

Record No. 5451

In the
Supreme Court of Appeals of Virginia
at Richmond

W. L. HARRIS, ET AL.

v.

E. L. DUNHAM, ET AL.

FROM THE CIRCUIT COURT OF HENRICO COUNTY

RULE 5:12—BRIEFS.

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

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

HOWARD G. TURNER, Clerk.

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. 5451

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 11th day of January, 1962.

W. L. HARRIS, ET AL.,

Appellants,

against

E. L. DUNHAM, ET AL.,

Appellees.

From the Circuit Court of Henrico County

Upon the petition of W. L. Harris and Kenneth J. Ganaway an appeal is awarded them from a decree entered by the Circuit Court of Henrico County on the 21st day of July, 1961, in a certain chancery cause then therein depending wherein Howard C. Vick was plaintiff and E. L. Dunham and the petitioners were defendants; upon the petitioners, or some one for them, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

page 49 }

May 31, 1961.

Gentlemen:

The evidence in the above entitled chancery cause was heard *ore tenus* on May 24, 25, and 26, 1961, and argument of counsel was made on May 29, 1961. Without endeavoring to set forth the details of the various pleadings and of the evidence and of the argument of counsel, the Court will endeavor to discuss one of the legal problems raised in argument of counsel (concerning which it has done some research) and to announce its decision in the cause.

The legal problem alluded to above raises the question of the remedies available to defendant Dunham who filed a cross-bill in the amount of \$75,000.00 against defendants Ganaway and Harris on allegations sounding in fraud and deceit in relation to Dunham's purchase from the other two of the 102 shares of stock issued by Dairy Queen of Virginia, Inc.

page 50 } It appears to the Court that the remedies available to defendant Dunham with respect to the transaction in question are basically two, namely: He may elect to rescind his contract; or he may elect to retain what he has received under the contract and bring an action to recover damages for the injuries sustained from the deceit. Consequently, Dunham was entitled to void or rescind the transaction or confirm it but he could not do both, thus if he adopted a part of the transaction he adopted it all and was left to his action for damages for the injuries sustained from the deceit. See Michie's Jurisprudence, Fraud and Deceit, Sections 34 and 36 and cases there cited, particularly *Wilson v. Hundley*, 96 Va. 96, etc. found in notes 13, 15 and 16. There is also authority to the effect that the victim of the fraud cannot both affirm and disaffirm and that a defrauded person may either affirm the contract and recover damages or disaffirm and rescind it but cannot pursue to a final conclusion both remedies. See 24 Am. Juris., Fraud and Deceit, Sections 130,

190, 191, pages 8 through 11, Section 200 at page 24 and cases cited.

For the reasons above stated the Court is of the opinion that by keeping and continuing to operate the business of Dairy Queen of Virginia, Inc. the defendant Dunham has made an election to retain what he has received under contract of December 29, 1958, and by adopting a substantial part of it that he has adopted it all, but retains his action for damages sustained from the deceit.

By adopting this course of action, the Court is of the further opinion that the defendant Ganaway is entitled to recover on his cross-bill against Dunham on the two overdue and unpaid notes of \$2,500.00 each (of a total of 4 notes included in the deferred purchase payments under the contract) plus interest at the rate and from the date stated in said notes plus an attorney's fee of 10% now allowed by the Court as reasonable. Also the Court rules in favor of the intervenor Newell on the two overdue and unpaid notes of \$2,500.00 each originally given to the defendant Harris pursuant to the contract of December 29, 1958, and subsequently assigned to Newell. The same ruling is made with respect to interest and attorney's fee on the notes held by Newell as to those held by Ganaway. Newell's claim on the notes is, of course, bolstered by the assertion that he is a holder in due course of the four notes of \$2,500.00 each received from Harris. I deem it unnecessary in view of the above ruling to decide whether Newell is a holder in due course but in passing the Court will state that it views Newell as a holder in due course despite the holding in *Moore v. Potomac Saving Bank*, 160 Va. 597, relied upon by counsel for Dunham.

page 51 } With respect to the cross-bill of Dunham for misrepresentations by Ganaway and Harris the Court is of the opinion that Dunham has shown by the degree of proof necessary in such cases that certain material, representations and concealments were made by the said Ganaway and Harris with the intention by the latter that Dunham should act upon them and that Dunham did act upon them and was misled to his injury and damage. See *Michie's Juris.*, Fraud and Deceit, Sections 3, 5, 15, 22, 24, 27 and cases there cited. I believe that it should be pointed out in passing (again without endeavoring to analyze the evidence in detail) that the defendant Dunham and his witnesses Mr. Morrison, Mrs. Gowdy, Mr. Gosnell and Mr. Leitchman made an impression on the Court on the clarity and straight forwardness of their testimony whereas the same cannot be said of all portions of the testimony of Ganaway and Harris.

In approaching the damages to which Dunham is entitled it

does not appear to the Court that Dunham who had more than a workable knowledge and understanding of P & L statements was misled by the figures appearing on page 7 of Dunham's exhibit No. 3 being the P & L statement for the fiscal year ended February 28, 1958 (operations for the year 1957). It seems clear to me that the three contractual parties were discussing net income figures which Dunham might expect if he took over the business at the meetings on December 28 and 29, 1958. Although Dunham's penned computations on page 7 of the above referred to P & L statement were incorrect mathematically, the evidence did indicate that he could expect a net income as follows:

\$ 2,400.00—officers salaries to be Dunhams
10,367.92—Manager's K to be Dunhams
1,421.00—clerical etc. to be Dunhams
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14,188.92—Total Salaries to be Dunhams
1,361.55—Actual profit for 1957
<hr/>
15,550.47—Net Profit Reasonably expected
3,400.00—Dunham's expected (actual) increase in travel expenses
<hr/>
\$12,150.00

The basic misrepresentations and concealments made by Ganaway and Harris to Dunham related to:

1. \$4,500.00 per year volume rebate which Dunham was led to believe he could count on.
2. Loss of income from the closing of six stores—operators throughout the State at the end of the 1958 season and not communicating it to Dunham.
3. The necessity for substantial repairs needed at the Roanoke store which had been closed by Health authorities and not communicating it to Dunham.
4. The unrest and hostility of the operators—dealers and not communicating it to Dunham.

From the evidence with respect to the above misrepresentations and concealments, the Court finds that Dunham is damaged to the extent of \$19,110.00 and is entitled to recover on his cross-bill against Ganaway and Harris for that amount. This figure consists of the expected \$4,500.00 volume rebate for the years 1959, 1960, \$1,522.00 costs of repairing Roanoke store to make it operative, \$5,540.00 loss of expected profit from the six non operating stores (Richmond-Azalea, Alex-

andria-Mt. Vernon, Danville, Roanoke, Norfolk and Virginia Beach-No. 3) based on total galls sold during 1958 at a net profit of 25½ cents per gallon and \$3,048.00 for the loss of expected income from four non operating stores (the six above cited less Danville and Roanoke which reopened) for 1960 based on the 1958 gallon sales for said stores totalling 11,956 gallons at a net profit of 25½ cents per gallon.

The counsel for the parties did not argue and hence the Court considers as undecided the question as to whether or not equity principles may offset and adjust the result of the monetary holdings in favor of the parties as above set out. If desired by counsel, this matter may be considered at the time of presentation of an order in connection with this opinion.

The above dissertation disposes of all questions before the Court except for the prayer of the complainant Vick for the guidance and disposition of the stock and his requested attorney's fee and reimbursement of costs as escrow agent under the contract referred to and complainant herein. As costs are to be assessed against the losing party under the doctrine in *Pettus v. Hendricks*, 113 Va. 326, the Court will assess against Ganaway and Harris the sum of \$300.00 attorney's fee and \$18.75 costs of suit. The attorney's fee is based on the rate of \$100.00 per day for the two full days and \$50.00 per day for the half day hearing on May 24 and for preliminary appearances at pre-trial conferences. It is considered by the Court that complainant was not required to actively participate in the litigation as was required of the other parties. With respect to the stock, the Court is inclined to the view that Vick should retain the stock pursuant to the agreement of December 29, 1958, as escrow agent until the deferred purchase notes are paid in full or counsel agree or otherwise.

Very truly yours,

EDMUND W. HENING, JR., Judge.

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DECREE.

This cause which has been regularly matured, set for hearing and docketed, came on this day to be heard upon the bill of complaint; upon the answer and cross-bill of the defendant,

E. L. Dunham, against the defendants, Kenneth J. Ganaway and W. L. Harris; upon the demurrer of the defendants, Kenneth J. Ganaway and W. L. Harris, to the cross-bill of the defendant, E. L. Dunham; upon the answer and the cross-bill of the defendant, Kenneth J. Ganaway, against the defendant, E. L. Dunham; upon the petition of Raymond Newell to intervene against the defendant, E. L. Dunham; upon the answers of the defendant, E. L. Dunham, to the cross-bills of Kenneth J. Ganaway and the petition of Raymond Newell; upon the answers of Kenneth J. Ganaway and W. L. Harris to the cross-bill of E. L. Dunham; upon the evidence of the plaintiff and all defendants and the intervenor, Raymond Newell, fully heard orally in open court in the presence of all parties and their counsel on May 24, 25, 26, 1961, and the exhibits therewith; and was argued by counsel.

ON CONSIDERATION WHEREOF, it appearing that counsel for W. L. Harris and Kenneth J. Ganaway, moved that the demurrers filed by these defendants to the cross-bill of E. L. Dunham be dismissed, the court doth order that the said demurrers be overruled.

page 54 } And the court, for the reasons set forth in its written opinion dated May 31, 1961, doth find, adjudge, order and decree as follows:

(1) That defendant, Kenneth J. Ganaway, recover a judgment on his cross-bill against E. L. Dunham in the sum of \$5,000.00 with interest thereon at the rate of 6% per annum from 1 January, 1959, through the date of this order, plus an attorney's fee of 10% of the said \$5,000.00;

(2) That the intervenor, Raymond Newell, recover a judgment on his petition against E. L. Dunham in the sum of \$5,000.00 with interest thereon at the rate of 6% per annum from 1 January, 1959 the date of this order, plus an attorney's fee of 10% of the said \$5,000.00;

(3) That on his cross-bill against the defendants, Kenneth J. Ganaway and W. L. Harris, the defendant, E. L. Dunham, recover a judgment, jointly and severally, against the said Kenneth J. Ganaway and W. L. Harris in the sum of \$19,110.00;

(4) That as to the disposition of the stock prayed for in the bill of complaint, the complainant, Howard C. Vick, retain the said stock pursuant to the agreement of December 29, 1958, as escrow agent, until the deferred purchase notes are paid in full in accordance with the terms of the agreement, unless the parties hereto or their counsel otherwise mutually agree;

(5) That the complainant, Howard C. Vick, recover a judg-

ment for his attorney's fee as escrow agent in this proceeding against the defendants, Kenneth J. Ganaway and W. L. Harris, in the sum of \$300.00 plus \$18.75 costs for the prosecution of this suit;

Counsel for the defendants, Kenneth J. Ganaway and W. L. Harris, object and except to those portions of the decree rendering judgment against the defendants, Kenneth J. Ganaway and W. L. Harris, and to that portion awarding an attorney's fee and reimbursement for costs to the complainant, Howard C. Vick, against the defendants, Ganaway and Harris.

Counsel for E. L. Dunham objects and excepts to that portion of the decree rendering judgment against the defendant, E. L. Dunham.

Enter: 7/21/61.

EDMUND W. HENING, JR., Judge.

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Received and filed in office September 15, 1961.

Teste:

MARGARET B. BAKER, Dep. Clerk.

NOTICE OF APPEAL AND ASSIGNMENT OF ERRORS.

To the Clerk of the Circuit Court of Henrico County:

Counsel for Kenneth J. Ganaway and W. L. Harris, defendants in the above styled suit, hereby give notice of appeal from the decree entered in this cause on July 21, 1961 and set forth the following assignments of error:

1. The court erred as to the law and the evidence in awarding damages to the defendant Dunham based upon its finding that the defendants Ganaway and Harris misrepresented volume rebate to the defendant Dunham.
2. The court erred as to the law and evidence in awarding damages to the defendant Dunham based upon its finding

that the defendants Ganaway and Harris failed to disclose to the defendant Dunham that six stores had closed at the end of the 1958 season.

3. The court erred as to the law and the evidence in awarding damages to the defendant Dunham based upon its finding that the defendants Ganaway and Harris had failed to disclose to the defendant Dunham that the Roanoke store was in need of substantial repairs.

4. The court erred as to the law and the evidence in finding that the defendants Ganaway and Harris had failed to disclose to the defendant Dunham the unrest and hostility of the operators.

page 57 } 5. The court erred in assessing counsel fees in the sum of \$300.00 and costs against the defendants Ganaway and Harris.

6. Paragraphs numbered 3 and 5 of the final decree are contrary to the law and the evidence.

KENNETH J. GANAWAY
W. L. HARRIS
By WILLIAM R. COGAR
Of Counsel.

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ASSIGNMENTS OF CROSS-ERROR ON BEHALF OF
E. L. DUNHAM.

Now comes the defendant, E. L. Dunham, by counsel, and assigns the following errors committed by the trial court:

1. The Court erred as to the law and evidence in awarding judgment to Raymond Newell against the said E. L. Dunham on the promissory notes held by Newell.

2. The Court erred as to the law and evidence in awarding judgment to Kenneth J. Ganaway against the said E. L. Dunham on the promissory notes held by Ganaway.

3. The Court erred as to the law and evidence in holding that by keeping and operating the business of the Dairy Queen of Virginia, Incorporated, E. L. Dunham could not raise misrepresentation, concealment, fraud or deceit as a defense to the claims for enforcement of the promissory notes.

Raymond Newell.

4. The Court erred as to the law and evidence by holding that Raymond Newell was a holder in due course.

5. The Court erred as to the law and evidence in permitting the complainant, Vick, to retain and in failing to award the stock certificates to E. L. Dunham.

E. L. DUNHAM,
By RICHARD N. HARRIS
Of Counsel.

Received and filed in office Sept. 22, 1961.

Teste:

HELEN D. CLEVINGER, Clerk.

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page 6 }

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RAYMOND NEWELL,
an intervenor, being first duly sworn, testified as follows:

By Mr. Oxenham:

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Q. Now, when did you purchase the four notes?

A. June 30, 1959.

Q. Who is the maker of the four notes?

A. E. L. Dunham.

Q. Did you know Mr. Dunham, Mr. Newell?

A. I did not.

* * * * *

Q. Did you know anything of Mr. Dunham's
page 10 } financial condition?

A. I did not.

Raymond Newell.

Q. Did you make any inquiry as to his financial ability or condition?

A. Only that information which Mr. Harris was able to give me.

Q. I see, and did he give you any information that would lead you to believe that Mr. Dunham was a financially responsible party?

A. Mr. Harris informed me that he would not himself have taken the notes if he didn't believe them to be good notes and collectible. He also informed me that Mr. Dunham had made two substantial payments, all of which led me to believe that the notes were good notes and collectible.

Q. Did you conduct any further investigation as to the man's financial ability?

A. That is the extent of it.

Q. Now, Mr. Newell, did you know Mr. Ganaway?

A. I did not.

Q. Have you since met Mr. Ganaway?

A. I met Mr. Ganaway yesterday.

Q. Did you know anything of the financial ability and, if so, what, of Dairy Queen of Virginia, Inc.?

A. I had no knowledge.

Q. Did you know anything of Dairy Queen of page 11 } Virginia, Inc., business operations?

A. I knew nothing of the Dairy Queen of Virginia operations.

Q. Did you know anything of any controversy that had arisen between Mr. Dunham, Mr. Harris, or Mr. Ganaway?

A. I did not.

Q. Did you know of any suits or pending suits that may have grown out of the transaction that these notes were given for?

A. I did not.

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CROSS EXAMINATION.

By Mr. Harris:

Raymond Newell.

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Q. Now, you mentioned something of your conversation with Mr. Harris, whom you say is your brother-in-law, at the time of the sale of these notes and you said something about Mr. Harris told you that Mr. Dunham was good for the notes, and one of the reasons he gave for making that statement was that Mr. Dunham had already paid something on the notes. Is that what you understood from Mr. Harris?

A. No, sir.

Q. I must have misunderstood you, then. What was it that you had reference to when you said Mr. Harris told you Mr. Dunham paid something?

A. He had made two substantial payments on some contract that existed between them and he felt that a man who was in position to make those payments was also in position to handle his obligations on these notes. It had nothing to do with any payment on any note that was due at that time or any time in the future.

Q. Sir, you bought four notes for a total matured value of \$10,000, for \$6000—your purchase price of these \$10,000 notes was \$6,000, isn't that right?

A. Correct.

page 16 } Q. What bargaining took place between you and Mr. Harris about the purchase of these things? Why was it, in other words, that you finally agreed on \$6,000 for \$10,000?

A. He accepted my offer.

Q. Who offered what first?

A. I offered \$6,000 to him after having been advised that the notes were available for purchase.

Q. What explanation or reason did Mr. Harris give you for wanting to sell the notes?

A. Well, actually, I didn't feel it was my position to ask him what he wanted to do with the money, but I felt reasonably sure he had some use for it in his business.

Q. Are you saying your impression was that he needed some cash quick?

A. I say that I did not ask him what his use for the money was, but I assumed that he would like to have some money to use in the business.

Raymond Newell.

Q. In other words, from what you say, he came into see you with these four notes in his hand and said, "Here, I have got notes worth \$10,000 and I think they are good and I will take \$6,000 for them," or he probably said, "What will you give for them?" And you said, "\$6,000," and he said, "Sold." Is that the idea?

page 17 } A. Are you saying that all that took part in one 15 or 20 minute transaction?

Q. Is that all the conversation over a period of time or however long it was that you ever had about these notes?

A. No.

Q. What else was said about it?

A. Mr. Harris had mentioned to me sometime previously I am not sure of the date, but I am guessing, or I remember as best I can, it was probably some several months prior to the purchase.

Q. You purchased them in June, June 30, 1959; that is the date of your check. Did you write him the check the same day you made the deal?

A. Correct.

Q. But he had originally initiated a conversation about wanting somebody to buy the notes from him, and specifically you, two or three months before that?

A. Yes, he had mentioned it to me.

Q. What did he tell you about the notes at that time?

A. He told me that he thought they were collectible.

Q. How come you didn't buy them then?

A. I didn't have any reason buying them at that particular time, maybe I didn't have the money. I don't re-
page 18 } call exactly.

Q. Did he keep coming back trying to get you to buy them?

A. I don't believe I quite understand what you mean by "keep coming back." We had some conversation if we saw each other from time to time, but do you mean that he would come to me specifically for that purpose?

Q. You said that he mentioned these notes to you some two or three months before you actually bought them. Now, you say you saw him some several times between then and the time you did buy them, and you implied that each time you saw him some conversation came up about the notes. Is that right?

A. Correct, yes.

Q. Who initiated the conversation about the notes? Did he keep pressing you each time he saw you, to give some

Raymond Newell.

further conversation about the purchase of the notes, or want to know your answer as to whether you were going to buy them? Did he do that?

A. He did not press me. Perhaps on some occasions he mentioned the subject first and perhaps on others I mentioned it first.

Q. Were you interested in buying the notes from the first time he mentioned them to you?

A. Yes, sir.

page 19 } Q. What aroused your interest?

A. The discount feature.

Q. Did his representation of how good the notes were also arouse your interest?

A. Certainly, I was interested in buying good notes, not bad ones.

Q. How long have you known Mr. Harris—I guess since the marriage? Has it been any longer than the marriage?

A. Some several years prior to the marriage.

Q. How long is all that?

A. Twenty-odd years.

Q. Mr. Harris has been engaged in the Dairy Queen business in North Carolina during most of that time, hasn't he?

A. No more than half of that time.

Q. What did he do before that?

A. He was in the tobacco business.

Q. Have you ever had anything to do about the Dairy Queen business?

A. Yes, sir.

Q. What?

A. Mr. Harris and I were partners in a Dairy Queen store operation in Fayetteville, North Carolina, between 1952 and 1955, or it could have been 1956. I for-

page 20 } get which year.

Q. There was an individual outlet and had nothing to do with the state-wide organization that Mr. Harris owns?

A. An individual outlet, correct.

By The Court:

Q. Would you state those dates again?

A. Between 1952 and 1955 or '56. I forget which year that business was sold.

By Mr. Harris:

Q. Do you know whether you had sold the business that

Raymond Newell.

you and Mr. Harris were running together in North Carolina before or after he acquired his interest in the Dairy Queen franchise in Virginia?

A. I really don't know when he acquired his interest in Virginia, but I am of the opinion, my recollection is that he had no interest in Virginia when that business was sold.

Q. Well, now, you knew that he acquired an interest in the business in Virginia, didn't you?

A. Yes, I knew that.

Q. And you knew that he had sold it?

A. I knew that he had sold it. Yes, I knew he sold it at some time later.

Q. You knew that these notes that he came to you to try to get you to buy were notes that had been executed page 21 } in connection with that sale, didn't you?

A. I don't know whether the notes—yes, that is correct, yes.

Q. All right, sir. Now, how many times would you say that you saw Mr. Harris between January, 1959, and the time that you bought these notes in June of 1959?

A. Maybe twice, maybe three times.

Q. Were these visits in your home or business visits, or what?

A. They would most likely have been visits in my home.

Q. Would he stay there over night?

A. No, sir.

Q. Just drop by or what?

A. Correct, just drop by, whenever he was in town on other business, whatever that might have been.

Q. Did you ever talk to Mr. Ganaway during this period of time?

A. No, sir.

Q. Did you ever talk to Mr. Dunham during this period of time?

A. No, sir.

Q. And you say that Mr. Harris never once mentioned any problem in connection with these notes; that is, specifically any controversy he and Mr. Ganaway were having page 22 } with Mr. Dunham over the execution of the notes, never mentioned that once?

A. Never.

Q. Everything he told you was to the contrary, everything was fine and you could expect payment on them at the mature date?

A. Certainly, I expected payment.

E. L. Dunham.

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E. L. DUNHAM,
a defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Harris:

page 26 }

Q. Mr. Dunham, we have filed a cross bill in your behalf in this case, and would you mind telling the Court in your own words how you first were acquainted with the Dairy Queen business in Virginia and what brought about your acquaintance or your interest in that business?

A. Yes, sir. In the early part of December, 1958, I read an ad in the Wall Street Journal which stated that there was a basic Dairy Queen franchise for an eastern state for sale, \$50,000 cash, no phone or mail inquiries, must be in person, at West Palm Beach, Florida, so I was going down there on some other business and I cut the ad out of the paper, and when I got down to Florida the man that I was to meet had been delayed in Cleveland because of bad weather, and so I had an extra day open.

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So, I drove back up there the next morning and introduced myself and asked him about the ad that had appeared in the paper and this ad also had stipulated that there would be \$25,000 gross profit and it was actually in the ad. So, I asked him about the business, I said, "What is it?" He said, "It

E. L. Dunham.

is a Dairy Queen franchise," and he proceeded to explain to me what that is, that you derived your income from royalty, that the member stores paid into the state franchise office, so then I brought up the question of the \$25,000. I said, "You stated in the ad this is \$25,000 gross profit. Now, what do you mean by gross profit?" And he said, "Well, it is profit.

Why?" I said, "Well, in our business, in the retail
page 28 } business, we refer to gross as being a figure before any expenses are taken out and I just want to get this clear before we carry it any further. What is it?" I said, "It is income, then, is that right? Personal income that I can expect to take out of the business?" And he said, "Yes." I said "Your ad states this sells for \$50,000 cash. I don't have that much money. Would you consider taking any less for the business?" And he said, "No, Mr. Dunham, we wouldn't because," he said, "where could you expect to buy a business that you could expect to pay for in two years?" So I said, "Well," I said, "I will—." He didn't have any of the books there in Florida. He said that they were in Richmond, so we couldn't look over any of the books.

