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Record No. 4973

In the Supreme Court of Appeals of Virginia at Richmond

LARCHMONT HOMES, INC.

v.

ANNANDALE WATER CO., INC.

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY

RULE 5:12—BRIEFS.

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

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

HOWARD G. TURNER, Clerk.

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

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 4973

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 26th day of November, 1958.

LARCHMONT HOMES, INC., Plaintiff in Error,

against

ANNANDALE WATER CO., INC., Defendant in Error.

From the Circuit Court of Fairfax County

Upon the petition of Larchmont Homes, Inc., a writ of error is awarded it to a judgment rendered by the Circuit Court of Fairfax County on the 24th day of July, 1958, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and Annandale Water Co., Inc., was defendant; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

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JUDGMENT FOR DEFENDANT ON MOTION TO STRIKE.

This day again came the Parties, by counsel, and thereupon came a jury, who were sworn to well and truly try the issue joined, and having fully heard the evidence, by motion of said Defendant, by counsel, the Court does strike out the said Plaintiff's evidence, to which action of the Court, said Plaintiff, by counsel, duly excepts, and thereupon the jury returned its verdict in the following words, to-wit: "We, the jury, find for the Defendant." Whereupon it is considered by the Court, that said Plaintiff take nothing by its suit herein and that said Defendant go hence without day and recover against the said Plaintiff its costs about its defense in its behalf expended, to all of which said Plaintiff, by counsel, duly excepts.

July 24th 1958.

HARRY L. CARRICO, Judge.

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NOTICE OF APPEAL; ASSIGNMENTS OF ERROR; NOTICE OF TENDER OF TRANSCRIPT.

Plaintiff appeals from the final judgment of this Court and assigns, as error, that the Court erred in the following matters:

1. Admitting certain evidence and excluding certain evidence, over Plaintiff's objection.
2. Reversing its own ruling on the admissability of certain exhibits.

3. Ruling, as a matter of law, that a deed of trust was a conveyance, as the latter word was used in a contract upon which the action was based.
4. Ruling, as a matter of law, that a parcel of land through which ran a water main was not "connected to the water main," as provided in said contract.
5. Ruling that Paragraph 5 of said contract was nullified in its entirety by reason of the failure of certain conditions.
6. Striking Plaintiff's evidence.
7. Instructing the jury to return a verdict in Defendant's favor.

The transcript of testimony will be tendered to the Court on the 11th day of August, 1958, at about 10 A. M.?

NATHAN L. SILBERBERG
Attorney for Plaintiff
1001 Pennsylvania Building
Washington 4, D. C.

Filed Aug. 11, 1958.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court of
Fairfax County, Va.

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SIMON HIRSHMAN,
was called as a witness and after being first duly sworn was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Silberberg:
Q. Please state your name.
A. Simon Hirshman.
Q. Where do you reside, sir?
A. 2601 Woodley Place, Northwest, Washington, D. C., Apartment 512.

Simon Hirshman.

Q. What is your business or profession?
A. I am a member of the bar of the District of Columbia and a practicing lawyer.
Q. For what period of time have you practiced law?
A. Since 1921.
Q. Directing your attention to the year 1947, were you at that time connected with a Columbia Pines, Incorporated?
A. I was.
Q. In what capacity, sir?
A. I was secretary, member of the board of directors, a stockholder.

Mr. Silberberg: May this be marked as plaintiff's Exhibit No. 1 for identification?

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Q. Mr. Hirshman, I show you a document of six or seven pages, marked Plaintiff's Exhibit No. 1 for identification. I ask you to look at it and then look at the signature, sir.
A. This document bears my signature, as secretary of the corporate seal of Columbia Pines, attached, and the signature, which are Joel S. Kaufmann, who was then president of the company, and Sidney Weinberg who signs as president and treasurer.
Q. Do you recall whether this document was prepared by you or presented to you and the other gentlemen connected with Columbia Pines for execution?
A. It was not prepared by me.
Q. Or anyone connected with Columbia Pines, to the best of your knowledge?
A. I have no recollection of who prepared it at all.

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Q. I show you now, Mr. Hirshman, a one-page document, typewritten, bearing a typewritten letterhead, Columbia

Simon Hirshman.

Pines, Incorporated, dated May 21, 1951, and ask you if you can identify the portion thereof down through the signature, of a person as secretary—not the last four lines but other than that.

A. Yes, this bears my signature as secretary and bears the signature of Mr. Joel S. Kaufmann as president, whose signature I recognize, and this was executed by both of us and delivered to the person addressed, Irving Berman and George Hurwitz.

Q. Directing your attention to the time indicated by plaintiff's Exhibit No. 3, namely the month of May, 1951, can you tell the Court and jury who were the owners, the stockholders in Columbia Pines, Incorporated at that time?

A. To the best of my recollection, the stockholders were Joel S. Kaufmann, his two brothers, Robert D. and Aaron P. Kaufmann and myself. The officers were Joel S. Kaufmann as president. I was secretary; and I have no independent recollection of who the other officers were.

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Vol. I.
page 40 } Q. Will you tell the Court whether there was any connection between A & B Land Company and Columbia Pines, Incorporated?

A. Same stockholders of the Columbia Pines, Incorporated, same officers were officers and stockholders with the exception of Weinberg, which was the reason why A & B Land Company was formed, was a foreclosure, A & B Land Company took title to all the land formerly owned by Columbia Pines; that's how A & B Land got into the picture.

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Q. Now, can you recall whether there was any meeting

Simon Hirshman.

of the stockholders of Columbia Pines, Incorporated, incident to the execution of the document which you have identified as Plaintiff's Exhibit No. 3?

A. Well, I have no independent recollection of the meeting of stockholders. Mr. Joel Kauffman was in an office; I was in an office in the same building. We were operating a mercantile establishment, a chain of jewelry stores throughout the country. Mr. Harris was his father-in-law. They were in there day in and day out. They were meeting very informally. We met in an office and whatever had to be done, corporate-wise, by way of dissolution or by way of meetings, everybody was present, but without the minute books and without records in front of me, I couldn't positively state that there was a meeting of stockholders, that there was a formal meeting of stockholders.

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Q. Mr. Hirshman, I show you a document which has been marked Plaintiff's Exhibit No. 4 for identification and would ask you to tell the jury just briefly what that document is.

Vol. I. page 49 } A. This appears to be a certified copy of a certificate of dissolution of Columbia Pines, Incorporated, dated July 25, 1951.

Q. Which was approximately two months after the letter that you have identified, addressed by Columbia Pines, to Mr. Berman and Mr. Hurwitz?

A. That's right.

Q. Will you tell the Court and jury what Columbia Pines was engaged in doing in the spring of 1951?

A. In the spring of 1951, Columbia Pines was engaged in the business of dissolving itself.

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Q. And what assets did it have?

A. It had no assets left at that time except whatever rights were contained in this assignment.

Q. What liabilities did it have?

A. It had no liabilities because they had all been guaranteed by the Kaufmann family and paid off by the Kaufmann family.

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A. That's correct.

Q. Now, Mr. Hirshman, the first part of this document in evidence, dated May 21, 1951, states, "Our affiliated A & B Land Corporation is turning over to you
Vol. I. the remainder of Columbia Pines so that you may
page 84 } carry out your subdivision development."

Would you explain to the court and jury who A & B Land Corporation was?

A. The first trust on Columbia Pines which was the land owned by Columbia Pines, Incorporated, was held by a corporation known as the Kaufmann-Goldnamer Corporation, a Delaware Corporation, in which Mr. Joel Kaufmann and his family had a half interest. They had guaranteed to Kaufmann-Goldnamer Company the payment of that mortgage.

Q. Who had guaranteed?

A. The Kaufmann family had guaranteed the payment of that mortgage as well as the payment of all liabilities of Columbia Pines.

In order to make a clean transfer of the thing and dissolve the corporation without a lot of notifying creditors and having a lot of other steps, we foreclosed. When I say "we foreclosed," Kaufmann-Goldnamer foreclosed under the first deed of trust they deeded the property to A & B Land Corporation, which was then, or which then consisted of the same identical stockholders and in the same proportions as Columbia Pines, and the Kaufmann family then paid off Kaufmann-Goldnamer Company and paid off all the creditors their obligations.

Simon Hirshman.

Q. By whom was the land in question then sold to Mr. Berman and Mr. Hurwitz?

Vol. I.
page 85 } A. The A & B Land Company Corporation, sold it to Mr. Berman and Mr. Hurwitz.

Q. Can you tell the Court about when that occurred with reference to the document that you have?

A. I have no independent recollection. Probably before this time, but I would have to see the contract of sale. I don't have it.

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Q. If you can recall, Mr. Hirshman, were there

Vol. I. any other documents or anything else that were
page 87 } turned over by Columbia Pines to Mr. Berman and Mr. Hurwitz at or about the same time?

