him and find out how much money I would need to bring the trust and interest up to date. We had this conference in Mr. Smith's office and I gave him my books and told him how much I thought I was back and he figured it up and told me that the best he could figure that I page 62 } would have to pay Mr. Robertson everything I owed him—I also owed Mr. Robertson a personal loan of $5,000 which was not due. Mr. Smith figured out everything, including the grass seed, the taxes, the insurance, the back payments to bring the first trust up to date, pay off the second trust in full, and the amount he gave me was, he said, "$2,500 would cover it." And I suggested to Mr. Smith if he would not hold the sale I would pay him $500 for his fee, which he agreed he would accept the check and take $50 a month from me on the balance, whatever was needed to cover his fee.

When I went to get—

Q. Wait a minute. Was that agreeable to Mr. Robertson?

A. Mr. and Mrs. Robertson were present. They brought me.

Q. Was that agreeable to them?

A. Yes.

Q. Go ahead.

A. Mr. Capoletti had his cows pastured on this farm and he came to me and said, "Don't let the farm be sold." And I said, "The only way I can keep it from being sold is to raise $2,500." Mr. Capoletti and I went to Mr. Smith's house on a Saturday evening. It was late and I asked Mr. Smith how long would I have to raise this money, and he

said, "So long as you have it there, if it is five minutes of twelve as of the day of the sale there won't be any
page 63 } sale." So Mr. Capoletti and I went the following Wednesday to the bank, talked to the man at the bank, got the certified check on Friday morning and came to Mr. Smith's office and I talked to his secretary and she said he wasn't in. It was 10:30 then and I went around to Mr. May and asked him to take this check and tender it to Mr. Smith and represent me in the case from then on.

Mr. May called Mr. Smith at that time while I was in his office and talked to him on the phone.

Mr. Lonas: Objection. Your Honor, for the sake of the record, I would like to renew my objection to all testimony concerning this first sale, if that is what he is getting to. It certainly is hearsay testimony what was said on the phone.

The Court: Any hearsay would be objectionable. So far as any other objection is concerned. It is overruled.

By Mr. Pickett:

Q. Did I understand you to say that Mr. May called Mr. Smith in your presence?

A. Mr. May called Mr. Smith while I was in his office and told Mr. Smith I was in his office and had a check there for $2,500 to bring my payments and interest up to date and to call the sale off.

Mr. May told me after he hung up that Mr. Smith said, "I have to confer with Mr. and Mrs. Robertson and let you know this evening at 5:00 o'clock." I went back to Mr. May's office that evening and sat there until 5:15 before
page 64 } Mr. May got Mr. Smith on the phone again. At that time he told Mr. May that—

Mr. Lonas: I object as to what Mr. Smith said.

The Court: Objection sustained.

Mr. Pickett: You can't state what Mr. Smith said to Mr. May because it is hearsay.

The Witness: Well, Mr. Smith, at the end of it—that was all to the first sale. Then, after he wouldn't accept the check—he said he wouldn't accept it—

Mr. Lonas: I object unless he said that to him.

The Court: Objection sustained.

The Witness: Mr. May prepared an injunction to have the sale stopped and that was at 11:30 Saturday morning of the 16th, at which the injunction was not granted, and it was

approximately 12:00 that day before the sale was held, because Mr. May and Mr. Smith were in Judge Sinclair's home discussing the proposal.

But after the sale was held Mr. Polland bid the place in for a total of $33,000 and he gave his check to Mr. Smith. I presume he made a settlement in front of the Court House for 10 per cent of the bid. I was cutting wheat on the farm that evening and I went back to the farm and about two hours later Mr. Polland came out and said I had twenty-four hours to move my stuff after Monday morning. I said, "I think Mr. Duvall gave his man thirty days to move page 65 } his stuff after the place is sold." I was shipping my wheat into Herbert Brown's—

Mr. Lonas: I don't think this kind of testimony is material with the issues involved. It may be on other matters but not on the issues before the Court now.

The Court: I don't think what Mr. Rogers is testifying to right now is in issue.

By Mr. Pickett:

Q. Well, did you see Mr. Smith at that sale?

A. Yes, sir.

Q. Did you say anything to him?

A. Not at the first sale I didn't, no, sir.

Q. Did you send anybody to the sale after the first sale or while the first sale was being bid?

A. I contacted Mr. Robertson myself and asked him what he would do, if that agreement still stands good? If that agreement stands good would he still accept? He said, "As far as I am concerned I don't want to do anything until Mr. Smith is consulted, but I don't want to sue him for making a proposition that he didn't know."

I sent Mr. P. W. Anderson on my behalf and he was supposed to have talked to Mr. Smith.

Q. For what purpose did you ask him to talk to Mr. Smith?

A. I asked him to go to Mr. Smith and see if he page 66 } could grant me any terms on this property or if he would sell me the property back.

Q. You can't tell what he told you.

Did that visit produce any results?

A. Nothing except I had Mr. Anderson go down to Mr. Robertson that evening and he called me that night and told me—Mr. Anderson determined from Mr. Robertson that if I got the interest and the money he was willing to go along.

Clifton B. Rogers.

Mr. Lonas: Who told you that?
The Witness: Mr. Anderson.
Mr. Lonas: I object to that.
Mr. Pickett: That is cumulative. Mr. Robertson already testified to that.
The Court: Sustained.

