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# Record No. 4987

## In the Supreme Court of Appeals of Virginia at Richmond

## BARCROFT WOODS, INC.

v.

## ROBERT J. FRANCIS

FROM THE CIRCUIT COURT OF ARLINGTON COUNTY

RULE 5:12—BRIEFS.

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

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

HOWARD G. TURNER, Clerk.

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

IN THE

# Supreme Court of Appeals of Virginia

AT RICHMOND

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## Record No. 4987

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VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 22nd day of January, 1959.

BARCROFT WOODS, INC., Plaintiff in Error,

*against*

ROBERT J. FRANCIS, Defendant in Error.

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From the Circuit Court of Arlington County

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Upon the petition of Barcroft Woods, Inc., a writ of error and *supersedeas* is awarded it to a judgment rendered by the Circuit Court of Arlington County on the 17th day of July, 1958, in a certain motion for judgment then therein depending wherein Robert J. Francis was plaintiff and Pomponio Realty Company and the petitioner were defendants; 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 ten thousand dollars, with condition as the law directs.

# RECORD

* * * * *

Filed in the Clerk's Office the 10th day of December, 1956.

Teste:

H. BRUCE GREEN, Clerk
VIRGINIA C. LONG, D. C.

## MOTION FOR JUDGMENT.

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

1. Plaintiff is a resident of Fairfax County, Virginia.
2. Defendant is a realty company licensed to do business in the Commonwealth of Virginia, with its principal place of business located in Arlington County, Virginia.
3. On May 18, 1955, plaintiff and his now deceased wife, Margaret B. Francis, entered into a valid, written conditional purchase agreement, and a valid, written sales contract with defendant for the purchase of a lot in Lake Barcroft Estates, Fairfax County, Virginia, and for the construction of a house thereon, including a number of special modifications and additions, and for the landscaping and general improvement of the property so purchased. Plaintiff has performed all of his obligations under said contracts.
4. During several discussions between plaintiff and agents of defendant realty company, taking place prior to the signing of the above mentioned contracts, plaintiff stressed the essential need for prompt construction because of
page 2 } pressing personal problems. As a result of these discussions, a clause was specifically included in the above mentioned sales contract stating that time was of the essence and that the house in question would be habitable and that the plaintiff would be able to occupy said house on or before September 1, 1955.
5. In addition, defendant specifically contracted that Lake Barcroft, known hereinafter as "the lake," would be "cleaned out" up to the lot purchased by plaintiff, and in consideration for this promise plaintiff obligated himself to pay the premium price called for in said contract.
6. Furthermore, defendant contracted in the above mentioned conditional purchase agreement to completely sod plaintiff's lot and to install a 40′ sand beach.

7. Due to the negligent actions and omissions of defendant, plaintiff was not able to occupy the house until November 1, 1955 and even at this late date only the second floor of the house was habitable, the first floor taking nearly another month to complete with many items as yet uncompleted. As a result of defendant's negligent failure to finish the house on schedule, plaintiff, his gravely ill wife and their family suffered serious hardship and inconvenience.

8. Although it was specifically provided in the above mentioned sales contract that the lake should be cleaned out up to the plaintiff's property and a beach installed, defendant, by his wrongful failure to perform said promise within a reasonable time, has breached the above mentioned contract, causing great loss to the value and worth of plaintiff's property in the amount of $20,000.00.

9. Defendant has further wrongfully breached the above mentioned sales contract by failing within a reasonable time to completely sod plaintiff's lot as provided in the
page 3 } sales contract, and has failed to properly complete many other items of a minor nature. Defendant has refused to execute these provisions of the above mentioned contracts without just cause or reason and despite continued and insistent requests by plaintiff that he perform.

10. As a result of defendant's negligent actions and his wrongful refusal to fully execute the terms and provisions of these valid contracts entered into in good faith by the plaintiff, plaintiff is seriously damaged financially, has suffered great personal anguish and inconvenience, all of which are still continuing.