A. I think some subdivision plats and things of that kind which showed the nature of what the development was, which was all in accordance with our oral understanding at the time they signed the contract to purchase the land, we turned over to them all the plans we had, all the subdivision layouts, and the assignment of whatever right we had against the Annandale Water Company.

Mr. Silberberg: Thank you, sir.
You may inquire.

CROSS EXAMINATION.

By Mr. Donovan:

Q. Mr. Hirshman, I believe you stated that you had no independent recollection as to who, in the first instance, prepared the contract which is referred to as plaintiff's Exhibit No. 1.

A. May I see which is plaintiff's Exhibit 1?
That's correct.

Q. Now, as to plaintiff's Exhibit No. 3, do you have any independent recollection as to who prepared that?

A. No.

Simon Hirshman.

Q. And as to plaintiff's Exhibit No. 5, do you have any independent recollection as to that?
A. No.

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Q. Was there any land to be turned over?
A. No; that had been deeded prior to that time.
Q. Had been deeded?
A. I think they had; I am not sure.
Q. Had been deeded by whom?
A. By A & B Land Company to—by the lot of corporations here, by, what's that—
Q. Would you like to see that?
A. By the A & B Land Company, A & B Land Corporation had deeded the land to Hurwitz and what-do-you-call-it, their assigns.
Q. Berman?
A. That's right.
Q. Prior to the execution of this letter on May 21, 1951?
A. I think so.

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Q. Mr. Hirshman, this letter, signed by Mr. Kaufmann, representing himself as president of Columbia Pines, Incorporated, also says: In consideration with your proceeding with such development, we hereby assign and transfer to you all our rights in and to a contract with James A. McWhorter, dated November 15, 1947, and dealing with refunds for water main installations.

Are you aware of what development is meant by the language in that paragraph which says, "such development"?

A. Yes, the houses that Berman and Hurwitz or their assigns were going to build on the land that they had purchased

from A & B Land Corporation in Columbia Pines, Annandale.

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The Court: The question is: Doesn't the document say that the consideration for it is the development of land by the addressees of that portion of Columbia Pines that was deeded to them by A & B Land Corporation?

The Witness: The document says the consideration of your proceeding with such development, we hereby assign and transfer to you all our rights in and to a contract with James A. McWhorter, dated November 15, 1947, and dealing with refunds for water main installations.

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JOEL S. KAUFMANN,
was called as a witness and after being first duly sworn was examined and testified as follows:

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Q. What is the nature of your business?
A. I am the treasurer of the Kay Jewelry Stores.
Q. Where is their principal office?
A. 1328 New York Avenue.
Q. Prior to that, where was it located?
A. 702 H Street, Northwest.
Q. Directing your attention to the year 1947, did you

Joel S. Kaufmann.

at that time have any connection with a corporation called Columbia Pines, Incorporated?

A. I did.

Q. What was your capacity?

A. I was president of it.

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Q. Now, in May of 1951, sir, the date showing on plaintiff's Exhibit 3, what was the business, what, if anything, was the business of Columbia Pines, Incorporated, at that time?

A. At that time we had sold the property to Mr. Berman and Mr. Hurwitz.

Q. And was Columbia Pines engaged in any business activities at that time?

A. No, we had the ground and that was it.

Q. You had had it?

Vol. I.
page 102 } A. We had had the ground.

Q. Do you know of an A & B Land Corporation?

A. Yes, I do.

Q. What was that corporation, sir?

A. The A & B Land Corporation took over the property of Columbia Pines.

Q. Was there any relationship by stockholders, directors, or officers, between A & B Land Corporation and Columbia Pines, Incorporated?

A. The stockholders were primarily the same.

Q. And the officers and the directors?

A. I was president of both companies, if I recall.

Q. Do you recall to whom you sold or were selling the land that you just described?

A. I was selling it to Mr. Berman and Mr. Hurwitz.

Q. Aside from the land, was there anything else that you were selling to them at that time?

A. We assigned all the plans of Columbia Pines, the architects' prints, all the papers, whatever assets we had were transferred to them.

Q. Was that all under the same deal that you made with Mr. Berman and Mr. Hurwitz?
A. Yes.

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JAMES A. McWHORTER,
was called as a witness and after being first duly sworn, was examined and testified as follows:

* * * * *

Q. What is your business?
A. I suppose you would say my primary business is operating the Annandale Water Company.
Q. What is your capacity in it?
A. I am president.
Q. And for how long have you been president?
A. Since the company was formed.
Q. Which was when?
A. The company was chartered in 1946 and officially went into operation in 1948.

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Q. You have been president throughout its entire history?
A. Yes.
Q. I show you, Mr. McWhorter, a document received—pardon me—an adjunct to a document. This is marked plaintiff's Exhibit No. 2 for identification, and I would ask you whether you can identify that document.
A. May I look at the document to which it is attached?
Q Certainly. Look at the whole thing if you will, please.
A. The page to which you refer is an assignment of a contract dated November 15, 1947, by and between Columbia Pines, Incorporated, and/or Sidney Weinberg, who were parties of the first part and James A. McWhorter, who was the party of the second part.
Q. Did you execute that assignment?
A. Yes.
Q. Who is the witness on the execution, please?

James A. McWhorter.

A. Senator John A. K. Donovan.
Q. Who was your attorney at the time?
A That's correct.

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Mr. Donovan: Do you have a map, Mr. McWhorter, of the area which would indicate it as of 1951 or a map of the area not showing outlines of houses?
The Witness: Yes.
Mr. Donovan: Do you have it here?
The Witness: I believe so.
Mr. Donovan: I will be glad to make it available.
Mr. Silberberg: I don't understand how that goes to the admissibility of what has been offered in evidence. There may be other maps and undoubtedly there are, but we are concerned only with that which has been tendered in evidence.

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Q. Would you step down and produce for the jury the map of Columbia Pines Subdivision which you have mentioned to Mr. Donovan?
A. Yes. This is one that was in the Timberlane case.

The Court: Go ahead and use it if that is the one you want.

Vol. I. page 128 } Mr. Silberberg: May this be marked as plaintiff's Exhibit No. 7 for identification?
The Court: No. 7 for identification.

(The document referred to was marked for identification as Plaintiff's Exhibit No. 7.)

James A. McWhorter.

By Mr. Silberberg:

Q. I show you now, Mr. McWhorter, the map which you have produced and ask you by whom it was prepared?

A. That was prepared by my survey office under my direction.

Q. This was done when?

A. This was done in 1948.

Q. What is this plat designed to represent, sir?

A. It shows all of the land which was owned by Columbia Pines, Incorporated. It shows sections 1, 2, and 3 of Columbia Pines Subdivision, including the houses which were built or supposed to be built in those three sections.

Q. Who put the house locations on the lot?

A. That was done in my office under my direction.

Q. Were the houses then on those lots?

A. The legend will show you that the ones in heavy print were existing and the ones in light print were proposed.

Q. Is it—am I correct in my understanding that the overall outline is intended to show the boundaries of the entire Columbia Pike Subdivision as it stood?

The Court: Columbia Pines.

Vol. I.
page 129 } By Mr. Silberberg:

Q. Columbia Pines, excuse me,—as it stood in May of 1948?

A. That is correct.

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Vol. I.
page 131 } Q. Do I correctly understand, sir, that the land then owned by Columbia Pines, Incorporated, were all of the lands embraced within the outer outlines of your plat except such individual houses as they may have sold off at that time, or by that time?

A. Are you speaking of Columbia Pines Corporation?

Q. Columbia Pines, Incorporated; that was what you were referring to?

A. Yes, they owned all of the property that—

Q. Now, you have identified this small section as being owned by your company at that time?

A. That was a pumping station.

Q. Was there a well?

A. There was a well.

Q. Would you indicate well and pumping station there, sir?

A. Yes.

Q. From whom did you—I mean the Annandale Water Company—acquire the two locations you have indicated, well pumping station and the tower site?

A. From Columbia Pines, Incorporated.

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Q. Would you resume the stand, please?

Directing your attention once again, sir, to the plaintiff's Exhibits 1 and 2 which you have identified as coming from the files of the Annandale Water Company, would you look at them again and tell the Court and the jury by whom the two documents were prepared?

A. Were prepared?

Q. Yes, sir.

A. The first document, which is the contract referred to, containing five pages, I am not certain as to who made the final draft of that contract.

Q. I am sorry; I didn't hear the latter part of your answer.

A. I am not certain who made the final draft of that contract.

Q. Well, I am asking if you know.

A. I do not know, then.

As to the second part, I believe that was prepared by Senator Donovan.

Vol. I.
page 135 } Q. Now, may I refresh your recollection, sir, as to the basic contract, the one of five or six pages, by calling your attention to your testimony on a prior instance when I asked you:

"Now, my question, sir, who prepared the physical docu-

ment itself which you have identified as having been signed?"

You answered at that time:

"I do not know."

I asked you:

"You don't know?"

And you answered:

"I believe that was prepared in my office but I can't be positive of it."

