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Richmond, Va.

Record No. 5119

In the Supreme Court of Appeals of Virginia at Richmond

CHARLES B. HAWTHORNE, ET AL.

v.

CHARLES L. HANNOWELL, T/A, ETC.

FROM THE CIRCUIT COURT OF ARLINGTON 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. 5119

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 27th day of November, 1959.

CHARLES B. HAWTHORNE, ET AL., Plaintiffs in Error,

against

CHARLES L. HANNOWELL, T/A, ETC.,
Defendant in Error.

From the Circuit Court of Arlington County

Upon the petition of Charles B. Hawthorne and Jean M. Hawthorne a writ of error and *supersedeas* is awarded them to a judgment rendered by the Circuit Court of Arlington County on the 2nd day of July, 1959, in a certain motion for judgment then therein depending wherein Charles L. Hannowell, t/a C. L. Hannowell Co., was plaintiff and the petitioners were defendants.

And it appearing that a *supersedeas* bond in the penalty of fifty-six hundred dollars, conditioned according to law has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code, no additional bond is required.

RECORD

* * * * *

page 3 } (Note: Exhibit filed with and made a part of motion for judgment).

THIS AGREEMENT made and entered into in triplicate this 24th day of May 1956, by and between CHARLES B. HAWTHORNE and JEAN M. HAWTHORNE, his wife, parties of the first part, hereinafter referred to as Sellers; and REUBEN MILLER and HERMAN MENDELSON, parties of the second part, hereinafter referred to as Buyers; and LOIS H. MILLER, Attorney, party of the third part.

WITNESSETH

That for and in consideration of the sum of FOUR THOUSAND TWO HUNDRED FIFTY AND 00/100 DOLLARS ($4,250.00), by check paid herewith unto Lois H. Miller, Attorney, to be held in escrow for and on behalf of Sellers, the receipt of which by Lois H. Miller, Attorney, is hereby acknowledged, the Sellers agree to sell and the Buyers agree to buy the following described business known as the VIENNA PHARMACY, located on Maple Avenue, in the Town of Vienna, Virginia:

All furniture, furnishings and equipment, including the 1954 Chevrolet delivery automobile, and trade name "Vienna Pharmacy", presently used in connection with operation of the Vienna Pharmacy, Maple Avenue, Vienna, Virginia, together with the good will and accounts receivable for the sum of FIFTY-FIVE THOUSAND DOLLARS ($55,000.00).

All salable merchandise (stock-in-trade), excluding all supplies located in the said Vienna Pharmacy, Maple Avenue, Vienna, Virginia, to be inventoried by a distinterested person, firm or corporation, the said person or firm making the said inventory to be agreed upon by the parties of the first and second part hereto, and the amount determined by the said inventory to be paid to the Sellers by the Buyers in addition to the aforesaid FIFTY-FIVE THOUSAND DOLLARS ($55,000.00), all of which is to be the total cost.

A lease dated September 1, 1954, by and between Elmer E. Cockrill and Anne L. Cockrill, his wife, and Charles B. Hawthorne and Jean M. Hawthorne, his wife, is to be assigned to the Buyers and is to be acknowledged by the Lessors (Cockrills); a copy of said lease is attached hereto.

TERMS: TWENTY-FIVE THOUSAND DOLLARS ($25,000.00) cash at time of possession, the deposit of FOUR THOUSAND TWO HUNDRED FIFTY AND 00/100 ($4,-
250.00) mentioned hereinabove and being held in
page 4 } for the balance, which will be determined upon the
completion of the said inventory, the Buyers or their assigns are to execute three negotiable promissory notes, described as follows:

Note No. 1 is to be for the sum of Five Thousand Dollars ($5,000.00) bearing interest at the rate of five per cent (5%) per annum, payable at maturity, and payable one year after date.

Note No. 2 is to be for the sum of Five Thousand Dollars ($5,000.00) bearing interest at the rate of five per cent (5%) per annum payable at maturity, and payable two years after date.

Note No. 3 is to be for the sum representing the balance of the purchase money, bearing interest at the rate of five per cent (5%) per annum, payable in monthly installments of Four Hundred Fifty and no/100 Dollars ($450.00) each plus interest on the unpaid balance, the said note to include a provision permitting additional payment in part or in full at any time without penalty.

The said notes are to be secured by a chattel deed of trust on all furniture, furnishings, equipment and merchandise now located on the premises of the Vienna Pharmacy at time of settlement. It is understood that the chattel deed of trust on all the stock-in-trade shall in no way restrict the sale of stock-in-trade in the usual course of business and the chattel deed of trust shall so provide.

It is agreed that all telephone numbers presently used by the Vienna Pharmacy are to be released to the Buyers or their assigns.

This contract is contingent upon Sellers' assignment to Buyers of the existing lease on the premises of the said Vienna Pharmacy mentioned hereinbefore. It is understood that said lease requires the written consent of the Lessors (Cockrills) for assignment.

With respect to the inventory and sale of the merchandise as hereinbefore referred to, it is mutually agreed that the said inventory will be made on May 31, 1956, and the final settlement shall take place on June 10, 1956, and on the basis of said inventory, priced at cost to Sellers, Sellers shall sell
and Buyers shall buy at said cost. The expense of
page 5 } inventory to be borne 50-50 by Sellers and Buyers.
The Sellers hereby warrant that they are the sole

owners of aforesaid furniture, furnishings, equipment and merchandise, that the same is fully paid for and is free from any liens and claims of any nature whatsoever, that they will save the Buyers harmless from any and all claims on the part of any person, or persons which may be asserted against the same, and the Sellers hereby agree to convey the same to the Buyers at time of settlement under this contract, and execute Bulk Sales affidavit.

Settlement under this contract shall be made June 10, 1956; provided however, that buyers shall take possesion on 1st day of June, 1956, after they have deposited in escrow with Lois H. Miller, Attorney, the total sum of Twenty-five Thousand and no/100 Dollars ($25,000.00) hereinbefore called for, the deposit mentioned herein being apart thereof, and shall operate the said business from that date June 1, and the Buyers shall be intitled to retain all profit therefrom and shall stand all losses which might be suffered from the operation thereof from and after the 1st day of June, 1956.

Sellers agree that they will not engage in a like or similar business, directly or indirectly, either as an individual, partner, or member or stockholder in a corporation within a radius of five (5) miles of the present location of Vienna Pharmacy, Maple Avenue, Vienna, Virginia.

The parties hereto recognize the C. L. Hanowell Company, Arlington, Virginia, as the real estate agent making the said sale, and it is understood that the Sellers are to pay to the agent a commission of 10% of the purchase price less and except the sum which represents the price paid for the saleable inventory, and Lois H. Miller, Attorney, is authorized to disburse this amount to the agent upon settlement of this purchase.

In the event Buyers shall default in the Performance of this contract, then and in that event the deposit paid herewith in escrow with Lois H. Miller, Attorney, shall
page 6 } be forfeited to the Sellers and and C. L. Hanowell
Company shall be entitled to receive the sum of Twenty-one Hundred Twenty-five and no/100 Dollars ($2,125.00), that being one-half of the original deposit. The parties hereto agree that such forfeiture is to be considered as liquidated damages.

All adjustments for rent, utilities, insurance, taxes shall be made between the parties as of date of settlement.

This sale is also made contingent upon issuance of all permits and licenses required by Federal or State law or Town Ordinance, and no forfeiture will be required of Buyers in the event such contingencies fail.

the value of salable inventory. Defendants, on or about May 26, 1956, said that they would accept a price of $55,000, plus the value of salable inventory, and the offer was revised to $55,000 plus the value of salable inventory immediately thereafter. Plaintiff located and produced for defendants a purchaser ready, willing and able to purchase said Pharmacy upon all of the terms and conditions set forth by defendants and their agent, Charles Hurwitz. A photostated copy of said proffered contract, duly signed by the prospective purchaser, is attached hereto and made a part of this complaint.

Defendants wrongfully and without cause or excuse refused to execute a valid contract properly tendered to them by plaintiff. Said contract represented a valid offer to purchase the defendants' property on terms which were orally agreed to in full by defendants. Despite this, defendants have refused to pay plaintiff the commission earned by him through full performance of all his contractual obligations.

Wherefore, plaintiff demands judgment against defendants and each of them in the sum of Five Thousand Five Hundred Dollars ($5,500.00)and costs, and so moves this Honorable Court.

MURDAUGH S. MADDEN.
MARY M. PERSINGER.

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Filed Feb. 28, 1957.

H. BRUCE GREEN, Clerk
Circuit Court, Arlington County, Va.
By R. H. WHITE, Deputy Clerk.

GROUNDS OF DEFENSE.

Now come the Defendants, Charles B. Hawthorne and Jean M. Hawthorne, his wife, by their Attorney and file this their grounds of defense to the amended motion for judgment heretofore filed against them by the Plaintiff and say:

1. That they admit so much of the amended motion for

This agreement shall be binding between the parties hereto, their heirs, executors, administrators and assigns.

WITNESS THE FOLLOWING SIGNATURES AND SEALS on this the date hereinbefore set forth:

..... (Seal)
Charles B. Hawthorne
..... (Seal)
Jean M. Hawthorne
REUBEN MILLER (Seal)
HERMAN MENDELSON (Seal)
..... (Seal)
Lois H. Miller

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AMENDED MOTION FOR JUDGMENT.

Comes now the plaintiff and states to this Honorable Court as follows:

Plaintiff is a realty company licensed to do business in the Commonwealth of Virginia, with its principal place of business located in Arlington County, Virginia.

Defendants are residents of Arlington County, Virginia.

On or about April , 1956, defendant Charles B. Hawthorne personally and orally requested plaintiff to produce a purchaser for a drug store owned and operated by defendants, and knowns as Vienna Pharmacy, located on Maple Avenue in the Town of Vienna, Virginia. Such purchaser was to be ready, willing and able to meet all of the terms and conditions prescribed by the defendant and the purchase price was originally listed at $105,000, including the value of salable inventory. For such service defendants agreed to pay plaintiff a commission of 10% of the purchase price, less that portion of the sale price which represented the amount paid for the salable inventory.

page 13 } As a result of defendants' request described above, plaintiff expended great time and effort in obtaining a suitable buyer. There were offers which were rejected as too low or otherwise unacceptable. Finally, on May 24, 1956, the plaintiff obtained an offer of $50,000 plus

Plaintiff for any commission earned by him as they deny that the Plaintiff has ever earned any such commission from them.