WHEREFORE, plaintiff demands judgment against defendant in the sum of $30,000.00 and costs, and so moves this Honorable Court.

MURDAUGH STUART MADDEN
Attorney for Plaintiff
212 Little Falls Street
Falls Church, Virginia.

* * * * *

Plaintiff demands a trial by jury on all of the issues of this cause.

* * * * *

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Filed Jan. 3, 1957.

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

MOTION FOR BILL OF PARTICULARS.

Comes now defendant herein by its counsel, and moves the Court to require plaintiff to furnish the following particulars of his claim:

1. File with the Clerk, and furnish defendant with, copies of the written conditional purchase agreement and written sales contract referred to in paragraph 3 of the Motion for Judgment, and advise which was first executed by the parties.

2. Itemize the "special modifications and additions" referred to in the said paragraph 3 and the "landscaping and general improvement of the property," also referred to therein, if such are not part of the written contracts. If such are not so part of said contracts, indicate the names of the parties entering into agreements for such modifications, additions, landscaping and general improvement of the property, the date or dates such were agreed upon, and the nature thereof if oral, and if in writing furnish the Clerk and the defendants copies thereof.

3. To what agents of defendant, by name, did plaintiff allegedly stress the need for prompt construction referred to in paragraph 4 of the Motion.

4. The name of the party allegedly obligated to clean out "the lake" referred to in paragraph 5 of the Motion, and whether said party entered into any agreement
page 7 } with anyone to clean out "the lake," and, if so, the date of and nature of said agreement.

5. Specify the negligent actions and omissions of defendant referred to in paragraph 7 of the Motion.

6. Itemize the factors causing the alleged great loss to the value and worth of plaintiff's property, in the aggregate of $20,000.00, referred to in paragraph 8 of the Motion and the amount of damages applicable to each such factor.

7. Specify the "other items of a minor nature," referred

to in paragraph 9 of the Motion, which defendant has allegedly failed to properly complete.

8. Itemize the factors, and the amount of damages applicable to each such factor, constituting the remaining $10,000.00 in damages allegedly suffered by plaintiff.

POMPONIO REALTY COMPANY
By L. LEE BEAN
Of Counsel.

* * * * *

page 8 }

* * * * *

Filed Feb. 20, 1957.

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

BILL OF PARTICULARS.

Comes now the plaintiff and in answer to defendant's motion for a Bill of Particulars, by counsel states as follows:

(1) Filed herewith and made a part of plaintiff's case are copies of the written sales contract and written conditional purchase agreement referred to in plaintiff's Motion for Judgment. It is plaintiff's recollection that the sales contract was executed just prior to the conditional purchase agreement.

(2) All of the items referred to in paragraph 3, of the Motion for Bill of Particulars are part of and included in the written contracts.

(3) The agents of defendant, referred to in paragraph 3 of the Motion for Bill of Particulars are Mr. Anthony Dennis and Mr. Lincoln Vance.

(4) Defendant specifically obligated himself to clean out the lake in the contracts herein sued upon. Plaintiff has no specific knowledge of the nature of any agreement between defendant and any other person with reference to cleaning out the lake.

page 9 } (5) The negligent acts and omissions referred to in paragraph 7 of the Motion for Judgment are

defendant's failure to supply sufficient men and materials at the times and places needed and with the qualifications necessary for completing the contract properly and on time.

(6) The factors causing the loss of value and worth of plaintiff's property in the aggregate of Twenty Thousand ($20,000) Dollars were as follows:

(a) A Fifteen Thousand ($15,000) Dollar premium on the value of "lake front lots" which plaintiff contracted to buy but which plaintiff does not have.

(b) A Five Thousand ($5,000) Dollar loss in various omissions and failures as follows:

i. Basement not properly panelled.
ii. Lawn not properly sodded.
iii. Beach not installed.
iv. Guttering not properly painted.
v. Beams in house stained wrong color.
vi. Kitchen baseboard not painted as specified.
vii. Broken bricks in house not replaced.