By Mr. Pickett:
Q. Why didn't you go to see Mr. Smith directly?
A. I figured if he wouldn't accept the cashier's check of $2,500 from Mr. May, the attorney representing me, I was wasting my time to talk to him. However, the last minute of the second sale I had Mr. Conner to bring to bid on the sale —to produce such money he thought it was worth. The conversation that Mr. Smith had with Mr. Conner and myself just five minutes before the sale was, "If you can't pay up everything owed on the farm I can't convey it back to you."

page 67 } And Mr. Conner was prepared to pay Mr. Robertson. The way I understood it, Mr. Smith said, "Everything including the judgment and the third trust would have to be paid off and the man on the third trust was not saved."

Q. That third trust was how much?
A. It was $5,000, payable to Christ Latsios, which came due in '57. Start paying on it in '57.
Q. This copy of a cashier's check which has been introduced in evidence as Plaintiff's Exhibit No. 4, is that a copy of it (handing the exhibit to the witness)?
A. That is a copy of it.
Q. Is that the cashier's check that you had and handed to Mr. May when he talked to Mr. Smith on the phone?
A. Yes, sir. And after Mr. Smith didn't accept that check I didn't know just what else to do. I carried it back and I had it made out to Mr. May—I have a copy of that home also, if you need it—and I held that for four days.

Mr. Pickett: Your witness.
Mr. Shaw: I want to ask some questions of the witness but it pertains to the cross bill. Would you rather I wait?
The Court: If it pertains to the cross bill and as long as the witness is on the stand you can ask him. It may be if you have no cross examination as such, let these gentlemen cross examine and you may bring what you have on the cross bill.

Clifton B. Rogers.

Do you want to go ahead on the cross bill?
page 68 } Mr. Shaw: No.

CROSS EXAMINATION.

By Mr. Hansbarger:
Q. Mr. Rogers, in 1950, you say, you purchased this property from Mr. Robertson?
A. Yes, sir.
Q. The price was $40,000 cash, is that right?
A. No, sir.
Q. It was $8,000 cash and $32,000 trust?
A. Yes. I have a copy of it.
Q. What all did that $40,000 include?
A. The $40,000 included everything on the farm.
Q. What was on the farm?
A. The personal property was leased to me for $8,000 cash—all personal property.
Q. What was on the farm?
A. Well, I can read it off to you.
Q. Would you?
A. "List of personal property of E. P. Robertson to be turned over to Clifton B. Rogers."
Q. That is the bill of sale?
A. Yes, would you take it and read it.
Q. Do you have any objection if it goes in evidence?
A. No, if Mr. Pickett doesn't.

Mr. Pickett: No, I haven't. I don't see the
page 69 } relevancy of it.
Mr. Hansbarger: I would like to offer it as Defendants' Exhibit No. 1.
The Court: It will be Defendants' Exhibit No. 1, Runyon.

(The document referred to was marked Defendants' Exhibit No. 1, Runyon, for identification and received in evidence.)

The Witness: That is a copy of the settlement if you want to see it (handing the document to Mr. Hansbarger.)

By Mr. Hansbarger:
Q. Now, Mr. Rogers, in arriving at the price of $40,000 you started to testify just a moment ago something about $8,000. Did that refer to the list of personal property included?

Clifton B. Rogers.

A. No, sir. It referred to the purchase price of the farm and everything on it.

Q. Which would include all of this (indicating)?

A. Yes, sir.

Q. Was any value placed on the personal property on the farm?

A. No. It was all sold to me in one-lump sum, $40,000, which I thought was a good buy.

Q. You said subsequent to this you got a chattel mortgage on it?

page 70 } A. Not on that property.

Q. How did you raise the $8,000 that you paid cash?

A. Do I have to answer that?

The Court: This doesn't have anything to do with the determination of that property.

Mr. Hansbarger: I will ask that it be stricken from the record—did you raise it from that property?

The Witness: I didn't raise it from that property.

Mr. Hansbarger: You didn't use this property?

The Witness: No.

Mr. Hansbarger: I will withdraw the question.

By Mr. Hansbarger:

Q. Mr. Rogers, when you left the farm how much of the personal property listed in this deed was left on the farm?

A. None of the personal property there.

Q. Was there anything to protect the place that was still there after you moved off?

A. I had the 4-H tractor—after I moved in?

Q. After you moved off how much did you leave before this went to foreclosure?

A. After I had my sale the 15th of April?

Q. After the foreclosure what was left on the property?

A. The first or second sale?

Q. The first sale?

A. After the first sale what was left on the prop-

page 71 } erty was a 4-H tractor which Mr. Lonas attached for judgment. That was placed against me for the Demery estate. Had a farm-all tractor—

Q. Were any of these items that you mentioned sold at the foreclosure sale?

A. No, sir.

Q. Mr. Runyon didn't get any of that?

A. Nothing from me. But there was some dairy equipment that was not sold but he tried to claim it.

Q. Did Mr. Runyon get that?

A. No, but he tried to.

Q. But he didn't get it?

A. No, sir.

Q. Now, you say you sold, I believe, most of your equipment and your cattle in April?

A. That's right.

Q. Why was that?

A. I had a voluntary sale to pay off the Marshall National Bank the money that I owed them.

Q. Mr. Rogers, didn't Mr. Smith advise you other than that sum of $2,500 how much was due to bring this thing up to date?