Wherefore, these Defendants pray that the amended motion for judgment be hence dismissed at the Plaintiff's proper costs.

CHARLES B. HAWTHORNE
Defendant.
JEAN M. HAWTHORNE
Defendant.
By JOHN ALEANDER
Defendants' Counsel.

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MEMORANDUM.

From: Walter T. McCarthy, Judge.

To: Murdaugh S. Madden, Esq., Counsel for Plaintiff, John Alexander, Esq., Counsel for Defendant, Lucas D. Phillips, Esq., Counsel for Defendant.

THE COURT has reviewed the pleadings and the evidence and the memorandum filed in behalf of the plaintiff.

THE COURT'S conclusion is that there are two questions presented by this case. The first is a question of fact:

DID THE DEFENDANT AGREE TO PAY THE PLAINTIFF A COMMISSION UPON THE SALE OF HIS STORE UPON TERMS STATED IN THE CONTRACT ATTACHED TO AND MADE A PART OF THE BILL OF COMPLAINT?

The burden of proof is upon the plaintiff. Has he carried that burden? Did the evidence preponderate in favor of the plaintiff?

Mr. Hanowell testified in his own behalf. His evidence is clear-cut and positive. He is not only an experienced real estate broker but an experienced witness. He was either telling the truth or he deliberately falsified his testimony.

judgment as alleges that these Defendants are residents of Arlington County, Virginia.

2. That they neither admit nor deny so much of the motion for judgment as alleges that the Plaintiff is a realty company licensed to do business in the Commonwealth of Virginia with its place of business located in Arlington County, Virginia.

3. These Defendants and each of them specifically and emphatically deny each and every of the other allegations of said amended motion for judgment.

And as for their further grounds of defense these Defendants and each of them aver and charge:

1. That neither of these Defendants ever requested the Plaintiff to produce a purchaser for a drugstore owned and operated by them and known as the Vienna Pharmacy upon the terms set forth in the amended motion for judgment or upon any other terms.

page 16 } 2. These Defendants and each of them specifically and emphatically deny that they or either of them agreed to pay the Plaintiff any commission whatsoever for any services alleged to have been performed by the Plaintiff.

3. These Defendants and each of them emphatically deny that the Plaintiff ever presented to them or either of them any purchaser for said Vienna Pharmacy ready, willing and able to purchase said Vienna Pharmacy upon terms and conditions either acceptable to or set forth by the Defendants and each of them.

4. These Defendants and each of them emphatically and specifically deny that one Charles Hurwitz was constituted, appointed, held out or represented to be the agent for them or either of them in any connection as alleged in the amended motion for judgment.

5. These Defendants and each of them emphatically and specifically deny that they or either of them ever refused to execute a valid contract properly tendered to them by the Plaintiff by affirmatively alleging that no such valid contract was ever properly tendered to them by the Plaintiff nor was any contract tendered to them by the Plaintiff in any fashion containing terms and conditions satisfactory to and set forth by these Defendants or either of them.

6. These Defendants emphatically and specifically deny that they or either of them is indebted to the Plaintiff in any manner and form whatsoever and particularly do they emphatically and specifically deny that they are indebted to the

The Court is of the opinion that plaintiff's theory is quite clear from his pleading: that plaintiff was entitled to a commission because he had procured a purchaser ready, willing and able to purchase. It is not clear from the defendants' pleading just what their defense to this charge is: whether they claim that the defendants had not contracted with plaintiff or whether they claim that no such purchaser had been produced.

In paragraph three of the defendants' further grounds of defense, however, the defendants make a clear cut issue denying that plaintiff ever presented to them any purchaser ready, willing and able to purchase on the terms and conditions acceptable to or set forth by defendants.

The Court is of the opinion that this question should be answered for the plaintiff.

The defendants contend that under the terms of the contract, defendants were to pay only in case of sale. The Court is of the opinion that this will avail them no defense, for it appears obvious that there would have been a sale except for the defendant Charles Hawthorne's capricious behavior.

A judgment shall be entered for the plaintiff.

Counsel shall draw the proper order.

June 5, 1959.

WALTER T. McCARTHY, Judge.

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FINAL ORDER.

On the 21st day of January, 1959, came the plaintiff, by counsel, and the defendants, by counsel, for the trial of this case.

The case was tried without a jury, the parties, by counsel, having waived the services of a jury and having agreed that all matters of law and fact should be presented to the Court for determination.

UPON CONSIDERATION WHEREOF, it is the opinion of the Court that the plaintiff, Charles L. Hannowell, trading as C. L. Hannowell Company, should recover of and from the defendants, Charles B. Hawthorne and Jean M. Hawthorne, his wife; and

He could hardly have been mistaken. He was corroborated by Mrs. Muzzioli who admittedly was inexperienced and obviously excited and who might have been mistaken. He is corroborated in part by Mr. Cammack. He appears to be corroborated by actions of the parties on the day the contract was drawn up and he is partly corroborated by Mr. Hawthorne's stated reasons for not going through with the deal.

On the other hand, Mr. Hawthorne testified that he never agreed to the sale on the terms stated. His testimony, however, was confused and uncertain. It is true that part of this was caused by his inability to produce, until near the end of his testimony, the contract which he says he was considering. The strength of his position is further weakened by the lack of frankness in his pleadings and at pretrial. He is not helped by his failure to produce Mr. Phillips. Finally, his actions clearly indicate that he got into an emotional state of irrationality over Mrs. Miller's part in the transaction.

THE COURT having considered all of the above, concludes that the preponderance of the evidence is with the plaintiff.

The second question, one of law, is:

WAS A CONTRACT EVER PROCURED BY THE PLAINTIFF?

page 23 } THE COURT is not advised as to whether an oral agreement to substitute a page in a previously signed agreement is sufficient.

THE COURT awaits the result of a study by counsel.

April 21, 1959.

WALTER T. McCARTHY, Judge.

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MEMORANDUM.

From: Walter T. McCarthy, Judge.

To: Murdaugh Stuart Madden, Esq., Counsel for Plaintiff, Lucas D. Phillips, Esq., Counsel for Defendants John Alexander, Esq., Counsel for Defendants.

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CHARLES B. HAWTHORNE,
was called as a witness by counsel for plaintiff and, having been previously sworn, took the stand, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Madden:

Q. Would you please give us your full name, address and occupation.

A. Charles Byrd Hawthorne, 5025 North 25th Road, Arlington 7, Virginia. And I am a pharmacist.

Q. You are a pharmacist. Are you the owner of any pharmacy?

A. Well, I will be the owner of one as soon as the chattel mortgage is charged.

Q. Are you the owner except for a chattel mortgage?

A. Yes, sir.

Q. What pharmacy is it?

A. Vienna Pharmacy.

Q. How long have you owned that pharmacy?

page 3 } A. Approximately five years.

Q. Now, sir, do you know a Charles Hurwitz?

A. Yes.

Q. Does he have a brother that works with him?

A. Yes.

Q. What is his name?

A. Jack Hurwitz.

Q. Which gentleman was sworn in here this morning?

A. Charles Hurwitz.

Q. Was he, during any of the negotiations and conversations that are the background of this litigation, your agent?

A. The only relationship that could be established there is that, going back to the beginning of this when this first started, I told Charlie that I had been approached about possibly selling the store and in order to keep it out of the store and out of Vienna—out of town—I suggested that he

It is, Therefore, the JUDGMENT of the Court that the plaintiff, Charles L. Hannowell, t/a C. L. Hannowell Company, recover of and from the defendants, Charles B. Hawthorne and Jean M. Hawthorne; the sum of Five Thousand Five Hundred ($5,500.00) Dollars, together with the plaintiff's costs, to all of which actions of the Court the said defendants, by counsel, except.

Entered this 2nd day of July, 1959.

WALTER T. McCARTHY, Judge.

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NOTICE OF APPEAL AND ASSIGNMENT OF ERROR.

NOTICE OF APPEAL.

The defendants, Charles B. Hawthorne and Jean M. Hawthorne, hereby give notice of appeal pursuant to Rule 5:1 §4, of the Rules of the Supreme Court of Virginia, and set out their assignment of error below.

ASSIGNMENT OF ERROR.

Charles B. Hawthorne and Jean M. Hawthorne assign as error the action of the Circuit Court of Arlington County, Virginia, in the trial of the case and the entry of final judgment for the plaintiff, Charles L. Hannowell, t/a C. L. Hannowell Company, the following:

(1) The evidence is insufficient to support the judgment of the Court.

CHARLES B. HAWTHORNE and
JEAN M. HAWTHORNE
By LUCAS D. PHILLIPS
Of Counsel for Defendants.

Filed Aug. 26, 1959.

H. BRUCE GREEN, Clerk
Circuit Court Arlington County, Va.
By V. LONG, Deputy Clerk.

Charles B. Hawthorne.

Q. We might as well, if you know of any.
A. Is it okay?
Q. Don't ask your attorneys if you may. Answer my question. You are under oath here and the Court—

Mr. Alexander: Your Honor, I believe the Court should instruct the witness he can only testify to the facts of which he has knowledge.
The Court: I think that is correct. I don't think he should testify to anything he has no knowledge of. But this question is direct. If there is any charge of breach of agency, I want to know what it is. If you are not making such a claim then it is immaterial.
page 6 } Mr. Alexander: I don't believe that issue was raised in the pleading.
Mr. Madden: And it won't come out in the defense?
Mr. Alexander: I certainly don't know of it.

By Mr. Madden:
Q. Then, in the pleading in this case, Mr. Hawthorne, you stated that you denied emphatically and specifically that Charles Hurwitz was appointed, held, or represented to be an agent, or either of them, in connection with this to a motion for judgment, that simply isn't correct, is it?
A. Would you repeat the question?
Q. I am saying simply, in the pleading here, you denied that Charles Hurwitz was an agent of any sort for you in connection with this transaction?