And does that refresh your recollection as to who prepared it or where it was prepared?
A. My answer today is the same. I am not sure.
Q. Is it your belief that it was prepared in your office?
A. It could have been, but then again it could have been prepared in the Columbia Pines field office.
Q. You mean Columbia Pines, Incorporated?
A. Yes.
Q. Well, now, to refresh your recollection on that score, I asked you on that same occasion, did I not:

Vol. I.
page 136 } "It was not prepared by Columbia Pines, was it?"

And you answered:

"Except as I stated in my answer."
"Question. I am asking as to the physical document.
"Answer. It was not.
"Question. Beg pardon?
"Answer. To the best of my knowledge, it was not typed by Columbia Pines.
"Question. To the best of your knowledge, it was typed by whom?
"Answer. It was typed in my office, probably."

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James A. McWhorter.

Q. I now ask you if you can recall what I have just read to you in the way of question and answer therefrom, whether this refreshes your recollection as to whether Columbia Pines prepared the document you now have before you.

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A. I think all of my answers that I have given all along tend to indicate that I do not know where it was typed.

Q. Is it correct, as you have testified in November, that it was not prepared by Columbia Pines; is that correct?

A. I would say it probably wasn't.

Q. Then by whom was it?

A. It could have been—

Q. I beg your pardon?

A. I say it probably wasn't but it could have been.

Q. Let me show you your previous testimony and see if it helps to refresh your recollection.

You testified on the November occasion, did you not, to the best of my knowledge it was not typed by Columbia Pines—is your recollection refreshed in some respect on that score so that you think it may have been by them?

A. No.

Q. All right.

Then you have no better knowledge than you had in November on that score?

A. That's correct.

Q. And you have no contrary knowledge now as to who, either in your organization or on your behalf, prepared it?

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A. You are referring to the final typing?

Q. I am talking about the document which has been identified as in evidence and which I believe bears your signature on the signature page.

A. Are you referring to the typing of the document or to the over-all negotiating of the document?

Q. My question, sir, was: Who prepared the document which you signed, which is from your files? I think my question is clear.

A. Not until I have a definition of "prepared" in this.

Q. You don't know who prepared it?

A. I know who negotiated it.

Q. I am not asking that, sir. I am asking who prepared the document, not asking who negotiated the agreement.

A. I do not know, then.

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James A. McWhorter.

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Q. What water company, or water system, furnishes water within the area that you have identified as the area of Columbia Pines, Plaintiff's Exhibit 7?

A. The Annandale Water Company.

Q. Is there any other company which makes any service there?

A. No.

Q. In other words, your company has the exclusive for that entire territory?

A. We have the franchise for that territory.

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Q. I will ask the question as of the date of the filing of this suit, November, 1957, sir.

How many customers or houses did you serve at that time on Columbia Pike?

A. We keep no detailed record of how many houses we serve on any particular street or section of any street or road.

Q. You were subpoenaed to produce here certain records of your company showing connections from your lines to houses in this subdivision; is that correct?

A. Yes.

Q. Would you be good enough to bring forth those records and let us see from those records how we can determine the information which is here sought?

A. I can produce the only record that we keep of such things in its original form.

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Q. Mr. McWhorter, you have brought to the stand what appears to be a loose-leaf book and I would ask if you would kindly identify that?

A. This is the cash receipts record of the Annandale Water Company.

Q. Would you explain to the Court and jury what the cash

receipts record of the Annandale Water Company contains?

A. It contains a record of every receipt of every kind, including payments for house service connections which have been made to the company from January 1, 1948, to December 31, 1957.

Q. Does that record, therefore, show every house connection in the area which has been identified on plaintiff's Exhibit No. 7?

A. It shows how many connections.

Q. My question, sir, is: Does it show every connection?

A. Yes.

Q. May the book itself be marked for identification, Your Honor, as Plaintiff's Exhibit No. 8?

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Q. Referring now to Plaintiff's Exhibit No. 8 for identification, will you be good enough to indicate where there appears the first record showing a connection in the Columbia Pines Subdivision?

A. The records of the first connection that appeared in the Columbia Pines Subdivision do not appear in this book. It was made prior to the company setting up this system of books and prior to the company officially taking charge of the Annaldale Water Company.

Q. Let me see if I understand your answer.

Do you mean that this book which you have identified as being a complete record does not show anything which transpired prior to January 1, 1948?

A. That is when the company started in business.

Q. My question is, does not show that, it does not show anything prior to January 1, 1948?

A. It doesn't show cash receipts, no.

Q. Does it show connections being made?

A. Not prior to that time.

Q. What record is there which would show such connections prior to January 1, 1948?

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A. The map on exhibit.

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James A. McWhorter.

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Q. Will you resume the stand please?

If I have correctly noted what you have stated, there were 69 house connections being serviced by you personally prior to the inception of Annandale Water Company operation on January 1?

A. That's right.

Q. Now, would you be good enough to look at Plaintiff's Exhibit No. 8, your record, and tell the Court and jury how many connections were made in the over-all subdivision thereafter?

A. That is going to be quite a job. There are approximately 18,000 entries in this book and we will have to go through them one at a time.

Q. Did you cause to be prepared several months ago, sir, a summary showing the number of house connections serviced by Annandale Water Company in the Columbia Pines Subdivision?

A. If I remember correctly, I had an estimated summary.

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Q. I show you, sir, a document marked Plaintiff's Exhibit No. 9 for identification, which is entitled "Columbia Pines Subdivision Water Connections" and I ask, without revealing its contents, if you can tell what that document is?

A. It is headed, "Columbia Pines Subdivision Water Connections."

Q. Have you seen it before?

A. Yes, I have seen copies of it before.

Q. Would you tell the Court and jury what the document is?

A. Would you interpret your question?

Q. I think the question speaks for itself, Your Honor. If the Court feels I should—

The Court: Can the jury hear all that?
Mr. Silberberg: Let me go back.
Would you re-read my question?
The Court: Will you tell the jury what the document is?
Mr. Silberberg: That is the question.

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The Witness: I would say the document is allegedly water connections in Columbia Pines Subdivision.

By Mr. Silberberg:
Q. By whom was it prepared, allegedly?
A. I do not know.
Q. Is it not a fact, Mr. McWhorter, that that summary sheet, that that document you have before you, was prepared by you or under your direction several months ago?
A. No.
Q. You had no connection with its preparation in any way whatsoever?
A. Only to the extent that it was probably prepared in my office either from the survey records which have no connection with the water company, or by someone working for the water company.

Mr. Silberberg: May I ask Your Honor's indulgence for just one moment, please?
The Court: Yes.

By Mr. Silberberg:
Q. Let me show you this document again and ask you if it is not true that this was prepared by your employees for purposes in connection with the controversy which we have before this Court. I am speaking of the Annandale Water Company—nothing to do with your private business as an engineer or surveyor.

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* * * * *

James A. McWhorter.

Q. Let me then see if I can refresh your recollection: Referring again to testimony given by you on November 4, 1957, page 31, I asked at that time, did I not, this question:

"Was this memorandum prepared by you or under your direction?

"Answer. This may have been prepared by water company personnel out of the office."

Now, can you tell the Court by whom it was prepared?

A. Can I tell the Court what?

The Court: That's exactly what he said, Mr. Silberberg.

The Witness: I just answered that question exactly the same way.

The Court: Exactly what he said, except he added it may have been partially prepared by an employee or employees in the other end of his business.

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page 165 }

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Q. I show you again, Mr. McWhorter, the exhibit—

Vol. I.
page 166 } The Court: Nine for identification.

By Mr. Silberberg:

Q. —entitled "Columbia Pines Subdivision, Water Connections," and ask you whether you delivered that document to your counsel or through your counsel to me in that form or as a copy thereof at any time prior to today?

A. I don't remember whether I did or not.

Q. Do you remember giving to either of your counsel any document of similar import or purport, showing the number of connections in the subdivision?

A. The only answer I can give to that is that I may have given them a copy of this that I had in my files. I don't remember.

James A. McWhorter.

Q. You mean this may be a copy of an original which you had in your file?

A. No, I didn't.

Q. Do you recall having seen that in the previous hearing of the similar issues in this case when you were a witness?

A. I don't remember that I did.

Q. May I refresh your recollection or attempt to refresh your recollection, Mr. McWhorter, by reading to you from the transcript of November 4, 1957, at page 31?

I asked you, and I ask you to follow along with me, reading:

Vol. I. page 167 } "Was this memorandum prepared by you or under your direction?

"Answer. This may have been prepared by Water Company personnel out of the office."

I am sorry; let me go back a little further so that I can give you the story in full.

The Court: Just a minute, Mr. Silberberg.

Mr. McWhorter, where did this writing come from, do you know? Where did it originate?

The Witness: I am not sure where this originated.

The Court: Do you deny the fact that it came out of your office?

The Witness: No, I think I testified that it may have come out, either from the survey office or the Water Company office.

The Court: Do you recognize it as a writing, or summary, whatever you want to call it, that has been compiled by someone in your employ?