A. No, sir, those were the figures he gave me.

Q. You never heard of $2,593.28?

A. No, sir.

page 72 } Q. Is this the first time you heard of that?

A. That's right.

Q. Did he give you any time limit that you had to bring this money in?

A. He said any time between the time that we talked to him—the figures that he gave me was as of May the 20th, to bring everything up to date. That was the day we were in his office.

Q. As of May 20th?

A. And he was trying to claim a $5,000 personal note that I owed Mr. Robertson that was not due until October. He tried to include that $5,000 in that $2,500.

Q. The only amount, under oath, that Mr. Smith ever told you was $2,500?

A. That's right. And if he told me more I could have gotten more.

Q. You never heard of the figure $2,593.28?

A. No, sir.

Mr. Hansbarger: That is all.

CROSS EXAMINATION.

By Mr. Shaw:

Q. Mr. Rogers, is this note signed Clifton B. Rogers and dated April 19, 1950, a note for $32,000 that you mentioned

Clifton B. Rogers.

in your previous testimony? (Handing the document to the witness.)

A. Yes, sir.

page 73 } Q. And this is the note dated November 9, 1950, signed Clifton B. Rogers and Pauline V. Rogers, for $1,500 second trust note that you previously mentioned (handing the document to the witness)?

A. Yes, sir.

Q. Now, there are on the back of these notes entries indicating payments made on them, first, 5-22-50, and the last one is 12-7-54, in varying amounts. Are those all payments that you made on this?

A. Mr. Pickett has my receipts and book. I had nothing to do with them. I went over this with you on the other case.

Q. Your receipts cover all that you paid?

A. That's right. Mr. Smith got it from me the day that I—

Q. They are referred to as pass books, I believe.

Now, there are two pass books here. One showing payments beginning May 19th, and the other payment, the last payment made, is 10-19-54, on a note for $32,000 listed on the first part and then it is marked $30,637.85 on the date of 4-19-50.

Do these show all of the payments you made on that note?

A. This payment here was made—this was the last payment that I made, the 20th of April 1955, $280.

Q. That was the last payment?

A. That's right.

Q. You never paid anything on that note since

page 74 } that day?

A. Since April, that's right. Since April '55, that is.

Q. Then, this one shows the last payment on date of 12-9-55 (indicating).

A. That was paid April 6th. Other than this it was $44 paid on the principal and that was the amount of interest due (indicating). This payment was probably the last.

Q. The last payment you made on that $1,500 note?

A. That is the date it was due (indicating).

Q. April 6, 1955?

A. That's right.

Q. You never paid anything since that time?

A. No, sir. It was supposed to be settled when the property was sold.

Mr. Shaw: I should like to introduce these pass books in

evidence. They purport to show the exact amount—as we understood at the previous hearing—paid, but the balances are incorrect.

The Witness: I wouldn't say, no. No, the balance is not incorrect.

Mr. Shaw: I say the balances are incorrect and that is a matter of mathematics.

The Witness: While we are going through with that—

By Mr. Shaw:

Q. Just answer my question.

page 75 } A. It is not incorrect, no, sir.

Q. These do show what you paid and when?

A. They show the—they are records of the payments that I made.

Q. That is all I want to know.

Mr. Shaw: I would like to introduce them.

Mr. Pickett: You are introducing this for the purpose of obtaining a judgment against him. Mr. Robertson doesn't want a judgement against him. You may ask him in open court.

Mr. Shaw: I will be asked to obtain one for him.

Mr. Pickett: He volunteered to me this morning that he would not sue Mr. Rogers and doesn't want a judgment against him.

The Court: He is asking for a judgment.

Mr. Shaw: That is in two parts. It starts here on this page, $32,000 and carries the balance over here (indicating).

The Court: Exhibit A, consisting of two separate parts.

(The pass books referred to were marked Defendants' Exhibit A, Robertson, for identification and received in evidence.)

The Court: Mr. Rogers, would you care if photostats are made of these books and then they will be returned to you?

Mr. Shaw: There are photostats right there that were introduced in another case in this court of those particular documents, as I remember. Certainly of those

page 76 } notes.

The Court: If there is no objection we can substitute those.

Mr. Shaw: They can be withdrawn from that.

Mr. Pickett: I would like to ascertain whether or not Mr. Robertson wants to obtain a judgment against him.

Mr. Shaw: As far as I know Mr. Robertson is suing Mr. Rogers for deficiency on those notes, and I don't know of anything to the contrary. I haven't been instructed to withdraw this suit.

The Court: What is this suit, General?

Mr. Shaw: That is on the $1,500 note. I have the records in another case containing the photostats of all these documents.

The Court: You are asking to get this one on the $1,500 note or the balance?

Mr. Shaw: Yes.

The Court: That will be Robertson Exhibit B.

(The document referred to was marked Defendants' Exhibit B, Robertson, for identification and received in evidence.)

Mr. Shaw: I also have photostats of the notes here, your Honor.

Here they are, Mr. Pickett, they are made in Fairfax (handing the documents to Mr. Pickett.)

page 77 } Here are the photostatic copies, your Honor (handing the documents to the Court.)

The Court: There are two parts of A and B. You can return those to Mr. Rogers and we will substitute the photostats.