Mr. Alexander: I object to that, if your Honor please. That is not what the pleading says. He says he is the agent as the motion for judgment.
Mr. Madden: I will withdraw the question.

By Mr. Madden:
Q. Now, in the pleading, Mr. Hawthorne, you stated that neither you nor your wife ever requested the plaintiff to produce a purchaser for the drug store upon the terms set forth in the amended motion, that is, for $55,000 plus the inventory, or upon any other terms. Now, that isn't correct, is it?
page 7 } A. I never requested the plaintiff to produce a purchaser for the store. The thing that happened was the purchaser's agent, or whatever the relationship is between Mrs. Muzzioli and Mr. Hannowell, came to my store,

furnish the desired information and get the basic material as regards to an offer for the pharmacy.

Q. He kept your books, didn't he?

A. Yes.

Q. So he would be the one to supply the inventory information and sales information—matters of that sort—to a prospective purchaser. Is that correct?

A. Yes.

page 4 } Q. You referred Mr. Hannowell's office to him for that information?

A. Yes.

Q. Did you authorize Mr. Hurwitz to give or state a selling price?

A. Yes. Mr. Hurwitz and I discussed it and decided upon the selling price.

Q. What was the price that you and Mr. Hurwitz decided upon?

A. The price that we decided upon was the dollar-for-dollar inventory to be paid at the time of settlement as a downpayment, and the remainder to be paid over a period not to exceed seven years with interest at five per cent.

Q. Anything else?

A. No. That is all.

Q. Anything for good will and fixtures?

A. That would be included in the $60,000.

Q. So that the total price, good will, inventory and fixtures, was all $60,000?

A. No, I didn't say that. There are two separate figures: one is dollar-for-dollar for merchandise—inventory—

Q. Plus $60,000 for fixtures and good will—

A. That is right.

Q. —as I understand it?

page 5 } A. That is right.

Q. So when you and Mr. Hurwitz discussed this, you authorized Mr. Hurwitz to state a selling price to the Hannowell people?

A. Yes.

Q. So he was authorized to do that for you?

A. That is right.

Q. You would feel bound by any action he took in connection with this transaction. Is that correct?

A. Anything outside of a breach of agency, I suppose.

Q. Do you know of any breach of agency here?

A. Well, a purported one which I don't know whether I should mention or not.

told me she had a purchaser who wanted the drug store. She said it seemed to be a busy drug store, "Would you be interested in selling?" I told her I would think it over and I would call her. And I called her and told her if the person she represented has enough money I would be interested in selling the store.

I did not approach the Hannowell Company to produce a purchaser for me.

Q. Is your position in this case that you don't owe him any commission because a person from his office came into your store first and said, "Is this store for sale?"

Is that your position in this case?

A. No, that is not my position. My position is that they never produced a contract that met with our minimum terms and conditions.

Q. That is your only position, isn't it?

A. As I said a minute ago, I definitley didn't ask them to produce a purchaser for me. They came to me and asked me if I would be interested in selling the store.

Q. And, eventually you said to them, "I will sell it for $60,000 plus the inventory," and these other terms that you related?

page 8 } A. That is right.

Q. If that sale goes through their commission would come out of the proceeds?

A. That is right.

Q. Your position is that they never came forth with a $60,000 offer and that you never agreed to sell it for $55,000. That is in the pleading filed. That is the only issue in this case, as far as you are concerned? That is the reason you didn't go through with it?

A. I don't think any contract they ever presented that the minimum downpayment—we have stipulated the total price; we have stipulated the period of payment; we have stipulated—

Q. What was the minimum downpayment you have stipulated?

A. The amount of the inventory, dollar for dollar.

Q. The minimum downpayment was the amount of inventory.

That wasn't to be even determined until there was an inventory taken by an appraiser sometime after the possession was transferred?

A. Well, in a business like that you know what a store

carries as an inventory. As a matter of fact, for as far as four years it wasn't under $40,000.

Q. Wasn't the idea for Mr. Miller to take over on the 1st of June and have it closed to the 10th of June to give time for an inventory to be taken?

A. Yes, but there still was no provision there for
page 9 } payment of $40,000 or $35,000, whatever the inventory would have been.

Q. You say there was no provision for the payment of that in the contract, and that is one of the defects?

The Court: He didnt' say that. It was stipulated the inventory would be a downpayment.

By Mr. Madden:

Q. That was a stipulation?

A. That is right.

Q. They didn't meet the $60,000 and they didn't meet the stipulation? That was to be all cash on the day of settlement?

A. That is right.

The Court: That is ambiguous . The first answer was $60,000, and you asked him if that would be an all-cash payment and he said yes, but he didn't mean that. That was dollar for dollar for the inventory.

Mr. Madden: That is what I meant, with a time payment applied to the $60,000.

The Witness: Plus whatever difference there was between the $25,000 downpayment and the actual value of the inventory, which would have to be added to that.

By Mr. Madden:

Q. Now, do you recall, having handed to you the proposed contract that is in the pleading file, dated 24 May,
page 10 } and signed by Mr. Miller and Mr. Mendelson (handing the document to the witness)—do you recall that?

A. Yes.

Q. You saw their signatures?

A. Yes.

Q. You saw there was a check made out to Lois Miller, an escrow holder, attached to that?

A. That was in the contract.

Q. For $4,250, a signed check?

Charles B. Hawthorne.

what you said to Mr. Hannowell when he gave this to you on that day?

A. When he gave me the contract?

Q. This contract right here (indicating).

A. The one I remember?

Q. Yes.

A. The one I remember stated the period of time payments was too long, the downpayment too small, and the total price insufficient.

Q. You gave him your objections to it at that time?

A. Yes.

Q. Didn't he come back that same day—or the next day—with an increase in the price to $55,000?

A. Not that I recall. I recall only one $55,000 contract.

Q. That was quite a separate contract than that, wasn't it? (Indicating)

A. Yes, it was.

Q. When did you get that contract—when did you get a copy of it?

A. Well, the other one I took—Mr. Phillips
page 13 } looked at it on the 29th of May, so I must have gotten it about the 26th or 7th.

Q. You don't recall getting it the 26th, or you just deduced that because you took it to Mr. Phillips?

A. I don't think I took it to him. I know I—

Q. You don't actually recall having received that on the 26th or 7th, do you?

A. I recall Mr. Hannowell bringing it. Whether it was the 26th or 7th, I can't say definitely.

Q. That was after he brought in this contract we have sued on. Is that your testimony?

A. That is right.

Q. May I see the contract that you are speaking about, and any other copies of papers and contracts that you have got in connection with this transaction from the plaintiff?

A. I have none with me. My attorneys have it.

Mr. Madden: May I see that while you are on the witness stand?

(Mr. Alexander hands Mr. Madden a group of documents.)

Mr. Madden: Mr. Alexander, I would like to see all papers, whether they are additional copies or not, that came from the plaintiff to the defendant in this case.

Charles B. Hawthorne.

A. Yes.
Q. By whom was that handed to you?
A. That contract?
Q. Yes.
A. By Mr. Hannowell.
Q. The contract called for $55,000?
A. No. That contract you are speaking of, dated the 24th, called for—one signed by Reuben Miller and Herman Mendelson, called for a $25,000 downpayment, two $5,000 notes—one payment to be made at the end of one year and one payment at the end of two years—interest on the balance at five per cent, and the balance was to be paid at $450 per month.
Q. Well, sir, are you speaking of the contract that is in the pleading?
A. I am speaking of the one I saw signed by
page 11 } Reuben Miller and Herman Mendelson.
Q. Would you look at this document and see if that is it (handing the document to the witness).
A. I don't recall the $55,000 on the copy of this I had. I believe that was $50,000.
Q. You recall one for fifty?
A. And the rest of it was as stated.
Q. Do you know the date on which this was presented to you (indicating)?
A. This contract was dated—
Q. No, sir, I am asking you the day on which it was presented to you?
A. It is dated the 24th and presented to me on the 25th, I believe it was.
Q. The 25th. All right, sir.
On the next day, the 26th, was another page brought to you calling for $55,000 on the front page, a different front page, to go with the same contract?
A. Not that I remember. The only $55,000 contract that I remember was another one.

The Court: What did you say?
The Witness: There was another—not actually a signed contract, but an offer, I suppose, for further negotiations that was presented.

page 12 } By Mr. Madden:
Q. Do you recall that you have testified on the 25th you received this contract except that you think it was for $50,000 instead of $55,000 on the first page? Do you recall

Charles B. Hawthorne.

Q. It must have followed it?
A. That did follow it.
Q. All right, sir. It is your testimony that you got that, you feel, on the 25th or 26th, or what date?
A. It's dated the 24th.
Q. Do you have any recollection when you got it, sir?
A. No, sir, I haven't, but I know—
Q. Well, don't answer the question, sir.
Now, is it not correct that you received a contract that had as its first page, a signed contract that had as its first page, $50,000 inserted?
page 16 } A. That is true.
Q. And subsequently you received this first page, to be identified as Plaintiff's Exhibit No. 1?
A. I can't recall receiving this sheet for $55,000.
Q. So that your testimony is you don't recall having received this??
A. That is true.
Q. Do you know where your attorney got it?
A. I must have given it to him. I am sure he didn't write it.
Q. I would like to, if you will, identify these other papers and, if we may, let's take them just from the dates on them, and ask you if those papers are papers that your turned over to your attorney (handing the documents to the witness)?
A. This (indicating) was the original contract which—

The Court: The question was whether those papers were turned over by you to your attorney?
Th Witness. Yes, sir.
The Court: Let's mark them and put them in the order which you want them marked. Let's give them a name so we know what we are talking about.
For the reporter's benefit, Plaintiff's Exhibit No. 2 is an agreement of sale, dated the 30th day of April. Plaintiff's Exhibit No. 3 is an agreement of sale dated the 21st of May.
And Plaintiff's Exhibit No. 4 is the agreement
page 17 } dated the 24th day of May.