The Witness: It may have been prepared by some of the employees of either the survey or the water company.

The Court: How did it come to be prepared by them if they prepared it? Did you direct it to be prepared?

The Witness: I don't remember directing anyone to prepare this.

The Court: Do you know how it came into this courtroom?

Vol. I. page 168 } The Witness: I might elaborate on that just a little bit. In some instances, where we have subdivisions that have several sections, such records as this are sometimes made up either from the survey files or from the water company files to give us an idea of what is

James A. McWhorter.

going on in a particular subdivision. That, in all probability, is how it originated.

The Court: How did it get here? How did it get into counsel's hands? How did it get to be an exhibit in the other case? It had to leave your office in some manner, didn't it?

The Witness: Was it an exhibit in the other case?

The Court: Yes, it was.

The Witness: I didn't remember that it was. It apparently was one that I had in my over-all files on Columbia Pines. Whether it was in the survey file or the water company files, I am not positive.

The Court: How did it get from that file, then, either into your counsel's hands or from wherever, to Mr. Silberberg's hands?

The Witness: I guess I must have taken it out of that file and given it to someone.

The Court: Who? You mean someone surreptitiously took it out of that file and gave it to them?

The Witness: What was that again?

Vol. I. page 169 } The Court: Do you mean that someone surreptitiously took it out of your files?

The Witness: Oh, no. In all probability I gave it to whoever got it.

The Court: Do you deny the authenticity of the document, aside from the accuracy of the computations on there? Do you deny that it is an authenticity document, coming out of your office?

The Witness: No, I don't deny that it is a document that was prepared out of one of the two offices. I do deny the accuracy of it.

The Court: All right.

Mr. Donovan: Maybe we can cut the Gordian knot here by perhaps stating that it could be admitted for what it is worth.

The Court: That's all that any exhibit is ever admitted for.

Mr. Silberberg: I won't accept that, if Your Honor please.

The Court: If he is willing for it to be admitted as an exhibit, that ends it, as far as I am concerned, Mr. Silberberg.

Mr. Silberberg: Without any qualifications?

The Court: I will say again, any exhibit, when it is ad-

mitted in evidence, is admitted for what it is worth. Once it becomes an exhibit, it is then up to the jury to determine is worth. That is, what weight is to be given to it.

Vol. I.
page 170 } Now, Mr. Donovan says that he is willing for it to become an exhibit. If it is going to be an exhibit, it is going to be an exhibit without any conditions on terms attached to it. It is then an exhibit for the jury to determine and as far as I am concerned, that ends it.

It will now be plaintiff's No. 9.

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page 2 }

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JAMES A. McWHORTER,
was recalled as a witness, and testified further as follows:

* * * * *

Q. Mr. McWhorter, would you be good enough to step down to the board again, please? I believe you testified yesterday that the area marked at the extreme right of the exhibit on which you wrote "Well and Pumping Station," was the source of the water for the subdivision. Is that right?

A. It was part of the source of the water for the subdivision.

Q. Was there any connection between that and the tower sight you have there indicated, any physical connection?

A. At the time that this map was prepared, no.

Q. When was that connection made?

A. I believe it was in 1951.

Q. Do you know by whom it was made?

A. It was made by the water company.

Vol. II.
page 3 } Q. Would you be good enough to draw a line, showing the approximate location of the connection, pipe, whatever it may be, between the two?

A. A one hundred gallon tank at this point, and a running line in this direction, and out into the street.

Q. To which street is that, sir?

James A. McWhorter.

A. Ridge Road, and from Ridge Road, we ran that connection around, connected it to an eight inch main in No. 1.

Q. Where did the eight inch main run? Will you indicate that on the map?

A. Originally, it ran to this intersection.

Q. You are referring to the intersection?

A. Of Ridge and Rose Lane, and ran down Rose Lane just as it was indicated.

Q. Would you indicate that by drawing it please, sir?

A. This way down. It ran from that point down there, and connecting it with a pump section.

Q. Would you be good enough to draw the extension beyond the line that appears to be Carroll Lane?

A. It may or may not be accurate.

Q. I am not asking that it be engineeringly accurate. Just show the existence of the line.

A. That way (indicating).

Vol. II. Q. All right, and you say that was through an page 4 } easement?

A. That is correct.

Q. Does that line substantially coincide with the extension of Rose Lane, that was thereafter made?

A. In part, yes; in part, no.

Q. From whom was the easement obtained?

A. From Larchmont Homes, Inc.

Q. These areas which you have indicated as the undeveloped portions of the Columbia Pines Subdivision in 1948, were they subsequently developed?

A. Yes.

Q. By whom?

A. By several corporations. I don't remember the exact number of them. I did have a record of them.

Q. Do you know who the principals in those corporations were?

A. Mr. Berman and Mr. Hurwitz are the two people I dealt with.

Q. Do you have a later plat, later than 1948, which would show to the Court and Jury the development in what appears on this exhibit to be undeveloped?

A. I have a plat which shows the boundaries and various sections which were added, and it does not show either streets or lots. It shows outside boundaries of the sections.

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James A. McWhorter.

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page 6 }

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Q. Would you resume the stand, please, sir? Mr. McWhorter, what are foot front charges in your business, or are they called front foot? I don't know which is the correct phrase.

A. They aren't called either one. Our regulations, as approved by the State Corporation Commission, say that for any lot and I believe parcel of land that is connected to our mains, that is service connection from the mains, may be charged to the party who is applying for that connection, in full. I cannot remember the exact wording of it. If you would care to have me, I would read it. I have a copy.

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page 7 }

Q I am trying to ascertain its approximate nature, whether this is a charge made to a property owner for connection to a water main already in the street on which this property fronts. Is that substantially correct?

A. We are allowed to charge the full cost of the main.

Q. Now, in how many instances did you make foot front charges, or whatever you may call them, to Mr. Berman or Mr. Hurwitz, or their company?

A. Strictly from memory, I believe that was three.

Q. And those were located where?

A. At the right-of-way of Columbia Pines.

Q. That would be at the extreme left of the map?

A. That would be along in here.

Q. Do you know when the line for which you made these charges, when was that line installed, sir?

A. I believe that line was installed in 1948.

Q. Thank you. Will you resume the stand, please? Incidentally, what is a foot front charge, approximately, in dollars?

A. It averages out at about $150.00.

Q. Per average lot?

A. Per connection.

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page 8 }

Q. Is that separate and apart from a connection or tapping charge?

A. There is a tapping charge of $60.00.

Q. And is that charge uniform for your company, for every house connection?

James A. McWhorter.

A. For household size meters, yes.

* * * * *

The Witness: The party of the first part in this case is Columbia Pines. Inc. and/or Sidney Weinberg and his associate.

By Mr. Silberberg:
Q. Who is the party of the second part?
A. I haven't gotten to that part yet. The party is James
A. McWhorter.
Q. Will you resume your reading, sir?
Vol. II. A. Shall I repeat the first sentence?
page 9 } Q. I think you might.
A. Paragraph No. 5: "It is understood and agreed that the party of the first part makes no agreement or guarantee that any definite number of individual subscribers will connect to the system. As soon, however, as a minimum of 200 main subscribers within the boundaries of the Columbia Pine Subdivision, now or as is hereafter established, providing any extension of such boundaries are contiguous to the boundaries of Columbia Pines, as developed by the party of the first part, have been connected to the system by the party of the first part, and are using the water supply, pursuant to the rates and regulations of the Annandale Water Company, then the party of the second part, or his assigns, will forthwith confer to the party of the first part, its promissory note in a sum equal to $100.00 per subscriber, such note to bear interest at the rate of four per cent per annum, and to be payable at the rate of $200.00 per month, beginning one month from the date thereof, applied first to accrued interest and then to principal and continuing thereafter at the same rate. on the same day of each and every month until paid in full, in order to reimburse the party of the first part in part for cost incurred in the constuction of the water system within the boundaries of Columbia Pine Subdivision, as set forth hereinbefore.
Vol. II. "The party of the second part reserves the
page 10 } right to pay in full the entire amount due to the party of the first part on the date on which any regular installment is due and payable. The party of the second part will pay the party of the first part the sum of $100.00 in cash for every connection in excess of 200 connections installed within the boundaries of the Columbia

Pines Subdivision, as aforesaid, and connected to the system by the party of the first part.

"It is understood and agreed, however, that in each case the party of the first part will be conveying and transferring to the party of the second part, the actual water connections to such house, including mains, taps and meter boxes, but not including connections for the meter box to the house.

"The provisions of this paragraph shall not apply to any lot or parcel of land in said subdivision which is conveyed to others by the party of the first part, without being connected to the water mains before such conveyance.

"The provisions of this paragraph shall also be null and void in the event of the bankruptcy of said party of the first part. In the event that the provisions of this paragraph become null and void on account of either contingency previously mentioned, then the party of the second part, or his assigns, shall be free to deal with any owner of any lot or lots in the subdivision, in the same manner that he would deal with any ordinary subscribers."