(7) The response to question 7 of the Motion for Bill of Particulars in contained in paragraph (6) above.

(8) The additional Ten Thousand ($10,000) Dollars in damage suffered by plaintiff is comprised of inconvenience, hardship and suffering caused plaintiff and his family by defendant's failure to complete the house on time. The enjoyment of this house was of extraordinary importance to plaintiff due to the serious illness of his wife, all of which was well known to the defendant.

ROBERT J. FRANCIS
By Counsel.

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DEMURRER.

Comes now the defendant and states that the Motion for Judgment as particularized in the Bill of Particulars is not sufficient in law and does not set forth a claim or claims for which relief may be granted by reason of the following:

1. The proper party or parties defendant are not before the Court.
2. The record shows on its face that plaintiff does not state a cause of action against this defendant.
3. For other matters apparent on the face of the record.

POMPONIO REALTY CO.
By Counsel.

Filed Feb. 28, 1957.

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

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ORDER.

This 28th day of March, 1957, came the Plaintiff by counsel, and asked leave of this Court to file his amended Motion for Judgment, and by and with consent of the counsel for defendants:

IT IS ADJUDGED, ORDERED and DECREED, that Plaintiff's amended Motion for Judgment which has been deposited in the Clerk's office of this Court be and the same hereby is ordered filed in this cause.

Enter this 28th day of March, 1957.

WILLIAM D. MEDLEY, Judge.

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Filed March 28, 1957.

H. BRUCE GREEN, Clerk
By MAC D. RICE, Dep. Clerk.

## AMENDED MOTION FOR JUDGMENT.

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

1. Plaintiff is a resident of Fairfax County, Virginia.
2. Defendant Pomponio Realty Company is a realty company licensed to do business in the Commonwealth of Virginia, with its principal place of business located in Arlington County, Virginia.
3. Defendant Barcroft Woods, Inc., is a construction company, with its principal place of business located in Arlington County, Virginia.
4. On May 18, 1955, plaintiff and his now deceased wife, Margaret B. Francis, entered into a valid, written conditional purchase agreement, and a valid, written sales contract with defendants for the purchase of a lot in Lake Barcroft Estates, Fairfax County, Virginia, and for the construction of a house thereon, including a number of special modifications and additions, and for the landscaping and general page 18} improvement of the property so purchased. Plaintiff has performed all of his obligations under said contract.
5. During several discussions between plaintiff and agents of the defendant companies, taking place prior to the signing of the above mentioned contracts, plaintiff stressed the essential need for prompt construction because of pressing personal problems. As a result of these discussions, a clause was specifically included in the above mentioned sales contract stating that time was of the essence and that the house in question would be habitable and that the plaintiff would be able to occupy said house on or before September 1, 1955.
6. In addition, defendants specifically contracted that Lake Barcroft, known hereinafter as "the lake," would be "cleaned out" up to the lot purchased by plaintiff, and in consideration for this promise plaintiff obligated himself to pay the premium price called for in said contract.
7. Furthermore, defendants contracted in the above mentioned conditional purchase agreement to completely sod plaintiff's lot and to install a 40′ sand beach.
8. Due to the negligent actions and omissions of defendants, plaintiff was not able to occupy the house until November 1, 1955 and even at this late date only the second floor of the house was habitable, the first floor taking nearly another month to complete with many items as yet uncompleted. As a result of defendants' negligent failure to finish

the house on schedule, plaintiff, his gravely ill wife and their family suffered serious hardship and inconvenience and grievous mental and physical suffering.

9. Although it was specifically provided in the above mentioned sales contract that the lake should be cleaned out up to the plaintiff's property and a beach installed, defendants, by their wrongful failure to perform said promise within a reasonable time, have breached the above mentioned contract, causing great loss to the value and worth of plaintiff's property in the amount of $20,000.00.