* * * * *

So with that, I returned to Kankakee, Illinois, and tried to raise the extra \$20,000 and I was unable to do
page 29 } it. Within a week or so I called Mr. Ganaway back on the phone and I said, "Mr. Ganaway, I am unable to raise the additional \$20,000. Now, have you contacted Mr. Harris and, if so, what is your decision?" And he said, "Well, yes I have contacted Mr. Harris and we are agreeable to selling to you for \$30,000 cash and the balance you can pay out on four notes at \$5,000 a year." I said, "What is your next step?" He said, "Well, we will meet in Richmond where we can go over the books and satisfy you as to the income," and I said, "All right, fine." So Mrs. Dunham and I drove down on December 28, 1958 and that was—I'm sorry, we drove down on December 27 which was a Saturday. I met Mr. Ganaway in the hotel and met Mr. Harris that morning in the hotel for the first time. We had breakfast together and they had called a Mr. Ed Hardy who is the CPA firm that handled their books for them to give us transportation out to the Dairy Queen of Virginia office at 5600 West Marshall Street. We got in the car and drove out there and when we got outside the building and we started to get out, Mr. Hardy said, "Well, will you gentlemen have

E. L. Dunham.

any further need for me?" And they said, "No, that is not necessary," so the three of us, Mr. Harris, Mr. Ganaway, and I went upstairs to the office and they showed me the profit and loss statement indicating the fiscal year ending 1957

because the fiscal year for 1958 had not been pre-
page 30 } pared yet. This was Decemebr, so it still had until

February of 1959 to go. In this profit and loss statement they showed me the income that Mr. Herb Morrison, who was State Supervisor, had drawn from the business. They also showed me an account listed as income which they called "Mix Profit Account," to the tune of some \$3500. They also showed me where they were receiving for the first time during 1958 a volume rebate from dairies, Virginia Dairy here in Richmond, and the Pet Milk Company. Since the books were not closed for 1958, we estimated that volume. I think they were listed then up through September or October and we estimated the volume to be at about \$4500, the volume rebate to be at about \$4500. By totalling these figures, I could see where the business did come up to paying \$23,000, \$23,000-some odd dollars plus. This was in addition to payments made to Mrs. Gowdey on a quarterly basis, so I said, "Well, I am satisfied, gentlemen. What do we do next?" And they said, "Well, we go and have the contract drawn up." This was on a Sunday, December 28.

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The next day, Monday, I again met with Mr. Harris and Mr. Ganaway in Mr. Vick's office and they had Mr. Hardy come there then, bringing the general book of the company which had been in their possession because Mr. Morrison had resigned in December and they were taking care of the payment of the bills in the interim. Mr. Hardy asked me if there were any questions in regard to the books of the company, and I remember that I did ask him a couple of questions; what they were I am not absolutely certain of at this time. I do not remember. Anyway, they must have been answered to my satisfaction and so he was asked to leave. He wasn't there over 15 or 20 minutes and he left, so then we decided that we would go ahead and have the contract drawn up.

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Q. What happened finally in the office of Mr. Vick that you were talking about? What did you finally consummate there?

A. Well, we finally proceeded to draw up the contract of sale wherein I agreed to pay the gentlemen \$14,000 in cash at that time and \$16,000 on or before February 1, 1959.

Q. Now, you saw this agreement that was put in evidence yesterday. Is that the same agreement that you page 33 { are talking about? I am referring to Plaintiff's Exhibit No. 1. Is this the exhibit or agreement that you have reference to that was executed in Mr. Vick's office?

A. Yes, sir.

Q. Now, what else, if anything, was executed besides that agreement on that day? Do you recall, Mr. Dunham?

A. The notes to Mr. Ganaway and to Mr. Harris for the balance of the payments of \$20,000.

Q. And they were provided for in the agreement, I believe?

A. Yes, sir.

Q. Now, subsequent to the execution of the notes and the agreement in Mr. Vick's office, what else happened in connection with Mr. Harris and Mr. Ganaway, Mr. Dunham?

A. One of the things I asked Mr. Ganaway and Mr. Harris was the fact that how come they had such little travel expense listed on the books when they told me it was Mr. Morrison's duty to call on the stores at least once a month and, as I recall it, the travel expense charged on the books for the year I looked at, the fiscal year ended 1957, was less than \$700.00, and I said, "Gentlemen, I am going to have to rent a car and if I travel the stores once a month, I feel certain that will not be adequate. What do you think would be a fair figure for us to assume that we would charge up for travel page 34 { expense?" Since neither one of them offered any information, I picked a figure out of the air of \$4,000. I said, "Do you think \$4,000 would be a fair figure to set?" And they both nodded in agreement and said, "Yes." I said, "Well, that means, then, that the \$25,000 income which you say I will get out of this business will be reduced by \$4,000, so that is \$21,000 a year net. Right?"

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And they both nodded in agreement, so we went ahead and completed the contract and the notes.

Q. Now, Mr. Dunham, referring again to the \$25,000 representation in the advertisement and your conversations with Mr. Ganaway on your first trip, or your only trip prior to the negotiation for the sale in Florida, then your conversations here in Richmond, what was your concern? What were you trying to find out in reference to this representation of \$25,000 gross profit in the ad? What was it you were after in getting from them about it?

A. I was trying to find out—

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page 35 } A. (Continuing) I was trying to make sure in my own mind that we were all thinking in the same accord and that was that the \$25,000 referred to in the ad was actual income I could take out of the business on a yearly basis.

By Mr. Harris:

Q. Do you mean by that, income to you?

A. Income to me.

Q. Did you say this to Mr. Ganaway when you first saw him in Florida? That this is what you were interested in?

A. Yes, I told Mr. Ganaway. He asked me what business I was in and I told him and I told him that I had been accustomed to making that kind of money in the retail business and that if it didn't produce a net income to me, around that figure, that I wouldn't be interested.

Q. What did Mr. Ganaway tell you at that time in Florida when you told him that?

A. That he could show me that the business paid as they advertised.

Q. Now, sir, also, I believe you said while you were in Florida it was agreed that you would go home and try to raise the additional \$20,000 which you were unable to do. You later called them and told them you were unable to raise it in cash and then you made the arrangement to meet with Mr. Harris and Mr. Ganaway in Richmond?

page 36 } A. Yes, sir.

Q. Which you say took place in the latter part of December of 1958?

A. Yes, sir.

Q. What was the main purpose of the meeting in Rich-

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mond? What were you supposed to do when you got here? What were you coming to Richmond to do?

A. Well, I came to Richmond with the express purpose of finding out and satisfying myself that the business would pay \$25,000 a year as they stipulated in the ad and that if it did, that I would go ahead and buy the business.

Q. When was it that you made up your mind to go ahead and buy the business? At what point of these conversations with these gentlemen?

A. After our meeting Sunday in the Dairy Queen office at 5600 West Marshall.

* * * * *

Q. Mr. Dunham, would you tell us something
page 37 } about the Dairy Queen business at this point so
the Court will understand basically its operation?
Will you explain for us briefly what the Artik Corporation is, what the National Development Company is? Just tell us how the business operates, if you can.

A. Well, the Dairy Queen of Virginia is a state franchise which is issued by the Artik Systems. The Artik Systems are the originators of the Dairy Queen machines; they are the original inventors of the Dairy Queen machines, as I understand it, and each franchise holder, state or district, pays into Artik Systems a royalty fee on each and every gallon of mix sold in his state or district. In our case, it is .04¢ a gallon that we pay to Artik Systems once a month on our volume.

The National Development Company is a subsidiary of franchise holders such as I, and we pay for their existence. The method of payment this year is at the rate of \$150.00 per store to belong to the National Development Company and they, in turn, are supposed to give us national advertising and national representation and make contracts on a national basis for our supplies, which result in a lower cost to the operators.

Q. Do you get any of the .04¢ back from the Artik?

A. Yes, sir, we pay them .04¢ a month per gal-
page 38 } lon a month and they rebate to us 1½ cents per
gallon per month.

Q. What is the relationship between the Dairy Queen Corporation of Virginia, that is, the state-wide franchise holder and the individual dispensers of Dairy Queen throughout the state, the gentlemen who run the little stores?

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A. Well, the people who have the store are Dairy Queen franchised operators. They, in most cases, are in business for themselves, owning the equipment or the building, or renting the building, and it is leased to them, and they buy mix through us, through our franchise and pay us a royalty. Once each week they send in a report to our office showing the number of gallons of mix they have purchased from the dairy and send in a check accompanying it for the cost of the mix plus the royalty to our office on a weekly basis.

Q. Now, who makes the contract with the dairy or dairies for the purchase of this mix?

A. Dairy Queen of Virginia, Inc. makes it on a yearly basis.

Q. Who actually orders the mix from the dairy for the individual operators?

A. The operators order their own needs for each store.

Q. How do they find out what dairy to order from?

A. Because we tell them at the state convention page 39 } each year that contracts have been made for the year and that their source of supply will be either Pet Milk Company or Virginia Dairy, or whoever it happens to be for their locality.

Q. Who does the dairy or the Pet Milk Company you mentioned, who does the Pet Milk Company send their bill to for the mix the operators purchase?

A. All dairies send their invoices to our office, Dairy Queen of Virginia, Inc., and we in turn pay the bills.

Q. Where do you get the money to pay for the mix from?

A. From the operators on a weekly basis on their report, which is the cost of mix plus their royalty.

Q. How much is the royalty now in the operation?

A. .35¢ a gallon.

Q. Is this the same for all operators?

A. Yes, sir.

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Q. Would you tell us what Mr. Harris and Mr. Ganaway told you about the contract that had been made with Mrs. Gowdey, or Mr. and Mrs. Gowdey?

A. Well, they showed me where in addition to the money

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that I was to pay them, the \$50,000, I also assume an obligation with Mrs. Gowdey for the balance that they owed her which was to be paid off at .07¢ per gallon on a page 41 } quarterly basis.

Q. Now, how much was the balance on this contract? Did they tell you at the time you were negotiating with them here in Richmond? Do you remember?

A. I think it was approximately \$124,000 or \$125,000.

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Q. Who was Wendall Morrisson and what store did he run?

A. He operated the three stores in Richmond: Broad Street, Government Road, and Azalea Avenue.

page 44 } Q. Do you know how long he had had those stores? He had them during the time Mr. Harris and Mr. Ganaway operated the business, as far as you know?

A. Before Mr. Ganaway and Mr. Harris—I don't know.

Q. Had them during their time?

A. Had them during their time.

Q. All right, sir, go ahead.

A. So, I went down to his store and introduced myself to him and he was very hostile toward me. I couldn't just get next to him, so I suggested that we go across the street and have a cup of coffee and a sandwich.

Q. Had you ever met Mr. Morrison before this?

A. No, sir. So, we went across to the restaurant there and what was to originally have been a half or three-quarters of an hour lunch turned out to be a three and a half hour session in which he really unloaded both barrels on me, started talking to me about mix—

Mr. Davenport: I object to this testimony with reference to conversation with Mr. Morrison.

Mr. Harris: May it please the Court, we are offering this testimony not to show the truth of anything that Mr. Morrison said, but to show the state of mind of Mr. Morrison at the time he made any statement to Mr. Dunham.

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Mr. Harris: It will show—the materiality is that it will show the state of mind of this and other operators toward Mr. Harris and Mr. Ganaway and toward the Dairy Queen business in Virginia in general at the time they operated their stores during Mr. Harris' and Mr. Ganaway's tenure. It will show the feeling that these operators had. To be quite frank about it, we expect further testimony to show a great deal of dissension throughout the entire system. All of

page 46 } the operators were mad as hornets with these two gentlemen and we hope our testimony will show that and we are offering this testimony to show that feeling on the part of these operators, not to show the truth of anything they might be saying, but only to show what their feelings were, their state of minds were at the time they made certain statements. As I understand the rule of evidence, this material is admissible.

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page 47 } Mr. Davenport: Maybe I can save some time if you will give me a moment. Your Honor, I am familiar with the rule, of course, that Mr. Harris cites and relies upon, and my suggestion—I still insist upon my objection—but my suggestion is that if the Court, in the interest of saving time, let the witness proceed, I still want to reserve my objection with reference to materiality and I assume the Court will refer to it before it moves on the question of materiality and this would go to any question along this line, this witness or any others, so undoubtedly he proposes to introduce it.

By Mr. Harris:

Q. All right, Mr. Dunham, go ahead and tell us of your conversation with Mr. Morrison, Wendall Morrison.

A. Well, Mr. Wendall Morrison informed me he had found out about an additional charge that was being placed to his

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cost of mix in addition to the royalty. He found that out in July of 1958, and that he had advised Mr. Herbert Morrison that he was going to do something about it. Well, of course, this came as a complete surprise to me and he really didn't give me a chance to say too much and I felt that I hadn't accomplished much in trying to get myself acquainted with the biggest operator in the state.

Q. What did he say he was going to do about it?
page 48 } A. Yes, he said he was going to take legal action to see what could be done about getting back this overcharge he had been charged.

Q. What overcharge was he talking about? Do you know?

A. Yes, sir, at that time they were buying mix from the Virginia Dairy and the cost of mix was $.84\frac{1}{2}\phi$ —this was a little confusing—at that time he had a $.19\phi$ royalty that was given to him. The Richmond stores had been given a $.19\phi$ royalty instead of $.35\phi$, and so they were charging him, in addition to the actual cost of the mix, $.05\frac{1}{2}\phi$ called mix profit charge, and in addition were getting back a volume rebate from Virginia Dairy which they did not return to him.

* * * * *

Q. We don't want to go into that, so what you learned from Mr. Morrison that he was upset about was the $.05\frac{1}{2}\phi$ mix profit that you described?

A. Charge.

Q. And the volume rebate from Virginia Dairy?

A. Yes, sir.

Q. They are the two things you mentioned?
page 49 } A. Yes, sir.

Q. Now, sir, after this conversation with Mr. Morrison, what then took place in your continued operation of the Dairy Queen business?

A. As I said, that was sometime between February 9 and February 19, state convention date. February 19, the state convention, Mr. Harris and Mr. Ganaway had previously agreed to come up here to help me put it on because it was new and foreign to me, so they came up and we had the convention at the Byrd Hotel. Mr. Wendall Morrison caused a lot of commotion there in that he was grabbing off all the operators as they were coming in and taking them off in the corner, buzz, buzz, buzzing to them, and so Mr. Harris and Mr. Ganaway decided to leave before the meeting was over.

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They didn't stay for the banquet that evening or anything else and they left me to face the music alone, and I got up at the state convention after the presentation by Mr. Grange of our National Development Company was over and I said, "Well, I understand there is a lot of irritation among you people now, but I have to put this on a permanent basis and I ask you this. You can't hold me responsible for anything that has happened in the past. Will you please work with me one year first and then form an opinion? Don't form any opinion, good, bad, or indifferent, but work with me a year first," and a couple of the operators in the back
 page 50 } started hollering and one of the boys, a Mr. Butcher, came to my rescue—

Q. Don't tell us that. That has nothing to do with it. At these state conventions, who attends the state convention?

A. The operators in the state.

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Q. What happened, if anything, after the state convention?

A. After the state convention I told them at that time that I was in the process of negotiating their dairies for the year 1959 and that I would advise them within a week of what the cost of the mix would be so I consulted with Mr. Vick, my attorney, and we decided that in view of the fact of all this trouble that was coming up, proposed trouble with Wendall Morrisson, that we had better send out a letter to the operators laying everything out so there could be no understanding as to how the cost of mix was arrived at.
 page 51 } So I sent a letter out dated February 23 to all the operators.

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Q. All right, sir. Just tell us what, generally, without reading the whole letter, tell us the information contained therein.

A. The information was to the effect that the \$12.75 would be the cost, their total cost of mix if they bought from Pet, and it was arrived at as follows—

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Yes, sir, the total cost would be broken down as follows: the actual cost of the mix from Pet Milk Company was \$8.95 a can. This is quoted in ten gallon lots. To that would be added a .03¢ per gallon, or .30¢ per can co-op purchasing charge.

Q. What was this co-op purchasing charge? What does it constitute?

A. It constitutes the money that the former owners had called mix profit account and they had charged some of the stores .03¢, some .04¢ and some .05¢ per gallon and upon advice of Mr. Vick, we decided it should all be even, and in examining what was happening to the volume of page 53 } the business with another man, the CPA man, Dick Hamlin, we needed this charge to keep our heads above water; otherwise we would have wound up the season in a loss.

Q. What did you specifically use the income from this money for, as far as the operators of the Dairy Queen Corporation of Virginia were concerned?

A. For paying office rent and the wholesaler's license fee, the same thing as has been charged to it with those gentlemen when they had it.

* * * * *

A. .89½¢ a gallon.

Q. —a gallon, and then .03¢ a gallon?

A. .03¢ co-op and .35¢ royalty, which brings it up to \$1.27½ or a total of \$12.75 per ten gallon can.

Q. \$1.27 per gallon?

A. \$1.27½ per gallon but this mix is purchased from the milk companies in ten gallon cans.

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Q. Now, the .35¢ royalty is what?

A. The .35¢ royalty is what is stipulated in the contract with the operators that they will pay as royalty fee for being a Dairy Queen operator.

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Q. Who gets this royalty?

A. Dairy Queen of Virginia, Inc.

Q. So, your ten gallon cans are made up of \$8.95 for the can itself, .30¢—that is, .03¢ a gallon on each gallon co-op purchasing which you say is used to run your state office, your supervisory facilities here in Richmond, and then .35¢ per gallon royalty which is \$3.50 per ten gallon can, which goes as a royalty from the operator to the franchise holder in Virginia. Is that what you are saying?

A. Yes, sir.

Q. That makes a total charge per ten gallon can of \$12.75. Is that what you said?

A. Yes, sir.

Q. Now, to whom does the operator pay this \$12.75?

A. The operator pays it to Dairy Queen of Virginia, Inc.

Q. What does Dairy Queen of Virginia, Inc. do page 55 } with each \$12.75?

A. Well, Dairy Queen of Virginia, Inc. pays \$8.95 to the dairy and keeps the .30¢ and the \$3.50.

Q. Now, you have been talking several times about a thing called volume rebate and you mentioned that this had come up in your conversations in Richmond with Mr. Harris and Mr. Ganaway on that Sunday at the office when you were conferring about this business. Would you explain to us just what this volume rebate that you are talking about is?

A. Well, some dairies give back what is called a volume rebate and I explained that in this letter that went out to the operators, showing them where from one to fifty cans per month was used there would be no volume rebate; from 51 cans to 80 cans per month, there would be .02¢ a gallon rebate, and so on up to a maximum of 201 cans or more per month, which would be a maximum rebate of .07¢ a gallon.

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page 56 } Q. This is on a state-wide basis?

A. Yes, sir.

Q. How often is this taken into account, monthly or quarterly?

A. On a monthly basis we get this volume rebate from the Pet Milk Company.

Q. So how much volume rebate do you get if each month, state-wide, you purchase more than 2000 gallons? How much volume rebate per gallon do you get back?

A. Seven cents per gallon.

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Q. Does the Dairy Queen, state-wide, purchase more than 2000 gallons a month?

A. Most months. I think there was often one or two months last year that we did not qualify for maximum rebate.

Q. Now, the figures that you are talking about are the Pet Milk Company rebates. Is that what you said?

A. Yes, sir.

Q. How many stores are there operating in Virginia now, or how many were there during February of 1959 estimated? How many stores were operating then, do you know, in 1959, as of February, 1959?

A. As of February, 1959, they showed a total of 31 stores. That was for the fiscal year 1958, showed a total of 31 stores in operation.

page 57 } Q. How many of these stores, assuming there were that many operating right now, how many of those stores used the Pet Milk under your operation of the business?

A. All but three it would have been; two in Alexandria and one in Falls Church.

Q. The two in Alexandria and the one in Falls Church did not use the Pet Milk?

A. That is right.

Q. Who do they buy from?

A. From the Alexandria Dairy.

Q. Do they get any rebate?

A. No, sir, Alexandria Dairy does not give a volume rebate.

Q. So, what you say, all the other stores qualify for the volume rebate?

A. Yes, sir.

Q. What do you do with the .07¢ per gallon that Pet Milk Company pays back to you on all the stores except the three in Alexandria? What do you do with the .07¢?

A. As I stated in the letter, that money would be re-dispensed to them monthly; as I got credit from Pet, I would in turn make out a check to each store for his gallonage used, times the rebate that was allowed for the state, so once each month a check goes out of our office to the store operators for the gallonage he has used for the month, times our
page 58 } rebate.

Q. So, each guy gets back—each operator gets back .07¢ times the number of gallons that he has used each month? Is that essentially what you are saying?

A. Yes, sir.

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Q. In Alexandria, is that the same volume rebate these gentlemen were talking about in their conversation with you in Richmond when they were showing you about the operation of the business?

A. Yes, sir.

Q. You mentioned some figure of \$4500 that you estimated, or that they estimated for you at that time as constituting the total volume rebate for 1958, I believe you said?

A. Yes, sir.

Q. Is that the volume rebate that you are talking about?

A. Yes, sir.

Q. Did they have a contract with Pet Milk Company or when did this contract with Pet Milk Company go into effect? Do you recall?

A. 1958 was the first year it went into effect, as far as I know.

Q. Was this the last year that Mr. Harris and Mr. Ganaway had it?

page 59 } A. Yes, sir.

Q. Were they returning the volume rebate to the dairy operators?

A. No, sir.

Q. What were they doing with the volume rebate, as told to you?

A. Included as income on the profit and loss statement.

Q. Is that the \$4500 that you had talked about?

A. Yes, sir.

Q. Now, you mentioned that Mr. Wendall Morrison was upset when he talked with you about finding out that he wasn't getting back this volume rebate, that he had found this out in July of 1958, I believe that is what you said?

A. Yes, sir.

Q. And this was July of 1958 while Mr. Harris and Mr. Ganaway were still operating the business?

A. Yes, sir.

Q. Is this the same volume rebate that we have been talking about that he was upset about not getting back?

A. His came from Virginia Dairy, but it was a volume rebate.

Q. Did Mr. Harris and Mr. Ganaway say anything to you during their conversation with you here in Richmond or at any other time while you were negotiating for the sale of this business about the fact that the operators or any operators were upset or that there was

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dissension among the operators over the fact they were not getting the volume rebate back?

A. No, sir.

Q. Did either one of them ever mention any question about these volume rebates?

A. No, sir.

Q. What was your clear impression, or what was said to you, conveyed to you by them about the volume rebates, this \$4500 we are talking about?

A. That I would be allowed to continue to show it as income as they had on the profit and loss statement.

Q. Did they ever tell you that the operators thought they ought to get it back or were mad because they weren't getting it back?

A. No, sir.

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Q. Now, you were talking about the hostile attitude, I think, of the operators on February 19 at the state convention. Would you tell us what, if anything, happened after that date concerning your operation of the Dairy Queen business here?

A. You mean with the operators?

Q. Just anything, what took place during your operation of the business?

A. Well, after the state convention on February 19, I contacted Mr. Harris and told him that I was dissatisfied with the way things were going and he related the message, I guess, to Mr. Ganaway and they called me and asked me if there was anything so urgent that they couldn't postpone it until a meeting in April at St. Louis, and I said, "Well, I suppose that will be all right."

Q. Did you have other conversations with them trying to reach some agreement about your dissatisfaction with the business?

A. Not at that time, not as of February—

Q. After that?

A. Yes, sir.

page 62 } Q. Would you just relate those briefly and tell us the results, whether they were good or bad?