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Q. Would you be good enough to refer to your record and tell the Court and Jury when the 200th tap in Columbia Pines Subdivision was made by your company, when you were paid for it?

Vol. II. page 12

A. We don't keep a cumulative record of the number of taps that have been made in any subdivision. These are entered as cash receipts, as they are received.

Q. And merely as cash?

A. It indicates the number of connections which were paid for.

Q. All right, and—

A. And it would be necessary to start from the beginning of this, take all the cash receipts and add them up to arrive at an approximate date.

Q. Let us see if we can do that without too much trouble, sir. I believe you testified yesterday that prior to the start of the entries in that book, that there had been made 69 connections in the subdivision. Is that right?

A. 69 connections were made by Columbia Pines, Inc. and one by Sidney Weinberg.

Q. But all within the subdivision. Is that right?

James A. McWhorter.

A. Within the boundaries of one, two and three of the Columbia Pine Subdivision.

Q. Those are the seventy indicated on Plaintiff's Exhibit No. 8, that is, the houses connected by the developer in Sections 1, 2 and 3, that is the first seventy. Is that right?

A. That is correct.

Vol. II.
page 13 } Q. They are not enveloped in this book?

Q. They are not enveloped in this book.

Q. Would you be good enough to look at your entries for January 21, 1952? These dates are approximations, so they may be two or three days thereafter.

A. There are no entries on January 1st. The first entry is on January 2nd.

Q. I am not asking you about January 1st. I said about January 21, 1952, about that date.

A. On January 21, 1952, the Larchmont Construction Corporation, rather the company, received from the Larchmont Construction Corporation the sum of $120.00.

Q. That covered how many taps?

A. Two taps.

Q. In this subdivision?

A. This entry does not state what subdivision, but the only dealings that we had with the Larchmont Construction Corporation were in the Columbia Pines Subdivision.

Q. So we had two taps in January, 1952? Would you look at June, approximately the 24th, 1952? Did you find there an item of approximately $1,680.00?

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page 14 }

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The Witness: I find on June 4th that the company received from the Larchmont Construction Company the sum of $1,680.00.

By Mr. Silberberg:

Q. How many taps does that cover?

A. That would have to be divided by sixty. That would be 28 taps.

James A. McWhorter.

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Q. Would you next look at about July 1, 1953?
A. I find on July 7th the company received from the Larchmont Construction Corporation—this has a note, Section 8, Columbia Pines—the sum of $960.00.
Q. Which I think amounts to sixteen taps. Am I correct, sir?

Mr. Turnbull: What year is that?
Mr. Silberberg: July, 1953.
The Witness: Sixteen.
Mr. Silberberg: Thank you.

By Mr. Silberberg:
Q. Would you look at the latter part of that month, about July 29, 1953, or within a couple of days thereafter, for an item of approximately $360.00?
A. Did we cover one that was dated July 27th?
Q. That was one you reported as $960.00, and the one we are inquiring about now is about July 29th, and the sum of approximately $360.00.

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page 17 }

A. We have an entry on August 3rd that the company received from the Larchmont Construction Corporation the sum of $360.00.
Q. That would be six taps. Is that right?
A. That would be six.
Q. Would you next look for a payment on or about November 20, 1953 in the amount of approximately $180.00?
A. What was that date?
Q. Approximately the 20th, and the amount approximately $180.00. This is still in 1953, Mr. McWhorter.
A. Yes, on November 23rd, there is an entry that the company received from Larchmont Construction Corporation the sum of $180.00.
Q. That would be three taps, sir?
A. Yes.
Q. Would you next look at approximately March 29, 1954, the payment of approximately $240.00?
A. March 29th, did you say?

James A. McWhorter.

Q. The 29th, approximately that.

A. March 30th, we have an entry that the company received from Larchmont Construction Corporation the sum of $240.00.

Q. That would be four taps, sir?

Vol. II. page 18 } A. Yes.

Q. Would you next look, sir, at around August 31, 1954, for a receipt of approximately $2,160.00?

A. We have an entry on September 3rd that the company received from Larchmont Construction Corporation the sum of $2,160.00.

Q. I believe that was equivalent to—

The Court: 36 taps.

Mr Silberberg: 36 taps That was September 3, 1954. Am I correct?

The Witness: That was when the entry was made.

By Mr. Silberberg:

Q. Mr. McWhorter, how soon after you received these monies did you make the connections, approximately?

A. Oh, they are generally done in one to two weeks.

Q. Therefore, as I find from your records that by the 3rd of September, 1954, you had received payment, monthly payment, which does include the 200th tap. Are the Court and Jury to understand that the 200th tap was made in approximately two weeks thereafter?

A. I didn't keep a record of the number we had there.

Mr. Silberberg: Are counsel, either of you, in any disagreement as to that?

Mr. Donovan: If my mathmetics are correct, I don't think it included the 200th at that point, after September 3, 1954.

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By Mr. Silberberg:

Q. In view of the 200th house connection payment having been made and having been received by your company at that time, on September 3, 1954, is it your testimony that the connection, the 200th connection was made within approximately two weeks thereafter?

A. If that is what those add up to, they were probably made within two weeks after that date.

James A. McWhorter.

Q. Did you at that time tender to anyone a note for two hundred times $100.00 per connection, or per subscriber, as set forth in Paragraph 5?

A. No.

Q. Did you make a payment of $100.00 per subscriber, to anyone, or any of the connections made after that time?

A. No.

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page 31 }

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Q. You were about to testify before as to houses built, connections made to persons other than those indicated on the exhibit. Would you be good enough to state where those houses are located?

A. According to the exhibit, one of them is located in Section 2, Columbia Pines; eight of them in Section 3; and one in Section 10(a).

Q. Therefore, the total of the connections which have been made, to the best of your knowledge, in the overall subdivision, is what?

A. According to the exhibit, the total number of connections by all parties in the Columbia Pines Subdivision would amount to 295.

Q. Does that include any in Parcel C, as indicated by zero?

A. Parcel C here says there are no connections or were no connections at the time this paper was prepared.

Q. Have there been any connections there since that time?

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Q. It is your testimony that there were some connections made by your company in Parcel C, which would be in addi-

tion to the 295 that you have just testified to that you don't know the number of?

A. There were some connections made.

Q. Is my statement to you correct, sir, that there were some connections made by your company in Parcel C, which would be in addition to the 295 that you have testified to, but you don't know the number in Parcel C?

Vol. II. page 33 } A. It would be in addition to the 295 shown on this exhibit which I am referring to.

* * * * *

CROSS EXAMINATION.

By Mr. Donovan:

Q. Mr. McWhorter, you testified to a number of connections made in this subdivision shown by Exhibit 6, from a period commencing in January, 1952, through September 3, 1954, and you stated that all of those were made for the Larchmont Construction Corporation. I wish to ask you whether or not you know who owned the land at the time the Larchmont Construction Corporation was getting the connections to these houses?

A. It was owned either personally by Berman and Hurwitz, or one of their various corporations.

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GEORGE H. HURWITZ,

was called as a witness on behalf of the plaintiff, and after having been first duly sworn, was examined and testified as follows:

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George H. Hurwitz.

Q. Do you have any connection with Larchmont Homes, Inc., the plaintiff in this case?
A. Yes, I do.
Q. What is that connection?
A. I am a stockholder, an officer, and a director.
Q. What office do you hold?
A. Secretary-Treasurer.
Q. When was that corporation organized, sir?
A. In 1957.
Q. And under the laws of what state?
A. State of Virginia.
Q. Is there any other principal officer in that corporation?
A. Yes, Irving Berman is the President.
Q. Have you been associated with Mr. Berman for any length of time, sir?
A. Yes, I have.
Q. For how long?
A. About ten years.
Vol. II. page 47 } Q. In the business which you have just described?
A. That is correct, in the land development and construction.
Q. Now did there come a time when Mr. Berman and yourself contracted to purchase land which has been described in this record as Columbia Pines Subdivision?
A. Yes.
Q. Will you tell the Court when you did so agree? When was that agreement made?
A. We contracted for it, and I believe it was in April, 1951.
Q. With whom were you in negotiation?
A. Names of the people?
Q. Yes.
A. Well, primarily, it was Joe Culpin.
Q. The gentleman who was on the stand yesterday?
A. Yes, that is correct.
Q. Following the negotiation of the contract, did you request or receive any documents, papers, or anything else from them?
A. Yes.
Q. What did you receive?
A. Well, they had quite an extensive collection of engineer-

George H. Hurwitz.

ing drawings, structural drawings, showing a lot of miscellaneous old correspondence, and quite a collection of things.

Vol. II.
page 48 } Q. Did there come a time, sir, when what has been introduced into evidence as Plaintiff's Exhibit No. 3 was delivered or sent to you?