Mr. Shaw: Here are the notes involved, one for $32,000.

The Court: The $32,000 note will be Exhibit C.

(The document referred to was marked Defendants' Exhibit C, Robertson, for identification and received in evidence.)

Mr. Shaw: Here is one more for $1,500 dated November 9, 1950.

The Court: That will be Exhibit D.

(The document referred to was marked Defendants' Exhibit D, Robertson, for identification and received in evidence.)

The Court: You have taken these out of the suit papers in the other file?

Mr. Shaw: Yes.

The Court: I would suggest, at your convenience, you prepare an order which would recite these were withdrawn from that file.

(Mr. Shaw confers with Mr. and Mrs. Robertson.)

page 78 } Mr. Shaw: Your Honor, I am under a rather embarrassing position—

The Court: I understand Mr. Robertson wants to abandon his claim against Mr. Rogers on account of this deficiency.

Mr. Shaw: He doesn't feel it the responsibility of Mr. Rogers that he get the full debt. His wife tells me she doesn't know. That puts me in an embarrassing position. I understood all along that I obtained a judgment for them and the debt is still due them and I was operating under that end. I am in between. There isn't a question about the indebtedness existing, and I am in the middle.

The Court: Mr. and Mrs. Robertson, can you hear me from there?

Mrs. Robertson: I don't think he can.

The Court: Mr. and Mrs. Robertson, suppose you come up here, please.

(Mr. and Mrs. Robertson approach the bench.)

The Court: General Shaw has filed for you what is commonly known as a cross bill in which he is asking, on your behalf, that a judgment be entered against Mr. Clifton B. Rogers for the difference between what was paid you on the note and what the proper payment should have been.

Now, it appears that you don't want to ask for a judgment against Mr. Rogers for that difference.

Mr. Robertson: I don't know anything about
page 79 } the law and I feel this way: That I had my notes in the bank and paid out for collecting on them and I gave the notes to Mr. Smith and he called the bank up, so he says, and got the figure and told me what to bid. I told Mr. Smith I wanted $35,000 to get it. And the statement was made on the note it wasn't correct, and I don't see why I should sue Mr. Rogers for somebody's else's big mistake.

The Court: It is not necessary for you to sue him at all.

Mr. Robertson: I am not going to do it. And if I can't get it—

Clifton B. Rogers.

The Court: All I want to do now is make sure you understand and to have you tell me you don't want to ask any judgment against Mr. Rogers.

Mrs. Rogers: Not at this time.

Mr. Shaw: May I ask the Court something further? I feel, under the law, if Mr. Rogers is forgiven this debt by Mr. Robertson his idea of if there is any possibility of collecting it from anyone else is erroneous. And he has to stand by the debt in his suit through me for two reasons: One, I tried to get his $1,500; and second, being in a position where nobody could charge him for having that debt. He has no responsibility for such damages suffered.

Mr. Robertson: Here is what I showed you and that is what I thought you—asked that letter take care of it.

Mrs. Robertson: I don't know anything about
page 80 } that.

The Court: Whatever the effect may be, you say you are not asking for a judgment at this time against him?

Mr. Robertson: No. I'll get it from somebody.

The Court: That may mean to me that you will try against somebody else and if you can't get it from somebody else you will come back to Mr. Rogers?

Mrs. Robertson: Maybe.

Mr. Robertson: I want to get my money.

The Court: The only thing I want you to know is that you proceed at your own risk from here on. You don't want to ask for a judgment against him?

Mrs. Robertson: I don't think it would be necessary.

Mr. Robertson: I want to try to get my money.

The Court: General Shaw is not responsible what happens from now on?

Mr. Robertson: That's correct.

Mr. Shaw: That will mean I am through with this case. I won't go through the trouble of preparing an order on these exhibits.

The Court: I think the record can just show the charge of Mr. and Mrs. Robertson against Mr. Rogers is dismissed at the request of the Robertsons.

(Mr. and Mrs. Robertson resumed their seats in the courtroom.)

page 81 } CROSS EXAMINATION (Cont'd.)

Clifton B. Rogers.

By Mr. Hansbarger:

Q. Mr. Rogers, prior to this first sale, relative to this money that you checked, you say that you got Mr. May to represent you?

A. Yes, sir.

Q. Did he keep you advised during the course of these proceedings?

A. Which proceedings do you mean?

Q. The first sale?

A. There was only a matter of one day, from the 15th to the 16th, that Mr. May had to work on the first sale.

Q. What did Mr. May do for you, do you know? What did he try to do?

A. I gave Mr. May this check for $2,500 on Friday morning around 10:30. He contacted Mr. Smith by phone, as I told you, and then he contacted him again in the afternoon, and Mr. Smith refused the check the second time. He said, "The only thing I can do is prepare an injunction and present it to the Judge tomorrow morning," and I think he called the Judge and asked him would he be in his home until 11:30 on Saturday morning, if they didn't make a settlement they would be there on Saturday morning. And Mr. Smith and Mr. May went to the Judge's home and stayed there until approximately 12:15. I don't know anything about
page 82 } the conference through the attorney to the Judge.