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Q. In St. Louis on the 27th, 28th and 29th of April, I met with Mr. Harris and Mr. Ganaway at the Board meeting there and again repeated to them all the things that had come up, and Mr. Ganaway listened briefly and left, and Mr. Harris and I sat and discussed this thing, and Mr. Harris said, "Well, we will try and work something out for you and we will contact you on it." And I indicated to them at that time that I was very unhappy and that as far as I was concerned they could take the business back and give me back my money and we would call it quits, and Mr. Harris said, "We don't want the business back." So I returned to Richmond and made three successive trips to Wilmington, on May 13, June 23, and July 29.

Q. This is Wilmington, what?

A. Wilmington, North Carolina.

Q. Which is where Mr. Harris was?

A. Yes, with the understanding that Mr. Ganaway, Mr. Harris, and I would try and arrive at some solution for this business. Mr. Ganaway never showed up at any of the meetings. Mr. Harris was there because that was his home—to make a long story short, we couldn't arrive at anything that was satisfactory, so I returned back to Richmond.

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Q. I notice the letter dated February 23, 1959, and I recall you making some reference to a conversation with Mr. Vick. Would you tell us what it was that prompted you to return these rebates, these volume rebates from the dairy to the operators? I think you have said it, but would you tell us again?

A. Yes, since Wendall Morrision had told me he was going to start legal action against Dairy Queen of Virginia, Inc., I obviously went to my attorney, Howard Vick, and we decided, in view of this legal turmoil which was going to come, that I would have to put him on a retainer basis and pay him \$100.00 a month retainer fee because he said he would have to be paid for all this work that was coming up, so on February 27 I made out the first check for \$200.00 to Mr. Vick for payment in January and February of 1959

as a retainer fee representing an attorney for
page 64 }

Q Did he give you any advice about what you

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should do about the volume rebates that the operators were complaining about?

A. Yes, we discussed this at length and decided that our best bet was to rebate the volume rebates.

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Q. You have used the terminology that "We decided." Do you have any explanation as to who it was that decided? Was this a joint decision?

A. A decision by Mr. Vick and myself.

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Q. Now, Mr. Dunham, how many stores did Mr. Harris and Mr. Ganaway tell you were in operation currently as of the time that they were speaking with you here in Richmond and explaining the business to you? Do you remember?

A. Thirty-one stores.

Q. After you began to run the business, which you say you came to Richmond, I believe, and started running at that time, on January 27, 1959, when you returned from Kankakee, Illinois; after that time, how many stores, if any, did you discover were operating in Virginia?

A. There were only 25 stores open for business at the beginning of the season for 1959.

Q. What happened to the six between 25 and 31, what accounting is there for the six stores?

A. They quit.

Q. Do you know why?

A. Well Azalea Avenue here in Richmond had lost its lease in the latter part of 1958 or at the end of the season of 1958.

page 66 } Q. What is the end of the season in this business?

A. Well, they did business up until November of 1958—Alexandria, Mount Vernon closed—why, I don't know.

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Q. You said Alexandria-Mount Vernon was closed as of what date?

A. As of the end of the season of 1958.

Q. The same as the Azalea Avenue store?

A. Danville closed as of the end of the season of 1958; Roanoke, Memorial Avenue, closed as of the end of the season of 1958, and I know the reason for that one closing.

Q. What was the reason?

A. It had been condemned by the Health Department and told it would not be allowed to be reopened until several things had been done to put it back in shape for 1959.

Q. All right, sir. That is four of them. How page 67 } about the other two?

A. Norfolk and Virginia Beach, Store No. 3—

The Court: Is that one or two stores?

Mr. Harris: They are two separate stores.

A In Virginia Beach there were three stores in 1958, all franchised through the same man.

By Mr. Harris:

Q. One of them closed?

A. One of them closed at the end of the season of 1958.

Q. And the Norfolk store is a different store from that one?

A. Yes, sir.

Q. When did it close?

A. As of the end of the season, 1958.

* * * * *

Q. I believe you have a copy. I am going to hand you the original and take back the copy and you can use it, the original, to speak from and I will give this copy to page 68 } Mr. Davenport. Would you tell us how much volume in gallons each of these six stores brought in during 1958?

A. Yes, sir. In 1958, Mount Vernon had 2,650 gallons; 1958, Danville had 6,430 gallons; the same year, 1958, Norfolk had 2,566 gallons.

Q. That is Norfolk?

A. Yes, sir. Memorial Avenue in Roanoke had 3,340 gallons; Azalea Avenue here in Richmond had 5,250 gallons,

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and the Virginia Beach store had 1,490 gallons, for a total of 21,726 gallons.

Q. This was the year 1958?

A. Yes, sir.

Q. Now, sir, I believe you have testified that the royalty which came to the Dairy Queen Corporation of Virginia from each of these stores was .35¢ a gallon. Would that be the figure for each of these stores?

A. Yes, sir.

Q. In addition, was there any—this cooperative purchasing charge that you mentioned which you now are assessing at .03¢ a gallon for the maintenance and operation of your facilities here in Richmond as a state-wide supervisory organization, were any of these stores being charged that item in addition to the .35¢ a gallon?

A. Yes, sir.

Q. Which ones of them were being charged that page 69 } item and how much were they being charged for that item per gallon?

A. They were all being charged—I am not sure, they varied, three, four, and five cents. The Richmond store, I know, was being charged .051½¢ a gallon and the other stores, I don't know whether they were paying .03¢ or .04¢

Q. But it was .03¢ or .04¢, in any event?

A. Yes, sir.

Mr. Davenport: What year are you talking about, Mr. Harris? 1958, before he took over?

Mr. Harris: This is 1958 you are talking about?

The Witness: Yes, sir.

Mr. Harris: This is before you took over?

The Witness: Yes, sir.

By Mr. Harris:

Q. Now, as a result of the demise of these six stores at the end of the season in 1958, did you receive any income from any of those stores during 1959, the first year that you had the business?

A. No, sir.

Q. That is, did the Dairy Queen Corporation of Virginia receive any income from them?

A. No, sir.

page 70 } Q. Either the .35¢ a gallon or the .03¢, .04¢, or 05½¢ a gallon in addition to the .35¢?

A. No, sir.

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Q. Now, have any of these stores opened since you said they didn't open during 1959, have any of them opened since their demise at the end of the year in 1958?

A. Danville has reopened for 1960.

Q. Do you know when they reopened? Do you mean for the 1960 season?

A. For the 1960 season.

Q. You said the season ends in November. When does the season begin?

A. Well, some stores, Danville, opened in April of 1960; some stores open the last week in February, others open in March, and most all stores, of course, are open by April 1st of each year.

Q. Have any of the other six stores opened besides Danville?

A. Yes, sir, Roanoke Memorial Avenue reopened.

Q. When did they reopen?

A. April of 1960, the latter part of April, 1960.

Q. How about any of the other four?

A. That is all.

Q. Just those two?

A. Yes, sir.

page 71 } Q. Now, I believe you told us that the Roanoke Memorial Avenue store had been closed for reasons imposed upon it by the Health authorities in Roanoke?

A. Yes, sir.

Q. And I think you said something about certain things were required by them to be done. Do you recall saying that?

A. Yes, sir. The roof had to be repaired or replaced; the walk-in box had to be repaired.

Q. What is that?

A. That is a freezer box where we keep the mix; the Dairy Queen machines had to be repaired. They were completely worn out, and the store had to be painted and two windows replaced.

Q. Who paid for all this?

A. I did.

Q. What do you mean by "I did."

A. Dairy Queen of Virginia paid for it—I didn't have the money to do it during the year of 1959, so I continued to pay rent on the store at the rate of \$120.00 a month rent for the entire year, because I didn't have the money to put it in shape according to the Health Department's specifications.

Q. Was this 1959?

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A. 1959.

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* * * * *

Q. How much money did you have to spend besides the rent? You say the rent was \$120.00 a month?

A. Yes, sir.

Q. That was continuous?

A. Continuous.

Q. How much did you have to spend to put the store back in shape to meet the requirements of the Health Department? Do you know that?

A. I have got the figures.

Q. Would you get them, please, sir?

A. Yes, sir. In 1960, I spent a total of \$1,522.60.

Q. Did this put the store back in shape to be opened?

A. Partially. I had to spend more money on it this year, but it allowed the store to be opened for 1960, yes.

Q. Now, Mr. Dunham, with reference to these six stores which you have testified about, all of which you said closed at the end of the 1958 season, which was in November, I believe you said you bought the business or negotiated with these gentlemen to buy the business in December, 1958. Was anything said to you by Mr. Harris and Mr. Ganaway about the condition or possibility that these stores were likely to close and would not be available for operation during 1959 and thereafter?

A. Only in one instance and that was Roanoke Memorial Avenue. Mr. Harris told me they did not have an operator signed up to take the store for that year as yet.

Q. Was that the only thing he told you about it?

A. Yes, sir.

Q. Didn't tell you anything about the Health Department?

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Q. Would you state again exactly what these records which have been designated Dunham's Exhibit No. 2, what these papers are, please, sir?

A. This is a report of every store, Dairy Queen store, in

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the state of Virginia, showing the monthly gallonage figure used by each store for a yearly total.

The Court: For what year?

page 75 } A. For the years of 1956, '57, '58, '59 and '60.

* * * * *

page 76 } Q. Are you an officer in the Dairy Queen Corporation of Virginia?

A. I am the President of Dairy Queen Corporation of Virginia. Inc., yes, sir.

Q. As such, what salary are you entitled to receive from the corporation?

A. By minutes of the Board meeting, I am entitled to draw \$12,000 a year salary.

Q. And this became effective when?

A. In January of—I mean February of 1959, the first Board meeting of 1959.

Q. Now, how much salary have you actually been paid by the corporation on a yearly basis since February of 1959?

A. In 1959 I drew \$4,000; in 1960, I drew \$12,000.

Q. Have you drawn any other than those two items?

A. 1961 I have drawn, I think, \$2,000.

The Court: What?

A. Two or three thousand dollars. I can look that up in the record, 1961. It was \$3,000 in 1961.

By Mr. Harris:

Q. Do you know why the corporation didn't pay you the \$12,000 a year in 1959 that it had agreed to pay you by the minutes or resolution of the Board of Directors? Why didn't it pay you the additional \$8,000?

page 77 } A. Because we didn't have enough capital to do it, without borrowing money.

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E. L. Dunham.

Q. Now, sir, if you will step up to the Bench so that we can all look at this. I am referring now to page 7 of Dunham's Exhibit No. 3, which is this profit and loss statement for the fiscal year ended February 28, 1958. I am referring to page 7 which states at the top that it is the statement of profit and loss for the fiscal year ended February 28, 1958 and I believe you have testified that this is the profit and loss page that these gentlemen, Mr. Harris and Mr. Ganaway, discussed with you here in Richmond. Is that what you said?

A. That is right.

Q. Would you show us, by pointing out to the various figures on this page, designating the amount and the explanation of it to the left, just what figures they showed you as constituting the money which would make up the \$25,000 a year income which you could expect personally from the operation of this business?

A. Yes, sir. They show here as officer's salary, \$400.00, so I listed that off to the side; they show next a Manager's Contract for \$10,367.92.

Q. What does that constitute? Who was the Manager or how did they happen to pay that out?

page 80 } A. Yes, that is the salary paid to Mr. Herbert Morrison for State Supervisory activities.

Q. Was he an employee of the corporation?

A. Yes, sir.

Q. Under Mr. Harris and Mr. Ganaway? Is that what they told you?

A. Yes, sir. Then, they had clerical and sales salaries for \$1,421.26.

Q. What did they tell you that was for?

A. For help they had in the office to help to do posting.

Q. All right, sir.

A. Then, there is a profit figure from operations of \$7,354.81, which, added to these figures, makes a total of \$19,383.99.

Q. Where did the difference between that and the \$25,000 that you were supposed to make come from?

A. Well, they had estimated a volume rebate from the dairies of \$4,500, as I have said.

Q. Is this the volume rebate that we went into at some length that they were keeping?

A. Yes, sir, and it didn't show on this because 1958 was the first year they had this volume rebated, so by adding that

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estimated \$4,500 to the \$19,383.99, you come up with \$23,-883.99.

page 81 } Q. Now, Mr. Dunham, I believe you had testified that they had—did not have the profit and loss statement for the fiscal year ending February, 1959, which would have covered most of 1958?

A. That is right.

Q. Since you were conferring with them in December, 1958?

A. That is right.

Q. Did they show you, or mention, or tell you about any figures during the year 1958, and this was the last part of that year that you all were talking, so it would have been about, oh, ten months, I suppose—did they mention any figures for that year as far as representing to you where you could expect to receive the \$25,000 personal income from?

A. Yes, Herbert Morrison was still in their employ and was drawing similar salary for 1959 and, in fact, they brought in additional help, a Mr. Harvey Welborn, in the office, and he was drawing a stipulated amount as salary. And at that time their checking account showed a balance of some \$10,000 still left in the bank.

Q. Did they show you any figures, facts and figures from any place about what had taken place, such as the items that they showed you on the 1957 balance sheet; that is, the one that ended the fiscal year 1958? You mentioned page 82 } the specific figures they showed you, such as officer salary, a Manager's contract, and how much money each of those constituted; did they show you any comparable figures for the year 1958 to show the same items on the statement you just testified from?

A. Not totalized because there was no total statement at that time.

Q. What did they tell you had taken place as far as these items were concerned during 1958? Do you recall? Did they tell you anything about 1958?

A. Yes, they told me Mr. Morrison was still in effect during 1958 and had drawn a similar salary out of the business for that year, as he had the previous year.

Q. What did they tell you about the officer's salary, if anything? Did they mention any figures about how much officer's salary had been?

A. No, except they showed me where there was \$10,000

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cash left in there which would not remain to me. They were going to draw that out before they sold the business.

Q. How about clerical and sale salary which was another item on the 1957 statement?

A. Yes, they said a Mr. Harvey Welborn had taken the place of the clerk, or sales he referred to in the profit and loss statement for the previous year because she page 83 } had to resign.

Q. Did they tell you anything about the volume rebate item which was \$4,500 on the 1957 statement? Did they tell you about anything you could expect or what had taken place with relation to this in 1958?

A. Yes, sir, we didn't have any such thing as a volume rebate in 1957 and they had told me that and it wouldn't show up on the profit and loss statement, and we estimated that to be around \$4,500 income for 1958.

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Q. You have mentioned your conversations with Mr. Morrison and you have mentioned the hostility which page 85 } was expressed by the operators at the state convention in February, 1959. Was his or was it not the first occasion, or was this the first occasion that you had been made aware of the dissension or hostility among the operators throughout Virginia?

A. Yes, sir.

Q. Did you have any idea that this existed before these incidents?

A. No, sir.

Q. Now, Mr. Dunham, if you had known, prior to your agreeing to purchase this business, and had been told that by Mr. Harris and Mr. Ganaway, that there was a great deal of dissension among the operators in the Dairy Queen in Virginia throughout the state, and if you had been told by them that there was some question as a result of this dissension as to whether or not the corporation could continue to retain as income the volume rebates that we have discussed and which figures were mentioned at \$4,500, would you have purchased the business if you had known then what you found

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out in February of 1959 at the state convention in your conversations with Mr. Morrisson?

A. No, sir.

Q. Would you have purchased the business from these two gentlemen if you had known and if they had told you that these six stores which you have testified about, page 86 } all of which closed in November of 1958 and all of which you have testified they did not tell you about, would you have bought the business if you had known prior to agreeing to purchase it, would you have bought it if you had known these stores were going to close or had closed?

A. No, sir.

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Q. I gather from what you said with reference to that that Mr. Harris and Mr. Ganaway made you aware of the fact there was a man named Herbert Morrison and that he existed and ran the business and that you knew of him when you negotiated for the sale? Did you know of him at the time you were talking to these two gentlemen?

A. Yes, sir, they had informed me that the reason they were selling the business was that Mr. Morrison's health had failed and they did not have a man to put up here, so they decided to sell the business, said he had suffered a stroke and been touched mentally and was under a doctor's care and taking some kind of pills, Mr. Harris said.

* * * * *

Q. Did it ever occur to you after that conversation about Mr. Morrison to go see Mr. Morrison and talk to him yourself?

A. No, sir.

Q. Why not?

page 88 } A. First of all, I thought he was sick and, secondly, I thought he might—wouldn't be in any position to tell me anything that they had been already able to tell me. They owned the business.

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Q. From what you have said, you haven't indicated that you made any attempts to gain any information about the business except from Mr. Harris and Mr. Ganaway. Did you make any attempt to find out from some other parties, such as Mr. Morrison, or somebody else, and attempt to verify anything Mr. Harris and Mr. Ganaway were telling you?

A. I contacted no one other than Mr. Harris and Mr. Ganaway.

Q. Did they ever suggest to you that you contact somebody else?

A. No, sir.

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page 90 } CROSS EXAMINATION.

By Mr. Davenport:

Q. When did Mr. Herbert Morrison leave the Dairy Queen, Mr. Dunham?

A. I beg your pardon?

Q. When did Mr. Herbert Morrison leave the Dairy Queen?

A. As of December of 1958.

Q. Shortly before you were in Richmond?

A. Yes, sir.

Q. Did you inquire of Mr. Ganaway or Mr. Harris as to whether Mr. Morrison might be consulted by you?

A. No, sir.

Q. Did you inquire of either of them as to whether there was any operator in Richmond with whom you might consult?

A. No, sir.

* * * *

Q. I understood your testimony to be that when
page 91 } you left Mr. Ganaway in Florida that you said
then, in effect, that you would meet in Richmond
and make your decision as to whether you were interested in
buying Dairy Queen after you saw the records. Is that correct?

A. Well, in essence, what I thought I said was that I would return to Kankakee first of all to see if I could raise the additional money to buy the business and it was on the phone conversation with him that we decided to meet in Richmond.

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Q. And that was the time you said that you wanted to come to Richmond to meet in Richmond so you could see the books and records and decide whether or not you were interested in buying the business?

A. Yes, sir.

* * * * *

Q. Now, you came to Richmond on a Sunday?
page 92 } A. Yes, sir.

Q. And you went to the Dairy Queen office with Mr. Harris, Mr. Ganaway, and Mr. Vick?

A. No, Mr. Harris and Mr. Ganaway.

Q. Mr. Vick was not present?

A. No, not until after he came to pick us up; Ed Hardy took us out there.

Q. How long were you at Mr. Vick's office?

A. Mr. Vick's office?

Q. At the Dairy Queen's office?

A. Dairy Queen office about, probably, half, three-quarters of an hour.

Q. And it was at that time that you saw the profit and loss statement for the year ending February 28 previous to that?

A. Yes, sir.

Q. Which would have been for the operating year 1957?

A. Yes, sir.

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Q. What other information did you request at the time of that conference?

A. None.

Q. What questions did you ask with reference to the business other than to see the figures in the profit and loss statement for the previous year?

A. None, other than the fact that they show me where they were going to get this \$25,000 from that they advertised.

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E. L. Dunham.

Q. Did Mr. Harris or Mr. Ganaway show you at the time of that conference the monthly statement for the year 1958, the current year, monthly operating statement?

A. We didn't have any monthly operating statement.

Q. Well, did he not show you figures for each operating month since March of 1958?

A. There are no monthly statements prepared. There is a general ledger for the company wherein everything is entered, credits and debits.

Q. Did you look at the general ledger?

A. Yes, sir.

Q. Did you ask any questions with reference to the general ledger?

page 96 } A. Not to my knowledge.

Q. Mr. Hardy was not there at that time, was he?

A. No, sir.

Q. You met Mr. Hardy the next day?

A. Yes, sir.

Q. Were you not asked if there were any questions you wanted to ask Mr. Hardy with reference to the records and the financial condition?

A. By Mr. Hardy, yes, sir.

Q. Did you ask him any questions?

A. A couple of questions I asked him, yes.

Q. Was there anything that you asked to which you got an unsatisfactory answer?

A. No, sir.

Q. Did you get any answers that have subsequently proven to be untrue?

A. From him?

Q. Yes.

A. No, sir.

Q. Did you get any answers with reference to the finances, from anybody, which subsequently proved to be untrue?

A. Will you repeat that?

Q. Did you get any answers from anybody with whom you were conferring that day with reference to the
page 97 } financial records of the company that proved to be untrue?

A. In a sense, yes.

Q. In what sense?

A. Well, getting back to this \$25,000 figure, they implied to me that the business would pay me \$25,000 a year net

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salary and assured me that it would continue, that that is why they advertised it that way and that is why I bought the business. Well, subsequently, I found that six stores were not even open for business, so that was an unsatisfactory answer as far as I am concerned.

Q. I asked you if they showed you or gave you any information about the finances of the company?

A. The finances of the company?

Q. That subsequently proved to be untrue?

A. I'm sorry. The finances of the company, no.

Q. Did they tell you anything about the condition of the company that subsequently proved to be untrue?

A. Yes.

Q. When?

A. They made the remark, Mr. Harris made the remark to me that there was not an operator, I would have to get an operator for Roanoke Memorial Avenue store.

Q. Was that untrue?

A. In a sense, yes, sir.

Q. What do you mean, "in a sense"?

page 98 } A. Because it had been closed by the Health Department and until I spent certain monies getting it ready for business, there was no sense in getting an operator for it.

Q. When had it been closed?

A. At the end of the 1958 season.

Q. By whom?

A. By the Health Department.

Q. Do you have any records to show when that was closed by the Health Department?

A. I don't.

Q. You don't?

A. No, sir.

Q. And how did you determine that it was closed at the end of the 1958 season?

A. Because when I went to reopen it, I was informed by the Health Department I couldn't reopen it until these things had been done that had been told the Dairy Queen of Virginia, Inc., in the last of 1958.

Q. That had been told the Dairy Queen of Virginia as of the last of 1958?

A. Yes, sir.

Q. And you were in Richmond negotiating for it as of the last of 1958?

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A. There is a difference. November of 1958
page 99 } ends the season for Dairy Queen, the last of
October, and I was in Richmond as of December of
1958.

Q. Weren't you told that the Alexandria—that the operator at the Alexandria store had given up his franchise or lease, or whatever it was?

A. No, sir.

Q. Were you not told that?

A. No, sir.

Q. When did you find that out?

A. When it didn't open for 1959.

Q. When did you find out it wasn't going to open in 1959?

A. Well, when he didn't show up at the state convention and the store just didn't open, so then I started making inquiries and found out he had closed as of the last of 1958.

Q. What method of inquiry did you use?

A. I called Herbert Morrison.

Q. And that was when?

A. In February, 1959.

Q. But you had not talked to Mr. Morrison at the time you bought the company or before you bought the company?

A. No, sir.

Q. When the man didn't come to the state convention a month later or six weeks later—when
page 100 } was the state convention, incidentally?

A. February 19, 1959.

Q. You then called Herb Morrison?

A. Yes, sir.

Q. Who else did you ask Herb Morrison about?

A. About the Danville store.

Q. You knew the Danville store was not open, did you?

A. I found out.

Q. You knew it before, didn't you?

A. No.

Q. Did you buy this business and not make any inquiry with reference to any of these stores as to whether they were in good standing?

A. Not one single one inquiry, no.

Q. You made no inquiry?

A. No, sir.

Q. And all the records were made available to you, weren't they, Mr. Dunham?

A. Here in December, the 29th or 28th of December.

Q. Did they refuse to answer any questions you asked with

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reference to any of the stores or any of the records of the company?

A. I didn't ask them any questions, no, sir.
 page 101 } Q. Did they volunteer any information to you
 which was false? I have asked that question before and I ask it again?