A. Yes.

Q. How did you get it?

A. You mean whether I got it in person or in the mail?

Q. If you recall.

A. I do not recall.

Q. But you do remember having received it?

A. Yes.

Q. What relationship was there between that document and the other papers which you said you received after you signed the contract?

A. Well, this is one of the things that the sellers were supposed to deliver to us. This is the instrument by which it was delivered to us.

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Q. What were those negotiations?

A. When we discussed the possibility of purchasing this land from them, primarily Mr. Culpin, we had agreed that they were going to give over to us all their properties and rights, and everything else that they had in anyway with Columbia Pines, the ground in Columbia Pines.

Q. Did there come a time when you saw Plaintiff's Exhibit No. 1, an agreement dated November 15, 1947, either in that form or in any other form?

A. Yes.

Q. When did you first see it?

A. About that time, we were negotiating.

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George H. Hurwitz.

* * * * *

Q. Did there come a time, Mr. Hurwitz, when you took title to the property?
A. Yes.
Q. The real property?
A. The real property.
Q. When was that conveyance made to you?
A. The property was conveyed to us by deed on November of 1951.
Q. When did you start doing your work there? When did you start doing any work in the subdivision?
A. We started working prior to our getting title to the property.

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Q. When you speak of "we," to whom are you referring?
A. Mr. Berman and myself.
Q. I show you, sir, a writing in two lines of typewriting, and a couple of signatures are appended to the bottom of Plaintiff's Exhibit No. 3, and ask you if you can identify the signatures thereon.
A. Yes.
Q. Whose signatures are they?
A. There is Mr. Berman's signature and my own.

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Q. Do you know how many houses you built, or caused to be built on that Parcel C?
A. Yes.
Q. How many?
A. Five.
Q. Do you know approximately when?
A. Well, during the year 1955.
Q. Were you on this property, which is indicated by these exhibits in 1951, when you testified you contracted to purchase it?
A. Oh, yes, in October.
Q. Referring, sir, to Plaintiff's Exhibit No. 7, can you tell the Court and Jury whether at that time there was a water

James A. McWhorter.

main, as indicated as the well and pumping station, and going down into those lands?

A. Yes.

Q. Do you know where the line is from those lands?

A. A grant along the roadway and came up to here, this property along in here (indicating).

Q. What is this, north or south? Is this the westerly end of the property?

A. I don't know.

Vol. II. page 57 } Q. In any event, this was the end of the line?

A. Yes.

Q. Did you ever receive from Mr. McWhorter of the Annandale Water Company any note or money in the form of payment of $100.00 per house connection in the Columbia Pine Subdivision?

A. No.

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Vol. III. page 2 }

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JAMES A. McWHORTER,

was called as a witness for the defendant and after being first duly sworn, was examined and testified as follows:

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Vol. III. page 3 }

* * * * *

Q. And with whom did you deal?

Vol. III. page 4 } A. Columbia Pines, Incorporated, and Sidney Weinberg.

Q. With whom personally did you talk?

A. For the most part, Sidney Weinberg.

Q. Your dealings were with Sidney Weinberg mostly?

A. He was vice president of Columbia Pines, Incorporated, and was in charge of the Columbia Pines project.

Q. And is that the said Sidney Weinberg who is mentioned as a party to this contract?

James A. McWhorter.

A. Yes.

Q. And the same Sidney Weinberg whose name appears on page 6 of Exhibit 1?

A. Yes.

Q. After the date of the signing of this contract, on the 15th of November, 1947, what occurred in this subdivision?

A. Three sections of the subdivision were developed and houses built on them.

Q. Now, in Exhibit No. 7, are those the—would you point out the areas on Exhibit No. 7—you can just state the areas if you like; you can do that from here.

A. It is the area shown on Exhibit 7 which shows lot lines, streets, and houses.

Q. And referring to page 1 and the paragraph thereunder, numbered 1, were there certain things to be done by Exhibit 1—

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page 5 }

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Q. Directing your attention to page 1, bottom of the paragraph, there is a paragraph numbered one. Will you read to the jury the duties of the party of the first part and tell them who the party of the first part is, as shown on that instrument?

A. The party of the first part was Columbia Pines, Incorporated and/or Sidney Weinberg and his associates. On page 1, paragraph numbered 1, reads as follows:

"The party of the first part will install in its subdivision of Columbia Pines, in the vicinity of Annandale, Fairfax County, Virginia, at its own expense, cast iron water mains (Class 150) with complete valves, fittings, fire hydrants, and caps, according to plans to be approved by the party of the second part.

"The party of the second part is James A. McWhorter.

"Under the inspection of the party of the second part.

Vol. III. page 6 } "A plan to be submitted by the party of the first part for approval shall be acted upon expeditiously by the party of the second part and approval shall not be arbitrarily or unreasonably withheld and if

the party of the second part does not disapprove the plans in writing within fifteen days of receipt, the plans shall be considered approved.

"The party of the first part agrees to convey and transfer absolutely unto the party of the second part all of the water system described herein which may be located within the subdivision of Columbia Pines, or its extension at Annandale, Fairfax County, Virginia." Period, and that ends the paragraph.

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page 7 }

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Mr. Turnbull: If they admit there was settlement ten years ago, then the facts of the settlement won't have to be shown, but I think the facts alleged in the settlement, we have to show consideration therefor and this is showing the consideration of the settlement, and the facts surrounding them, what there was to be settled.

Mr. Silberberg: I am referring to that portion which says that the Columbia Pines, Incorporated, acting by and through its president, Joel S. Kaufmann, agreed to settle and did settle all debts due to the defendant. That is clear. I don't think there can be any departure from there, or any explanation therefrom.

The Court: Do you admit that to be true?

Mr. Silberberg: That Columbia Pines paid—yes, very definitely; no question about it.

Mr. Turnbull: There was a settlement then.

Mr. Silberberg: That portion I do.

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page 8 }

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Q. Now, at that time that the work ceased, what were the boundaries of the area in which the water system had been installed?

James A. McWhorter.

A. The water system was installed in Sections 1, 2, and 3, as shown on the Exhibit, and a main had been run from Rose Lane at the right-hand edge of the subdivided portion.

The Court: Maybe you had better step down there and point it out.

The Witness: The water system had been installed in the subdivided part of the land of Columbia Pines which embraced Sections 1, 2, and 3, which were developed by Columbia Pines, Incorporated, and in addition to that, a main had been extended from Rose Lane at this point to the pumping station at that point—at that point here is an easement where a future street would be built.

* * * * *

Vol. III.
page 9 } The Witness: Most of the work on that main—well, it was done in the latter part of 1947 and the first half of 1948. It must have been the first seven or eight months, but during the earlier part of 1948.

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page 10 }

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The Court: Did the main run from the pumping station all the way to that point just indicated on the plat?

The Witness: The mains were completely connected from this point up to Rose Lane and through the streets that are shown in, on this plat, with the exception of main here and a main down this street, and a main from this point on that street.

The Court: Prior to March 11, 1949, were there any connections on that main between its connection with the pumping station and its connection with the main in the subdivided portion shown on plaintiff's Exhibit No. 6?

The Witness: No.

The Court: Were there any such connections prior to August 8, 1950?

The Witness: No.

James A. McWhorter.

The Court: Were there any such connections prior to November 14, 1951?

The Witness: No.

The Court: When, if you know, was the first connection made to that main between the two points I have indicated on Exhibit No. 6?

Vol. III. page 12 }

The Witness: It was, if I could refer to some of the documents there, I believe I could come close to pinpointing it.

The Court: Some of these exhibits or something you have there?

The Witness: Well, I have a subdivision plat which might be easier to identify from.

The Court: All right, if you can do so quickly.

The Witness: I am referring to prints of Section 10-B, Columbia Pines, and Section 10-C of Columbia Pines, which were furnished to me by the—well, I am going to say Larchmont Construction Corporation because they were the ones that we were dealing with and Mr. Berman and Mr. Hurwitz; and they were furnished to me from their offices.

The Subdivision plat of Section 10-B which includes part of Rose Lane between the end of Section 3 and the pumping station was dated March 24, 1954, and was signed by John R. Williams, Certified Land Surveyor, and Civil Engineer. The remainder of Columbia Pines down to the pumping station, except for small parcels which is known as Parcel A on Section 10-C of Columbia Pines, is dated June 22, 1954, and signed by John R. Williams, Certified Land Surveyor and Engineer, and no connections were made to any houses on that section of pipe, meaning Section from here to the pumping station, prior to those dates.

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By Mr. Turnbull:

Q. I show you exhibit No. 1 and I point on Exhibit No. 7 to the basic area shown in the outline of this exhibit. Did you provide any water within this area to anyone under the contract which is Exhibit No. 1?

James A. McWhorter.

Mr. Silberberg: I object to that.
The Court: On what grounds?
Mr. Silberberg: The contract does not call for a—pardon me just a moment, sir—I am sorry; I withdraw my objection.
The Court: All right.
Answer the question.