(The documents referred to were marked Plaintiff's Exhibits Nos. 2, 3 and 4, respectively, for identification and received in evidence.)

By Mr. Madden:
Q. Now, with reference to Plaintiff's Exhibits 2, 3 and 4. that have just been marked by the Court, those are papers

Mr. Alexander: That is exactly what I am trying to find.

By Mr. Madden:

Q. All right, sir, does that piece of paper say page 14 } $55,000 on it (handing the document to the witness)?

A. That says $55,000.

Q. Where did you get that?

Mr. Alexander: Your Honor, I think we are going to have the witness testify to these papers, so I think they ought to be identified.

The Court: Let me have that one.

Mr. Madden: I was going to wait to see if he got it, but if it could be introduced now it is all right.

The Court: He just wants to give it a name.

Do you object to calling it Defendant's No. 1?

Mr. Alexander: The plaintiff is putting it in.

Mr. Madden: I would like to put it in as Plaintiff's No. 1.

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

Mr. Madden: Is this going to be called $55,000 first sheet?

The Court: I don't know about that. It ought to be called Plaintiff's No. 1.

All right, the witness has in his hand a paper designated as Plaintiff's Exhibit No. 1.

By Mr. Madden:

Q. Am I correct, sir, that that does call for page 15 } $55,000 plus the inventory?

A. Yes.

Q. You received that paper from Mr. Hannowell?

A. I must have.

Q. And, you received it separately from the other papers?

A. I must have, otherwise it would be with the other papers.

Q. Do you know when you received it?

A. No, sir, I don't.

Q. Do you know whether you took that down with you to Mr. Phillips?

A. No, sir. The contract that I took to Mr. Phillips was one that must have followed this one.

Charles B. Hawthorne.

page 19 } by defendant's attorney as a carbon copy of Plaintiff's Exhibit No. 3. And I would like to introduce it in evidence, as it has some marginal notes on it.

The Court: We will call it Plaintiff's Exhibit 3-A, then.

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

By Mr. Madden:

Q. Now, Mr. Hawthorne, in connection with your testimony that you took Mr. Phillips a contract that was not the contract that is in the pleading, that being a contract that you received after the one that is in the pleading, after you received it, is it your testimony that the one you took to Mr. Phillips is not one of those (indicating)?

A. Not one of those I had a minute ago.

Q. That you had in your hands, which are Plaintiff's Exhibits 2, 3 and 4?

A. That is right.

Q. You don't know where that one is that you took to Mr. Phillips?

A. I don't have a copy of it.

Q. That is what you testified was the final thing you were offered (handing a document to the witness)?

A. That is right.

Q. And, that wasn't acceptable to you?

A. That is true.

page 20 } Q. That one is missing, is that right?

A. (The witness made no response.)

Q. I wish you wouldn't keep looking over to your attorneys in connection with these answers.

A. It's missing if nobody can produce it.

Q. Was it signed?

The Court: Are you going to let that question go into the record? He was looking to see if there are some other papers. He doesn't have the papers in front of him.

Mr. Madden: I regret any other implication. Would you like to look at these?

By Mr. Madden:

Q. If you would like to look at these documents again, you may, sir.

A. Let me see them again, then.

Q. All right, sir, (handing the documents to the witness.) I

which you received from the Hannowell Company, aren't they?

A. One of them—the first one I received from Charlie Hurwitz who received it from the Hannowell Company.

Q. The first one you received from Mr. Hurwitz who received it from the Hannowell Company. Is that your testimony?

A. Yes.

Q. You have testified that after you received the contract that is in the pleading in this case you received another one?

A. That is true.

Q. That is among these (handing the documents to the witness), and I am handing you Plaintiff's Exhibits 2, 3 and 4?

A. That is not among the exhibits. Not signed.

Q. You say it is not among the exhibits and not signed?

A. That is true.

A. I don't care whether it is signed or not. It is page 18 } not among those exhibits?

A. No.

Q. Did you give it to your attorneys?

A. I think I did.

Q. You testified that you took it down to Lucas Phillips' office and that is the one which you took down there, didn't you?

A. That is right.

Q. All right, sir,—

Mr. Alexander: May I see those exhibits?

Mr. Madden: Yes, sir. (Handing the documents to Mr. Alexander.)

Mr. Alexander, that is why I earlier asked you for the copies of any of these papers. If I could have them I would like to see them. Anything that you have that came from Mr. Mannowell's office, whether they are the originals or copies.

Mr. Alexander: The rest of these are copies we made.

By Mr. Madden:

Q. Now, sir, do I understand your testimony that none of these—

The Court: He gave that (indicating). I don't know what that is.

Mr. Madden: Let me introduce that. It is being introduced

Charles B. Hawthorne.

A. It probably would have been—

Q. Excuse me. Do you know of any problem that was raised or had ever previously been raised by the Cockrills?

A. I do know when I bought the said store there was a Jewish fellow interested in buying it and I got the store and he didn't, because the lease would not be assigned to him.

Q. All right, sir. The Cockrills were subsequently contacted, weren't they?

A. I didn't contact them.

Q. I understand. They were subsequently contacted?

Mr. Alexander: I object to the question. The witness said he didn't contact them. It would be hearsay.

Mr. Madden: I didn't say by you, sir.

page 23 } The Court: The question is whether you heard him being contacted or whether you know he was contacted. It is a different thing. It may or may not be objected to. I think the witness is going to be fair with us.

Were you present when anyone else contacted them?

The Witness: No, sir.

The Court: Did you ever hear of anyone contacting them?

The Witness: Yes. sir.

The Court: Go ahead.

By Mr. Madden:

Q. Did you say to Mr. Hannowell, Mrs. Muzzioli and Mr. Cammack—do you know who Mr. Cammack is?

A. No, sir, I don't.

Q. Do you know who Mrs. Muzzioli is?

A. Yes.

Q. Did you say to Mr. Hannowell and Mrs. Muzzioli, "That loud-mouthed bitch, Lois Miller, had ruined this deal, and because that loud-mouthed bitch, Lois Miller, contacted the Cockrills and spread it all over town," you weren't going to go through with the thing?

A. No, sir, I didn't say that.

Q. Did you say anything at all like that?

A. As regards to assigning the lease, no. As a matter of fact, my knowledge of that was when Mrs. Cockrill come in the store one day and said, "Charlie, I don't know

page 24 } what it's all about but someone called me the other day about assigning the lease to the building and I didn't know what to tell you because Ted is in Massachusetts" —that is Mr. Cockrill So when Mr. Hannowell come around I

am handing you Plaintiff's Exhibit 2, 3 and 4, because those are the ones the question has been about.

A. There was another one.

Q. There was another one?

A. Yes, sir.

Q. All right, sir. In connection with this missing document, it was not Plaintiff's Exhibit 3, which is dated the 21st of May, was it?

A. No, sir. It, too, was dated the 24th of May.

page 21 } Q. It, also, was dated the 24th of May?

A. That is true.

Q. Was it signed?

A. It was unsigned.

Q. It was unsigned.

Is your testimony that the only one of these papers you took to Mr. Phillips to go over that weekend is an unsigned contract that is not here today?

A. That is true.

Q. You did not take in the signed contract which is in the pleading here?

A. No, sir, I took only one.

Q. You took him the unsigned one, and you did not take him the signed one which the check had been in?

A. That is true.

Q. Now, do you recall that in connection with all of these contracts the lease had to be assigned?

A. That was a provision in the contract, yes.

Q. Do you recall who was going to take care of talking to the Cockrills about that?

A. I understand that the purchaser's attorney—

Q. Excuse me, let me state my question. Do you recall who was going to take care of contacting the lessors, the Cockrills?

A. Yes.

page 22 } Q. Who was that?

A. I was going to when a satisfactory contract was presented.

Q. There was no question in your mind that they would give their permission if you had a contract to sign?

A. I don't know.

Q. Was there or wasn't there?

A. There was some question in my mind whether they might or might not.

Q. What was the problem?

A. Well, the problem probably would have been,—

Q. No, sir, I don't want—

the store, and I had a part-time pharmacist—Mrs. Miller's son-in-law was an employee in the store, and while
page 26 } I had been gone my employees had gone to said pharmacist and said, "You better be looking for another job. You are going to be out of work; the drug store is being sold." And the pharmacist told me the classified source of information was extremely reliable. That is when I said, "That big-mouthed bitch, I'll show her she is not so reliable." That was the exact words.

Q. You said, "That big-mouthed bitch, I'll show her she is not so reliable"?

A. Yes.

Q. It is your testimony, although Mr. Phillips said there had been some criticisms of the contract, that was the straw that broke the camel's back? That, generally, is your testimony?

A. You mean Mrs. Miller—

Q. I mean the pharmacist came to you and said, "I am going to have to get another job"?

A. No, the thing that broke the camel's back, the combination of that plus the fact there were some provisions in the contract that Mr. Phillips wouldn't sanction.

Q. Did you ever suggest to Mr. Hannowell that he ought to sue Lois Miller for damages for having loused up this transaction?

A. Not that I recall.

Q. You don't want to answer that yes or no?

page 27 } A. The statement I made was—

Mr. Alexander: If the Court please, he said that he doesn't recall.

The Court: If he can't recall he can't answer yes or no.

Mr. Madden: Your Honor, this is one of these things, I submit, if a man did it he would remember and if he didn't he ought to be able to say, no.

The Court: I don't know whether that is true or not. You can argue it when the time comes to argue the case. You have a right to make the argument, but not while he is on the witness stand.

By Mr. Madden:

Q. Now, sir, this transfer of possession was to be on the 1st of June, is that correct?

A. Yes.

asked him about Mrs. Miller contacting the Cockrills and inquiring about assigning the lease, and I told him it was my position to do that, not Mrs. Miller's. And Mr. Hannowell told me that—then he said, "Well, being an attorney I can tell you she violated article so and so of the code of ethics, and I will go and straighten her out right now."

So when Mr. Hannowell came back he said Mrs. Miller told him Mr. Ahalt had told her to call the Cockrills about assigning the lease.