Q. You weren't present?

A. No, sir.

Q. Was it all right with you if Mr. May prepared this injunction?

A. Yes, sir.

Q. You had full knowledge that he was going to do it?

A. I signed the paper. I signed the paper on Saturday after he prepared it.

Q. Was that the injunction of the bill?

A. What ever the claim was to he had to take it to the Judge.

Q. Would you recognize the paper if you saw it today?

A. I would recognize my signature if it was on it.

Q. Would you recognize a copy of that paper?

A. I wouldn't unless my signature is on it.

Q. Did you read it when you signed it?

A. Yes, sir.

Q. You know exactly what was in that original bill?

A. I read it over. I didn't memorize it.

Q. But you read it?

Clifton B. Rogers.

A. I read it before I signed it.
Q. Do you know where it is now?
A. No, sir.
Q. You don't have any idea?
page 83 } A. No, sir.
Q. You say you don't know whether or not you would recognize a copy of it?
A. Unless I see my signature on it I won't say it's the same one.
Q. You read it—

Mr. Pickett: I object. He is arguing with the witness.
The Court: Objection sustained.
Mr. Hansbarger: I will withdraw that.
That is all.
Mr. Smith: Your Honor, I would like to ask this: I have had reason to believe that the petition Mr. Rogers signed is in the court at this time. I think Mr. Pickett has it among his files and is not aware of it, and I would like to request that he examine his files and see if he can find a petition like this one.
Mr. Pickett: I haven't seen the court papers.
Mr. Smith: It was turned over to you by Mr. May, I believe.
This is the petition we presented to your Honor on the day of the sale.
Mr. Hansbarger: May I resume my cross examination?
Mr. Smith: I will yield.
Mr. Hansbarger: Does he have the original?
Mr. Smith: Yes, he has.

page 84 } CROSS EXAMINATION (Cont'd.)

By Mr. Hansbarger:
Q. Now, I hand you this paper, Mr. Rogers, and ask you if that is the bill you signed (handing the document to the witness)?
A. Yes, I signed this.
Q. That is your signature?
A. Yes, sir.

Mr. Hansbarger: Mr. Pickett, do you have any objection if I ask the Court to identify this and mark is for identification?
Mr. Pickett: No.

Clifton B. Rogers.

Mr. Hansbarger: I would like to offer it in evidence.
Mr. Pickett: I would like to know the relevancy of it?
The Witness: The answer is because $2,593 is on it.
Mr. Hansbarger: You wait until I ask you a question.
The Court: That will be Exhibit 2, Runyon, for identification.

(The document referred to was marked Defendants' Exhibit No. 2, Runyon, for identification.)

By Mr. Hansbarger:
Q. I will refer you to page 3 of this Defendants' Exhibit No. 2, Runyon, for identification, and ask you whether or not—just read to the Court that figure (indicating) page 85? Isn't that figure that is shown $2,593.28?
A. That shows it there but it also shows a commission of $300 which Mr. Smith agreed not to include in the $2,500.
Q. That would reduce the $2,593 to $300 less?
A. That's right, and the $2,500 I overpaid what I needed.
Q. All that you needed to bring to Mr. Smith, if that is the case, was $2,200?
A. I needed $2,500, Mr. Smith told me.
Q. Then you say Mr. Smith agreed to deduct the $300?
A. He agreed to take $500 commission for his trouble. He didn't specify it on this. That could have been either he could take $300 or $200. He didn't say that at the time.
Q. What did he agree to?
A. To take $500 for his trouble and he would take a note from me to pay the $50 a month above the $2,500.
Q. So there would be no commission made on this bill?
A. Wasn't supposed to be.
Q. He agreed he would take the $2,500 less the $500, is that what you are saying?
A. He agreed for me to bring him $2,500, and all above the $2,500 that I needed to pay his commission I could pay him $50 a month.
Q. How much of that figure totalling to $2,593.28 is the commission shown?
A. Three hundred dollars shown here (indicating) page 86.
Q. That is right.
A. No, it's supposed to be $500.
Q. You signed it?

Clifton B. Rogers.

A. I signed it that morning, but I didn't read that particular item.

Q. You didn't read it?

A. I couldn't say that I remember that item, but I know the figures Mr. Smith agreed to go along with me—

Q. Let me see if I understand that agreement.

Did Mr. Smith agree with you to call off this sale in the event you would bring to Mr. Smith prior to the time of the sale an amount equal to the cost at this stage of the game plus the back payments of interest and principal?

A. He told me $2,500 is what I needed. And if I needed $3,500 I could have gotten $3,500, but he told me to bring $2,500. That is a list of things he—his commission is not on that paper.

Q. You agreed after that statement was made that he could knock the commission off and all you had to bring him—and you would give him a note for it?

A. I was to give him a note for the difference of what he needed. This statement he gave me was as of May 20th, was to bring him $2,500. Then any other money as part of the $2,500 he would accept the note payable to him at $50 a month.

Q. What was that note for?

page 87 } A. His fee.

Q. His commission?

A. Not commission, because his commission of the sale would be $1,650, which he got, and his commission for setting up of the sale would have been $500.

Q. What is the $300 on?

A. That is part of his commission.

Q. That is, you also gave him a commission on the $2,500?

A. No, I didn't give him anything. He didn't accept anything from me. That was only a proposal.

Q. Let me ask you this again: You testified, I believe, on cross examination previously that you had never heard of the figure $2,593.28?

A. I absolutely never heard of it. I absolutely don't remember reading $2,593.28 in there, but it was evidently in there when I signed it.