A. No, sir.

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Q. Before you left the conference on Sunday, you told Mr. Harris and Mr. Ganaway that you were satisfied and wanted to go through with the deal. Isn't that right?

page 105 } A. Yes, sir.

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Q. Did Mr. Harris suggest that you ask Mr. Hardy any questions you wanted to?

A. Yes, sir.

Q. Now, in your complaint, your cross bill, you have alleged—I am referring to paragraph three at the bottom of page two, reading an excerpt from it. You have alleged that “because Dunham was unable to see the profit and loss statement of the Dairy Queen of Virginia, Inc., as it had not yet been prepared, and in view of the fact that the books of the corporation did not reflect the true condition of the corporation, or the knowledge of Ganaway and Harris, Dunham relied upon the fraudulent statements of Ganaway with respect to the true stock of Dairy Queen of Virginia, Inc., and the condition of the corporation.”

What books of the corporation did not reflect the true condition of the corporation?

A. The big master book that is in the office of Dairy Queen of Virginia, Inc., and also the statement to the effect that they had this income from volume rebates.

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Q. What books of the corporation did not page 107 } reflect the true condition of the corporation? That is my question. That is what your allegation is.

A. I have a copy of the book showing volume rebates by months which was there in the office that they showed me.

Q. Was that false?

A. No, it was not false.

Q. What was in the books which did not reflect the true condition of the corporation?

A. I don't know how to answer that.

Q. You alleged it, or your attorney did for you.

A. Well, because my complaint is—

Q. I didn't ask you what your complaint is. I asked you what books did not reflect the true condition of the corporation.

A. Well, I don't know how to answer it.

* * * *

REDIRECT EXAMINATION.

By Mr. Harris:

Q. Mr. Dunham, you have testified on direct page 108 } examination concerning the dissension among the operators with reference to the volume rebates and you have also testified that the gentlemen, Mr. Harris and Mr. Ganaway, in showing you the profit and loss statement, showed you, in addition, a little book that had a list of the volume rebates in it that they had received from the Pet Milk Company and they represented to you that they had been retaining these, the corporation had been retaining these items which amounted to some \$4500 and that this would be considered income of the corporation. Isn't that what you said on direct examination?

A. Yes, sir.

Q. Did the books of the corporation or any of the records of the corporation reflect otherwise?

A. Well, that is why I couldn't answer his question. The books reflected that it showed as income as of that date, yes.

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Q. After you took over the operation of the business, what did you discover with reference to the volume rebates that these gentlemen had told you you could keep?

A. I discovered that according to my attorney that we should not keep them. All we were entitled to keep was the .35¢ royalty.

Q. Was this a condition of the corporation that wasn't reflected in the books that these gentlemen showed you?

* * * * *

page 110 } Q. Your answer is yes?
A. Yes.

* * * * *

Q. Did the books of the corporation show how many stores were operating at the time that these gentlemen showed you the books in December of 1958?

A. Yes, sir.

Q. How many stores were operating?

A. Thirty-one.

page 111 } Q. And when you took over the business in January of 1959, how many stores did you discover were operating? I believe you said earlier—

A. Twenty-five.

Q. Now, did the books that these gentlemen showed you then reflect that there were actually 31 stores operating?

A. Yes, sir.

Q. Did this subsequently turn out to be true or untrue?

A. It turned out to be untrue.

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RECROSS EXAMINATION.

By Mr. Davenport:

Q. What books show how many stores were operating in December, the 28th or 29th, 1958?

A. This spread sheet showing store volume by months.

Q. That is Exhibit what?

A. Exhibit 2.

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E. L. Dunham.

Q. How many stores showed any volume for page 112 } December, 1958?

A. How any stores on the 1958 statement are you speaking about?

Q. Yes, sir, for the month of December.

A. For the month of December there were 1, 2, 3, 4, 5, stores.

Q. That showed what?

A. That showed gallonage used for the month of December.

Q. And how many stores showed gallonage in the month of November?

A. I'm sorry, no, there were only three stores showed gallonage for 1958 in December.

Q. All right, sir. How about in November?

A. November, there were 16 stores.

Q. Now, what record showed that there were 31 stores in operation at the time you were talking to Mr. Ganaway and Mr. Harris?

A. This same spread sheet. It is listed by months; under June and July there were 31 stores in operation.

Q. June and July?

A. Yes, sir, and for months previous.

Q. How many stores do you have now?

A. Now, 25 stores—no, I'm sorry, 26 stores—I'm sorry again. 28 with two that have been opened this year.

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REDIRECT EXAMINATION.

By Mr. Harris:

Q. Mr. Dunham, I gather from what you have page 115 } said about the end of the season and so on, you said, I think, that the season is over in this business in November of 1958. When did you say the season begins?

A. Usually, March 1 of the year and ending as of October of each year.

Q. What are the so-called peak months of the business like this?

A. June, July, and August.

E. L. Dunham.

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Q. Did they specifically mention to you in conversations the number of stores they had that operated? Where did you get the 31 stores that you have said you were told existed?

A. They showed me this spread sheet of the stores' volume.

page 116 } The Court: You are again referring to Defendant Dunham's Exhibit No. 2.

By Mr. Harris:

Q. That spread sheet shows 1959 which, of course, was not on there at the time they were showing it to you. Isn't that right?

A. That is right

Q. So, when you say they showed you the spread sheet, what year was it they were showing you?

A. Well, I saw for 1956 and '57 and '58, up through November of 1958.

Q. And how many stores did those spread sheets show as actively operating during the peak months of those years?

A. Thirty-one stores.

Mr. Davenport: It has to do with this profit and loss statement. The question relates to the volume
page 117 } rebate and what the circumstances were at the time of his conference, and I believe he testified that they told him a figure of something like \$4500?

A. Estimated \$4500.

By Mr. Davenport:

Q. Estimated for a year and that, he considered, was one of the facts reflecting in the records which were inaccurate. Is that correct?

A. Yes, sir.

Q. Now, in your Exhibit No. 4, which is the Certified Public Accountant's report for the year ended February 28, 1959, I see an item called "Gain on Sale of Mix, \$4,214.99," listed under sales. Is that the item to which you are referring or of which the estimate was made of \$4500.00?

A. Gain on Sale of Mix, yes, sir.

Q. That is the same item?

A. That is the same item.

Q. Well, as of the time that the books were audited, ap-

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parently from the report, the books of the company were correct with reference to the volume rebate, were they not?

A. Yes, sir.

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page 126 } HERBERT R. MORRISON,
being first duly sworn in behalf of the Defendant,
E. L. Dunham, testified as follows:

DIRECT EXAMINATION.

By Mr. Harris:

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Q. Mr. Morrison, during the period of 1956 until around the latter part of 1958, did you have any connection with the Dairy Queen of Virginia, Inc.?

A. Yes, sir.

Q. What connection?
page 127 } A. I was State Manager.

Q. Who employed you?
A. Mr. W. L. Harris and Mr. Kenneth Ganaway.

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Q. Then what happened?

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I believe it was the next day that Mr. Harris called me and told me that I had been selected to become the State Manager. With that, or very shortly thereafter, I think January 3 or 4 of 1956, I moved to Richmond with my family, setting up a state office in my home and, of course, the state and national convention came right behind that.

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It was the following November or December that we had our first advertising meeting of a group of state operators or store operators throughout the state and they were some of my best operators and we met at the William Byrd Hotel. It was during that meeting that Mr. John Ring called me aside and showed me a mix bill he had gotten from Southern Dairies.

Q. Who is he?

A. He was a franchise holder and Dairy Queen operator from the City of Danville. He showed me the bill and it was a bill that was supposed to have come to the office.

page 131 } He had gotten it.

Q. To your office?

A. Yes, to the state office.

Q. Who was the bill from?

A. The bill was from Southern Dairy in Danville.

Q. All right, sir. Go ahead.

A. I saw the bill. He said, "What is the meaning of this—

* * * *

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A. Mr. Ring showed me the bill and asked me to explain it. At that time I was flabbergasted because I hadn't known of any previous bill sent directly to the store and I couldn't understand it and I forget now how we got around it, but I never could explain it satisfactorily to Mr. Ring, however hard I might try.

Q. What was it about the bill that bothered you?

A. Well, there was a difference in price of what he was paying and what the bill was for.

Q. Who was he paying?

A. Us, direct.

Q. Us who?

A. To the office.

Q. The Dairy Queen Corporation of Virginia?

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A. Let me go back a minute. When the contracts were set for mix deliveries throughout the stores, the state franchise holder or Dairy Queen of Virginia, Inc., in this case, guaranteed payment of all these bills from the different dairies, so the mix was delivered directly to the store and billed to Dairy Queen of Virginia, and we in turn paid for page 133 } the mix weekly and received weekly reports from all the operators showing the amount of mix they used, the price and amount of royalty required. Mr. Ring went home that night in a little heated state, I might say, and about a month later on one of my trips throughout the state, he jumped me about it again—

Mr. Cogar: What year are we talking about?

A. We are talking about 1957, in November of 1957.

By Mr. Cogar:

Q. That was the first time he showed you this invoice?

A. Yes—I'm sorry, it was November, 1956; it was before the 1957 season started. The contract had been gotten for the mix and this was prior to that.

By Mr. Harris:

Q. All right, sir, go ahead.

A. So, Mr. Ring said, "I will tell you this: I am going to operate this year. Next year I am either going to buy my mix independently or I am going to withdraw from the Dairy Queen organization." And I proceeded to state the franchise agreement to him and he said, "I don't care. That is the set-up and I am going to do it. I am not going to pay this price." So I made—I don't know whether it was a letter or telephone call to Mr. Harris and Mr. Ganaway or whether or not it was a meeting. I just can't remember—

Q. Approximately when was this?
page 134 } A. This was before the season, before the 1957 season started.

Q. All right, sir.

A. This was his last operating year as Dairy Queen. Towards the last of that year the agreement was reached between Mr. Ring and myself, and when I say myself, my approval came from Mr. Harris and Mr. Ganaway to allow Mr. Ring to buy his mix independently in 1958, simply pay us the royalty. And the reason it was done, because we did not want

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to lose a high volume store at that time. You might say we were still crawling.

• • • • •

Q. To answer my question about the call, you started to make some remark about a call to Mr. Harris or Mr. Ganaway?

A. Mr. Harris was present at that advertising meeting; Mr. Harris, he was present in the William Byrd page 135 } Hotel.

Q. When was this, now?

A. In November, I think, of 1956.

Q. All right, sir. Go ahead.

A. And I told Mr. Harris afterwards, after the meeting, exactly what the conversation was that was, frankly, held in the bathroom.

Q. You are talking about the conversation with Mr. Ring?

A. Yes, the conversation with Mr. Ring, and I do not remember what his answer was. However, when Mr. Ring came up with the agreement to go in 1958 and buy his own mix, it was agreed upon and he did so for 1958.

Now, when I went out and got the mix prices, that was the first time I had become aware that that was not a general practice. When I came to the State of Virginia as a State Manager and was very shortly thereafter appointed Executive Vice President and allowed to buy two shares of stock, I had been operating under Mr. Harris and, as I said before, he had treated me like a father. I had no reason to doubt anything he said or did as far as the operating was concerned. I felt this was a legitimate transaction and that every state was doing the same thing. I had no reason to think otherwise, until I started getting this complaint and, of course, Mr.

Ring wasn't too quiet about it and I got, at the page 136 } end of that year—

Q. Which year?

A. End of 1957, I went out and contacted the dairies. I got the mix prices or contract prices for the following season which was 1958. I believe it was four different dairies that supplied us mix in 1958. The arrangement was a mix rebate over and above so many gallons. It was pro-rated so that the more mix you used, the more rebate you got back. And with this information, I went to Atlanta, Georgia, to a national convention at which time I gave Mr. Harris prices from the different dairies and I remember very distinctly

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he was laying on the bed relaxing, propped up with a pillow, and I was sitting in the chair talking to him and he told me then what to charge the stores. Now, every store with the exception of Richmond, had the same price, overall price, due to the fact that any convention or any get-together of operators, they could discuss the price and find out if there was a difference that each was paying, so most of the others paid the same price with the exception of the four Richmond stores at that time.

In July of 1958, right in the middle of our season again, Mr. Wendall Morrison who, I might add, is no kin to me, was opening the franchise for the Richmond area and had three stores, approached me one day with a bill, I think, from Virginia Dairy.

page 137 } Q. Were you buying mix from Virginia Dairy at this time?

A. Yes, we were, for the Richmond area. This bill also showed a difference in our cost and the cost to the stores, and he being President of the Virginia Operators Association and Store Owners, became highly indignant.

Q. You say he was President of it?

A. Yes.

Q. What was this organization he was President of?

A. It was the Operators Association.

Q. What operators?

A. The state operators of Dairy Queen stores, individual stores.

Q. When had that been organized, do you know?

A. I think that was organized in 1956, I believe.

Q. Were all the operators a member of this organization?

A. Yes.

Q. Go ahead.

A. I forgot where I was.

Q. You were talking about Mr. Wendall Morrison's conversation with you about it.

A. He told me then he had no intention of going along with it. He was going to see the other operators and let it be known he knew it and he was going to be sure
page 138 } that they knew it.

Q. What month?

A. July, 1958.

Q. Go ahead.

A. In August of 1958, which is the following month, I

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wrote a letter to Mr. Harris and Mr. Ganaway for an important meeting in Richmond. We had some important things to discuss and as soon as we could get together, the better off we would be and Mr. Ganaway replied he could not leave West Palm Beach, Florida, and suggested we have the meeting there, which was done. That was agreeable with Mr. Harris, so Mr. Harris and I went to West Palm Beach and had a meeting called by myself to discuss the problems of the coming year.

Q. What were those problems that you discussed?

A. Well, first, we had Mr. Ring who had bought mix independently in 1958, had informed us that he was not going to open at all in 1959, regardless of what the consequences were.

Q. His store was where?

A. Danville, Virginia. We had a store, a company owned store in Roanoke, Memorial Avenue, that had been orally condemned by the Health Department. I had gotten some figures on it and it was approximately \$5,000.00 to fix it up in first class shape, in my opinion.

page 139 } Q. Did you tell that to Mr. Harris?

A. We discussed all these. We had lost the Mount Vernon Avenue in Alexandria. We had Duke Street in Alexandria that was in serious trouble; we had a store in Norfolk that was in serious trouble; we had one in Portsmouth in serious trouble. We had a store in Roanoke that Mr. Buck, the owner and operator, owed everybody in the country. Let me see, we had a store in Franklin which the company owned and that had blown up and the operator had pulled out. We had several stores that were in bad financial trouble, Falls Church, Front Royal; there were approximately ten in all. I don't know how many I have named, but we discussed this thing at length about the stores. We discussed about the knowledge of the mix profit—

Q. What do you mean by "knowledge of the mix profit?"

A. I mean that the operators were aware of it and were beginning to show great unrest. I don't know how else to put it.

Q. What was it about the mix profit they were aware of that was causing the unrest, that you recall?

A. In plain English, it was the up-charge which was used for advertising and so forth, and I would like to bring that out. There was a mix profit, however it was always done at

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the convention that Mr. Hardy of Hardy and
 page 140 } Irvin, which was a CPA that did our books, read
 a mix profit report in the year so broken down that
 it passed over the operators' heads, that they weren't aware
 of it. That was done every year. That was a must.

Q. This mix profit that you are talking about was how much
 per gallon?

A. Let me see, per gallon was three four, five cents. I knew
 it by cans, ten gallon cans, thirty, thirty-five or forty cents.
 It amounted to thirty-five hundred, forty-five hundred a year,
 I don't know. It is on the books and it was kept in a separate
 account. I think I was in Florida, wasn't it?

A. Yes, in Florida, discussing this with Mr. Harris.

Mr. Davenport: What year?

A. September, 1958.

By Mr. Harris:

Q. That is when he was in Florida.

A. This meeting, I brought out all the things I could think
 of that were coming up that I felt that they should know and
 be aware of.

Q. Would you list those things and specify them? You have
 already mentioned the ten stores, the problems with those;
 you mentioned the dissension among the operators about the
 mix profit, the three, four, five cents depending on which
 store got charged which item. What else did you
 page 141 } discuss?

A. We also discussed grills in these stores.
 Some of them had them and some didn't. Quite a few wanted
 them due to the long season and more profit for them, and I
 remember distinctly right in the middle, practically, of the
 conversation Mr. Harris said, "How about the company buy-
 ing my shares of stock?"

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Q. Did the corporation have any profit to buy the stock
 with that you knew of?

A. If I am not sadly mistaken, the corporation was showing

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a deficit at that time and I believe the words of Ed Hardy were that a company showing a deficit could certainly not buy outstanding stock. I believe that is the very words.

Q. That is the information you said you conveyed to Mr. Harris?

A. No, I conveyed it to Mr. Ganaway. I considered that my duty as an executive vice-president to keep Mr. Ganaway and Mr. Harris posted as to what was going on in the State of Virginia and that I tried to do. Now, that was, like I say, in September.

Q. 1958?

page 143 } A. 1958. Things went very—from bad to worse.

Q. In what way?

A. Well, I don't know. At that point, maybe, it was when I blocked the sale of the stock, I don't know, but there is a lot of difference at that point. There seemed to be a wall getting thicker every day. Nothing I suggested was satisfactory. There could possibly be no policy changes. They had told me that, so with that in mind I resigned in writing, registered mail, return receipt, to both Mr. Harris and Mr. Ganaway. I don't know exactly when that was. I think it was in November. However, I worked out the given time almost. I noticed the last posting on the ledger was December 10, 1958 and my notice stated December 15.

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Q. Mr. Morrison, you have mentioned the unrest, I think that was the term you used, among the operators that you conveyed to these gentlemen in Florida in September, 1958.

page 144 } Did you have any further conversations with them concerning these difficulties, if that is the expression to use, between the operators and the corporation or the state franchise organization, after that date before you resigned, that you discussed with them?

A. Well, did I have any further discussion before I resigned?

Q. Yes, sir, about the problems with the operators?

A. It seems to me we were continually talking about it either in letter or telephone from that time on.

Q. Would you repeat that answer?

A. It seems we were continually talking about it or discussing it from that time on, from September until my resignation in December. Now, I would like to bring out one thing right here. After I came back from West Palm Beach—

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Q. This was September, 1958?

A. In September, and they had agreed to no policy changes. I had offered and put it in writing to buy the business. Now, I will tell you why. We had three more years left of depreciation; we had been not using the depreciation money to put back in the operation, and I figured that the stores, maybe, with three years' depreciation money left to put into the state, we could build something before the end of that time that would give us a living.

Q. Did you have any further difficulties with page 145 } the operators or any gripes with the operators, specifically after September of 1958, that you can remember?

A. No, because at the end of September, most stores were closing, they were closing for the season, September, October, and November, and at the time I left in December I don't think there was anything open except maybe two or three stores in Richmond.

Q. Now, you say that in September you called the attention of Mr. Harris and Mr. Ganaway to the difficulties you were having with the operators and the dissension that existed among them. Did you at any other time after September, 1958, call this same thing to their attention, that you remember?

A. I don't remember but I am sure we did, but it wasn't getting any better, so I am sure I must have called their attention several times after that.

Q. Now, you mentioned in the course of executing these new contracts with Southern Dairies, and you had executed one for the Richmond stores, apparently, with Virginia Dairy, were you getting any volume rebate back from these dairies, based on the amount of volume of mix that was sold?

A. Yes, sir.

Q. Do you remember which dairy you were getting that back from and when the contract was made with them? I think you mentioned the Pet Milk Dairy somewhere?

A. Let me see, we had Virginia Dairy, Pet page 146 } Dairy, we had a dairy in the northern part of the state, Alexandria, in Falls Church, and Swift and Company, I think; four dairies supplying us in 1958.

Q. Were you getting a volume rebate from any of those dairies?

A. All four of them.

Q. You were managing the corporation. What were you doing with this volume rebate?

A. It was put in the bank and on the ledger it is ear-

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marked "Volume Rebate" under a column by itself and each check was listed, or is listed.

Q. Was that money returned to the operators or was it kept by the corporation, the volume rebates?

A. I never knew any return to the operators, unless it was done after December 10.

Q. You said you received these complaints, and after the dissension among the operators. Did any of them ever complain about not getting the volume rebate? Did they know there was a volume rebate?

A. Not to my knowledge, they didn't—yes, wait a minute. This has been a long time ago and I am trying my best to be fair to everybody about this thing. It seems to me that Wendall Morrison went to Virginia Dairy and after he got this invoice—

page 147 } Q. Which was in July?

A. Of 1958, he went to Virginia Dairy to verify that thing and he also found we were getting, I think five cents a gallon rebate, the best I can remember; yes, he knew that.

Q. Did he ever complain to you about that, that you remember?

A. No, but I do know he complained to Harvey Welborn who was working out of the office at that time.

Q. Who was Harvey Welborn? What did he have to do with this?

A. He was a store owner and operator in Martinsville, Virginia, that came to work with us in March of 1958.

Q. Came to work with us? Now, with whom?

A. With Dairy Queen of Virginia.

Q. In what capacity?

A. Assistant State Manager. I believe that was his title, and it was his duty to cover the state, convey any new ideas or new methods of operation to the different operators and to help them solve their many problems. Now, Mr. Welborn might have talked to Wendall. I do not know.

Q. Did Mr. Welborn ever tell you that he knew about the volume rebate himself?

A. Well, Mr. Welborn had access to the books.

Q. He worked under you?

page 148 } A. He worked there in the office and the office was very small and it wasn't being hid, to my knowledge, in the office and he had access to it any time he wanted it. He could have looked. I never noticed him getting particularly curious about it. Naturally, he had to

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know when he came there what was going on and when he saw the rebate checks, I am sure he must have asked me, although I don't—I really don't remember about that.

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Q. When were you taken sick?

A. July 29, 1957.

Q. What was the nature of your sickness?

page 149 } A. They called it mental exhaustion. It resulted in complete paralysis of the right side of the body and I was up and moving around in the hospital; in fact, I was home in less than three weeks.

Q. How long were you away from your job at the Dairy Queen office?

A. As best I can remember, less than 30 days, and I was back in the office four or five hours a day. Mrs. Lee was in constant contact with me on the telephone at home. However, at that time I could not write. My wife drove me to the office. I believe Mr. Howard Vick was signing the checks. I think that is right. When Mrs. Lee had to leave us in November of 1957, due to pregnancy, I talked to him about another lady. Mr. Welborn had been to see me, he was living in Richmond, unemployed and an experienced Dairy Queen operator. It occurred to me that Mr. Welborn would make us an excellent man, so I talked to Mr. Harris and Mr. Ganaway and the remarks were that "we can't pay him over \$2500 a year, if he wants it," so I talked to Mr. Welborn and he accepted it.

Q. As Assistant Manager?

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Q. You started to tell us that you got back. When did you get back to full-time work in the office, except for travel which you said for the traveling Mr. Welborn undertook—How much did your sickness contribute to your inability to work and when did you go back to full-time employment?

A. Frankly, I don't know, but the books will show us that point because I was posting. We did not have a secretary at that time and I was posting the ledger. Exactly how long

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I was out I don't know, but I would say less than two months I was back posting the book.

Q. That would have been sometime around the fall of 1957 that you were back for good?

A. That is right.

Q. Did you have any more sickness or any more difficulty after that?

A. Not one day since that time.

Q. How about right around December 27, 28, and 29 of 1958? Were you still living in Richmond on those three days?

A. Yes, sir.

page 151 } Q. Were you sick on those three days or incapable of carrying on a conversation with anybody or anything of that nature?

A. I don't know when I was incapable of carrying on a conversation except for the two days I was in the hospital after having my stroke. I couldn't talk for a couple of days and after that it began to come back—you are talking about a year later?