Q. Did that have anything at all to do with you not going through with the transaction?

A. No

Q. And, you never used the words that could have even been construed as calling Lois Miller, "A loud-mouthed bitch" as her contact in this?

A. Not in regards to assigning the lease.

Q. What regard did you use that in connection with, sir?

A. When Mr. Hannowell brought in the final contract he submitted to me—

Q. Which is which one?

A. Which is the one that is missing, which in-
page 25 } cluded in it the inventory plus $55,000, with a down-
payment of $25,000, an assignment of the existing chattel mortgage which was at that time $24,000, and two $5,000 notes payable a year apart and the principle was to be paid off at $250 per month.

So that is the contract I took to Mr. Phillips.

Q Yes, sir. I thought you were going to tell us in this answer when you said something about—

A. If you give me two more minutes I will reach this point. So I took that up and—as a matter of fact, I was in Lovettsville, Virginia the 28 and 29th of May. The 28th—Mr. Phillips was out the evening of the 28th, and Mr. Hannowell called up at Lovettsville and asked me if I had seen Mr. Phillips, which I replied, "No." So, the 29th I went to Mr. Phillips' office to examine the contract and Mr. Phillips had several objections to it.

I then returned to the store to work the evening of the 29th of May and Mr. Hannowell came walking in and at that time he said, "Did Mr. Phillips see the contract?" And I said, "Yes he did." He said, "What did he think of it?" I said, "Mr. Phillips had several objections to the contract." But I said, "The deal is off." I said, "I am calling it off now," and that is when I said, "My relief pharmacist"—I, at that time, I think, was working ninety-eight hours a week at the time in

Charles B. Hawthorne.

apart and the balance was to be paid off at $450 a month plus interest at five per cent.

Mr. Madden: I'm sorry, I didn't get that. Is that $450 a month?

The Witness: That is right, plus interest at five per cent.

By Mr. Alexander:

Q. You still own and operate the Vienna Pharmacy?

A. I do.

Q. Did Mr. Hannowell or any of his associates ever present to you an offer—signed offer—any person whatsoever, for the purchase of the Vienna property on the terms of $60,000 plus inventory were the inventory been cash?

A. No.

Q. Did you ever at any time authorize Mr. Hannowell or anyone connected with his firm to sell the property for any less terms?

A. Not less than $60,000 plus inventory with the
page 30 } balance to be paid for a period not to exceed seven
years.

Q. Those three conditions were made clear to Mr. Hannowell?

A. Yes. I think they are in writing on one of those contracts which Charlie Hurwitz wrote them.

Q. Did you ever agree with Mr. Hannowell or any employee of his firm to take less than that for the property?

A. No.

Mr. Alexander: That is all.

Mr. Madden: One final question.

RE-DIRECT EXAMINATION.

By Mr. Madden:

Q. Do I understand that the missing document—let's say a missing document to which you now recall you were supposed to attach this first page, being Plaintiff's Exhibit No. 1, called for $450 per month payments?

A. This page is not a part of the missing document.

Q. What document does it go with?

A. It must go with—well, there is one there which the first page is exactly the same. In this the offer is raised from $50,000 to $55,000.

Q. Then, sir, is it your testimony—and I am showing you

Charles B. Hawthorne.

Q. Which meant that Reub Miller was to come in and take over and run this business operation?

A. Yes.

Q. The day you testified that you said the deal is off was on the 29th of May?

A. On the 29th of May, that is true.

Q. It wasn't the 30th, Memorial Day, but it was the evening of the 29th?

A. That is true.

Q. You were concerned, among other things, with
page 28 } the fact that one of your pharmacists had heard about it?

A. I was concerned about the fact I would lose an employee and I would be working ninety-eight hours a week again.

Q. One final question, sir.

You say you never agreed to $55,000 plus inventory?

A. That is true.

Q. Never, at any time?

A. That is true.

Q. Yet, you also testified that was the price in this document you took down to Mr. Phillips?

A. That is true.

Mr. Madden: I have no further questions.

CROSS EXAMINATION.

By Mr. Alexander:

Q. Mr. Hawthorne, I believe you testified that the one page, Plaintiff's Exhibit No. 1, was not accompanied by a substitute page. Is that correct?

A. That is true.

Q. Do you recall the terms in the contract? Were you just given the one page as Plaintiff's Exhibit No. 1, or were there some other pages attached to it?

A. This (indicating) was the only page I was handed at the time.

Q. Was that to be substituted for a page in
page 29 } another contract?

A. This (indicating), I believe, was to be substituted for a page in the contract of the same date, which was the same wordage, the only change being from $50 to $55 thousand dollars, on this particular page.

Q. What was the balance of the terms under that contract?

A. Well, this contract had two, $5,000 notes payable a year

the exhibit that was filed with the complaint—that it was to go with this document here (handing the document to the witness)?

page 31 } A. What was the question again?

Q. When you were given this, Plaintiff's Exhibit No. 1, a single sheet, was it to go with the document—that is, the Exhibit attached to the complaint—and become the first page of that document?

A. From the likeness of the two pages it must have been, but I don't recall.

Q. Was it to go with a document that was signed by Reub Miller and Mr. Mendelson?

A. That I can't recall. The only one I can recall is the $50,000 one with the conditions set forth on page 2. However—this must be a replacement for a page which said $50,000 originally.

Q. This was a document that called for $450 per month?

A. That is true.

Q. That was one of your conditions, $450 per month?

A, That wasn't one of my conditions.

Q. How much per month did you want?

A. I wanted it paid evenly over a period not to exceed seven years.

Q. Evenly over a period not to exceed seven years?

A. Yes.

Mr. Madden: All right, sir, thank you.

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FRANCES B. MUZZIOLI,

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

DIRECT EXAMINATION.

By Mr. Madden:

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Frances B. Muzzioli.

A. Well, I told him I had a—first of all I told him I was a real estate agent, and I had my business card with me. And, of course, my broker was C. L. Hannowell of C. L. Hannowell Company, and that I had a client that I knew was qualified and interested in buying a drug store and I was not at liberty to divulge the name at that time, and if there was any possibility of his selling his drug store.

He told me, no, he hardly thought so. And I asked him, well, could I please leave my business card with him. It had my name and home address on it, and he said, yes, I could. And that was my first contact with him. I left my business card with Mr. Hawthorne at the drug store.

Q. Then, did you have a subsequent contact with him?

A. May I ask, when you say "contact" do you mean by telephone or physically seeing the man?

Q. Any contact of any kind.

A. The next one, shortly after that—I don't know the exact date—I think it was the latter part of April, somewhere around the 23rd. I may be off a few days there. About eleven o'clock at night Mr. Hawthorne called my home. Of course, I answered the telephone and he said that he was Mr. Hawthorne owner of the Vienna Drug Store. Do you want me to tell you the conversation?

page 35 } Q. Yes, please.

A. Well, when he first said his name, I said, "Who?" He said, "You know, Mr. Hawthorne"—because eleven o'clock at night is late and the name didn't ring a bell. He said, "You know, the Vienna Drug Store." And I said, "Oh, yes, yes."

He asked me did I really have a client that was interested in buying a drug store at the time or was I just looking for general information. I said, no, sir, I wasn't looking for general information, that I had a qualified purchaser, that I only knew the man in business but I had known him personally and he was most anxious to buy a drug store. And I said, "Mr. Hawthorne, I can't give you the man's name. I have to get in touch with Mr. Hannowell, the broker." I instructed him that was general real estate routine. And Mr. Hawthorne—there was no figure discussed or any terms or anything. In fact, I didn't know anything to ask about inventory over the phone. It was just rather a short conversation.

He said, "We certainly hope that maybe we could get together on this," that whoever bought his drug store, he thought, would have a very good buy. I did ask him, I believe, over the phone that night, would he sign exclusive listing, and

Lois H. Miller.

Q. Is this, Plaintiff's Exhibit No. 4, the only agreement you drew in connection with this transaction?

A. I believe it was, Mr. Alexander.

Q. Did you redraw any part of it, do you recall?

A. I know that a part was redrawn, but I don't believe it was done in my office.

Q. This contract had a provision for you to execute it, did it not?

A. Yes. That was for, as I understood, because I was to hold the funds in escrow.

Q. You did not execute it?

A. No.

Q. The contract filed with the motion for judgment as an exhibit, which I show you herewith (handing the document to the witness), you did not draw that?

Mr. Madden: I'm sorry, I did not hear the question.

Mr. Alexander: Would you read the question, please.

page 66 } (The reporter read the pending question.)

By Mr. Alexander:

Q. It might help you, Mrs. Miller, if you compare that with this (indicating).

A. I was going to say that I don't think—I believe that the first—I think everything is all right except the first page. I believe it is the same contract except the first page, and that would have been because of the additional $5,000 that—

Q. Did you draw the first page in the exhibit?

A. No. No, this goes along with the result of the conference.

Q. And you did not execute this contract?

A. No, I did not. It was to come back to me with the money.

Q. The money had not come to you prior to that time?

A. No.

Q. The suggestion that you appear as an escrow agent was made by Dr. Reuben Miller and Mr. Ahalt?

A. It was Mr. Ahalt's suggestion, yes.

Mr. Alexander: No further questions.

RE-DIRECT EXAMINATION.

By Mr. Madden:

Q. Mrs. Miller, I am a little confused about what the testi-

he said, no, he wouldn't do that with anybody, but the first person that brought the man to meet his terms—at that time I didn't know his terms—they would have a sale. I said, "Well, Mr. Hawthorne," I was quite please and happy he page 36 } contacted me, and I said, "I will get in touch with Mr. Hannowell right away," probably not that night because it was eleven o'clock then. And he said, "All right, you do that." And I said, "I will have him call you immediately."

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page 37 }

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Q. Did you have anything whatsoever to do with drawing up or reviewing or correcting or amending any of these contracts in connection with this case?

A. No, sir. I just looked and listened.

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LOIS H. MILLER,

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

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CROSS EXAMINATION.