Q. You signed it?

A. Yes, sir.

Mr. Hansbarger: That is all.

(Witness excused.)

Mr. Pickett: Plaintiff rests, if your Honor pleases.
Mr. Hansbarger: I want to offer Exhibit No. 2 in evidence.
The Court: Defendants' Exhibit No. 2, Runyon, is now in evidence.

page 88 } (The document referred to previously marked Defendants' Exhibit No. 2, Runyon, for identification, is received in evidence.)

Mr. Hansbarger: If the Court please, could we request a five-minute recess?
The Court: Yes.

(A short recess was taken.)

Mr. Lonas: Mr. Runyon.

Thereupon,

BENJAMIN HARRISON RUNYON,
called as a witness by counsel for defendants, Runyon, and having been previously sworn, testified further as follows:

DIRECT EXAMINATION.

By Mr. Lonas:
Q. Mr. Runyon, previously you testified, I believe, that it was your recollection that you had only signed one note in connection with both the first sale and the second sale, is that correct? Do you recall testifying to that?
A. I testified signing the note, yes.
Q. Could you have been mistaken in that, if you had a chance to refresh your recollection of the matter?
A. Well, I could have been.
Q. Now, I will ask you, first of all, to look at this paper and see if you can identify it (handing the document to
page 89 } the witness)?
A. Yes. I signed this on the 8th of October.
Q. Do you recall the date of the second sale?
A. I think that was on the 8th, Saturday. We went from here to Mr. Smith's office and signed it.
Q. You are positive you did not sign this paper prior to the second sale?
A. Yes, I am quite positive of that, sir.

Benjamin Harrison Runyon.

Mr. Lonas: I would like to have this marked Defendants' Exhibit No. 3, I believe.
The Court: Exhibit No. 3.

(The document referred to was marked Defendants' Exhibit No. 3, Runyon, for identification and received in evidence.)

By Mr. Lonas:
Q. Mr. Runyon, that note has now been paid in full, has it not?
A. Yes.
Q. That was the note that you gave as part of the purchase price when you bought the property at the second sale?
A. Yes.
Q. Mr. Runyon, will you look at this paper and identify it (handing the document to the witness).
A. Yes, I signed this one. But I understood this page 90 } was no good. When the first sale was no good this was no good.
Q. Have you had this paper in your possession since the time you signed it?
A. No, I have not.
Q. Do you know where it has been?
A. No.
Q. Do you know where it was left the last time you saw it?
A. With Mr. Smith.
Q. Do you recognize your signature on this?
A. Yes.

Mr. Lonas: I would like to have this marked as Exhibit No. 4.
The Court: Exhibit No. 4.

(The document referred to was marked Defendants' Exhibit No. 4, Runyon, for identification and received in evidence.)

Mr. Lonas: That is all I have.
Mr. Pickett: I have no questions.

(Witness excused.)

Mr. Lonas: We will rest, your Honor.

H. Selwyn Smith.

Mr. Smith: I have not been sworn and I would like to take the stand.

page 91 } Thereupon,

H. SELWYN SMITH,

having first been duly sworn, took the stand in his own behalf, and testified as follows:

The Witness: Being a party defendant in this I felt I should take the stand in my own defense.

I was employed by Mr. Robertson after Mr. Rogers had gotten in default with his several obligations with Mr. Robertson to proceed to foreclose, or collect if they could prior to foreclosure of these several obligations. There were considerable conversations back and forth and several meetings in the office, and on one occasion—I do not know the date but my notes indicate here we got together—Mr. Rogers was, in effect, advised and that it was in accordance with Mr. Robertson's wishes and acquiesced by Mr. Robertson that if he would raise the sum of $2,593 and some cents on or before the 14th day—that is, 5:00 o'clock in the evening the 14th day of July 1954—I believe it was two days before this foreclosure—that we could stop this foreclosure sale.

I made notations at that time, and contrary to what Mr. Rogers said, there was a provision in that agreement whereby the commission due me, or which I would ask for the trust, provided for 4½ per cent of the face of the note, and in the event it was a settlement of cash I would ask for $300 in cash, and if not it was paid $100 in cash and a page 92 } $400 note payable six months after that date. There was no $500 note considered at all.

This was transmitted on to Mr. Rogers and subsequently thereto Mr. May called at my office and stated he had a $2,500 cashier's check. The check was late and I turned it down simply and purely because our offer was $2,593 by a specific date, and he had not met the requirements. There was nothing more said at that particular time.

On the morning of the sale, just prior to coming out here for the sale, I received a telephone call—I believe it was—and was told this paper had been prepared, and at that time I was required at the Court House here. I was furnished a copy of a bill in which Mr. and Mrs. Robertson and myself were made party defendants and, as your Honor knows, we came to your Honor's home and at that time the bill was

H. Selwyn Smith.

presented and discussed in its entirety. It was a bill for an injunction as to the sale.

Mr. Robertson stated he did not know of this $2,500 tender, and I would differ with Mr. Robertson that he did know of that tender in the office. He knew that we had gone down to the Judge's home and that was the reason why we had gone to your home.