Q. Yes.

A. I was just as normal as I am right now.

Q. I believe you said the visit to West Palm Beach, Florida was in September, 1958 which was a year after you had gone back from the sickness?

A. That is right.

Q. You mentioned in the course of telling us something else that you were appointed Executive Vice-President. Do you remember how long you had been Manager or General Manager before you got to be Executive Vice-President of the corporation?

A. Yes, I came to Virginia and took over the duties in January and this was sometime during the following summer of 1956, July or August, I would say.

Q. You mentioned your contract as an independent contractor. What was your contract with these gentlemen as a Manager and later as an Executive Vice-President? How were you paid and what were the arrangements?

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A. I was paid a commission basis. I got, I believe, seven cents a gallon for out of town stores, and five cents a gallon on every gallon of mix sold in the State of Virginia, out of which I furnished my own automobile, my own travel expenses, throughout the state. Now, that does not include conventions or such as that. I was reimbursed for those trips.

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By Mr. Harris:

Q. Do you know whether Mr. Welborn is carrying on any other sort of business connected with the Dairy Queen besides actually working for the corporation itself?

A. Yes, sir, Mr. Welborn owned the Dairy Queen in Martinsville, Virginia, and also the franchise for the City of Martinsville. He had a store leased to a Mr. and Mrs. Carter during this time, so he was a store owner.

Mr. Harris: Witness with you.

CROSS EXAMINATION.

By Mr. Cogar:

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Q. You were, in a sense, troubleshooter as well as attending to the business locally?

A. That is right.

Q. And part of it was to solve problems, was it not?

A. Whenever possible, yes; if they became too great, then I immediately got in touch with Mr. Harris or Mr. Ganaway, or both.

Q. Are complaints unusual in a service type organization or franchise organization of this kind?

page 159 } A. Legitimate complaints aren't unusual, no.

Q. Now, about this mix profit, you knew it was being charged, didn't you?

A. I knew it in 1957.

Q. Why didn't you—

A. I would like to clarify that, too. I knew it at the national convention when Mr. Harris and I got together in Atlanta, Georgia.

Q. When was this, sir?

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A. In January or February, 1957.

Q. It had been charged in 1956?

A. In 1956 the contract was already let when we came in the picture, for the mix.

Q. Then, there was no mix profit?

A. When the company went out of business and I placed new contracts in July or August of 1956, to my knowledge, there was not; to my memory now, there was no mix profit. That did not occur. The price was gotten in 1957. Now, that is the best of my knowledge.

Q. I hand you the report on examination of the books and records of Dairy Queen of Virginia, dated February 28, 1957, and ask you if you recognize this?

A. Yes.

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Q. Do you find on page six of this report under heading of "Sales" any indication of mix profit?

A. Yes, I do, but I would also like to bring out that this is for the fiscal year ended February 28, 1957.

Q. What actual year was that?

A. This was January, February, I guess, that would be 1956.

Q. I guess so, too. What is the amount of mix profit?

A. \$2,920.69.

Q. Would that, then, indicate to you, sir, that you were mistaken and that there was a mix profit in 1956?

A. Yes, I guess I am, in 1956. As I said before, when I came up here in 1956 I was not aware that there was any irregularity. I thought that was done everywhere. I had no reason to doubt anything Mr. Harris did or said as far as the operation was concerned, because five years prior he had been fine to me as an operator, a sub-franchise under his franchise.

Q. Is your answer yes, you were mistaken?

A. My answer is yes. My first recognition of any irregularity was when Mr. John Ring handed me a mix bill in early 1957.

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Q. When was the operators' meeting held in 1957?

A. I am not sure, but I think it was sometime during the winter. I know it was during the winter months before our state convention in February, so I would say in November of December.

Q. Of '56?

A. Of '56, and it was held at the William Byrd Hotel and I am sure there is an expense record of that somewhere.

Q. Were the operators advised at that meeting that they were entitled to rebate, to some rebate that they could take in the form of cash or advertising?

A. Advertising or cash, that is right.

Q. What was that that was given to the operators? From what source did those funds come?

A. Came from mix profit.

Q. So, the operators knew at that time of the existence of this charge and their portion of it was coming back to them? Did they know it?

A. It was read by Mr. Hardy, yes.

Q. And at an open meeting where all the operators in attendance were present?

A. That is right.

Q. The same procedure occurred in 1957, did it not?

A. That is right.

Q. So, as early as this first meeting, this mix profit was no secret to them?

A. Well, yes and no. The way it was read, I don't think they realized. In fact, I am sure they didn't realize what it amounted to.

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A. I remember in the meeting in 1956 or '57, the question was asked "Who wants to leave it here for cooperative advertising or—

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Q. Leave what?

A. In cash, the proportion of the mix profit refundable through advertising, two cents a gallon, or something like that, and I believe I am correct in saying that Mr. Wendall Morrison wanted his in cash and Mr. John Ring wanted his in cash, and outside of that I think that was the only two checks that were drawn.

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Q. To the best of your recollection, were the other persons whom I understood you to say expressed great concern over this mix profit, were they present at this meeting?

A. For the most part, I would say yes.

Q. It is my understanding that you previously said that some of these complaints you got were late in 1957 and in 1958?

A. Most of them started coming in around the season of 1958, the summer of 1958.

Q. Which was more than a year after the first report had been read?

A. Yes.

Q. So far as the volume rebate is concerned, Mr. Morrison, my understanding of your testimony is—let me ask you this, sir. Who negotiated this contract calling for volume rebate with the mix supplier?

A. I negotiated the contract with the mix supplier.

Q. Then it was to you that the first knowledge of a volume rebate came in this business?

A. That is right.

Q. Did you see anything wrong with it at the time?

A. No, at the time I didn't.

page 169 } Q. Did you report to Mr. Harris or to Mr. Ganaway you saw anything wrong with it?

A. No.

Q. You thought you had done a pretty good job, didn't you?

A. That is right.

Q. It is my understanding that no operator ever complained about the volume rebate, that you said they didn't know about it?

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A. Well, now, there is a difference between volume rebate and mix profit.

Q. I am aware of that.

A. You want to know about the volume rebate?

Q. I want to know if any operator ever complained to you about volume rebate?

A. To my knowledge, no operator knew it until Mr. Wendall Morrison went to see Mr. Ring at the Virginia Dairy in July, 1958 and was told there was a volume rebate plus a mix profit.

Q. Did you not say, sir, that he did not complain to you about it?

A. Did I not—Mr. Wendall Morrison was the one that complained.

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Q. Mr. Morrison, in response to a question by Mr. Harris on direct examination, do you recall having stated to him that—and these are my words—my understanding of the substance of your testimony—that so far as you knew, none of the operators knew about the mix profit and then you corrected it by saying you think that Wendall Morrison found out about it when he went to this dairy and then having said further that he never said anything to you about it, and having said further that he may have said something to Harvey Welborn about it but that Harvey never mentioned it to you, but the books were in the office and you guess maybe Harvey knew about it because he had access to the books, volume rebate. Do you recall saying that?

A. Yes, I remember that.

Q. All right, sir. Is your answer now that no complaint was ever made to you directly?

A. Let's put it this way. There was no complaint at the time Mr. Morrison said something to me in July
page 173 } about the mix profit until he went to Virginia Dairy, I think, in August of that year and if I am not mistaken, he went with Mr. Leachman, I believe, at the time and then is when they found out about the volume rebate also and, yes, he mentioned that.

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Q. Who mentioned it?

A. After that time.

Q. Who?

A. Wendall Morrison.

Q. Mentioned what to you?

A. About the mix profit and the volume rebate, too, and I think I also testified to the fact that he told me in no uncertain terms he was going to notify the operators, he wasn't going to let it pass.

Q. Who said that?

A. Mr. Wendall Morrison.

Q. Then, on direct examination when you said that you didn't recall any complaint having been made to you, you were mistaken?

A. At what time are we talking about? What year?

Q. I am talking about any time.

A. I don't remember saying that because Wendall Morrison had complained in August or September of 1958 to me directly about this thing, just prior to our trip to West Palm Beach.

page 174 } Q. And did you bring that to the attention of Mr. Harris and Mr. Ganaway?

A. I am sure I did.

Q. What do you mean, you are sure you did? You think you did?

A. I mean it's been quite some years ago and I went with the specific purpose of bringing out the conflicts and the possibility of a blow-up between Dairy Queen of Virginia, Inc., and the store operators. That was the specific reason of the meeting.

Q. When was this meeting, sir?

A. I believe in September, 1958.

Q. My recollection is that at that meeting that you previously testified that you advised Mr. Harris and Mr. Ganaway at that meeting that the Franklin operator had pulled out or was going to pull out. Is that right?

A. I think at that time he had pulled out. We had already paid him off, he had gone.

Q. Who owned that store in Franklin?

A. Dairy Queen of Virginia.

Q. Which was unlike many of your other stores which were—

A. That is right.

Q. All they had was a franchise?

Herbert R. Morrison.

A. Dairy Queen of Virginia owned the building on a lease holding improvement. We paid rental on the land, borrowed the money from J. R. Gowdey to build the building, Mr. Player being the operator. It was sold to him for a \$1800 royalty or a franchise cost of \$1800. He went into that store and paid us a rent and at the time the settlement was made, I believe it was done by Mr. Howard Vick, closed it out, and I have forgotten now the settlement cost or price to Mr. Player, but the store was going to be without an operator, and, naturally, being a company store we were concerned about that, too. We had payments to make to Mrs. Gowdey on the building. We had rent to pay on the land, which wasn't much, \$50,00 a month, I think, but we were in need then of an operator for that position.

Q. Did you get one?

A. Not at the time I left, no.

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Q. You say it was not in operation?

A. Would not be in 1959 if we did not find an operator for it.

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Q. All right, sir. How about Mount Vernon? It is my recollection that you stated at this meeting in September, you advised Mr. Harris and Mr. Ganaway that Mount Vernon would not open?

A. Mount Vernon had already closed prior to that meeting.

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Q. Will you read that to the Court, sir? Will you read the date?

A. November 7, 1958, "Dear Doots, We have been notified that Dairy Queen, Mount Vernon Avenue, Alex-

Herbert R. Morrison.

andria, has closed for good. I received five weeks payment from John Ring, leaves him three weeks behind. Holding bad check from bank, Roanoke, \$1,975.00 am right on top of him." Signed, "Sincerely, Herbert."

Mr. Cogar: I offer this, Your Honor, as a Defendant Harris and Ganaway exhibit.

The Court: Who is "Doots"?

The Witness: Mr. W. L. Harris, Your Honor.

(The said document was marked and filed as Defendants Ganaway and Harris Exhibit No. 6.)

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A. That will clarify the fact that I did notify them the store was closing. I might be wrong about the date.

Q. All I ask is when you are not sure, say so, and when you are positive, say you are positive.

A. All I want is to—

Q. Does it not occur to you, now, sir, that this was not discussed in September at the meeting in Palm Beach?

A. I couldn't have been if it didn't close until November.

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Q. Now, the other thing I recall you mentioned at this September conference was something to the effect that John Ring, who I believe was in Danville, said he wasn't going to open. Is that right, sir?

A. That is right.

Q. Is this the first trouble you had ever had with John Ring?

A. John Ring started in 1957 at the meeting, advertised at the meeting at the William Byrd Hotel and he showed me a statement from the dairy, and in 1958 he was allowed to buy his mix independently and send us a royalty check, which

Herbert R. Morrison.

he was continually getting behind on, and I think that letter there refers to that also, the exhibit, that he was five or six weeks behind in his payments, and we were riding him about his payments on his royalty as much as we could to get our money, and when he stated he would not open for 1959.

Q. Do you know if John Ring is presently in the Dairy—holds a franchise in the Dairy Queen of Virginia?

A. Yes, but it took a suit to bring him back in it.

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Q. Was it not a fact that Mr. Ring had substituted some serial numbers on machines and tried to switch them?

A. That is right.

Q. That was the cause of that law suit, was it not?

A. I think the cause of the law suit—now, again, clearly understand I was out of Dairy Queen and had no interest in it at that time. This happened some time in 1959 or 1960, I don't know, but Mr. Ring did buy two junk machines from Mrs. Gowdey and I understand switched serial numbers and sent the old machines into Mr. Dunham and said, "Here are my machines. I am through with Dairy Queen." However, he kept the two rebuilt machines that he had and the original serial numbers, as I say, had been changed, but he was operating independently last thing I heard and I don't know whether it was 1959 or 1960.

Q. And because of that switching, Mr. Dunham, your understanding is, sued him?

A. I understand Mr. Dunham sued him because he was operating with a Dairy Queen freezer and selling not a Dairy Queen product. There again it was no concern of
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Q. Now, the last item which I have in my notes that you referred to as having occurred at this meeting in Palm Beach in September, 1959, something to do with the Roanoke operation and it had been condemned?

A. Yes.

Q. What was the problem in Roanoke?

A. Well, we had a leaking roof which we had tried to fix a year or two before at a cost of three or four hundred dollars, and after the thing was fixed the contractor died and so

Herbert R. Morrison.

we never could complete the repairs. The walk-in box would not close tight, the floor was rotten in it, had rotted out around the door. The freezers were completely worn out. I would say a good price for the freezer would have been \$15.00 a piece for junk. They could not make a decent product. The lot was dirt, a lot of dust. When it rained, it was mud. The building was a converted service station and, frankly, wasn't any asset to Dairy Queen at all.

Q. Let me ask you this. This again is not an independent operator; this is a store owned by Dairy Queen of Virginia?

A. This is a store owned by Dairy Queen of Virginia.

Q. So we have not here any question of any operators being unhappy. This is one of our own stores, Dairy Queen of Virginia. Right?

page 185 } A. That is right.

Q. Had Mr. Harris or Mr. Ganaway told you they wouldn't repair that building?

A. I had a man in Roanoke that was in a short order business, and by that I mean hamburgers and hot dogs and so forth, and had been in a successful operation for years, offered to take that place and remodel it, rebuild the machines and follow whatever cleaning up program we insisted upon which we had gone so far as to draw it up at a cost of approximately \$5,000; was going to take a remaining eight years of a lease of \$150.00 a month that we had and turn it into a remodeled, up-to-date Dairy Queen with a grill combination. Now, for that he wanted us to give him the operation and he would spend \$5,000 fixing it up and relieve us of the obligation of the rent. He was ready to sign a contract and I believe, again—I am guessing, I don't know whether it was both or one, but I think Mr. Harris turned it down. Now, the ultimate result of it was that Dairy Queen, Memorial Avenue, did not open up and, again, it is hearsay but I don't know whether it is opened up or not.

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Q. But here again this was not a case of an independent operator being dissatisfied?

A. No, it was not.

Herbert R. Morrison.

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Q. At this meeting in Palm Beach, it is my understanding that you have stated that Mr. Harris offered to sell his stock to Dairy Queen of Virginia?

A. Yes, sir.

Q. For what price?

A. \$25,000.

Q. And he owned what percentage of the stock?

A. Fifty per cent, maybe he owned 49, with the two shares I had, I think it was 49 apiece, and I had two.

Q. Fifty of 102 shares?

A. Yes, sir.

Q. Was Mr. Ganaway agreeable to that?

A. Yes, sir, on the telephone, conference telephone with Mr. Vick, the deal was—I guess you would call it a Directors Meeting—was held on a conference phone and the deal was made with the understanding Mr. Harris was to send the stock to Mr. Vick for escrow until it was paid for by the company.

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Q. And Mr. Ganaway had been willing to let the corporation buy Mr. Harris' shares for \$25,000?

A. Yes and no. He agreed to it in West Palm Beach. When he found it was not legal in the State of Virginia, he admitted he was glad that I had notified him. Now, I found out from—I don't know whether Mr. Vick is familiar with that or not, but Mr. Hardy talked to me about it and says, "It is a violation of Virginia law for a corporation to buy stock unless it was out of the profit," which we didn't have.

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Q. Were you distressed or fearful for the future of Dairy Queen of Virginia at the time you submitted your resignation?

Mrs. G. R. Gowdey.

A. Was I distressed about it?

Q. Were you fearful for the future of it?

A. Yes, sir. The future didn't look so good. In fact, down in West Palm Beach I thought, "We better change some policies or buy a black suit and come to the funeral," because we were burning as fast as we could.

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MRS. G. R. GOWDEY,

being first duly sworn in behalf of the Defendant E. L. Dunham, testified as follows:

DIRECT EXAMINATION.

By Mr. Harris:

Q. Would you tell us your full name, please, and your residence?

A. Verna Leachman Gowdey, 5226 Wythe Avenue.

Q. Mrs. Gowdey, your husband was Mr. G. R. Gowdey?

A. Right.

Q. Would you tell us how Mr. Gowdey, first, just by way of background, how Mr. Gowdey first got the franchise and the interest in the Dairy Queen situation in Virginia? Just relate a little history for us, please.

A. He bought it from Mr. H. H. McCullough of page 210 } Geneseo, Illinois, in September, 1948.

Q. And how long did Mr. Gowdey operate the Virginia franchise?

A. From that date until February 20, 1956.

Q. And to whom did he sell the franchise rights of Virginia?

A. W. L. Harris and Kenneth Ganaway.

Q. Is Mr. Gowdey deceased?

A. Yes, sir.

Q. When did he die?

A. December 11, 1956.

Q. Were you the sole heir to his estate?

A. I have a daughter.

Q. Were you familiar with the operation of the franchise when Mr. Gowdey ran it, or did you take part in any of the operation of the franchise?

Mrs. G. R. Gowdey.

A. Yes, sir.

Q. What did you do?

A. Well, I think I was the Girl Friday but to explain that, I operated stores here in Richmond personally and was familiar with much of the operation of the State and knew all the operators over the State.

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Q. Mrs. Gowdey, do you know whether any of those dairies, during the time Mr. Gowdey had the operation, gave what is called a volume rebate?

A. Yes, sir.

Q. Did they give any sort of rebate?

A. Yes, sir.

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Q. Now, I believe you said that some of these dairies gave the volume rebate. Do you remember which ones, specifically?

A. Well, I am more familiar because the Shenandoah Valley was the most recent, and that happens to be a matter of court record in Chesterfield County in another case.

Q. Was that the one in Laurel, Maryland?

A. That is right.

Q. Do you remember how much of a rebate they gave?

A. No, I am sorry. I do not.

Q. Do you know what Mr. Gowdey did with the rebates?

A. He gave it back to the store operators and that is a matter of court record in Chesterfield County because of another case.

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Mrs. G. R. Gowdey.

Q. Mrs. Gowdey, you mentioned a moment ago that the volume rebate that was received from the various dairies, you remembered specifically the one in Laurel, Maryland, was returned by Mr. Gowdey to the operators—

A. Southern Dairies, too, gave a volume rebate.

Q. Did he do the same with that, as far as you know?

A. Definitely.

Q. Did the income of the volume rebates to Mr. Gowdey and the return of them by him to the operators appear on the records of Mr. Gowdey?

A. Yes, sir.

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Q. Mrs. Gowdey, during the time Mr. Harris and Mr. Ganaway were operating the business, do you know whether they were receiving volume rebates back from any of the dairies they had contracts with?

page 219 } A. I didn't see their books.

Q. Do you know whether they were receiving them back or did you receive any information to that effect?

A. I received rumors.

Q. From whom?

A. Operators.

Q. Can you name any operators?

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Q. Did you know or did you have contact with Mr. Welborn during the period when he was employed by the Dairy Queen Corporation as Assistant Manager?

A. Yes, sir.

Q. Did you have conversations with him about the operations during that period of time?

A. Well, yes, I did.

Mrs. G. R. Gowdey.

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Q. When did Mr. Welborn, as far as you know, become an employee of the corporation? Do you remember, approximately?

A. Let's see. That would be early in 1958, I believe.

Q. Early in 1958?

A. If that was the last year they operated, that is right.

Q. Now, did your conversation with Mr. Welborn take place after his employment?

A. Several months afterwards.

Q. Would you tell us what he told you about the operation?

A. Yes, I was very shocked and very surprised when he told me *me* that they were not only keeping a greater portion of the volume rebate, but also making a charge that they called mix profit that was charging the operators over and above their .35¢ royalty.

Q. Now, had Mr. Gowdey charged anything like page 223 } this mix profit?

A. No, sir.

Q. What did you do, if anything, after you received this information from Mr. Welborn?

A. Well, I did what would be the natural thing to do. I immediately went to my attorney.

Q. Who was that?

A. Mr. Wilbur Allen.

Q. Is he here in this city?

A. Yes, he is with Allen, Allen, Allen, and Allen.

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Q. What did you do after your conference with him?

A. For a while, for the rest of that season, in the later season, we didn't say anything, and then Mr. Allen wrote a letter to Mr. Harris and Mr. Ganaway, telling them that we were disturbed and concerned over the future of the operation. This isn't word for word, probably, but that we would like to have a meeting with them or see them; so they came up and

we met with Mr. Allen and Mr. Harris and Mr. page 224 } Ganaway in Mr. Vick's office.

Q. Who met with them?

Mrs. G. R. Gowdey.

A. Mr. Wilbur Allen and I met with them.

Q. What took place at that time?

A. Well, they weren't very cordial.

The Court: Were or were not?

A. They were not very cordial and they had Mr. Vick, I suppose—he accused me of meddling and so at that time Mr. Harris and Mr. Ganaway offered to sell the business back to me.

By Mr. Harris:

Q. What did you do at the meeting? What brought on their accusation of meddling? What did you tell them you had called the meeting for after you got in the meeting?

A. For future plans, what was their future plan for development and how—there was a list of about ten stores at that time that were in—well, their gallonage was so low that I was concerned and disturbed over it and I had some machines in my possession that could be used in the field for practically nothing, and I asked Mr. Morrison if there was any chance of getting in some new stores. It was to my advantage as well as to the corporation, and he said no, they have no plans.

Q. Did anything about the volume rebates come up at this conference?

page 225 } A. No.

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page 226 }

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Q. Now, Mrs. Gowdey, at the time Mr. Welborn made these statements to you about the volume rebates, do you recall what his feeling was as far as they were concerned?

A. He operated some stores so, of course, he was very upset and very hostile and worried, too.

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Q. Did Mr. Welborn tell you anything about how the operators, besides himself, felt about the volume rebate situation?

A. Well, of course, they were very upset. There was hosti-

Mrs. G. R. Gowdey.

lity all over the state with all the operators. As a result of it, because other operators had received statement inadvertently that should have been sent to the Dairy Queen Company of Virginia, Inc., and by, I suppose, a mistake in the mails or in addressing it, they sent it to the store operators instead of to the company and Mr. Morrison, as early as June—Mr. Wendall Morrison, now—as early as July told me that he had received a statement from Virginia Dairy that should have gone to the office and that he was being overcharged with mix.

Q. What was his reaction to that overcharge?

A. He was very hostile toward it because I was pushing him for money that he owed me and he was being bled by the corporation, he considered it, for money that didn't belong to them.

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Q. I believe you said this conversation with Mr. Welborn took place early in 1958?

page 228 } A. No.

Q. When did it take place?

A. Mr. Welborn did not approach me with any of this until it was in August, I believe, of 1958, after the season was getting on its way down from the peak of the season, and we considered the peak of the season June, July and August. It was the end of that season.

Q. It was in that period that you began finding out about all this dissension and the volume rebate problem?

A. Yes, sir.

Mr. Harris: Witness with you.

CROSS EXAMINATION.

By Mr. Cogar:

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Q. What did the stores pay to Mr. Gowdey?

A. They paid the price of mix plus .35¢ royalty.

Mrs. G. R. Gowdey.

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Q. Now, you said you have overheard complaints of some people about volume rebate. Now, who made these complaints, specifically, Mrs. Gowdey?