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10. Defendants have further wrongfully breached the above mentioned sales contract by failing within a reasonable time to completely sod plaintiff's lot as provided in the sales contract, and have failed to properly complete many other items of a minor nature. Defendants have refused to execute these provisions of the above mentioned contracts without just cause or reason and despite continued and insistent requests by plaintiff that they perform.

11. As a result of defendants' negligent actions and their wrongful refusal to fully execute the terms and provisions of these valid contracts entered into in good faith by the plaintiff, plaintiff is seriously damaged financially, has suffered great personal anguish and inconvenience, all of which are still continuing.

WHEREFORE, plaintiff demands judgment against defendants in the sum of $30,000.00 and costs, and so moves this Honorable Court.

MURDAUGH STUART MADDEN
Attorney for Plaintiff
212 Little Falls Street
Falls Church, Virginia.

* * * * *

Plaintiff demands a trial by jury on all of the issues of this cause.

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* * * * *

Filed March 28, 1957.

H. BRUCE GREEN, Clerk
By MAC D. RICE, Dep. Clerk.

## DEMURRRER TO AMENDED MOTION FOR JUDGMENT.

Comes now the defendants herein and state that the Amended Motion for Judgment, and Bill of Particulars earlier filed, are not sufficient in law and do not set forth a claim or claims for which relief may be granted by reason of the following:

1. A necessary party to the cause has not been joined as a defendant, to-wit, Barcroft Lake Shores, Inc.
2. Damages claimed by plaintiff are too remote, speculative, uncertain and contingent to be recoverable in respect to Paragraph (6) (a) and Paragraph (8) of the Bill of Particulars.
3. For other matters apparent on the face of the record.

POMPONIO REALTY COMPANY
BARCROFT WOODS, INC.
By Counsel.

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THE 28th day of March 1957 this case was heard on the demurrer to the amended motion for Judgment, which said matter the Court took under advisement.

Entered this 29th day of March, 1957.

WILLIAM D. MEDLEY, Judge.

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To: M. S. Madden, Esq., Attorney for Plaintiff.
L. L. Bean, Esq., Attorney for Defendant.

This case was heard on the Amended Motion for Judgment, the Bill of Particulars earlier filed, the Demurrer of Defendants to said Amended Motion for Judgment and to

Paragraph 6a and Paragraph 8 of said Bill of Particulars, argument of counsel on said demurrer, and memoranda filed by counsel.

Upon consideration whereof the Court is of the opinion that the demurrer of Defendant should be sustained as to Paragraph 8 of the Bill of Particulars and overruled as to other matters raised by said demurrer. It is noted that the allegations of Paragraph 8 of the Amended Motion for Judgment are, in effect, the same as Paragraph 8 of the Bill of Particulars and therefore, the Court's ruling applies also to said Paragraph 8 of the Amended Motion for Judgment.

An order should be prepared pursuant to this memorandum and, after endorsement by counsel of record, be presented for entry. Such order should provide for the filing by defendants of grounds of defense within a specified time.

January 22, 1958.

WILLIAM D. MEDLEY, Judge.

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* * * * *

ORDER.

This Cause came on to be heard this 3rd day of February, 1958, upon the papers formerly filed and read herein, and particularly upon the demurrer filed by defendants to the amended motion for judgment and to paragraph 6 (a) and paragraph 8 of the bill of particulars, argument of counsel and memoranda filed, and

The Court having duly and carefully considered the same, it is

ADJUDGED AND ORDERED that the demurrer be, and the same hereby is, sustained as to paragraph 8 of the amended motion for judgment and paragraph 8 of the bill of particulars, to which ruling of the Court plaintiff excepts, and it is further

ADJUDGED AND ORDERED that the demurrer be, and the same hereby is, overruled as to the other allegations of the amended motion for judgment and of the bill of particulars, to which ruling of the Court defendants except; and it is further

ADJUDGED AND ORDERED that the defendants shall have 21 days from the entry of this order within which to file their grounds of defense.

page 24 } AND THIS CAUSE IS CONTINUED.