At that time the first sale, of course, was attacked as there was a question later raised, either because it was overlooked by Mr. May or he did not at that time feel it was page 93 } pertinent. At that time Mr. Luke M. Polland, an unmarried man from Annandale, Virginia, Route 2, Box 575, was the successful bidder for $33,000. He gave me a check for $3,300, and subsequent thereto Mr. Polland whom, if my memory serves me correct, I believe is an attorney, called me and advised me that he had assigned his rights to Mr. Runyon. That was the first I knew of Mr. Runyon.

Subsequent thereto I was advised by Mr. Robertson, in effect, that he was going to let Mr. Runyon borrow a sum of money as part of the purchase price and the balance of it, of course, was to be cash, and Mr. Runyon acquiesced in that and delivered to me a check for $8,700. I had already had $3,300, and Mr. and Mrs. Robertson asked me to prepare the necessary papers.

I was also advised by Mr. Runyon that Judge C. Lacey Compton was to represent him and Judge Compton advised me he wanted to examine the title. At that point everything was at a standstill until Judge Compton had a chance to examine the title and, if my memory serves me right and my notes reflect the papers were not prepared until after he had had an opportunity to examine this title, he raised the question as to the sufficiency of the sale. There was considerable correspondence back and forth and at my own election—incidentally, in the meantime I did advise Mr. Robertson that the reason I was not able to set up the sale—Mr. page 94 } Runyon, of course, knew from Judge Compton, but Mr. Robertson was advised the reason we were not able to set up that sale was because there had been a question raised concerning the sufficiency of the title.

At my own election I decided rather than proceed with a suit for declaratory judgment or proceed with—as a matter of fact, Judge Compton would not pass the title, and rather than proceed with the declaratory judgment I elected to void that particular sale and so advised all parties concerned.

H. Selwyn Smith.

Prior to that time of voiding the sale Mr. and Mrs. Runyon had signed the note and, evidently, the deed of trust in my office, and I had prepared a deed. I know I prepared a deed because Judge Compton had a copy of that deed which he was using to examine the title.

When I elected to void the sale and advised the parties and advised it would be at the cost of myself and the only concern would be the lapse of time I, at that time, drew a check payable to Mr. Runyon for $3,300, which I had deposited in escrow and endorsed his check for $8,700 back to him. I also voided the note and handed the note and two checks to Mr. Runyon. Mr. Runyon turned around and gave the check back to me and the note and said, "You keep them in your file so if I am successful at the next sale you will have them, and if I am not successful you can give them to me at that time."

page 95 } We proceeded to the next sale and I did not hear from Mr. Rogers, as my memory serves me and my notes do not reflect I heard from Mr. Rogers any time between that time at all. There was a question of my coming up in the substitute trustee. I felt it wise to salvage a perishable control, and did so.

The second sale was held. At the time of the sale Mr. Laws was retained by me to cry the sale off and at the time of the sale Mr. Conner came up to me and asked me could Mr. Rogers convey this property to him? And I advised Mr. Conner that it could be conveyed to him subject to the existing liens which would run the property up to an excess of $37,000. I had knowledge of that because Mr. Rogers attempted to sell to Mr. Duvall for $37,000, and that was an insufficient amount to pay off the liens and obligations at that time. And when Mr. Conner heard of those liens he did not appear to be interested. He did, as my memory serves me, bid several totals at each of the two sales. It was only at the second sale that Mr. Rogers conveyed that to him.

At each of the sales the property was cried off at $33,000. On the first one Mr. Polland was the successful bidder; on the second Mr. Runyon was the successful bidder. And Mr. Laws marked it on the advertisement, the successful bidder signed it and the date, and gave it to me.

Subsequently thereto I was again advised by Mr. Robertson that he was willing to go through with and loan Mr. Runyon

page 96 } the $21,000, and it was the conversation at that time about the interest rate, that he wanted a greater rate of interest. And I didn't know until

H. Selwyn Smith.

I heard it here this morning that he actually talked to Mr. Runyon and he gave the answer that he testified he gave this morning.

On that occasion I again drew a new trust and note and prepared a deed, Judge Compton certified the title and after he examined the deed of trust note, I believe,—as a matter of fact, they were all turned over to him for recordation. I do not have the recording receipt but I believe it was shown Judge Compton paid the clerk fee for recording it.

Subsequently, I do not know—I don't recall, at least, when the note by Mr. Runyon was paid off. I then filed my accounting and learned after figuring the accounting that there was a discrepancy in what Mr. Robertson thought was due and owing and what showed on the face of the note as due and owing. That discrepancy, of course, has been previously adjudicated and I do not—unless they want to cross examine, it is proper at this time.

The Court: All right, Mr. Pickett, any questions?

Mr. Pickett: I have no questions.

The Court: Mr. Hansbarger or Mr. Lonas, do you have any questions?

The Witness: I would further state, your Honor, at the time I was presented with a copy of this bill to enjoin the sale that I did agree with the terminology of the page 97 } bill which was—the original of which was, I checked, properly signed and acknowledged by Mr. Rogers, and it did on that date state what our agreement had been and that was $2,593.28 was to be paid on or before the 14th day of July 1955. And the statement in the bill on its face shows it was $2,500 tendered and it was tendered on the 15th day and, if my memory serves me, that was the real basis of my argument before your Honor at that time, on the face the bill showed it had not complied with the terms of the offer. The offer had been made by the beneficiary of the note and not by me, and I did not have the authority to vary the terms of that offer. I was instructed at that time to proceed.