By Mr. Turnbull:
Q. Did you supply any water in the unsubdivided areas of Exhibit No. 7, any one under the contract which has been admitted as Exhibit No. 1?
A. No.
Q. Did you supply water to others under other contracts?
A. Yes.
Q. What contracts were they?
A. They are the contracts shown in the exhibits which were introduced yesterday afternoon.

Mr. Turnbull: That's all.

Vol. III.
page 24 } CROSS EXAMINATION.

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page 26 }

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By Mr. Silberberg:
Q. Between whom is that agreement?
A. That particular one is Larchmont Properties, Incorporated and Annandale Water Company.
Q. Incorporated?
A. Right.
Q. And by whom is it executed?
A. It is executed by Irving Berman, the President of Larchmont Properties, Incorporated, and it is attested by George H. Hurwitz, the Secretary-Treasury.
Q. Would you turn to the next page and see whether there is provision for signature of anybody from Annandale Water Company?
A. There is a typed notation, accepted, Annandale Water Company.

James A. McWhorter.

Q. By whom?
A. It has my named typed under it.
Q. Is it signed?
A. It is not.
Q. I show you defendant's Exhibit O and ask you whether that likewise provides for signature by you and is unsigned?
A. It has the note, "accepted," "Annandale Water Company, Incorporated, By" and my name is typed under it as President.

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page 27 }

Q. But it is unsigned?
A. It is not signed.
Q. I show you defendant's Exhibit P; is the same true in that case?
A. That's correct.
Q. Defendant's Exhibit Q contains no such provision, apparently.
Defendant's Exhibit R, is that likewise, does that likewise provide for your signature, but is unsigned?
A. The same as being accepted.
Q. But it is unsigned?
A. It is not signed.
Q. And is the same true as to defendant's Exhibit S?
A. Yes.
Q. You have testified, sir, that your dealings with Columbia Pines, Incorporated, were extensively with Mr. Weinberg, is that right?
A. He was the principal person that I negotiated with.
Q. How do you spell his name?
A. I believe it is W-e-i-n-b-e-r-g.
Q. Would you be good enough, sir, to look at the plaintiff's Exhibit No. 1 and tell the jury how his name is spelled thereon?

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Q. How is it signed?
A. The way it is written, it would be awfully hard to tell.
Q. You don't know whether it is W-i-n-e, or W-e-i-n?
A. No.
Q. All right, sir.

James A. McWhorter.

A. It is typed W-i-n-e—under his signature.

* * * * *

Q. I show you plaintiff's exhibit No. 5 in evidence and ask you whether you can tell from the signature thereon what is the spelling of Mr. Weinberg's name?

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page 29 }

* * * * *

By Mr. Silberberg:
Q. How is it signed?
A. I really couldn't say.
Q. You can't tell whether it is W-e-i-n or W-i-n-e?
A. I certainly can't.

* * * * *

Q. I direct your attention to the pleading which is labeled "Response" and specifically paragraph 3 thereof, and ask you how Mr. Weinberg's name is spelled therein.
A. It is typed in here W-i-n-e-b-e-r-g.

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page 30 }

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Q. Now, sir, in the light of what you have just seen in these exhibits and the pleading, is your recollection refreshed at all as to who prepared, or where was prepared—pardon me. Let me preface that.
Do you know who prepared the pleadings, sir, that is in this case?

A. Donovan, Turnbull and Brophy, 106 Little Falls Street.

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page 31 }

Q. They are attorneys for Annandale Water Company?

James A. McWhorter.

A. That's correct.

Q. Were that firm, or members of that firm, attorneys for you in 1947?

A. Yes.

Q. In the light of this, sir, is your recollection refreshed in any respect as to who prepared, in what office was prepared, the document identified in evidence as Plaintiff's Exhibit No. 1, the 1947 contract?

Mr. Turnbull: If Your Honor pleases, we are the only persons who can testify to that.

The Court: Well, if he doesn't know, all he has to say is he doesn't know, or that his memory is not refreshed. That is what the question is.

The Witness: Judge, in order to answer that question properly, it would be necessary for me to go into the background of the—

The Court: The question is: Is your memory refreshed now as to where or by whom this exhibit was prepared? Either your memory is refreshed or it is not refreshed. You can answer yes or no.

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page 42 }

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Mr. Silberberg: I have no further questions.

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By Mr. Turnbull:

Q. Do you have a plat which would show that?

A. Yes, I do have.

Q. Would you please get it?

Mr. Turnbull: Do you object to this plat?

James A. McWhorter.

Mr. Silberberg: I don't know what it is; may I see it, please?

This is what I asked for originally. I understood there was no such thing.

Your Honor, counsel is now showing me a plat similar to that which I asked Mr. McWhorter about at the very beginning of his examination, which he said he had none.

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The Court: I don't know about that.

Do you object to the use of this plat?

Mr. Silberberg: I do, sir.

The Court: On what grounds?

Mr. Silberberg: On the ground that when witness was asked if he had such a thing, on my examination, he said he had none.

The Court: That is not a valid objection to the use of it now, if it is otherwise proper and accurate.

Mr. Silberberg: In view of the fact it was not made available to me at the time that I was inquiring, I don't think it may be used later by his own counsel.

The Court: Objection overruled.

Mr. Silberberg: My exception please, sir.

Mr. Donovan: If Your Honor please, for the sake of clarification of the record, that was yesterday when Mr. McWhorter was on the stand and Mr. Silberberg and I were examining, and I recall it very well. Mr. McWhorter said they had an outline, just showing the outlines of the plats. Mr. Silberberg stated then that he didn't want that. He wanted a map showing the individual lots which Mr. McWhorter doesn't have.

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page 55 }

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By Mr. Turnbull:

Q. I show you again Exhibits I, N, O, P, Q, R, S, which you testified were signed only by one party, and I ask you, are they acknowledged?

Mr. Silberberg: By whom?

Mr. Turnbull: By anybody.

James A. McWhorter.

Mr. Silberberg: I would say the document speaks for itself in each case.

I will stipulate that certain of them are acknowledged and certain of them are not.

Vol. III. page 56 } Mr. Turnbull: Which ones are not?
Mr. Silberberg: Just as the documents appear.
The Witness: They are all acknowledged.

By Mr. Turnbull:

Q. Will you read for the jury after "Witnesseth" that paragraph?

Mr. Silberberg: Which one?

The Witness: "Witnesseth: That for and in consideration of the sum of $5, lawful money in hand paid, the receipt of which before the signing, sealing and delivery of these presents is hereby acknowledged, and other valuable and lawful considerations, the said Pleasant Ridge Homes, Incorporated, does hereby grant and convey unto the said Annandale Water Company, Incorporated, its successors and assigns, the water system, including the mains, fittings, fire hydrants, and house service connections located in the dedicated streets and easements in the Subdivision of Columbia Pines, Section 7, Fairfax County, Virginia, plat of said subdivision being recorded among the land records of said county in plat book No. 965 at page 177, and Columbia Pines Section 10-A, Fairfax County, Virginia, plat of said subdivision being recorded among the land records of said county in plat Book No. 1106, at page 443."

By Mr. Turnbull:

Q. Now, are the rest the same throughout all of these?

Vol. III. page 57 } Mr. Silberberg: I don't understand the question. The same in what respect, sir?

Mr. Turnbull: Are these conveyances of property just like that, then?

Mr. Silberberg: I will object to that, if Your Honor please, on two grounds. One is that this is not proper re-direct as to the character; that was not dealt with on cross examination.

Secondly, that the documents will speak for themselves.

The only thing taken up on cross examination was the execution and the lack of any signature on any of the documents by the Annandale Water Company.

The Court: I think on that point the main thing is to show

whether signatures were necessary on the part of Annandale Water Company. I assume that is the purpose of this examination.

Mr. Silberberg: I don't understand it to be that way, Your Honor, because the documents, the documents themselves say, and make provision for a signature, and the witness has so testified.

The documents themselves have that provision.

The Court: I understand that.

Mr. Silberberg: I think that the interrogation, the re-direct—

Vol. III. page 58 } The Court: Are you attacking the validity of the conveyance?

Mr. Silberberg: I am not attacking the execution thereof by—

The Court: Are you attacking the validity of the conveyance because of the fact that they are not accepted or there is not a signature on the "Accepted" part?

I would like to know what the answer is.

Mr. Silberberg: If Your Honor will allow me just a moment to see how the document is entitled.

I am, sir.

The Court: You are attacking the validity of these, each of these, conveyances, as I understand it.

Mr. Silberberg: Where provision has been made for acceptance and there is no evidence of acceptance.

The Court: You deny their validity?

Mr. Silberberg: I am attacking the validity because of provision therein made, and my understanding is that a conveyance of this type requires an acceptance.

The Court: Where did you get that understanding?

Mr. Silberberg: From the documents themselves. They were prepared by men presumably most conversant with this type of work.

The Court: Let me see them.

Vol. III. page 59 } Exhibit 2 doesn't even contain such a provision, Mr. Silberberg.