By Mr. Alexander:

Q. Mrs. Miller, these two conferences you have testified to, Mr. Hawthorne was not present at either one of them?

A. No, sir.

Q. And your client was by Mr. Grayson Ahalt?

A. No, by Dr. Miller.

Charles Hurwitz.

Q. Now, going back to this contract of May 24th. Was that signed by Dr. Miller and Dr. Mendelson as originally offered for $50,000 figure?

A. Yes.

Q. Who changed the first page of that contract?

A. I did, and Dr. Miller okayed it.

Q. But Dr. Miller and Dr. Mendelson did not make any notations on the first page?

A. On the first page itself?

Q. Yes.

A. No, they did not. Not that I recollect.

page 89 } Q. Dr. Hawthorne didn't tell you, on the submission to him of the last copy—he told you he wanted to have Mr. Phillips go over the last contract?

A. Yes. He told me he wanted his attorney to look over the contract.

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page 90 }

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CHARLES HURWITZ,

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

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DIRECT EXAMINATION.

By Mr. Alexander:

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Q. Did you discuss with Mr. Hanowell at that time upon what terms Dr. Hawthorne advised you the Vienna Pharmacy would be sold for?

A. Yes.

mony is. Is it your testimony that the contract that
page 67 } is attached to the complaint here (indicating) is the
contract that you drew except for the first page?

A. Except for the first page, and that is because of the additional $5,000 that was required in the purchase price. At least, that is the way I understand it.

Q. And, Plaintiff's Exhibit No. 4 is the first page that you drew?

A. That is right.

Mr. Madden: That is all. Thank you.

The Court. I don't know whether this is going to come up or not.

Mrs. Miller, in reference to the last question, did you ever draw, in your office, more than one copy? I am not talking about carbon copies, I am talking about more than one copy of a contract entered into between these parties?

The Witness: No, I think there was only one.

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CHARLES L. HANOWELL,

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

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CROSS EXAMINATION.

By Mr. Alexander:

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page 88 }

* * * * *

Charles B. Hawthorne.

A. Mr. Hanowell started trying to sell me on the idea of accepting it. He stated that coming from that particular contract would be a considerable amount of interest income, page 97 } which at five per cent—undoubtedly, it would have been since it was spread over a number of years. And he also told me at that time I—there was a provision in that contract which stated the fixtures, furnishings, and so forth, were free and clear, which they weren't because there was a chattel mortgage from my initial purchase of the business which was in existence at the time.

How much was the chattel mortgage on the equipment?

A. It was $24,000 at the time.

Q. Did you apprise Mr. Hanowell of that fact?

A. I did.

Q. Were there any other liens on the store at that time?

A. There was. I don't know whether it was exactly a lien or not, but there was open an amount of $10,000 where we enlarged—we started out on half of the building and had taken over the other half. We borrowed $10,000 to take over the equipment for that expansion.

Q. After you told Mr. Hanowell you could not accept this $50,000 contract, do you recall what day that was on?

A. It must have been—the contract was made the 24th. The 26th, I imagine.

Q. Did you tell him what you would take for the property at that time?

A. Yes, sir.

Q. What did you tell him?

page 98 } A. Inventory plus $60,000 with the amount of inventory as downpayment and the balance would be paid in a period not to exceed seven years.

Q. Are you sure you told him that?

A. I am.

The Court: Would you read that answer back.

(The reporter read the witness' answer back.)

The Court: You mean by that the amount of inventory was to be made in cash?

The Witness: That is right.

By Mr. Alexander:

Q. Now, were there any subsequent contracts presented

Charles B. Hawthorne.

Q. What were the terms?

page 92 } A. The terms were $60,000 for the fixtures and good will and cash for the inventory.

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CHARLES B. HAWTHORNE,

was recalled as a witness by counsel for defendants and, having been previously sworn, testified further as follows:

DIRECT EXAMINATION.

By Mr. Alexander:

Q. Mr. Hawthorne, around May 26th or 27th, 1956, as I understand it, there was a contract presented to you signed by Reuben Miller and Herman Mendelson, in which they agreed to pay you $50,000 plus inventory for your store. Is that correct?

A. That is true.

page 96 } Q. Now, who brought that contract to you?

A. Mr. Hanowell.

Q. What did you do with that contract when you saw it?

A. When I saw the contract?

Q. Yes.

A. If I remember correct—strike that. I remember distinctly I would keep the contract overnight to look it over. So I didn't have time to 10:00 p.m. at the store to examine the contract and I took the contract home with me that night.

Q. Did you go over it about that time?

A. Yes, I did.

Q. Then what did you do with the contract?

A. I took the contract back to the store the following morning when I went to work.

Q. Then what happened as far as the contract is concerned?

A. The next thing that happened was Mr. Hanowell came in and asked me what I thought of the contract.

Q. What did you tell him?

A. I told Mr. Hanowell the price was too low, the payment period too long and the price inadequate.

Q. What did Mr. Hanowell have to say to that?

Charles B. Hawthorne.

CROSS EXAMINATION.

By Mr. Madden:

Q. Dr. Hawthorne, am I correct that the contract that you took to Mr. Phillips is not here in the courtroom?

A. Unless one of my attorneys has it; I don't have it.

Q. Well, it is not one of the ones that has been introduced?

A. No, it isn't.

Q. You didn't take any of these signed contracts, either Plaintiff's Exhibit No. 4 or Plaintiff's Exhibit No. 5, up to Mr. Phillips?

A. No, the contract I took him was the one providing the assumption of the chattel mortgage with the payment of $250 per month.

Q. You went to see Mr. Phillips when?

A. On the 29th of May.

Q. You had been given, had you not, both of these prior signed contracts by that time?

A. Yes, I had.

Q. Do you know why you took one unsigned contract instead of two signed contracts?

A. Because they were the last contracts sub-
page 101 } mitted to me.

Q. It wasn't signed?

A. No, it wasn't. It still was the last contract Mr. Hanowell brought to me, or the last offer made to me.

Q. It called for $55,000?

A. Fifty-five thousand dollars plus inventory.

Q. Why, Mr. Hawthorne, did you take it up there if it wasn't signed and it wasn't at a price that you ever considered accepting?

A. Because Mr. Phillips has been my attorney as an advisor for a number of years, and in the assumption of a chattel mortgage—I am not an attorney, I don't know anything about it, but in the assumption of a chattel mortgage I assume there is liability. I don't know, but I assume there is. Plus the fact the offer of inventory plus $55,000 went, I could either accept or reject it.

Q. It wasn't out of the question that you might have accepted, is that what your testimony is?

A. I didn't say that. I said there was an offer I could accept or reject.

Q. But your testimony is that you never authorized this

to you, any further contracts, after you told him you would not accept this $50,000 contract?

A. There was one further contract.

Q. What were the provisions of that contract?

A. The provisions of that contract were that the purchasers would make a downpayment of $25,000 in cash. There were to be two $5,000 notes, one payable one year later and one payable two years later. And the purchasers were to assume the chattel mortgage which was then existing in the amount of $24,000, and the balance was to be paid off $250 per month with interest at the rate of five per cent.

Q. What was the price on that contract?

A. The price on that was inventory plus $55,000.

page 99 } Q. What did you say at the time that contract was presented?

A. That was the contract I took up to Mr. Phillips to look at and advise me on.

Q. Did you make any statement at that time to Mr. Hanowell—who presented the contract to you?

A. Mr. Hanowell.

Q. Did you make any statement to him at that time about the acceptability of that contract?

A. No. I told him I was going to take it up to Leesburg for Mr. Phillips to read and advise me.

Q. What was your next conversation with Mr. Hanowell or any of his associates?

A. Well, the next conversation was the now famous one where when I got back—no, the next conversation was when Mr. Hanowell called me at Lovettsville the following evening and asked if I had seen Mr. Phillips yet and which I replied that I hadn't.

Q. And, it was the next conversation, the testimony has been, that you told him the deal was off. Is that right?

A. That is right.

Q. At any time, under any circumstances, did you tell Mr. Hanowell, Mrs. Muzzioli, or anyone else, that you would accept a contract for $55,000 on that business?

A. No, sir.

page 100 } Q. Are you positive of that?

A. I am positive.

Mr. Alexander: Witness with you.

Charles B. Hawthorne.

A. No, it isn't.
Q. Do you know when the handwriting went on it?
A. (The witness made no response.)
Q. If you don't know say you don't know.
A. I don't know.
Q. Now, I want you to look over that document and see if you know what that is (handing the document to the witness)?
A. Yes. This is the contract I took to Mr. Phillips.
Q. How do you know that?
A. How do I know that?
Q. Yes.
A. No. 1, I can remember the $250 payment per month; and No. 2, I can remember the assignment of the chattel mortgage.

page 104 } Q. Did this meet your terms and conditions?
A. No.

Q. Now, the $450 a month one didn't?
A. This didn't either.
Q. Why didn't it?
A. Because computing the payment period on this particular contract, if I remember correctly, it runs approximately ten years.
Q. And that was the only thing wrong with this one?
A. No. We still hadn't gotten the provision for the downpayment in the amount of the inventory.
Q. Well, Mr. Hawthorne, among all these drafts and various documents that run subsequent to each other there is some confusion which comes first. In none of them is there any reference to making all of that money the downpayment. Do you have any—
A. That is the condition under which the property was originally—I can't say listed with Mr. Hanowell because it never was officially listed, but that was the agreement that was entered into on my behalf by Mr. Hanowell and Charlie Hurwitz. And the reason for that was to keep somebody from taking the business, either run it down and/or selling out the inventory for practically nothing and dumping it back on my lap.

page 105 } Q. So, this one wasn't any good either as far as you are concerned?
A. That is right.

Q. You took it up to go over it with Lucas Phillips?
A. That is right.

man to bring you that offer? You never said, "Go out and get me $55,000"?

A. That is true.

Mr. Madden: Excuse me a moment. You don't have any more papers?

page 102 } Mr. Alexander: I have one that I am going to ask him to identify.

Mr. Madden: I will start back if there is another document. These papers were all supposed to be out on this table this morning and if there is some question whether it is purportedly one of those papers—

Mr. Alexander: This is not one of the papers you asked for. I gave you everything you requested.