Entered: February 3, 1958.

WILLIAM D. MEDLEY, Judge.

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Filed Feb. 20, 1958.

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

GROUNDS OF DEFENSE.

Come now the defendants herein and for their grounds of defense to the amended motion for judgment, as particularized in the bill of particulars, respectfully state:

1. Admit the allegations contained in paragraph 1 of the amended bill.
2. Admit the allegations contained in paragraph 2 of the amended bill.
3. Admit the allegations contained in paragraph 3 of the amended bill.
4. Admit that plaintiff and his wife entered into the contracts referred to in paragraph 4 of said amended bill, but neither admit nor deny, and demand strict proof, of the remaining allegations contained in said paragraph.
5. Admit that discussions were had between plaintiff and defendants' agents, but not of the nature alleged in paragraph 5 of the amended bill. Deny the remaining allegations thereof and demand strict proof thereof, affirmatively alleging that the contracts referred to speak for themselves.
6. Admit that portion of the allegations con-
page 26 } tained in paragraph 6 of the amended bill which is reflected in the contracts referred to, but deny and demand strict proof of the remainder of said allegations.

7. Admit that portion of the allegations contained in paragraph 7 of the amended bill which is reflected in the contracts referred to, but deny and demand strict proof of the remainder of said allegations.

8. Deny and demand strict proof of the allegations contained in paragraph 8 of the amended bill.

9. Deny and demand strict proof of the allegations contained in paragraph 9 of the amended bill.

10. Deny and demand strict proof of the allegations contained in paragraph 10 of the amended bill.

11. Deny and demand strict proof of the allegations contained in paragraph 11 of the amended bill.

WHEREFORE, defendants pray to be hence dismissed, with their costs.

POMPONIO REALTY COMPANY and
BARCROFT WOODS, INCORPORATED
By L. LEE BEAN
Of Counsel.

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Pretrial proceedings, April 24, 1958.

BEFORE: WILLIAM D. MEDLEY, Judge.

Present: For the Plaintiff: M. S. Madden, Esq.
For the Defendant: L. L. Bean, Esq.

This is a Motion for Judgment of $20,000.

Facts: Plaintiff is a resident of Fairfax County, Virginia. Defendant Pomponio Realty Company is a Realty Company licensed to do business in Virginia, with its principal place of business located in Arlington. Defendant Barcroft Woods Inc., is a construction company with its principal place of business in Arlington.

On May 18, 1955, plaintiff and his deceased wife, Margaret B. Francis, entered into a valid, written conditional purchase agreement and a "V W" sales contract with defendants for

purchase of a lot in Lake Barcroft Estates, Fairfax, and for construction of a house thereon.

Plaintiff alleges:

That he has performed all his obligations under the contract; that, prior to the signing of the contracts, in discussions between plaintiff and defendants' agents, plaintiff stressed the need for prompt construction because of pressing personal problems; that, as a result, a clause was included in the sales contract stating that time was of the essence and that the house would be habitable and that plaintiff would be able to occupy the house on September 1, 1955; that defendants contracted that Lake Barcroft would be "cleaned out" up to plaintiff's lot and in consideration for this promise, plaintiff obligated himself to pay the premium price called for in the contract; that defendants contracted in the conditional purchase agreement to completely sod plaintiff's lot and install a 40 foot sand beach; that, due to defendants' negligent actions and omissions, plaintiff could not occupy the house until November 1, 1955 and even then only the second floor was habitable; that it was almost a month before the first floor was habitable; that defendants breached the sales contract in failing to clean up the lake and install the beach within a reasonable time, thereby causing $20,000 loss in the value of plaintiff's property; that defendants wrongfully breached the sales contract in failing to completely sod plaintiff's lot within a reasonable time; that defendants have refused to execute these provisions of the contracts without just cause or reason and despite continued and insistent requests by plaintiff that they perform; that, as a result of defendants' negligent actions and wrongful refusal to perform the contracts which were entered into in good faith by plaintiff, plaintiff is seriously damaged financially.

page 28 } Defendants deny plaintiff's allegations, except as set forth in "Facts" above, and demand strict proof thereof.