Mr. Silberberg: That's correct; I have directed my objection to those which have provision for an acceptance-

The Court: You are not attacking the validity of this instrument?

Mr. Silberberg: I am not attacking the validity of the instruments as it reads as to its legal effect. However, I have something else to say.

The Court: I want to be straight about your position con-

cerning these documents. Exhibit I is another one that does not contain a provision for signature of the grantee.

Mr. Silberberg: There were two; that's correct, sir.

The Court: As to the others, I understand that you deny the validity of these instruments because they have not been signed by an officer of Annandale Water Company, Incorporated, in that portion which says "Accepted" and has a line.

Mr. Silberberg: That's correct, sir.

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Vol. III.
page 60 } RE-CROSS EXAMINATION.

* * * * *

Q. Was this prepared, referring to Defendant's Exhibit Z, prepared for use in litigation, either this suit or prior suit?

Vol. III. page 61 } A. It may have been prepared for litigation in the first suit, the Timberlane Homes, Incorporated, filed against the Annandale Water Company.

Q. You are the person who directed its preparation?

A. Yes, sir.

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page 62 }

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By Mr. Silberberg:

Q. The first connection in the unsubdivided portion, you testified, was made in 1954, is that right?

A. In the unsubdivided portion outside of sections 1, 2, and 3, Columbia Pines.

Vol. III. page 63 } Q. That is what I am referring to, what is the blank space on plaintiff's Exhibit 7 within the original bounds, outer bounds of Columbia Pike?

A. To the best of my knowledge.

* * * * *

James A. McWhorter.

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The Court: You have denied the validity of each of these exhibits which the witness has, is that correct?

Mr. Silberberg: That's correct, sir; and the Court has sustained me.

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The Witness: The number of connections shown, according to Plaintiff's Exhibit No. 9 totals 135, in the sections involved.

In the documents which you handed me.

The Court: Exhibits N, O, P, R, and S. Is that correct?

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page 98 }

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The Court: Well, I don't think the grounds of your motion relating to requirement of 13-84 are good. I don't think the grounds of your motion relating to the requirements, the form and so forth of the assignment itself, are good.

But I have, since the motion was made yesterday, been very much concerned with the meaning and effect of paragraph 5. I came to the court house early this morning, spent a great deal of time going over this contract in an effort to determine from it, from a legal standpoint, what the intention of the parties was and what the effect of it was.

I think that the contract, and particularly paragraph 5, has to be read extremely carefully and in my opinion the effect of paragraph 5 in particular is this: That as Mr. Silberberg has indicated, the reaching of the 200th connection was a triggering of the obligation on the part of the party of the second

part to execute his note and commence his monthly payments, and also to commence paying $100 payment in cash
Vol. III. for connections thereafter.
page 99 } I think that the parties intended, and I think this contract has this effect, that if before a connection was made, and I think by "connections" in the latter part of this paragraph it meant just exactly what the little earlier part of the paragraph says, it means that it is the actual water connections to such house including mains, taps, meter boxes, but not including connections, that if before such connection had been made, a lot or parcel had been conveyed away by the party of the first part to others, that then the provisions of this paragraph, and it is very specifically shown, were to be null and void; and if they were to be null and void as to those conveyances, and as to those lots, and parcels then what happened to those lots and parcels thereafter in any respect, so far as this contract was concerned, had no meaning, no bearing whatsoever.

You can only come to that conclusion after you read, first of all, this which says the provisions of this paragraph shall not apply. That means it has no bearing whatsoever in any way to any lot or parcel or land of said subdivision which is conveyed to others by the party of the first part without being connected to the water mains before such conveyance.

Provisions of this paragraph shall also be null and void in the event of the bankruptcy of the party of the first part and then there is here what shows what the intention of the party was as to the meaning of the language that the
Vol. III. provision of this paragraph shall not apply in the
page 100 } event that the provisions of this paragraph become null and void on account of either contingency—that is, either the conveyance prior to the connection, or the bankruptcy; either one of those contingencies, if they occur, then this paragraph is to be null and void: that is, as though it never existed in this contract at all.

And as to that portion of it which says any lot or parcel conveyed to others before such connection, then it will be as though this paragraph didn't exist as to those conveyances.

Now, the only question in my mind on this point is as to whether there is or is not a question of fact to be determined by the jury on whether or not there is a conveyance to others and whether or not, if there has been a conveyance, it was made before the connection to the water mains.

On that point, I have given a great deal of thought. If it is purely a question of law, it is for the Court to determine, but if there is a question of fact to determine, then certainly the jury can determine it on proper instructions from the Court.

Now, we have in this case the fact that Columbia Pines, Incorporated, after the execution of this agreement, conveyed the land in trust to certain trustees; a default occurred in the payment of that deed of trust, there was a foreclosure and a deed by the trustees to an affiliate corporation and subsequently into Berman and Hurwitz and so forth down the line.

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Is it a question of law or of fact as to whether that constitutes a conveyance under the contract?

In addition, on the latter part of it you have the fact that before that conveyance there had been a line running through the unsubdivided portion from the well and pumping station at the rear of the land to the subdivided portion and counsel has contended that that means that unsubdivided portion is connected to the water mains.

Is that a question of fact or of law?

Thereupon, so far as these points are concerned, which are the main points in my opinion raised by the motion raised yesterday, hinges the Court's ruling on this motion. If there are questions of fact to be determined, if they are questions to be determined, it is up to the jury. If there are no questions of fact involved—if it is a matter of law, these things are conveyances, as a matter of law they being connected, the pipe being connected at one end to the well and at the other end to the mains at the subdivided portion, if, as a matter of law, it is not connected to some unsubdivided portion, I think the Court ought to grant the motion on those grounds.

Of course, we have in addition to those grounds. that which has been raised here today concerning these conveyances and the attack that has been made on them, the denial of their validity.

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It seems to me that as a matter of law there has been a conveyance to others here of lots and parcels without their first being connected to the water mains before such conveyance; that at that time there were not, and there did not thereafter, so far as the remaining land was concerned, come into existence 200 connections as contemplated by this contract so as to trigger the liability of the defendant for the payment of this money.

But I think the motion ought to be granted on that ground.

It is unnecessary for me to indicate what I think, also that the position of the defendant, that the position the defendant has taken concerning the denial of the validity of these conveyances, does amount to a failure of performance on the party of the parties of the first part in this contract, and it amounts to a failure of consideration under the terms of this contract which is a condition precedent, in my opinion, under

the language of this contract, to an existence of a liability on the part of the party of the second part or his assigns to pay the money.

So I am going to grant the motion, sir.

Mr. Silberberg: Your Honor is ruling that

Vol. III. these are matters of law rather than matters of
page 103 } fact?

The Court: Yes.

Mr. Silberberg: May I ask Your Honor if you would make a ruling with reference to the third point made in yesterday's argument, namely, that even if the contention raised by the defendants be correct, in so far as liability for payment for the 200-plus, that the liability for payment of the original 70 which were connected with the party of the first part named there, in that that liability is a fixed liability—not a fixed liability, pardon me, but a liability contingent only upon the 200 figure being reached.

payment of the original 70 which were connected with the party of the first part named there, in that that liability is a fixed liability—not a fixed liability, pardon me, but a liability contingent only upon the 200 figure being reached.

The Court: I have made ruling on that point in what I have said.

Mr. Silberberg: I did not understand you.

The Court: You have the reporter read it to you. I have made my ruling on that.

Mr. Silberberg: May I respectfully note my exception, sir, on the grounds that I have previously stated, and upon the further grounds that the language to which the Court has alluded; namely, the sentence in paragraph 5, reading, the provisions of this paragraph shall not apply to any lot or parcel of land in said subdivision which is conveyed to others by the party of the first part without being connected to water mains before such conveyance, I respectfully submit that has

taken from the jury the question of fact as to

Vol. III. whether the remaining lands were connected prior
page 104 } to such conveyance, which remains a question of
fact.

In other words, both of those conditions, as I understand it, have to be met for the escape clause to become operative and the further point that this sentence does not render the entire reimbursement paragraph null and void but renders it null and void as to any such subsequent land.

(Whereupon, the proceedings were resumed in open court:)

The Court: Ladies and gentlemen of the jury, the defend-

ant has made in this case what is known as a motion to strike the evidence of the plaintiff and I have granted that motion.

That means that the evidence of the plaintiff has been stricken out and that means, then, that there is no evidence before you supporting the plaintiff's claim in this case, all the evidence having been stricken out as a result of my granting this motion.

However, under our system of law in this State, it is still necessary that you, the jury, return a verdict in this case.

So I will now ask you to go to your room and return a verdict.

Now, you will recall from having served before that your first duty when you get to the room is to elect from among your group one of your members to be a foreman.

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Then when you have arrived at your verdict, I have prepared a form for you to follow which you will complete by adding to it that which is your verdict.

So go to your room now and consider the verdict, keeping in mind that I have stricken all of the evidence in the case.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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RULE 5:12—BRIEFS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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