Mr. Madden: I misunderstood you. I'm sorry.

By Mr. Madden:

Q. Now, Mr. Hawthorne, do you recall why the monthly payments in some of the contracts, or at least one of them, was $250 a month and why it was $450 a month in some of the others?

A. I think the reason is that in one of the contracts it provided for the purchaser to assume the then existing chattel mortgage, and in the other it did not. That was the difference in the two contracts. As I said, I don't know what the liabilities are in assuming a chattel deed of trust, if that is the proper legal terminology.

Q. In the one where you were to pay off the mortgage, that was all right on there, the payment was $450, and the one where they were to assume it, it was $250?

A. That is right.

Q. And the difference in that was to pay off the

page 103 } chattel mortgage?

A. That is right.

Mr. Alexander: If the Court please, I owe Mr. Madden an apology. The papers we have been looking for have been found. (Handing the documents to Mr. Madden.)

By Mr. Madden:

Q. I hand you a document and ask you whose handwriting that is at the top (handing the document to the witness)? If you know.

A. I don't know.

Q. It is not yours, is it?

Charles B. Hawthorne.

Mr. Madden: Let me look at it again.

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

Mr. Alexander: I have no further questions.

The Court: Let me have all of these contracts.

page 107 } Dr. Hawthorne, was this check, which is now marked Plaintiff's Exhibit No. 7, ever exhibited to you?

The Witness: No, sir. I can truthfully say to you this is the first time I have ever seen that check. Mrs. Miller was holding it in escrow and she and I had no conversation at all.

Mr. Madden.: What did he say there.

The Court: He said Lois Miller and he had no conversation at all. He had no reason to see the check.

Your attorney produced here this morning what is now marked Plaintiff's Exhibit No. 2, a contract dated April 30, 1956, between you and Salem Zurich, which is signed by him and not by you. When was this delivered by you into the hands of your attorneys?

The Witness: That contract was taken to Mr. Hurwitz' office by Mr. Hanowell, and Mr. Hurwitz called me on the phone and then rejected that contract.

The Court: I want to know when your attorney got it?

The Witness: This one (indicating)?

The Court: Yes.

The Witness: I don't know.

The Court: Now, then, referring to Plaintiff's Exhibit No. 3, which is dated the 21st day of May, between you and your wife and Reuben Miller. That was produced this morning by your attorneys. Was this ever in

page 108 } your hands?

It is signed by Reuben Miller but not by you.

The Witness: This is the contract, or copy of a contract, —after this contract with Salem Zurich was refused I had nothing more from Mr. Hurwitz and nothing more from Mr. Hanowell. One day while I was working in the store Reuben Miller walked in and said—he looked at me and said, "Charlie, I'm here to talk business. I guess you know I am trying to buy the store." He said, "I didn't know that it was your pharmacy business that Mr. Miller and Zurich were interested in." He said, "The Zurich deal fell through" and they went to him. He said, "I don't know why you went

Charles B. Hawthorne.

Q. You didn't take the other assignments, they weren't any good either?

A. That is right.

Q. Do you recall this morning testifying that your inventory never ran below $40,000?

A. In the past four years, right. I have been there five years. The first year the inventory of the business, when I bought it, was $22,000, and at the end of that year—after taking over and establishing the store—it was $35,000.

Q. Do you recall the first answer that Mr. Hurwitz gave on the witness stand to Mr. Alexander's question, that you all discussed selling it for $95,000?

A. It was never discussed selling it for $95,000.

Q. I asked if you recall Mr. Hurwitz' answer?

A. Yes, I recall.

Q. He did say that there was a discussion of $95,000?

A. No, he didn't say that. Ninety-five thousand dollars based on $35,000 inventory—if the inventory was $35,000 the price would be $105,000.

Mr. Madden: I have nothing further.

page 106 } Mr. Alexander: I want to apologize both to the Court and Mr. Madden for not producing that this morning. We have been tearing up files looking for it all day.

RE-DIRECT EXAMINATION.

By Mr. Alexander:

Q. Dr. Hawthorne, this paper I hand you here (handing the document to the witness), I believe you testified on cross examination that was the paper you took and discussed with Mr. Phillips.

A. Yes, that is right.

Q. That is the paper you had reference to when you testified this morning and said it had been misplaced?

A. That is right.

Mr. Alexander: I would like to put in this as Defendants' Exhibit No. 1.

Mr. Madden: Excuse me. Would you make an erasure of what is on this here (indicating).

By Mr. Alexander:

Q. This pencil writing here is not yours?

A. No, it isn't.

to the real estate agent with this since you and I talked previously about it a year before."

That is the contract Reub Miller brought to me.

The Court: He brought that to you himself?

The Witness: Yes.

The Court: What did you do with this?

The Witness: If I remember correctly, Reub came back a couple of days later and picked up that contract and about that same time Mr. Hanowell and Mrs. Muzzioli came to the store for the first time.

The Court: This morning this was produced by your attorneys (handing the document to the witness.)

The Witness: I can't remember what I did with the contract, but I know this was his copy of the contract he gave me the first time he came to the Vienna Pharmacy to talk to me.

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The Court: Did you take it to your attorneys and discuss it with them?

The Witness: This contract?

The Court: Yes.

The Witness: No, sir. That has a price of $85,000.

The Court: Am I correct this Exhibit 3-A is the same as Exhibit 3?

Mr. Madden: Yes, your Honor.

The Court: Both of them came out of your files?

Mr. Madden: Yes. They both came from Mr. Alexander's file.

The Court: Dr. Hawthorne, I have here ,apparently, five first pages, and I have a proposed contract dated the 24th day of May. Could you tell me anything about the order in which you got these? One of them, more than likely, is a carbon copy of the other.

The Witness: This (indicating) was first.

The Court: You are handing me Plaintiff's Exhibit 6 and Plaintiff's Exhibit 4?

The Witness: Those are the same.

The Court: Plaintiff's Exhibit 6 is a first page, and Plaintiff's Exhibit 4 is a complete document. You say Exhibit 6 is a copy of the first page of Exhibit 4?

The Witness: Yes, sir.

The Court: That is the first one you got?

page 110

The Witness: Yes, sir.

The Court: After you got this Plaintiff's Exhibit 4 with the names of Reuben Miller and Herman Mendel-

Charles B. Hawthorne.

son on it, did it ever leave your possession? Did it ever leave your possession until you gave it to your attorney?

The Witness: I don't think so.

The Court: Didn't you give it back to Mr. Hanowell and did he bring it back to you again?

The Witness: I can't remember, sir.

The Court: When he brought you this—

The Witness: That was the one—that was the contract Mr. Hanowell brought to me.

The Court: Let's not get into those.

You say this is the first one he brought you?

The Witness: Yes, it was.

The Court: It was signed by Reuben Miller and Herman Mendelson?

The Witness: Yes, sir.

The Court: Was the first page ever detached from here?

The Witness: From that contract?

The Court: This one right here, Plaintiff's Exhibit No. 4. This is the one you handed in this morning.

The Witness: No, sir.

The Court: It remained intact like this all the time?

The Witness: Yes, sir.

page 111 } The Court: Did you ever give it back to Mr. Hanowell?

The Witness: Mr. Hanowell came to the store and asked me about that particular contract which, as I have said before, didn't meet the three conditions set forth for selling the store.

The Court: Did he ever take away from you one that he once gave to you?

The Witness: No.

The Court: You don't think he ever did?

The Witness: No, sir.

The Court: Did you have more than one copy of it?

The Witness: No, sir. I had only one copy.

The Court: Can you explain what you did with the carbon of the first page?

The Witness: Well, I assume, when I was notified that I was being sued I took all my contracts to my attorney and turned them over to him.

The Court: You got just the first page?

The Witness: I can't answer that, sir.

The Court: You don't know?

The Witness: No. I know I didn't take any carbon copies myself.

Charles B. Hawthorne.

The Court: Did you ever take this contract to your attorney prior to the time the suit or action was begun?

The Witness: No, sir.

page 112 } The Court: You did not?

The Witness: No, sir.

The Court: What is the next contract?

The Witness: The next is this one which is the same as that one except for the first page.

The Court: Where did you get this from?

The Witness: Where did I get that sheet?

The Court: Yes.

The Witness: I assume Mr. Hanowell brought it to me.

The Court: I am referring now to Plaintiff's Exhibit No. 5.

The Witness: That contract (indicating)?

The Court: Yes. Who attached that first sheet on there?

The Witness: This first sheet?

The Court: Yes.

The Witness: I can't answer that, sir. It's different typewriter, different paper—

The Court: Did you tear this sheet off of Exhibit No. 6?

Mr. Madden: Your Honor, may we approach the bench to be out of the hearing of the witness?

The Court: He can step outside, if you want.

Mr. Madden: I think it may be helpful.

(Thereupon, the witness left the courtroom.)

Mr. Madden: Your Honor, Plaintiff's Exhibits 5, 6 and 7 are the ones I introduced and came out of our files. So I don't think he can answer the question where

page 113 } these came from.

The Court: Exhibits 5, 6 and 7 are from your files?

Mr. Madden: Yes. It is the same as this (indicating), but the other came out of their files.

The Court: It appears No. 6 was originally attached to No. 5 without the first page. No. 5 was added.

Mr. Madden: These are our exhibits, but I don't think he can identify it. He has a copy of this (indicating).

The Court: No. 1.

Mr. Madden: That is the one that my recollection is he testified this morning that he got it and later it was—

The Court: He said 5, 6 and 7 came from them.

Charles B. Hawthorne.

Mr. Alexander: Yes.

Mr. Madden: That is what was sued on and this became the first page.

The Court: All right, let him come back in.

(Thereupon, the witness resumed the witness stand and testified further as follows:)

The Court: I will withdraw that question. Apparently, I was under the impression these papers were yours and they have told me they aren't yours. Forget that.

Going back to Plaintiff's Exhibit No. 1. You produced this paper this morning as being the one that you took to your attorney—or did you say you took that to your attorney?

The Witness: No, sir, I did not.