A. Mr. Welborn is the person that told me.

Q. Did anybody ever complain to you?

A. About volume rebate?

page 248 } Q. Yes.

A. That is—that was so well handled that I don't know if the operators became aware of that as soon as they did the overcharge for mix or not.

Q. So, what you were really talking about was the so-called mix profit?

A. That was what they were hostile about, yes.

Q. It was the mix profit that they were hostile about?

A. That was definitely one thing, and then when they learned they were not getting all volume rebate, of course, they were concerned about that ,too, because they had received it in the past.

Q. Did you attend the meetings of the operators held, the annual meetings held by Mr. Harris and Mr. Ganaway?

A. Yes.

Q. Did you attend it in 1957?

A. Yes, I think so.

Q. Did you attend the one in 1958?

A. Let me see. I get '58 and '59 confused—perhaps so.

Q. There was good attendance of operators at those meetings, was there not?

A. Fair.

Q. Do you recall Mr. Ed Hardy reading out to
page 249 } these operators a statement of mix profit?

A. Yes.

Q. He did it at the first meeting held after—

A. I am not sure. I remember that the gentleman was there and reading something.

Q. In the presence of the operators?

A. The operators were in the room, yes.

Q. And he began reading this in 1958?

A. I am not sure which years I heard him or which years he was there.

Mrs. G. R. Gowdey.

Q. Did you know he was talking about mix profit, Mrs. Gowdey?

A. I judged that he was; I judged he was talking about volume rebate.

Q. What?

A. I judged he was speaking of volume rebate.

Q. I thought you said nobody knew about volume rebate?

A. When Mr. Hardy was talking, I judged that was volume rebate. When he made any report to me, that was volume rebate. As I understood it, they could take it in cash or they could take it in advertising.

Q. Is it your understanding that they had volume rebate—was it your understanding they were talking about volume rebate?

page 250 } A. That is what I thought Mr. Hardy was talking about.

Q. Which they were charging—if he read it in 1957, that was what they got in 1956; if he read it in the early part of 1958, it is probably what they got in 1957 and whatever was taken in 1959, would be read in the early part of 1960? In other words, they would hear about it a year after?

A. The year following.

Q. So, at the meeting in 1957, February, 1957—These meetings are held at the beginning of the season?

A. That is right.

Q. So, at the February, 1957, meeting you understood that what Mr. Hardy was talking about was volume rebate and in February of 1958, at that meeting, you understood that what he was talking about was volume rebate?

A. I am not sure that I was in the room at both of those meetings. I know Mr. Hardy attended some of those meetings, but I don't remember whether it was 1957 or 1958.

Q. All right, at one time or the other, what he read you understood to be—

A. To be volume rebate.

Q. And you think the operators understood it to be volume rebate?

page 251 } A. I can't answer for them.

Q. Prior to hearing it on these occasions, you had heard the operators complain about volume rebate?

A. Prior to—State that again, please?

Q. Prior to this meeting in February, 1958, or prior to this meeting in February, 1957, or during the meetings themselves—

Mrs. G. R. Gowdey.

A. Now, this is volume rebate you are speaking of?

Q. Yes.

A. No.

Q. Had you heard any complaints up to that time?

A. Yes, not about volume rebate, but I had heard complaints.

Q. What had you heard complaints about, Mrs. Gowdey? You hadn't heard anything about a complaint on volume rebate in 1957?

A. No, not on volume rebate.

Q. In 1958?

A. Yes, Mr. Welborn complained when he discovered it.

Q. In 1958? When was that in 1958?

A. When he told me about the mix profit and also a small portion of volume rebate had been returned to the operators.

Q. The volume rebate had been returned to page 252 } the operators?

A. I said a portion. He told me a portion of it had been returned to the operators.

Q. When was this? In 1958?

A. August.

Q. August of 1958?

A. Yes.

Q. If the record showed in this case there was no such thing as a volume rebate in 1957 and in 1958, would that shock you and cause you to think perhaps you were mistaken?

A. I don't know anything about their records. I haven't seen their records.

Q. Do you know when they commenced to collect the volume rebate, Mrs. Gowdey?

A. Well, from the volume they were doing, the stores were doing, I presume that they had a volume rebate.

Q. When?

A. In both years.

Q. They had it in 1956, '57, and '58?

Mr. Williams: She said she presumed; she hadn't seen the books.

Mr. Cogar: I would like to know for what years she presumed.

A. I would presume they had it for all three years.

Dallas Gosnell.

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Q. You were complaining because they were not prosecuting the development of the business in the state. Is that correct, Mrs. Gowdey?

A. I could see no future with them at all because they were not spending any money in the state at all. I don't know what they did with their profit. I suppose they took it to their states, respective states. I have no idea what they did with it, but there weren't any new stores being put out. The operators were in a state of confusion.

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page 266 } MR. DALLAS GOSNELL,
being first duly sworn in behalf of the Defendant
E. L. Dunham, testified as follows:

DIRECT EXAMINATION.

By Mr. Harris:

Q. You full name, please, sir.

A. Dallas R. Gosnell.

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Q. Are you a Dairy Queen operator at the present time?

A. Dairy Queen operator and owner.

Q. You say you are an owner and an operator of a Dairy Queen? Where, Waynesboro?

A. Waynesboro.

Q. This is the same town you live in?
page 267 } A. Yes.

Q. How long have you been an operator?

A. Nine years.

Q. When did you first become one?

A. 1953, I think it was, that season, start of the season of 1953.

Q. You, then, were an operator during the period of time when Mr. Harris and Mr. Ganaway operated or had control of the Dairy Queen franchise for the State of Virginia?

Dallas Gosnell.

A. Yes, sir.

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Q. Mr. Gosnell, did you ever have any conversations with Mr. Welborn about the operation of the Dairy Queen Corporation?

A. Yes, after he had been with them and making the tours of the stores, a few trips, then he would come by on his normal trip of problems and talking over our problems with him, and he made remarks of the operation—

Mr. Cogar: If Your Honor please, I would like it understood that we here again object to any testimony which this witness may have concerning what Mr. Welborn said to him. Is this again being offered merely to show a state of mind and not the truth of the matter?

Mr. Harris: Yes, sir.

The Court: Same ruling.

By Mr. Harris:

Q. Mr. Gosnell, did at any time Mr. Welborn, in the course of his conversations and his travels—how often did he come by, by the way?

A. Approximately once a month.

Q. Now, during the course of these trips to see you all, or to see you specifically, did he ever talk to you about the volume rebate or mention anything about the volume rebate?

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A. Toward the latter part of the season.

Q. What season? What year?

A. Should be 1959, I believe it was—No, it would be 1958. It was before Mr. Dunham had the Dairy Queen.

Q. You mean the latter part of the season of the year Mr. Dunham took it over?

A. That is right. And, of course, he as a store owner and myself, we would talk about different things and when he got with the Dairy Queen Company, why, things came up that he didn't like as an owner himself and he knew that others were interested and we would talk about the procedures that they had and prices, and such as that that showed up when he was

Dallas Gosnell.

with them and that was strictly as a conversation and he was in a position to where he felt like it wasn't right and when he told me, why, it wasn't right with me. He wanted to know why on certain items that things was being done like they were.

Q. What certain items were you worried about?

A. Mix prices didn't seem to correspond with what we thought they should. When we have a mix price quoted to us by whoever owned the Dairy Queen of Virginia, we would take their word for it. I mean, we figured that was the way it should be, and if the prices at that time we found out didn't correspond to what they should have
page 270 } been and what we were paying and what the company was paying for the mix, and we just felt like that there was something wrong some place and we didn't know what or whether it was the proper procedure to go through, so a little later on—let's see, it would be in the early part of 1959—we decided, as a Dairy Queen Association of Operators, a group of operators, that we would see if there was anything we could do about it and we had started forming a group to contact a lawyer to see where we stood, and just to find out what the legal proceedings might be of stopping the overcharge, is what we called it, of mix.

I thought, and most of the operators, I am sure, felt the same way, according to their conversation, that mix was being charged to us at the price that the Dairy Queen Company of Virginia was paying for it.

Q. What was your reaction when you found out from what Mr. Welborn said that this wasn't so?

A. Well, I was just like anybody would be. I wanted to find out why they were doing it and it was a problem which the average businessman would want to know why he wasn't being charged what he had been told that mix cost. So, we was downright disgusted with the operation in that respect, for sure, and other problems had come up which we had tried to talk out and couldn't get any satisfaction on, so we

knew there was no use trying to line out anything
page 271 } through the Company of Virginia.

Q. Who did you talk them out with?

A. Well, ourselves, and then we had different companies, mix companies, dairy companies, or mix companies, and one or two of us found out prices that we could buy mix for as an independent—I mean, just on our own contract, and we could buy mix as cheap then as we were getting it, or cheaper than we could get it through the Dairy Queen Company of

Dallas Gosnell.

Virginia, which proved to us that we were not paying the proper price for mix. I mean, ourselves, and the prices were quoted to us at one price and when we could go out and buy it as an individual at a cheaper price, why, we began to wonder why as a group we couldn't buy it as cheap as an individual could buy it.

Q. Did all this wondering and this disgust—I believe you used the word disgust—did all that take place prior to the sale to Mr. Dunham?

A. That was about that time, before we knew the Dairy Queen of Virginia was being resold.

Mr. Harris: Witness with you.

A. (Continuing) I myself did not know that Dairy Queen of Virginia had sold until we came to the convention in 1959—No, I think it was February, about the middle of the month.

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CROSS EXAMINATION.

By Mr. Cogar:

Q. When did you say you first found out about this, what you call an overcharge? Is that what you called it, an overcharge?

A. That is what I would call it myself, yes, because when we buy mix at one price and we were charged another price higher than what we could pay for it, that would be an overcharge and that was—the first time probably was, oh, three, four, five months before Dairy Queen of Virginia changed hands.

page 273 } Q. Now, two elements have been discussed here, two different charges, and I want to make sure if we know which ones we are talking about. One is called a mix profit and the other is called a volume rebate. Just what is it that you are talking about?

A. I am talking about if you are talking about a volume rebate as coming back to the store operators, as it is now, why, that is what I am talking about on the mix price, the difference in the mix price, what we paid for it as compared to

Dallas Gosnell.

what Dairy Queen Company of Virginia pays for it, or paid for it.

Q. It is not true that what Dairy Queen of Virginia paid for it—their contract price was the price you paid?

A. I don't know about that because I don't know what they paid, what their contract called for. I don't run that office.

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Q. You don't know—strike that. It is my understanding that you believe at the time Mr. Harris and Mr. Ganaway were operating this business that what you paid was made up of two items only, the actual cost that they were paying for the mix, plus .35¢ a gallon royalty?

A. Yes, as far as I know. I can't remember whether the .03¢ overcharge is in there or not, but I am sure—

Q. If it was, did you have any complaint about that?

A. No.

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Q. These things that Welborn told you, did you ever communicate with Mr. Harris or Mr. Ganaway about them?

A. No, sir, I have gone through problems with them before and not got any basic satisfaction, so why should
page 280 } you do anything else?

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page 282 }

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Q. You never did contact a lawyer, this group
page 283 } you had in mind, did you?

A. I myself didn't. Some of the operators did contact lawyers.

Dallas Gosnell.

Q. You have heard?

A. I know that they did.

Q. Do you know who they were?

A. I couldn't tell you the names of them because I wasn't on the—in that end of it. I mean, I agreed to go along with it and we had accumulated a little money and promises of more if we went ahead with it and they had made contact on it.

Q. They never employed a lawyer, though did they?

A. Never put a retainer down, no.

Mr. Cogar: I have no further questions.

REDIRECT EXAMINATION.

By Mr. Harris:

Q. Mr. Gosnell, just a couple more short questions. From your conversation with Mr. Welborn from which you said you got disgusted when he told you about the volume rebate you weren't getting back, did you make a complaint or let Mr. Welborn know you were disgusted?

A. Yes, sir, we did, or I did.

Q. Did the other operators do the same thing, as far as you know?

page 284 } A. They did the same thing.

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A. After he had told us that and we looked into it, we were really disgusted and wanted to find out what we could do, whether we could get things lined out or get out of Dairy Queen or find out where our differences were in our prices and when we went to convention in February, and there was a good bit of unrest and conversation about "Well, I am going to get out," and "There is no use fooling around. We can't do anything about it." And at that time Mr. Dunham was introduced and announced he was Dairy Queen of Virginia, Inc.

Q. What February was this?

A. That is when he took over, the first time that—I would say that anybody basically knew—it was the first official notice that Dairy Queen of Virginia had sold, and the conversation and unrest was already stirred up before we even had any notice that Mr. Harris and Mr. Ganaway were not Dairy Queen of Virginia.

Dallas Gosnell.

Mr. Harris: I have no further questions.

RECROSS EXAMINATION.

By Mr. Cogar:

Q. I have one, Mr. Gosnell, I think only one page 285 } right now, This is something that the operators were concerned about, presumably, but you did not contact Mr. Harris and Mr. Ganaway?

A. No, sir, due to the fact they were in Florida or some place else and I am not financially able to spend time and money and such as that running over the country and operate the business.

Q. And so far as you know, none of these people that you have discussed, or these complaints that you have referred to had been communicated to Mr. Ganaway or Mr. Harris? Did they know—

A. Other than possibly before somebody might have contacted?

Q. But you don't know that they knew of this, of your own knowledge?

A. I knew that the others knew about it and I felt that they knew.

Q. Wait a minute. Do you know of your own knowledge whether Mr. Ganaway and Mr. Harris knew of this, of your own knowledge?

A. I would say they did, yes, sir.

Q. How would you say that?

A. Because they operate the business.

Q. Do you know of anybody that communicated it to them?

A. Not specifically, no.

page 286 } Q. Then you don't know?

A. In that length of time—

Q. Then you don't know?

A. No.

REDIRECT EXAMINATION.

By Mr. Harris:

Q. You said something a moment ago about some of the operators and possibly yourself had contemplated leaving Dairy Queen as a result of all this?

A. Yes, sir.

Q. Do you know how many operators were contemplating that?

Oakley Leachman.

A. I know of two or three; one did, definitely left.

Q. Who was that?

A. John Ring, and I myself was thinking about it and it is rather disturbing to do business with people you feel like they are supposed to be working for you and in your favor, and then find out it is working in the other direction, and it is hard to keep an organization happy when you don't cooperate with them. One person—I mean, even two people or more, when you won't sit down and talk with them and work problems out, why, you can't have a harmonious group.

Q. As far as you are concerned, has it been harmonious since Mr. Dunham took over?

A. I have no basic complaint about it since then. My gallonage, of course, has gone down, but as far as I can control and he can control, it is due to the weather and other factors in normal business procedures.

* * * *

MR. OAKLEY LEACHMEN,

being first duly sworn in behalf of the Defendant E. L. Dunham, testified as follows:

DIRECT EXAMINATION.

By Mr. Harris:

Q. Your full name, please?

A. Oakley Thaddeus Leachman.

* * * *

Q. I am going to ask you some questions and page 288 } then these gentlemen will probably ask you some and if you will look at us when you talk. Have you ever at any time been connected with the Dairy Queen business, Mr. Leachman?

A. Yes, sir.

Q. Will you tell us when and how you were connected with it?

A. Yes, sir, I owned a store until just last month, from early 1950 until just last month, on the Petersburg Pike.

Q. Here in Richmond?

A. Yes, sir, and then I always was half partner with my father in a store at Waynesboro, Virginia, starting in 1952

Oakley Leachman.

as partners. Father subsequently passed away in 1954 and about all the interest of his estate was his part of that store and I was the owner of that store for a number of years until just about three years ago. I sold that to Mr. Gosnell who preceded me on this witness stand and—

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Q. Mr. Leachman, were you then operating your Dairy Queen store on Petersburg Pike during the time when Mr. Harris and Mr. Ganaway were the owners, so
page 286 } to speak, of the Dairy Queen of Virginia, Inc.?

A. Yes, sir, I was.

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page 290 }

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Q. Did Mr. Welborn ever tell you anything about the business affairs of the Dairy Queen of Virginia, Inc., the corporation itself? Anything about how it was run?

A. Well, in late October, during the—no, during the month of November, 1958, he told me some news that was quite discouraging to me.

Q. What was it?
page 291 } A. He told me that I was paying more for that mix than I should, according to what he deemed my contract called for.

Q. Did he explain? Did he give any further explanation of the fact you were paying more? Did he tell you why or how or what you were paying for or weren't paying for?

A. I believe he did.

Q. Will you tell us what it was?

A. Well, as I remember, Mr. Welborn told me that what the company told us we would pay for that mix was not what they were paying the dairy for it, and on top of that, we were not getting the rebate back, the gallonage rebate that he felt we should have.

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Oakley Leachman.

Q. What was your reaction to finding out the fact that you weren't getting the volume rebate back?

A. Well, I was perturbed, naturally, about that. Let me clarify that, if you will. We were getting some volume rebate back, that is true.

page 294 } Q. How were you getting that back?

A. As I recall—of course, that has been some time ago, we got—I got two checks, as I recall, see,—I got two checks back for volume rebate that year, 1958.

Q. Now, did you convey your reaction or say anything to Mr. Welborn about the information he gave to you? Did you tell him how you felt about it?

A. It is possible I did. I don't recall; it is possible I did, that I told him that was rather perturbing news, if it was true. I had no way of knowing myself.

Q. Did you convey any of this feeling that you had to Mr. Morrison, to Mr. Herbert Morrison, who was the Manager, actual General Manager or Executive Vice President?

A. I didn't see Mr. Morrison.

Q. Did you discuss this with anybody, what Mr. Welborn told you?

A. A few months, it might have been a month or 60 days later, I saw Mr. Wendall Morrison who ran the other three stores here in Richmond, and he and I talked about what—I assume he had been told also the same—

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Q. Did Mr. Morrison know about the rebate already or did you tell him?

A. I didn't tell him.

Q. Did he know about it?

A. He did.

Q. What was his reaction about the volume rebate when you talked to him?

A. He was perturbed about it. He had three stores to my one here in the City of Richmond.

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Oakley Leachman.

page 296 } CROSS EXAMINATION.

By Mr. Davenport:

Q. Mr. Leachman, when did you first learn that the company was receiving a volume rebate?

A. Well, of course, I was never certain myself that they did. I just had to take somebody's word for that.

Q. When were you first told that they were receiving a volume rebate?

A. That was—Well, like I just told you, in November of 1958.

Q. And up to that time you never heard anything about a volume rebate?

A. Not about volume rebates, no, sir.

Q. And didn't you testify just a moment ago, towards the end of Mr. Harris' questions, that you got two checks back in 1958 for volume rebate?

A. Yes, I did.

Q. You got them between November and January 1?

A. Well, they would have had to have been between those months, yes, because after Thanksgiving I would have closed. As I remember it, it is in there somewhere. It had to have been in there somewhere. I recall two checks in particular; there might have been more.

Q. So you got them after you heard about it from Mr. Welborn?

page 297 } A. No, I had gotten one of them before that, one of them possibly came in; oh, the first check might have come in in June or July.

Q. Then you did know about volume rebate, didn't you?

A. Sir?

Q. Then you did know about volume rebate?

A. I wasn't sure in my mind at the time whether it was volume rebate or whether it was an advertising refund.

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REDIRECT EXAMINATION.

By Mr. Harris:

Q. You got through saying you don't know whether those checks were volume rebate or advertising refunds? Would you explain what advertising refund is?

Kenneth J. Ganaway.

A. When we do some advertising during those times, we always would, as I recall—the company would pay a certain amount of that, and—

Q. Of the advertising?

A. Yes, sir. We would occasionally get checks page 298 } back from them for their part of the advertising, but the two checks in question here were volume rebates, I am positive of that.

Q. You are positive of volume rebate?

A. I am positive those two checks were volume rebates, yes.

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KENNETH J. GANAWAY,
a Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Cogar:

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Q. The record indicates that Mr. Morrison resigned, then, in November of 1958?

A. That is right, yes, 1958, that is right.

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Q. What was the transaction with Mr. Harris? Had you offered to buy his stock or did he offer to buy yours?

A. We made an offer where either of us would sell to the other for \$25,000 for our shares of stock.

Q. And approximately when did that occur, sir?

A. I would say that occurred around September of that year.

Kenneth J. Ganaway.

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A. These papers indicate the action that we took to purchase the stock of Mr. Harris, purchase to be made by the Dairy Queen of Virginia, Inc. Corporation.

Q. For what amount?

A. The amount here was \$25,000.

Q. For how many shares?

A. That was for 50 shares of stock.

Q. When was this action taken?

A. On September 26, 1958.

Q. And these are the minutes of your Board meeting, approving that, is that right?

A. That is right.

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Q. Did this sale ever—was it ever consummated?

A. No, that action was not completed due to the fact that it seemed to be not possible under certain Virginia regulations which I am not familiar with.

Q. How did you learn of these regulations?

A. I believe that in a phone call from Mr. Herbert Morrison.

Q. Following this transaction, attempted transaction, was there any other effort to sell the stock or any other offer made by and between you and Mr. Harris?

A. Well, this item here was not a case of selling—of Mr. Harris selling the stock to me. It was to the corporation. We later considered a sale of stock of one or the other and we agreed at that time that either of us would buy the other and Mr. Harris made me an offer to sell for \$25,000 and I accepted the offer.

Q. Was that consummated?

A. No, that wasn't, either.

Q. Why was it not, sir?

A. Well, shortly thereafter we, of course, received word

Kenneth J. Ganaway.

that Mr.—we received word of Mr. Morrison's resignation and also at the same time we received correspondence from Mrs. Gowdey's attorneys that they desired to talk to us about the state of the business, so immediately we page 306 } headed for Richmond.

* * * * *

Q. I will ask my question again, Mr. Ganaway. Mr. Harris had offered to buy your stock or you had offered to buy Mr. Harris' stock?

A. Well, we on different occasions both happened—but I think in this particular case here, he called me and outlined the terms under which he would sell or he would sell his stock to me, and this letter here which you have confirmed the arrangement, the purchase of it.

Q. Will you identify it? Is this the letter you wrote to him?

A. That is right, yes, sir.

Q. What is the date of that letter?

page 307 } A. This is November 14, 1958.

Q. Will you read that letter to the Court?

(The letter was read aloud by the witness and subsequently marked and filed as Defendant Ganaway Exhibit No. 4.)

* * * * *

Q. And what had he offered you for your stock?

A. The total purchase price?

Q. Yes, sir.

A. \$25,000.

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Q. You say this meeting lasted an hour to two hours? When did you next see Mr. Dunham?

A. We saw him the next day?

Q. Where?

page 318 } A. That was at Mr. Vick's office.

Q. Who was present at that time?

Kenneth J. Ganaway.

A. Present there were Mr. Vicks, Mr. Harris, Mr. Dunham, Mr. Vick's secretary, and myself, and I can't recall whether our CPA, Ed Hardy, was there at the time when we arrived or whether he came in shortly thereafterwards, but he was present part of the time.

Q. Why was he there?

A. He was there to make available all the records of the corporation for Mr. Dunham's inspection.

Q. Did he make them available?

A. Oh, yes.

Q. And did Mr. Dunham inspect them?

A. He did.

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page 324 } Q. How many stores did you have at the time of this sale, Mr. Ganaway, in Virginia?

A. I can give you a range. I don't know exactly.

Q. I think the record shows 30 or 31. I don't recall myself, had done business during the 1958 season. How many of these operators did you know personally?

A. Well, I guess I have met all of them on occasion, but I would say I guess I know all of them personally.

Q. Where had you gotten to know them?

A. At our annual meetings.

Q. During the last year of your operation, 1958, had you received any complaint from these operators?

A. No.

Q. Specifically, had you received any complaints from Wendall Morrison about anything?

A. Oh, no, definitely not.

Q. Mr. Leachman?

A. No.

Q. Mr. Ring, John Ring?

A. No.

Q. Mr. Gosnell?

A. No.

Q. None of the people had registered any complaint with you?

A. No, that is right.

page 325 } Q. About the operation of the business?