Defendants admit the contracts but deny that they contracted to "clean out" the lake.

Defendants further deny that they were to install the beach until the lake was lowered by Lake Barcroft Shores, Inc.

This case is set for trial by jury on July 9, 1958.

WILLIAM D. MEDLEY, Judge.

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THE 9th day of July 1958 came the Plaintiff by his Attorney, David B. Kinney and the Defendant by its Attorney, L. Lee Bean.

WHEREUPON neither side requiring the services of a jury, all matters of law and fact were presented to the Court for determination.

THEREUPON opening statements were made to the Court by counsel for Plaintiff and Defendant until the Court adjourned for the luncheon recess.

WHEREUPON after the luncheon recess, counsel again proceeded to introduce his evidence until the Court adjourned to July 10, 1958, at 10:00 A. M.

Entered this 10th day of July, 1958.

EMERY N. HOSMER, Judge.

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PURSUANT to adjournment the 10th day of July 1958 came the Plaintiff by his counsel, Murdaugh S. Madden and David Kinney and the Defendant by its counsel, L. Lee Bean.

WHEREUPON counsel for Plaintiff again proceeded to introduce his evidence and at the conclusion of which counsel for the Defendant moved to strike the evidence of the Plaintiff, which said motion was denied by the Court and to which ruling of the Court, the Defendant excepted.

THEREUPON counsel for the Defendant proceeded to introduce his evidence until the Court adjourned for the luncheon recess.

WHEREUPON after the luncheon recess counsel for the Defendant again proceeded to introduce his evidence, at

the conclusion thereof counsel for Plaintiff and Defendant submitted the case to the Court without argument.

THEREUPON the Court took the case under advisement and adjourned.

Entered this 11th day of July, 1958.

EMERY N. HOSMER, Judge.

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The Court is of the opinion, after careful consideration of all the evidence in this case, that the plaintiff is entitled to recover from the defendant, Barcroft Woods, Incorporated, the sum of $7,925.00 damages for breach of contract as follows:

| | |
|---|---|
| For failure to clean out lake and install a sand beach | $7,100.00 |
| Failure to panel cinder block walls in basement | 385.00 |
| Failure to properly paint gravel strip or flashing | 140.00 |
| Failure to finish sodding lot | 300.00 |
| Total | $7,925.00 |

Counsel for plaintiff will prepare and present for entry an order of judgment endorsed by counsel for all parties for the amount of damages awarded herein.

July 14, 1958.

EMERY N. HOSMER, Judge.

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ON THE 9TH AND 10TH DAYS of July, 1958, appeared the plaintiff and his counsel, Murdaugh S. Madden and David

B. Kinney, and the defendant by its counsel, L. Lee Bean, for the trial of this case.

NEITHER SIDE requesting the services of a jury, all matters of law and fact were presented to the Court for determination.

UPON CONSIDERATION WHEREOF, it is the opinion of the Court that the plaintiff should recover of and from the defendant Barcroft Woods, Incorporated, and that the plaintiff shall recover nothing from Pomponio Realty Company, a corporation.