The Court: But that did come out of your file?

page 114 } The Witness: It must have come out of one of my attorneys' files.

The Court: It is the same as the one sued on?

The Witness: Yes. And actually, I believe it is the same as the first page of the contract I did take to my attorney. This is the one I took to Mr. Phillips (handing the document to the Court.)

The Court: What I am trying to get at is the original of this. Where is it? Did you ever have it?

The Witness: That I don't know, sir. I am sure I didn't.

The Court: Do I understand you to say that you never saw this before?

The Witness: No, sir, I saw this before. I say it is the same page as the first page of the contract you have in your hand, which I took to Mr. Phillips.

The Court: You don't know where this particular piece came from?

The Witness: That is right.

The Court: The one you took to Mr. Phillips—

The Witness: Is the one you have in your hand.

The Court: It was not signed?

The Witness: That is right.

The Court: The one that I was asking you about which is signed, you say you never saw that? Just look at the signatures is what I am talking about. You say it

page 115 } wasn't presented to you with the signatures on it?

The Witness: That one was, but this is a different contract than the one you have there.

The Court: Let me see the first page.

The Witness: The first page is the same and the second page is different.

The Court: Do you have a copy of the contract like this, complete?

The Witness: No, sir, I haven't.

The Court: What I am trying to get at is, were you ever shown a copy of a contract by them with that first page on it without any signatures on it?

The Witness: Not that I remember.

The Court: You don't have such?

The Witness: No, sir.

The Court: That came out of their file?

The Witness: I don't know whose file it came out of.

The Court: It didn't come out of yours?

The Witness: I don't have any file.

The Court: It came out of your attorneys' file, one or the other.

What did he say to you about the execution of this when he gave it to you and you told him you wanted to let your attorney look at it?

The Witness: The only thing Mr. Hanowell
page 116 } said to me when he brought this to me was that
it was a new contract in which the offer had been raised to inventory plus $55,000, and in this one the purchasers had assumed the chattel mortgage which is in the preceding one there.

The Court: You said he said this was an offer. Who was making an offer? Did you ask him anything about the signatures not being on there?

The Witness: No, sir, I didn't. The only thing I did was take this contract up to Mr. Phillips for advice.

The Court: You say now, at that time nothing he showed you was signed by Mr. Mendelson or Mr. Miller?

The Witness: No, sir, none of this was signed at all.

The Court: And, you didn't see the check?

The Witness: No, sir, I have never seen this check until today.

The Court: Do you know how many copies of that he had when he was talking to you?

The Witness: The only thing I know is I was given one copy. That was the one I took to Mr. Phillips.

Charles B. Hawthorne.

The Court: Was the new page on it when it was given to you?

The Witness: The contract?

The Court: Did he take a page off and add one on, anything like that, in your presence?

The Witness: No, sir, not that I recall. The page 117 } only thing I was handed the contract and I said, "I'm going up to Leesburg tomorrow and I will take this and have Mr. Phillips read the contract and advise me," and that was where it was left. I saw Mr. Phillips the 29th of May 1956.

The Court: That is all.

Are there any questions?

Mr. Madden: Yes, your Honor.

RE-CROSS EXAMINATION.

By Mr. Madden:

Q. Do you recall my asking you this morning whether or not on the 26th of May Mr. Hanowell didn't submit a contract to you with the check attached?

A. No, sir. You didn't ask me that. If you did, I didn't hear.

Q. It is your testimony now—

A. I don't think you asked me that question.

Q. It is your testimony now that you never saw that check before today?

A. That is true.

Q. You never saw any other check and you didn't say anything to the contrary this morning?

A. That is right.

Q. Plaintiff's Exhibit No. 1, which is a single sheet calling for $55,000, you do recall receiving that, do you not, from Mr. Hanowell?

page 118 } A. I don't recall it in a single sheet.

Q. How do you recall it?

A. As part of a contract.

Q. As part of which contract, sir?

A. As part of the contract with the $450 per month which was the last contract before we had the one which provided for $250.

Q. That is your testimony now, is it?

A. Yes.

Q. Now, do you recall this morning being asked by me, do

you recall having received a first or single page? Do you recall that?

A. Yes, sir. I said, "No."

Q. You said, "No," you didn't say that "I must have received it from Mr. Hanowell"?

A. If I had the single sheet I had to get it somewhere. I'm sure I didn't type it myself to carry it with me.

Q. It is your testimony now this must have been attached to something else when you saw it. Is that right?

A. Either that or it was given to me singularly, although I don't remember. I don't remember it being given to me singularly.

Q. You think it must have been attached to the thing that you took to Mr. Phillips?

A. That is right.

page 119 } Q. That is Defendants' Exhibit 1. You think it must have been, what, stapled onto that?

A. Stapled on that or possibly as a separate sheet I took with me.

Q. Did you take this up to Mr. Phillips (handing the document to witness)?

A. No. The one I took was this Defendants' No. 1.

Q. Then, let me ask you again, what you think this might have been attached to?

A. As I said, obviously, it is part of a contract. The one which you have a photostatic copy of.

Q. Nothing is obvious to me right now. Your recollection is that you got it as part of what we sued on, the thing that is attached to the complaint. Is that your recollection?

A. I don't recall. I must have.

Q. Now, what did you say to Mr. Hanowell about the fact that he was submitting you signed documents, that is, Plaintiff's Exhibit No. 3 and Plaintiff's Exhibit No. 4, that stated right on there there was a check being paid simultaneously? What did you say to him about the fact there wasn't any check?

A. I didn't say anything. I think the contract provides the check was being held in escrow by Lois Miller. At least that is my—

Q. Why do you say that?

page 120 } A. Why do I say that?

Q. What your recollection is what the contract says?

A. It was to be part of the downpayment.

The Court: What contract are you talking about now?

The Witness: It says, "The sum of $4,250 by check paid to Lois H. Miller to be held in escrow for and on behalf of the seller"—

By Mr. Madden:

Q. My question is what did you say to Mr. Hanowell about that state of affairs when he presented you with this or any of these contracts?

A. Any of these contracts?

Q. The fact there was no check?

A. I didn't say anything about it.

Q. That didn't bother you then, did it?

A. No. I assumed Lois Miller had the check and if the sale was consummated I then would receive the check.

Mr. Madden: That is all. Thank you.

The Court: Any questions, Mr. Alexander?

Mr. Alexander: No.

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* * * * *

CHARLES L. HANOWELL,

was recalled, and testified further as follows:

The Court: Mr. Hanowell, did you leave with Mr. Hawthorne a signed copy of this contract that he said he wanted to show to his attorney?

The Witness: The contracts which I took to him which he said he was going to show to his attorney were signed, yes.

The Court: Were signed?

The Witness: Yes, sir. We had numbers of contracts written and I think I took him copies of all of them.

The Court: You said you were there prior to Memorial Day, which was Saturday the 26th, I think that is correct.

The Witness: Yes, sir.

The Court: Showing you what is Defendants' Exhibit No. 1, is that one of the copies of the contract that you delivered to him as being the last, that is, a copy of the contract you are suing on now? (Mr. Madden hands the document to the witness.)

The Witness: No, sir. This was a prior contract, and the last one delivered with the new page put on it called for $25,000 downpayment, $55,000 for good will and business, and the payments of $450 a month for chattel trust. That is a copy of one of the prior contracts.

The Court: Have you got the original page of the contract you are suing on?

page 122 } The Witness: Of that changed page?

The Court: Yes.

The Witness: No, sir. As I remember it, your Honor, in delivering the contracts I left no less than the original and at least one copy. The contracts are generally made in triplicate, and I am quite sure I delivered the original and one carbon to Dr. Hawthorne. It is just a matter of practice over a number of years, and I am quite sure I did so. I would not have the original in my possession.

The Court: Is Plaintiff's Exhibit No. 4, which I have here, the pages subsequent to the first page, that is, the original of the contract upon which you are suing to which a page was added?

Mr. Madden: May I have the complaint copy, your Honor?

(Mr. Madden hands the documents to the witness.)

The Court: I am talking about the pages subsequent to the first page.

The Witness: With the exception of the first page, it is the original. This actually was the original contract and the first page was amended.

The Court: What I am driving at is, the second, third and fourth pages of that remained a part of the contract all the way through, did they not?

The Witness: Yes.

The Court: And you added a new sheet?

page 123 } The Witness: Yes, sir. And that became an original sheet for the first time. I gave him the original and at least one copy.

The Court: Was it attached to this?

The Witness: I delivered it to Dr. Hawthorne. I did not personally attach it. I said that would be substituted as the first sheet, after we got to an agreement about the price.

The Court: You delivered him a loose sheet of paper?

The Witness: I delivered him the first sheet of the contract.

The Court: And you told him to attach it?

Charles L. Hanowell.

The Witness: I told him to attach it and told him that it would be the first copy and, apparently, the original seems to be missing.

The Court: You gave him one more than one copy?

The Witness: Just over a long period of time, your Honor, I never leave less than two copies with an owner. Generally more, but at least two.

The Court: That is all.

Any further questions?

Mr. Alexander: None here, your Honor.

The Court: Do you rest?

Mr. Alexander: Yes.

Mr. Madden: I would like to ask Mr. Hanowell one last question.

page 124 } Mr. Hanowell, you testified this afternoon that you had the check in your possession and exhibited it to the defendant when you presented the contracts which were presented on the 26th of May. Is that correct?

The Witness: I had the check attached to the contract, on the contract which we presented on the 25th of May. That same check was transferred and used as the downpayment, deposit on the contract dated the 26th, and it never left the contract until—I take that back, it was with the file at all times and I took it to the office when Dr. Hawthorne said he was going to take it to his attorney.

To the best of my recollection, that check was not presented but shown to Dr. Hawthorne showing that we had a valid title, although it was made to Mrs. Miller, the attorney. I testified that the contract dated the 24th—obviously, I didn't—to the best of my recollection, it probably was not presented to him the morning of the 25th, the check was dated that day and I would not have presented it until I got the check.

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A Copy—Teste:

H. G. TURNER, Clerk.

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