A. Oh, no.

Q. How about Welborn? Is that his name?

A. Yes, Welborn, that is right.

Q. Harvey?

Kenneth J. Ganaway.

A. Harvey Welborn.

Q. Had Harvey Welborn communicated to you any complaint of operators?

A. No, I had no communication with Harvey.

Q. Now, you heard Herbert Morrison testify yesterday concerning a meeting which you had in West Palm Beach, I believe September of 1958?

A. Yes, sir.

* * * * *

Q. Did he mention the Roanoke store to you?

A. He could have mentioned it to me, but I page 326 } don't recall any discussion about Roanoke, particularly, no.

Q. You were familiar with the problem in Roanoke?

A. I was familiar with the store in Roanoke, yes, and I knew—in fact, I am not even sure of this, but I think at the time we didn't have an operator for the store. I do recall that much about it.

Q. Any discussion about volume rebate at that meeting?

A. No, not to my knowledge.

Q. What did you know about the volume rebate, Mr. Ganaway?

A. Nothing.

Q. You knew it had been collected?

A. To be perfectly frank, I don't know much about the operation of the Richmond office. I was not that close to it.

Q. Who had the closest—other than Mr. Morrison—who had the closest contact with the operation?

A. Well we had, of course, Harvey Welborn was close and also Mr. Harris was closer in touch with it and I was, as far as the actual operation was concerned.

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CROSS EXAMINATION.

By Mr. Williams:

Q. Mr. Ganaway, as I understand it, you and Mr. Harris purchased this Dairy Queen business in 1956, is that correct?

Kenneth J. Ganaway.

A. Yes, I believe that is right.

Q. And you formed a corporation called the Dairy Queen of Virginia, Incorporated, to be the purchaser of the business from Mr. Gowdey who had traded as a sole proprietor?

A. That is right.

Q. Is that right, sir?

A. I believe so.

Q. There is no secret about that?

A. I am not sure of the sequence. Those are the basic things, yes.

Q. And then you and Mr. Harris undertook to run the Dairy Queen of Virginia, Incorporated, business as of the time the sale was consummated?

A. I don't know exactly when the operation started. I couldn't tell you that.

Q. Whenever it did, you and Mr. Harris, your page 329 } partner, undertook to run the business?

A. That is correct.

Q. And each of you owned 50 per cent of the stock?

A. That is correct.

Q. Now, initially, who was to be the managing partner, or the active partner, in the business? You or Mr. Harris?

A. There was no active managing partner as far as I could tell, because we hired a manager for that purpose.

The Court: I can't hear you.

A. We hired a manager to manage the business for us.

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Q. Now, at the time you employed this General Manager here in Virginia, who, I believe, was Mr. Morrison, from then on you didn't take any active role in the management of the business. Is that correct?

A. Not in the management of the business, no.

Q. You delegated all of that to this General page 331 } Manager or your partner, Mr. Harris, who, I believe, kept a closer watch on the operation than you did?

A. He had a true picture of it, yes.

Q. But you gave Mr. Harris and Mr. Morrison authority

Kenneth J. Ganaway.

to act for the corporation and you would accept their decision without any right to quarrel about it. Is that correct?

A. Well, management-wise, yes. There is an area you can get into there that becomes policy and that is different.

Q. Well, the mechanical end of the business you turned over to them?

A. That is right.

Q. On policy, you reserved to yourself 50 per cent right, which was your stockholding in it, to veto or disagree?

A. That is correct.

Q. Now, on November 15, 1958, I believe a letter was addressed to you by Wilbur C. Allen who represented Mrs. Gowdey's interest? Your name was spelled "Kanaway," but I think we all know you are talking about Ganaway. Is this—

The Court: Is this an exhibit?

Mr. Williams: Yes, sir, Your Honor, Dunham's Exhibit No. 6.

page 332 } By Mr. Williams:

Q. Did you receive that letter?

A. Yes.

Q. Is that your copy of it?

A. I have no way of determining whether it is my copy or not.

Q. Now, in the first paragraph of that letter it shows that this Dairy Queen of Virginia business, under your stewardship, had deteriorated to a point where about one-third of the stores were about to go out of business—

* * * * *

Q. It says in the letter, Mr. Ganaway, that under your stewardship the business has deteriorated to a point where about one-third of your operating stores are about to go under. Is that correct? Read it out loud. Maybe we can understand it better.

A. (Reading) "Mrs. Gowdey has become extremely concerned over the fact that the gallonage statements furnished her from the various Dairy Queen stores indicate that approximately ten stores are operating at or below the break-even point. In all probability these stores will not open next season."

page 333 } Q. All right, now. Read on in the letter and see if the writer of that letter is requesting that

Kenneth J. Ganaway.

you give him assurances that some affirmative action will be taken to abate the deterioration in the business that he alludes to?

A. Shall I read the whole thing?

Q. Yes.

The Court: Excuse me one minute. What is the date of that letter?

A. November 15, 1958. This is the second paragraph: (The witness continued reading the letter.)

Q. Now, following receipt of that letter, did you write to Mrs. Gowdey or her attorney any assurances that the business wasn't going to pot or that you were taking any steps or requesting your General Manager to take any steps to stop the very thing they were complaining about?

A. No, we wrote no letter, no.

Q. You have no documentary proof of any sort to show that you have complied with the request of Mrs. Gowdey's letter?

A. Well, we have stated previously that we went to Richmond as a result of the letter, but we had no correspondence.

Q. What date did that meeting take place in Richmond?

A. I would say it was within, probably, fifteen page 334 } days of the date of that letter.

Q. Now, the ad that you caused to be published in the Wall Street Journal, was that placed after you had received this letter from Wilbur Allen dated November 15, 1958?

A. Yes, definitely.

Q. Now, at the time Mr. Dunham came to see you in Florida in response to the ad that you had run in the Wall Street Journal, did you show him a copy of this letter?

A. No.

Q. When you met in Richmond on December 28, 1958 which, I believe, was a Sunday, did you show him this letter?

A. You mean me personally?

Q. Yes, you personally?

A. No, I personally didn't, no.

Q. On December 29, 1958, when this sale was consummated in Howard Vick's office, did you show him a copy of this letter?

A. I didn't, no.

Q. While you had personal knowledge of these people here on the scene feeling that one-third of the business was

Kenneth J. Ganaway.

about to go under, you never communicated that fact to your potential buyer, personally?

A. Well, there were some good reasons for not page 335 } doing it.

Q. Can you answer my question yes or no? Did you ever communicate the contents of this letter to your potential buyer on the three occasions when you saw him and were negotiating the sale?

A. I wouldn't communicate anything to anybody that wasn't true. I had no reason to.

Q. And you were disputing the truth of the contents of this letter?

A. Why, of course.

Q. All right, sir. Now, you have caused to be introduced in evidence Ganaway's Exhibit No. 3, Ganaway's Exhibit No. 4, and Ganaway's Exhibit No. 5, which I hand to you to see if you are still familiar with them?

A. Yes.

Q. Now, in all three of those documents, it relates to an inter-corporate sale or an inter-partnership sale between you and Mr. Harris, isn't that correct?

A. That is correct—hold it. No, two of them do.

Q. And one of them relates to a corporate purchase of the 50 per cent interest?

A. No, no.

Q. Tell me what they relate to.

A. One of them relates to the sale of our stock—

page 336 } The Court: Which one?

A. That is the one dated, let's see, is there a number on here? I think that is 5.

Mr. Harris: It is Defendant Ganaway's Exhibit No. 5.

A. This one here relates to a proposed sale of our stock to another corporation.

By Mr. Williams:

Q. To anybody that will buy it?

A. To somebody.

Q. To somebody?

A. Not to anybody; to a specific person.

Q. Is that specific person identified in the letter?

Kenneth J. Ganaway.

A. No, it wasn't identified in the letter because that isn't pertinent, and one involves the sale—

The Court: Which one?

A. Ganaway Exhibit No. 4; this relates to the sale of stock between us, and the other one here which is Ganaway Exhibit No. 3 relates to the minutes of the Joint Meeting of the Board of Directors and Stockholders in which the corporation proposed to buy Mr. Harris' stock.

By Mr. Williams:

Q. Now, I will ask you if the date on all three of those documents is not subsequent to the time that your page 337 } State Manager, Mr. Morrison, came to Florida and told you and Mr. Harris that you were in difficulty here in Virginia, you had been raping the business, so to speak, not developing it, and you were bound to go broke?

* * * * *

Q. What was the date Mr. Morrison came to Florida and met with you and Mr. Harris and if you have any documentary proof in your file to confirm it by one way page 338 } or the other, please produce it.

A. If the date in reference to this is the question, it was prior to these two. There is no question about that.

Q. Was it in August or September?

A. I believe it was September.

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Q. What did you discuss?

A. Well, we discussed mainly the proposition of whether we should permit the stores to go into the food business in addition to Dairy Queen.

Q. How about the Roanoke situation, the condemnation by the Health Department?

A. I don't know whether the condemnation by the Health

Kenneth J. Ganaway.

Department was mentioned at that particular meeting or not. I couldn't say.

Q. You heard about it?

A. No, I don't know whether I did or not, now. I knew we didn't have an operator for the store, but the condemnation by the Health Department, I can't recall that.

Q. How about the Ring situation in Danville?

A. I don't know whether it was touched upon, but it is likely, because I believe the fellow was in arrears two or three weeks in his payment to us.

Q. How about the situation with the operators
page 340 } generally about the volume rebate? Was that
discussed?

A. No.

Q. How about the dissension among the operators about feeling that on the basic mix price they were being over-charged?

A. To my knowledge there was no dissension among the operators and no discussion about it. It was never brought up.

Q. At the time of that meeting in Florida in September, 1958, did you have any information that ten of the stores in the Dairy Queen chain were in financial difficulty and about to go under?

A. No.

Q. And you didn't find that until you got a letter from Mrs. Gowdey's attorneys, then, I take it, on November 15, 1958?

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Q. But someone else, by November 15, 1958, at least, called to your attention that they thought ten of the stores were having problems?

A. That they thought, that is right.

Q. That they thought?

A. Yes.

Q. And that is the first date that you know of that situation existing or being suspected?

A. I still don't know it.

Q. Or being suspected?

A. That is right.

Kenneth J. Ganaway.

Q. I will ask you if all three of the documents that you now hold in your hand weren't written subsequent to the time that Mr. Morrison came to Florida to meet with you and Mr. Harris, irrespective of whether it was a social meeting or a business meeting?

A. What is that question? Was that a question?

Q. Yes.

A. I didn't get it. Start again.

The Court: Let her read it back.

(The previous question was read.)

A. Yes.

Q. Now, take the corporate resolution that you have in your hand. Do you have it before you?

page 342 } A. I have it.

Q. Now, under the terms of that proposal, isn't it a fact that the corporation was going to buy 50 per cent of the stock, using corporate money, and you or Mr. Harris, whichever of you wound up being left in the business, didn't have to put up any money at all?

A. No, I wouldn't say that.

Q. Well read the proposal.

A. How far do you want to go back? Do you want to start here? (Indicating) There are several things in this.

Q. Take such part of it that you think is necessary to answer my question.

A. All right. "Mr. Harris, who is the holder of 50 shares of the common stock of the corporation, offered to sell to the corporation his stock for a total purchase price of \$25,000, payable \$7,000 in cash immediately upon acceptance of the offer by the corporation; \$5,000 due and payable on or before January 15, 1959 and \$5,000 due and payable on or before July 15, 1959, with the remaining \$8,000 to be paid in monthly installments with the first such installment to be due and payable for the month of October, 1959, equal to two cents per gallon for all Dairy Queen mix used or sold in the Commonwealth of Virginia until the entire \$8,000 shall have

been paid. No part of the purchase price is to
page 343 } bear interest. There were further stipulations
that the 50 shares of stock now owned by Mr.
Harris will be endorsed and placed in escrow with Howard C.
Vick to be delivered to the corporation upon full and final

Kenneth J. Ganaway.

payment of the purchase price and that the salaries of officers of the corporation other than the Executive Vice President would not exceed \$2,400 per year until the entire purchase price had been paid * * *

Q. So, under that proposal, Mr. Harris would have gone out of the business, but you, Ganaway, wouldn't have paid any money to buy any of his stock. Isn't that correct?

A. You mean me personally?

Q. Personally?

A. The corporation was making the purchase.

Q. But not a nickel of Ganaway money would have gone into the purchase of that stock?

A. No, that is right.

Q. Now, I ask you if under the other proposal and not talking about the one for the \$70,000, I don't know the amount of it, if under the terms of that proposal, the business itself wasn't to put up the money for the purchase of the stock rather than either Harris or Ganaway?

A. That is right.

Q. Now, in running this ad in the Wall Street page 344 } Journal, did you compose the ad yourself?

A. Partially, I would say; I think my office help did.

Q. Did you meet with Mr. Harris before that ad was caused to be published?

A. Yes, definitely.

Q. And you agreed upon the basic substance of the ad before it was to be—

A. Basic substance, that is correct.

Q. And you were designated as the person to receive inquiries that might result from that ad at West Palm Beach, Florida, is that correct?

A. That is correct.

Q. Now, the ad shows the following figure, "Basic franchise, Middle Atlantic State, showing gross profit of \$25,000 annually available, \$50,000 cash." Is that your recollection of it?

A. That is what the ad reads, yes.

Q. And that is the way you intended it to read?

A. Yes, that is correct.

Q. Where did you get the figure of \$25,000 gross profit, \$25,000 annually available from?

A. That was after a consultation with Mr. Harris, after looking over the general books and so forth.

Kenneth J. Ganaway.

Q. In other words, you and Mr. Harris were
page 345 } satisfied from the books that you could point
your finger to \$25,000 worth of money that would
be profit from that business?

A. Well, that depends on your definition of profit. I don't know.

Q. If somebody came to you and said, "Show me where the \$25,000 gross annual profit is," you had to have figures that you could point to, isn't that correct?

A. Oh, which we did, yes.

Q. And you were prepared to do that?

A. Yes, which we did.

Q. And you did it for Mr. Dunham? You showed him \$25,000 worth of figures?

A. I didn't show him personally.

Q. But Mr. Harris did, or Mr. Hardy?

A. That is right. That was upon examination of the books.

Q. But when he came here to Richmond and said, "Gentlemen, show me where there is \$25,000 worth of profit in this profit and loss statement," you pointed out figures that would total \$25,000 or approximately that. Isn't that correct?

A. Did I do it or somebody else?

Q. You or Mr. Harris?

A. Speaking generally?

page 346 } Q. I am talking about all three.

A. I can't always answer what may have happened in the room. I may have been out.

Q. But you were there?

A. Yes, I was listening.

Q. And either you or Mr. Harris or Mr. Hardy did it?

A. That is probably true.

Q. Because Mr. Dunham didn't indicate a willingness to buy until you showed him \$25,000 as the ad indicated, isn't that correct?

A. I would say that is probably correct.

Q. That is correct. There is no probable about it?

A. Right.

Q. And either Mr. Harris or Mr. Hardy, the accountant, showed him those figures that would come to \$25,000. Isn't that correct?

A. Well, in a way, yes, but you are getting a little bit off the broader subject, though, as to what the income from the business is.

Q. In the ad you didn't bother to mention the indebtedness

Kenneth J. Gananway.

to the Gowdeys which, I believe, approximated something like \$125,000, isn't that correct? Look at it. Does the ad say—

A. That is right, I have to think a little bit, page 347 } occasionally.

Q. All right, I want you to. Then, after he came to your place of business in Florida, you told him about the \$125,000 which he understood?

A. I don't recall that. I think the way it was put was that there was seven cents a gallon out of what he would get that was earmarked for Gowdey, and I don't know if I remember the other part because we were talking in strictly general terms, because I had no figures or anything. I know it was seven cents a gallon.

Q. You didn't have any books with you in Florida?

A. No.

Q. But the figure of \$25,000 had been in the ad?

A. That is right.

Q. And the sale price of \$50,000 in the ad?

A. Was in the ad.

Q. And they were the only two figures you had to try to justify to any purchaser that might inquire about them?

A. Well, I might add that in our conversation down there I told him that above and beyond the royalty income, he had a potential of franchise sales which was probably another five or ten thousand dollars a year, depending on his ability.

I don't know whether that enters into it.

page 348 } Q. That is over and above the figure?

A. Over and above what the operators pay.

Q. You didn't realize five cents in franchise sales the three years you owned Dairy Queen of Virginia, did you?

A. Say that again.

Q. Did Dairy Queen of Virginia, Inc. ever sell a sub-franchise while you owned it?

A. I think so, yes.

Q. Does it show in your books?

A. I think so.

Q. Which one, 1957, 1958, 1959?

A. I don't know.

Q. They are up there. Get one of them and show it to me.

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EDWARD I. HARDY,

being first duly sworn in behalf of Defendants Ganaway and Harris, testified as follows:

DIRECT EXAMINATION.

By Mr. Davenport:

Q. Will you state your name, please, for the Court Reporter.

A. My name is Edward I. Hardy.

* * * * *

Q. What is your business?

A. I am a Certified Public Accountant.

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Q. Did you or your firm do the accounting work for Dairy Queen of Virginia, Inc., for 1956 through 1958 at the time it was owned by Messrs. Harris and Ganaway?

A. Yes, during the time of their ownership. I am not positive about those dates. I think it began with the fiscal year ended February 28, 1957 and continued through the fiscal year at the end of February in 1960.

Q. In the meantime, did the ownership of Dairy Queen of Virginia change hands?

A. Yes, it did.

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Q. Did you have any part in—strike that. Were you present at any time during negotiations with reference to the sale of the business in December, 1958?

A. I was present on two occasions, the first of which was what must have been the last Sunday of the year 1958, although I do not recall that any negotiations took place in my presence on that day. The second—

Eward I. Hardy.

* * * * *

Q. When was the next time you saw them?

A. The next day, Monday.

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Q. Do you remember how you happened to go to that office?

A. Yes. As well as I recall, Mr. Vick called me, knowing that the general ledger of the corporation was in our office, and asked me if I would bring it to the office, which I did.

Q. And when you got to the office, what did you do then, if anything?

A. Very little. I, of course, delivered the general ledger and answered any questions that were put to me, then reviewed with the sellers and the buyer certain amounts of cash that were to be left in the business. That was about the substance of it.

Q. Did you talk to Mr. Dunham, who was the buyer?

A. Very briefly, and very casually.

Q. Did he ask you any questions?

A. I am sure he did. I think they were so casual I can't recall what they were.

Q. Did you at any time during that conversation ask him whether or not he wanted any information?

page 359 } A. I can't say that I directly suggested that to him.

Q. Did anyone else suggest it to him in your presence, as far as you recall?

A. Well, the impression was that my instructions were—I can't give you the wording—but my instructions were to answer any questions Mr. Dunham might pose to me.

Q. Did he make any response to that?

A. I recall that he took the general ledger and I more or less stood over his shoulder for a very short time and answered several, I guess you would call them, perfunctory questions.

Q. So far as you could determine, was there any effort made to, or was an effort made, to reveal the fact concerning the finances of the business?

A. My impression was definitely that anything he wanted to know, he could know.

W. L. Harris.

Q. Mr. Hardy, do you recall what was going on in Mr. Vick's office when you arrived, with reference to what appeared to be the status of the negotiations for this purchase and sale?

A. Well, again calling on my memory for about two and a half years back, my impression is that the deal, the transaction, had, in essence, been consummated. I seem to recall—

Q. Why?

page 360 } A. I seem to recall that Mr. Vick's secretary was then in process of drawing what must have been the final legal document for the transaction.

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W. L. HARRIS,
a Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Cogar:

Q. State your name to the Reporter.

A. W. L. Harris.

* * * * *

Q. Where do you live?

A. Wilmington, North Carolina.

* * * * *

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Q. How many stores were there when you took over?

A. When we took over there were 29 stores, if I remember correctly; four or five of them were on the low volume side. We got it up to 31. I think there were 30 stores in operation in 1958.

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W. L. Harris.

Q. Now, Mr. Harris, tell us about this mix profit which you have heard discussed here, how it originated and how it was handled?

A. Well, the mix profit came about—we had heard or it had been inferred that possibly—when we started to make arrangements with the companies, we knew there was going to be some cost for the additional service, the service of furnishing mix to the stores has nothing to do with the contract of using Dairy Queen name and the freezers; that is, an additional service and probably the best service. I think it is done as well in this state as any state I know of. We make contracts with one or more dairies, we guarantee to them the payment of the bills which the dairies like very much and by assuring them of having a route or area that they can furnish a volume of mix, we have been able to get some fairly good mix prices in the course of the years. The cost of administering that service is more than the Dairy Queen of Virginia can afford because the Dairy Queen business is basically a franchise business, that is where you get your money to operator from and everything else on the franchise side of it. This is a service.

Q. Was it a service you were obligated to render?

A. The service we are obligated to render was to permit them to use the machines in the Dairy Queen name.

Q. That is what you got the thirty-five cents page 370 } for?

A. Yes. This is in addition, but in good business you have got to do a little more than just what you are called for to increase your business, so we did this and we charge, in some instances, a penny or more. I don't know exactly, I can't pinpoint how much we charged from each dairy, but it came out an even figure and at the end of the year, we kept that account separate. At the end of the year, the mix profit, we charged certain accounts to it, such as wholesale prices, which is the only wholesale thing we bought—wholesale taxes, I mean, bookkeeping and other legitimate expenses were charged to it and the profit derived from that, at the end of the first year's operation, was told to the operators at their state meeting and they were asked if they wanted it in cash or would they prefer putting it into an advertising fund, meaning the two cents fund, the two cents per gallon we explained to them. They voted that they preferred it in the advertising fund. However, some several of the stores took it in cash which was agreeable with us.

W. L. Harris.

Q. How did you determine what you would keep and what you would give back to the operators?

A. We didn't keep anything.

Q. I mean what you did not—how did you determine what was not refundable?

page 371 } A. Herbert was instructed to consult with the auditor about what were the legitimate expenses for this service, and after consultation with the CPA that was determined these were legitimate expenses and what should be charged against the account, and the remainder of the money was the profit. Now, in the case of 1958—

Q. What did you do with the profit?

A. The profit was, as I just stated a minute ago, was offered—the stores were told about it at their first meeting under our supervision and were asked if they wanted it in cash or did they prefer putting it in the advertising fund along with the two cents, making it at that particular year, profit, 10.007 cents, I think, per gallon.

Q. Let me hand you this memorandum not addressed to anyone, dated November 17, 1956 and ask if you can identify that?

A. Yes. We selected a group of operators in the state for a consultation on advertising for the following year, next year, 1957, and we discussed—that is when we decided on the two cents and then we found that it was related to some of them that very probably we would have a mix profit at the end of the year and, if so, we wanted it to go back to them. That was prior to the announcement at the meeting, now.

Q. To whom did this go?

page 372 } A. That went to the advertising group, I think.

Q. I want to ask you to read the third paragraph of that letter to the Court.

A. (Reading) "We would like to see this money put into additional advertising for each store, but the money does not belong to us; therefore it will be up to the stores as a group, whatever is decided we will agree." Incidentally, this letter was written by Mr. Morrison.

Q. What is it when you say, "This money does not belong to us"? Is this the mix profit?

A. I meant the profit from the mix over the up-charge, over the year's additional charge. I am sure that is the way Herbert interpreted that.

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W. L. Harris.

Q. Now, sir, you have heard other testimony
page 373 } here concerning the volume rebate. I understand
that is something different from the mix profit we
have been talking about. What is volume rebate and how
did it come about?