IT IS, THEREFORE, THE JUDGMENT of the Court, the defendant Barcroft Woods, Inc., duly excepting to this ruling, that the plaintiff recover of and from the defendant Barcroft Woods, Incorporated, the sum of Seven Thousand, Nine Hundred and Twenty-Five Dollars ($7,925.00), plus the plaintiff's costs of court expended herein; said sum ($7,925.00) representing damages as follows:

| | |
|---|---|
| For failure to clean out lake and install a sand beach | $7,100.00 |
| Failure to panel cinder block walls in basement | 385.00 |
| Failure to properly paint gravel strip or flashing | 140.00 |

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| | |
|---|---|
| Failure to finish sodding lot | 300.00 |
| Total | $7,925.00 |

Entered this 17th day of July, 1958.

EMERY N. HOSMER, Judge.

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Filed Aug. 25, 1958.

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

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

To: H. Bruce Green, Clerk
Circuit Court of Arlington County
Arlington, Virginia

Defendant Barcroft Woods, Inc., by its attorneys, hereby gives notice, pursuant to the provisions of Section 4, Rule 5:1, of the Rules of the Supreme Court of Appeals of Virginia, as amended, of its appeal from that certain Judgment Order entered in the above-styled case on July 17, 1958, in which plaintiff, Robert J. Francis, was granted judgment against the said defendant in the sum of Seven Thousand Nine Hundred Twenty-five and 00/100 Dollars ($7,925.00), plus plaintiff's costs of court expended.

Further, pursuant to the said Rules, said defendant assigns the following errors:

1. The Court erred as a matter of law in overruling defendant's demurrer as to the failure of plaintiff to join as a defendant Barcroft Lake Shores, Inc.

2. The Court erred as a matter of law in overruling defendant's demurrer as to the allegations in other than paragraph 8 of the plaintiff's amended motion for judgment and the bill of particulars filed by plaintiff.

page 36 } 3. The Court erred as a matter of law in overruling said defendant's motion to strike the plaintiff's evidence at the conclusion of the presentation of plaintiff's case.

4. The Court erred as a matter of law and fact in holding that said defendant contracted to "clean out" Lake Barcroft next to plaintiff's lot.

5. The Court erred as a matter of law and fact in holding that said defendant contracted to install the plaintiff's beach prior to the lowering of Lake Barcroft by Barcroft Lake Shores, Inc., or in holding that said defendant contracted to lower said lake, as well as install said beach.

6. The Court erred as a matter of law and fact in holding that said defendant failed (a) to panel cinder block walls in plaintiff's basement; (b) to properly paint gravel strip or flashing and (c) to finish sodding the lot.

7. The Court erred as a matter of law in admitting, over the objections and exceptions of said defendant, certain improper, incompetent and irrelevant evidence offered by plaintiff.

8. The Court erred as a matter of law and fact in relying upon the evidence referred to in paragraph 7, *supra,* in finding judgment against said defendant.

9. The Court erred as a matter of law and fact in allowing plaintiff to recover judgment against said defendant.

Said defendant will make timely application for writ of error and suspension and/or *supersedeas*.

BEAN AND SIZEMORE
By L. LEE BEAN
Counsel for Defendant
Barcroft Woods, Inc.

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ORDER GRANTING SUSPENSION BOND.

This Cause came on to be heard upon the papers formerly filed and read herein and particularly upon the Notice of Motion for Suspension Bond, and

IT APPEARING TO THE COURT that said motion is proper and should be granted, pursuant to Section 8-465, Code of Virginia (1950), as amended, it is

ADJUDGED AND ORDERED that the judgment order be, and the same hereby is, suspended as to execution thereon for a period of 60 days from the date hereof and thereafter until the petition for appeal is acted on by the Supreme Court of Appeals, provided (1) said petition for appeal is filed within four (4) months from the date of the judgment order; (2) provided, further, that defendant, or someone acting for it, files a bond in the Clerk's office, with surety to be approved by the Clerk, in the penalty of $10,000.00, the condition of said bond reciting the judgment, and the intention of said defendant to present such petition; and providing for the payment of all such damages as may accrue to any person by reason of such suspension in case a *supersedeas* to such judgment be not petitioned for within such time, or if so petitioned for should not be allowed and be
page 38 } effectual within the time so specified.