Mr. Hansbarger: I have one question, Mr. Smith.

CROSS EXAMINATION.

By Mr. Hansbarger:

Q. Was there ever any agreement between you and Mr.

Runyon that if he was the successful bidder at the second sale that you would extend him credit?

A. No, sir. As a matter of fact, the only time that I recall Mr. Runyon and Mr. Robertson being together at any time during this entire transaction was at the time of the second sale. The two gentlemen were standing together and I stopped the sale and walked over to them. I told Mr. Laws to stop the sale right then and then I walked over to them and they had some conversation and I told them if they page 98 } were trying to get together on anything that it would be wrong, it would a be null and void sale. They assured me they were not, and at that time there had not been any indication there was anything like that. I asked the two gentlemen to part and they did, one went one way and the other went the other way and we resumed the sale.

Q. To your knowledge, there was no agreement between Mr. Runyon and Mr. Robertson that you were aware of?

A. No, sir.

Mr. Hansbarger: That is all.

The Court: All right, Mr. Smith.

(Witness excused.)

Mr. Smith: That is my case, your Honor.

The Court: Is that all the evidence, Mr. Pickett?

Mr. Pickett: Yes.

The Court: All right, would you gentlemen like to argue?

Mr. Pickett: I don't feel I am able to argue this afternoon, if the Court pleases, I am a little fatigued by this trial today and I would suggest we file briefs.

The Court: What is your position, gentlemen?

Mr. Lonas: Of course, we are prepared to argue, but with respect to counsel I don't think we can very well object to his request. I think, probably, the case should be argued before your Honor and I don't know that we actually want to be in a position to file briefs later on.

page 99 } Mr. Pickett: Well, I think it probably would be well to have the evidence written up for the benefit of the Court and counsel before the argument takes place.

The Court: I don't know what other day an oral argument could be heard, gentlemen.

Mr. Smith: If I may say, I have very little oral argument to make but this wasn't an unusually long trial today, and

certainly I think there is no time like the present, and certainly, with the facts fresh in our minds it can best be argued and disposed of at this time.

Mr. Shaw: May I interpose, your Honor? There is one angle to this case probably left hanging in the air. The cross bill cited alleged the complainant still is indebted to the defendant, Robertson, on the notes and asked for two things: Return of the notes for judgment against the complainant for the amount of the indebtedness.

Now, for a reason satisfactory to them, the Robertsons have indicated they don't desire to obtain a judgment against the complainant, and that is their decision. On the other hand, they have said something about pursuing possible remedies against others. I don't know what those are, but there is still the fact the complainant has the notes that are unpaid and I believe the Robertsons are entitled to them.

We certainly can prove that, unless counsel is ready to remit it and, I think, for whatever they are worth
page 100 } the Robertsons are entitled to have those notes due them. There is $4,000 and $500 some due on the second. There is another angle to that second note signed by both, the complainant and his wife and, of course, they couldn't obtain the judgment against his wife.

This is a question of whether Mr. Pickett wants to introduce this to show those notes are unpaid. There has been a lot of trouble in connection with this and these people are entitled to the notes, and since I have had the case taken away from me I still think it is my duty to bring to the attention of the Court one aspect of the case the Robertsons may not have considered, and they are entitled to what they are asking.

The Court: Of course, in this particular prayer they ask for an accounting and, in effect, a judgment for the balance owing on their claim. And further, "that the complainant be required to produce that for us in said accounting."

Mr. Shaw: I still think they are entitled to the notes and/or any remedies they may feel they have.

The Court: Does Mr. Rogers object to that?

Mr. Rogers: No, sir, I do not at this time. I don't want to release them at this time.

Mr. Shaw: We tried to have a pre-trial hearing and Mr. Pickett objected to that because it was unnecessary on the grounds of the indebtedness. It was admitted, and
page 101 } now they want to hang onto the notes they haven't paid.

It's a pure question of mathematics. Take those notes and compare those payments made there and make the proper

applications with the accounting of Mr. Smith, which is in evidence introduced the first thing this morning, and the existence of the indebtedness stands out like a sore thumb.

The Court: Well, that may be true, but they have actually abandoned any claim for relief against Mr. Rogers at this time. I appreciate your interest.

Mr. Shaw: I wanted to see what could be done for my client.

The Court: Gentlemen, I don't know when I can hear an oral argument in this case. If you want to submit it on briefs it would be all right. As far as the evidence is concerned, I have taken notes which would suffice for me. I don't care about a transcript being made up.

I would say ten days to submit a memorandum, if you gentlemen want to do it that way.

Mr. Smith: As far as this defendant is concerned, I would much rather proceed with it today.

Mr. Lonas: Your Honor, I think counsel indicated he is not up to it to go on with it today and I think we would yield to that. We were prepared to do it and if it has to be submitted on memorandum then we will have to do it within whatever time you want us to submit it.

page 102 } The Court: I would say submit it on memorandum. You could just mail the memorandum to me.

(Whereupon, at 3:15 o'clock p. m., the hearing in the above-entitled matter was adjourned.)

Tendered to and signed by me this 8th day of May, 1959.

ARTHUR W. SINCLAIR
Judge of the Circuit Court of
Prince William County.

A Copy—Teste:

H. G. TURNER, Clerk.

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§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

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

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

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