A. In 1958, Herbert, in making his negotiations for mix—
part of this I will have to refer to as my impression, but
I think my impressions are pretty much correct. In negotia-
ting for mix for the 1958 season, he contacted a dairy in
Richmond, Pet Ice Cream and Milk Company, and was able
to show them the fact that they could bill to us direct and be
assured of getting paid weekly and, incidentally, all bills, as
far as I know, were discounted or paid immediately during
the three years we were in operation; that he would be
entitled to a volume rebate for the total volume used from
that dairy. Now, I think in 1958 we dealt with four dairies,
I think it was Swift, Pet, the one in Richmond, and Alexan-
dria Dairy. He was able to get a volume rebate for the first
time from any dairy in that year. He got it from Pet and, I
believe, the Richmond store. He advised us of his good
negotiations and he later said that the checks were coming
in and he would advise to keep it separately, that he didn't
know how we would handle it, just as we weren't positive
what we were going to do with the mix profit and, actually,
it was never decided by Mr. Morrison or Mr. Ganaway or
myself definitely as to what would be done with it. We hadn't
had that problem prior—not problem, but that
page 374 } good luck prior to that.

Q. You didn't have a volume rebate in 1956?

A. Or '57.

Q. Or '57?

A. To my knowledge.

Q. But Mr. Morrison negotiated it for the calendar year
1958? He reported it to you?

Mr. Williams: Calendar or fiscal?

Mr. Cogar: Calendar.

A. He reported that he had made the contract. I never
did know exactly what the background was as to how many
gallons and whatnot. I never saw the negotiations.

page 375 }

W. L. Harris.

Q. Mr. Harris, when this was negotiated, this volume rebate in 1958, what effect did that have, so far as cost of mix to the operator in comparison to what he had paid the year before?

A. It certainly was not any higher. If anything, it was a little cheaper because we were always trying—so long as we kept the quality right and it was a quality mix—it did not increase the cost to the operator. Now, it is shown in the records as to what he paid for mix in 1947 and '58 and I imagine—

Q. You mean '57 and '58?

A. '57 and '58. You could see what the cost is but I am quite sure he made a good deal. I feel certain, although most things were going up. I don't think that the mix cost him any more. I am inclined to think less.

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Q. During the time that you and Mr. Ganaway page 376 } owned Dairy Queen of Virginia, did you ever have any changes in management of stores, or was it a perfectly constant situation for three years?

A. That is true. I found that out the first couple of years I was in the business. You always have—it may be in the form of a change of ownership of a store or it may be that a store has picked a wrong location and his volume drops, and he actually should be out of business and we have change of ownership every year, practically, and for various reasons the stores or number of stores fluctuate. If I recall correctly, in a memorandum from Herbert, this has been from memory, in 1957 we had five or six stores to change hands. I think we did open up one or two stores.

* * * * *

Q. You say that you got a memorandum from Herbert about changes?

A. Oh, in a note or a little piece of paper.

Mr. Williams: Do I understand that a lot of these loose documents that are not signed came from Herbert?

Mr. Cogar: So far as I know, this is the only one that wasn't signed. I will ask him.
page 377 } Mr. Williams: You didn't ask Herbert yesterday. I was wondering wouldn't that have been the best way to prove it?

W. L. Harris.

The Witness: I will say this is his handwriting. I can't swear that it is, but I will state categorically that it is his handwriting and it came from him.

By Mr. Cogar:

Q. What is this memorandum?

A. It was a memorandum that could have been in an envelope with other correspondence or by itself or could have been handed to me up here on one of my trips.

Q. Who?

A. Mr. Herbert Morrison.

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page 378 }

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Q. I was asking you about complaints of the
page 379 } stores in 1957 and '58. Specifically, I will ask
you this. Did you know of the difficulty in Roanoke?

A. Well, Roanoke, that has been trouble since we had it in this respect; it was sold to us by Mr. Gowdey along with Staunton, as being in excellent shape, good shape. We got an operator in there and he wasn't a very good one. We did have to spend some money on the store and I think there is a record in the files that—oh, we could have spent four, five, or six hundred dollars on the store. I was never too concerned about it because it had a very favorable lease and we always felt that we could have sold the lease for a profit, or leased it out at a profit. From a managerial standpoint it may have looked like a bad thing to have bought it from Mr. Gowdey originally, but we never felt too bad about that store because we felt we had a very good possibility of selling the lease.

Q. Was there an independent operator in that store, Mr. Harris, or did you own that store?

A. Well, we leased it. Now, I don't want to be too technical on this because Herbert did the negotiations on it. I do know at one time he had some trouble with an operator up there and if I recall, in 1958 he may have had some trouble about some buildings, which could be possible. I can't be specific about this. I do know that we were approached about

W. L. Harris.

page 380 } spending a very sizable amount of money on
that store and giving it to somebody else, and I
didn't approve of that policy.

Q. Giving it to somebody else?

A. Yes.

Q. What about John Ring in Danville?

A. What about him?

Q. Had he raised any complaint to you? Did you know of any difficulty with him?

A. Well, John had been one of Mr. Gowdey's very special operators.

Q. What, sir? He had been what? One of Mr. Gowdey's—

A. I think so. I think Mr. Gowdey was very fond of John and I met him almost immediately the time we got in the business and, oh, he griped a little, right much, and fussed about the advertising or rebate a little bit at each meeting and we would usually sit down and drink a coca cola and talk about it. It was usually the same thing over again.

Q. He knew about it?

A. Just normal, healthy gripes, I interpreted them as.

Q. Had he ever threatened to, made a serious threat to close his business?

A. Not to me. As a matter of fact, he was do-
page 381 } ing pretty good, I thought.

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page 383 }

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Q. Mr. Harris, I want to get to Mrs. Gowdey here now. What was Mrs. Gowdey's interest in Dairy Queen of Virginia after you bought it, total extent of it?

A. What was Mrs. Gowdey's interest in Dairy Queen of Virginia after we bought it?

Q. What financial interest did she have in it?

A. Mr. Gowdey sold the franchise rights to the State of Virginia to Dairy Queen of Virginia, Inc. After Mr. Gowdey's death, I assumed that Mrs. Gowdey was heir.

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page 384 }

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W. L. Harris.

Q. What payment did Mrs. Gowdey receive
page 385 } from Dairy Queen of Virginia? What was she to
receive?

A. Seven cents per gallon.

Q. For how long?

A. Until the indebtedness of the company was paid to
her which, I believe, the original deal was for \$145,000, \$10,
000 cash, until \$135,000 had been paid off and there was
some interest charge that went with it.

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page 386 }

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Q. Why did your offer to buy Mr. Ganaway's stock never
come to consummation?

A. Why did my offer to buy Mr. Ganaway's stock, why it
was not completed?

Q. Yes, sir.

A. Approximately the same time Herbert Morrison re-
signed as State Manager, we had this letter here
page 387 } from Mrs. Gowdey which I thought satisfied her in
every sense, that we were doing a very nice job,
designating the thousand dollars we spent for advertising.
With Herbert not here as a State Manager, with not being
able to leave Wilmington to come here as a State Manager,
and with my firm conviction that for the good of the opera-
tors of the State of Virginia they should have a Manager-
Owner on the spot or living here in Richmond, I thought it
best for me not to buy but try to locate a good—such a man.

Q. When was that decision made?

A. That decision was made by me the night of the meeting
with Mrs. Gowdey, before Mr. Ganaway and I left town that
night.

* * * * *

Q. Before I get to this negotiation, at least
page 388 } in chronology, I passed over one thing. You
heard Herbert Morrison testify yesterday about
his September meeting with you in Palm Beach, September,
1958?

A. Oh, yes, September, 1958, yes.

W. L. Harris.

Q. To what extent did he relay to you complaints of operators or dissension or any matter of that kind?

A. Well, that being in his realm, I don't recall him referring to dissension of operators in the state. It was more a policy meeting of such as the grill thing, and he did mention something about he thought possibly the company could buy him a car. I don't want to be too specific in that. I know he did say something that I very heartily disagreed with and he wanted to raise Harvey Welborn's salary to \$5,000 and I did not like any part of that.

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page 390 }

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Q. Did Mr. Dunham see these monthly statements for your three years of operation?

page 391 } A. Whether he saw the originals or not, but he was shown my copies.

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page 393 }

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Q. What were you attempting to arrive at in these computations?

A. I wanted to know what Mr. Morrison's service cost, or salary cost was for that month, both per gallon and in dollars and cents. The Gowdey payment was .07¢, we knew, but I wanted to know what it was in dollars and cents. The royalty to Artik in this particular case, it is two and a half cents, deducting a cent and a half that we normally get back from them, and the dues at that particular time for the Development Company were 30.42 and that is the amount of money and I derived—in these figures I derive as what is known, I term as gross from royalty in that we are basically in a royalty business. That is where we either make our money or don't. I determine the gross from royalty. I later broke it down—

Q. As I understand this, you were taking your .35¢ royalty and deducting from it each month what you had to pay Her-

W. L. Harris.

bert Morrison, what you had to pay the Gowdey estate, what
 you had to pay Artik, and what you had to pay the
 page 394 } Development Company, and that gave you gross
 royalty which is what you had left out of your
 .35¢?

A. You are correct, other than it is an average of what
 the royalty is for that month, rather than .35¢ royalty, be-
 cause the Richmond stores only paid .19¢; the other stores
 paid .35¢, so the average royalty for that month, which in
 the month of November was 30.81.

Q. Did you show and discuss with Mr. Dunham these
 monthly statements for the year 1958?

A. Both Sunday and Monday and subsequent times and
 pointed out that what he could expect to operate his business
 on would be his total royalty, deducting expenses, and he
 could take Herbert's remuneration and the gross from royalty
 and that was what he would have to operate his business
 on.

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page 396 }

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Q. With all the records in that office, you naturally didn't
 have time to discuss all of them with Mr. Dunham. Did
 you discuss in detail some records more than others?

A. I could summarize all this up. I made it known to Mr.
 Dunham that all the records that I knew pertaining to the
 operation of the Dairy Queen of Virginia, other than what
 Mr. Ed Hardy or the CPA had, were in this office, to my
 knowledge they were all in there. I mean, to the best of my
 knowledge, they were all in this office and that he had access
 to them and if he wanted any comments about them and
 anything pointed out, I would be glad.

Q. Were these records discussed specifically?
 page 397 } A. I stated that they were not only Sunday, but
 the next day.

Q. Following the adjournment of that meeting, you next
 met on Sunday?

A. In Mr. Howard Vick's office.

* * * * *

W. L. Harris.

Q. Did Mr. Dunham look at the books at that time?

A. Mr. Hardy brought him some books and it was made known to Mr. Dunham that Mr. Hardy was there to answer any questions and any record he might want to see. As to what he looked at or what page or what ledger sheet, or what-not, I don't know, but he had them available and looked at them.

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page 399 }

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CROSS EXAMINATION.

By Mr. Williams:

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Q. Now, at the time that you first met with Mr. Dunham in Richmond on December 28, 1958, did you show him a copy of the letter that had been sent to you by Wilbur Allen, who represented Mrs. Gowdey?

A. No, sir.

Q. You received a copy of that letter, did you not?

A. Yes.

Q. And I think it is your copy that was put in page 400 } evidence?

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Q. Now, you sold your notes to your *borther*-in-law, Mr. Newell on June 30, 1959. Isn't that correct?

A. I think so.

Q. Now, prior to that time you had had some conversations with Mr. Dunham about his dissatisfaction with what the books showed on the Dairy Queen of Virginia, isn't that correct?

A. I had had some conversation with Mr. Dunham pertain-

W. L. Harris.

ing to claiming *hardships*, not quite as much volume as he had anticipated.

Q. And he was claiming that that you couldn't get \$25,000 out of the business.

A. I have never talked to him in realms of \$25,000 or \$35,000, specific money. He claimed that he
page 404 } wasn't getting—I can't say that he has made any claims at all. We have had some discussion and he said the volume isn't what he probably anticipated. I don't want to be specific with that unless I can remember when and where I talked to him. I don't want to just make a vague statement of that kind because I don't think it would be a constructive statement.

Q. You are being very successful at not being specific, but go ahead.

A. I think I have answered your question.

Q. Did you tell your brother-in-law at the time you gave him a 40 per cent discount on these notes that you were having this trouble with Mr. Dunham who was the maker of the notes?

A. What is your interpretation? You want me to interpret the word "trouble"?

Q. I am asking you did you tell your brother-in-law, Mr. Newell, when you gave him a 40 per cent discount on these notes, that you were having trouble with Mr. Dunham and he would have to watch out?

A. Who watch out? Mr. Dunham?

Q. Your brother-in-law, on collecting the notes?

A. My dealings with anybody that I have ever known, I don't think I have to tell them to watch out. What do you want me to tell you that I told my brother-in-law?

Q. You gave him a 40 per cent discount on notes—

A. I sold eight notes which extended over a
page 405 } four year period to my brother-in-law for \$6,000.

Q. One of which had just about matured at the time of the sale?

A. None of them were matured at the time I sold them, I don't think.

Q. Did they mature sometime in August of 1959?

A. I believe that first date is August 15; you probably have the notes on that.

Q. And you made the sale on June 30, 1959. Is that correct?

A. As far as I remember.

Q. So that note had the month of July and fifteen days

W. L. Harris.

of August, which was six weeks to go to maturity. Isn't that correct?

A. Whatever time, the date you designate—

Q. And for holding the notes for six weeks, Mr. Newell was going to get a 40 per cent profit?

A. I don't think \$2500 is 40 per cent of \$6,000. You are overlooking the fact that these notes extended over a four year period and I needed \$6,000. I needed some money and I was able to sell the notes to Mr. Newell for \$6,000.

Q. Now, at this meeting at the summit in Florida in September of 1959, did your State Manager, Mr. Morrison, call to your attention the fact that a great deal of unrest had developed among the operators here in Virginia and that the business was really in trouble?

A. At the meeting that we had in Florida, the summit, Mr. Morrison did not mention any general unrest of the operators.

* * * * *

Q. All right, now. After that meeting in Florida, between the Executive Vice President and the two owners of this business, you and your partner, Mr. Ganaway, then began certain negotiations to sell the business? Isn't that correct?

A. Again, you are emphasizing "negotiated." There was an offer of me to sell my stock, yes, and I subsequently made an offer to buy 50 shares of stock.

Q. And that offer was made after this meeting in Florida?

A. I think I designated that time a little while ago when we said it was decided after the meeting here in Richmond with Mrs. Gowedy; specifically, I definitely thought an Owner-Manager should move to Richmond to operate the business, so that has been answered.

page 407 } Q. No, it hasn't been answered because you met with Mr. Morrison in September in Florida and you didn't hear from Mrs. Gowdey until November 15. In that interim some effort had been made by you and Mr. Ganaway to sell the business. Isn't that correct?

A. Let me get my dates—

Q. In September you met in Florida?

A. Yes. The latter part of November here—

Mr. Cogar: Could the witness have the exhibits?

W. L. Harris.

A. I think they are self-explanatory, aren't they?

(Documents were shown to the witness.)

A. That has been discussed. I don't deny any of that.

By Mr. Williams:

Q. All three of these sales efforts occurred after you met with Mr. Morrison in Florida but before you heard from Mrs. Gowdey's attorney? Look at the dates and answer yes or no.

The Court: Mr. Williams, identify the exhibits.

Mr. Williams: I am referring to Ganaway's Exhibits 3, 4, and 5.

By Mr. Williams:

Q. And you didn't receive any letter from Mr. Morrison saying he was going to resign until about the middle of November of 1958. Isn't that correct:

page 408 } A. That is correct.

Q. So, something occurred at that meeting in Florida between you and Mr. Ganaway and Mr. Morrison that made everybody start a whole lot of activity that owned stock in it, to sell the business. Isn't that correct?

A. You are saying that.

Q. Do you agree or disagree?

A. Not in the manner in which you have said it.

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Q. Now, Mr. Ganaway said—you heard him testify and I believe he said you all agreed to the running of an ad. Is that correct?

A. I am under the impression that he did.

Q. Do you agree or disagree that you decided jointly to run an ad in the Wall Street Journal?

A. Not in the Wall Street Journal; to run an ad.

Q. Was it his decision to run it in the Wall Street Journal or yours?

A. I would have had no objection—I don't know that I specifically agreed to running an ad in the Wall Street Jour-

W. L. Harris.

nal on any specific date. However, I will say I would have had no objection to it if he had consulted me so you can assume that he did.

Q. As I understood his testimony, the ad that was caused to be placed in the Wall Street Journal, representing that there was a business in a Middle Atlantic state showing a gross profit of \$25,000 annual available had been approved by you, is that correct?

A. Not in the terminology of your words. I wouldn't object to him having put that in there.

Q. Now, I hand you the ad and ask you to read it and then tell us whether you approved of the form of that page 410 } ad before it was put in the Wall Street Journal, or whether you delegated to your partner, Mr. Ganaway, the responsibility to run the ad for both of you?

A. May I hear that over again?

Q. Prior to the time that that ad was made to appear, did you approve of it or did you at any time approve of it before it was run? Did you give your partner, Mr. Ganaway, authority to cause that specific ad to be put in there?

A. I don't think I approved any specific ad, meaning that I saw the description before it went in the paper. It was agreed that he should do some advertising and put an ad in the paper. I wouldn't have disagreed if I had seen it, however.

Q. Where did you get the figure of \$25,000?

A. I didn't get the figure.

Q. That was Mr. Ganaway's, I take it?

A. Well, I don't know exactly what you are arriving at, what you are trying to get at right this minute.

Q. You never heard of the figure \$25,000, I take it, then, before the ad appeared in this advertisement in the Wall Street Journal?

A. Of gross profit?

Q. Yes.

A. As stated in that ad?

page 411 } Q. Yes.

A. I don't know that that \$25,000 word, the figure exactly was pinpointed in specific amounts.

Q. What financial records of the Dairy Queen of Virginia, Inc., were you going to rely upon to show a potential buyer that there was annually available a \$25,000 gross profit, so that you could fulfill the ad that you had caused to be run?

A. I didn't cause the ad to be run, I don't think.

Q. Well, your partner did, but what figures did you have

W. L. Harris.

available that would show a profit, a gross profit of \$25,000 annually available?

A. I can't answer that question for one or two reasons. You are asking me to be a CPA and a "whatnot" all at once here. Would you mind stating it over again?

Q. What financial records of the Dairy Queen of Virginia, Incorporated, did you have available to show to a prospective buyer that he could make an annual profit of \$25,000 out of the operation of that business, gross profit?

A. My answer to that is that all records of the Dairy Queen of Virginia, Inc., were available for any prospective buyer if he wished to see them to determine whether he could make \$1.00 or \$25.00 or \$35,000; that would be his discretion to determine what would be made.

Q. Do you recall whether Mr. Dunham asked page 412 } you "Now, show me the \$25,000."

A. He has never asked me to show him any \$25,000.

Q. Never asked you to do that at all?

A. That is right.

Q. Did you undertake to show to Mr. Dunham on your profit and loss statement how he could realize \$25,000 or approximately that figure?

A. I have emphasized to Mr. Dunham the two figures that he could operate the business on. As I have stated before in the monthly statement, that is Mr. Morrison's remuneration and the gross from profit figures which are in the record.

Q. What do those two figures total?

A. They vary from year to year, depending on the amount of mix used.

Q. What did they total in 1957 or '58?

A. They are on record so you can see.

Q. Get the record and read them off.

A. What year, sir?

Q. 1957.

The Court: What exhibit is that, please?

Mr. Williams: Harris Exhibit No. 5.

A. It shows "H. R. Morrison, \$10,427.64, gross profit; \$14,854.21."

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W. L. Harris.

Q. Did you authorize any volume rebate to be paid by Mr. Morrison in 1958 to any operators anywhere in Virginia?

A. Any volume rebate?

Q. Any volume rebate?

A. Did I authorize the payment? No, sir.

Q. Did you hear the gentleman, Mr. Leachman, this morning testify that he received two checks from the Dairy Queen of Virginia in 1958?

A. I heard him say that he did.

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Q. What do those checks show it was for?

A. Advertising allowance, it says here, on both of them. These checks were dated August 18 and September 10, 1958, and were signed by Herbert R. Morrison, shows \$49.61 and \$30.49. One of them is designated as advertising allowance and balance of advertising allowance, which I interpret, if you care to look in the records on advertising allowance for that year, it would verify we did allow a two cents advertising allowance.

* * * * *

Q. Did Mr. Morrison at any time during 1958 and before the sale of this business was made to Mr. Dunham, call to your attention that the Roanoke store which was owned by the Dairy Queen of Virginia, Inc., had been condemned by the Health authorities?

A. He advised me there was some repair—I can't state specifically, but I was advised that there was
page 418 } some repair on a roof that needed to be done
in Roanoke, I believe.

Q. Did you tell Mr. Dunham at the time the sale was consummated that you had a store in Roanoke that was in such a state of disrepair that it may have to close?

A. I did not tell him that. Roanoke was discussed as a store that would have to be something done about it and that the lease was very favorable. That is my general idea of what was commented about that.

W. L. Harris.

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Q. Now, at the time you were meeting in Richmond discussing the sale of this business with Mr. Dunham and specifically while you were in the offices of the Dairy Queen of Virginia, was Mr. Ganaway with you?

A. Did I hear that discussed?

Q. No, I said while you were in Richmond on December 28, 1958, in the offices of the Dairy Queen of Virginia, Inc., was Mr. Ganaway with you?

A. Yes.

Q. And did he stay there during the entire time of your negotiations with Mr. Dunham?

A. In the discussion with Mr. Dunham?

Q. Yes.

A. Or whatever you might call it?

Q. Yes.

A. As far as I know, unless he could have
page 420 } stepped out the room momentarily.

Q. Did you ever hear Mr. Ganaway on that occasion tell Mr. Dunham that he had received from your state operators in Virginia a letter saying that the business had gone to pot?

A. No.

Q. All right. No further questions. Thank you.

REDIRECT EXAMINATION.

By Mr. Cogar:

Q. Concerning this offer of yours to buy Mr. Ganaway's interest in the business, you had offered to buy out Mr. Ganaway for \$25,000?

A. Yes.

Q. And it was in the fall of 1958?

A. Yes.

Q. It is my understanding that you testified that the reason that didn't go through was because Mr. Morrison resigned shortly after that. Is that right?

A. That is correct. That was one of the reasons; that was the major reason.

W. L. Harris.

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page 423 } RE CROSS EXAMINATION.

By Mr. Williams:

Q. As early as April of 1959 did you receive any correspondence from Mr. Dunham claiming that things had been misrepresented to him?

* * * * *

A. I can't say whether I did or not. I wouldn't doubt it because I am quite sure—I can't say categorically I did or didn't. I am sure if Mr. Dunham said I did, I very probably would have received it.

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Q. Do you normally keep your business mail or throw it away?

A. I normally keep right much of it.

Q. I hand you a second letter addressed "Gentlemen," but signed "Ed Dunham," reportedly dated May 14, 1959 and ask you if you received a copy of that letter?

A. I think I do remember receiving a similar letter.

Q. All right. Read it, if you will, and then I will introduce it.

Mr. Cogar: I ask for the materiality of this letter.

Mr. Williams: It relates to the holder in due course, whether he had notice or not. I will follow it up as soon as the letter comes in.

By Mr. Williams:

Q. Read it.

A. (The witness read the letter)

Q. Did you call this letter to the attention of your brother-in-law, Mr. Newell, at the time you gave him a 40 per cent discount on this \$10,000 worth of notes?

W. L. Harris.

A. At the time I sold my notes to Mr. Newell, I did not call his attention to that.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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