Entered this 26th day of August, 1958.

EMERY N. HOSMER, Judge.

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NOTICE OF MOTION FOR SUSPENSION BOND.

To: David B. Kinney
Murdaugh S. Madden
Counsel for Plaintiff.

Comes now Barcroft Woods, Inc., defendant herein, by counsel, pursuant to Section 8-465, Code of Virginia, (1950) as amended, and moves the Court for an order suspending the execution of the judgment herein for a reasonable time pending presentation of petition for appeal and the granting of a writ herein.

BEAN AND SIZEMORE
By L. LEE BEAN
Counsel for Defendant
Barcroft Woods, Inc.

Legal and timely service accepted this 25th day of August, 1958.

DAVID B. KINNEY
MURDAUGH S. MADDEN
By DAVID B. KINNEY
Counsel for Plaintiff.

Filed Aug. 26, 1958.

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

page 40 } The Commonwealth of Virginia:

Know all Men by these Presents, That we, Barcroft Woods Inc., Principal, American Surety Company, a corporation, Surety by Edward J. Thoma, Atty. in fact are held and firmly bound unto Robert J. Francis et al. in the sum of Ten Thousand and 00/100 (10,000.00) Dollars, to the payment whereof, well and truly to be made to the said Robert J. Francis et al. we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. And we hereby waive the benefit of our homestead exemption as to this obligation.

Sealed with our seals, and dated this 26 day of August, one thousand nine hundred fifty-eight.

The Condition of The Above Obligation Is Such, That whereas, on July 17, 1958, the said Robert J. Francis obtained a judgment against the said Barcroft Woods, Inc., in the sum of $7,925.00, together with court costs, in Law No. 6037, Arlington Circuit Court; and, whereas, Barcroft Woods, Inc., intends to file a petition for appeal of said judgment to the Supreme Court of Appeals of Virginia; and whereas, pursuant to order of the Court entered August 26, 1958, the said obligors bind themselves to pay all damages as may accrue to the said Robert J. Francis or any person of interest by reason of the suspension of such judgment in case a *supersedeas* to such judgment be not petitioned for within such time or if so petitioned for should not be allowed and be effectual within the time so specified, then this obligation to be void; otherwise to remain full force and virtue.

BARCROFT WOOD, INC. (Seal)
By REECE POMPONIO (Seal)
President

AMERICAN SURETY
COMPANY (Seal)
By EDWARD J. THOMA (Seal)
Attorney in Fact.

In the Clerk's Office of the Circuit Court for the County of Arlington, the 26 day of August, 1958:

This bond was executed and acknowledged by the obligors, and ordered to be recorded. American Surety Company By Edward J. Thoma, Atty. in Fact the surety therein having first justified on oath that its estate, after the payment of all its just debts, and those for which it is bound as security for others, and expects to have to pay, is worth the sum of Ten Thousand Dollars, over and above all exemptions allowed by law.

Teste:

H. BRUCE GREEN, Clerk
By VIRGINIA C. LONG,
Deputy Clerk.

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* * * * *

NOTICE.

To: David B. Kinney, Esq.
Murdaugh S. Madden, Esq.
Counsel for Plaintiff
Court House Square
Arlington 1, Virginia.

In accordance with Rule 5:1, Section 3 (f) of the Rules of the Supreme Court of Appeals, and pursuant to our telephone conversations of September 8, 1958, and September 12, 1958, in which you indicated that you would review your true copy of the transcript in the above case, you are hereby notified that I will tender the original of the transcript, with inked minor corrections noted on certain pages thereof, to the Honorable Emery N. Hosmer, Circuit Judge, at 9:30 A. M., Monday, September 15, 1958, in his chambers.

BEAN AND SIZEMORE
By L. LEE BEAN
Counsel for Defendant
Barcroft Woods, Inc.

Service of copies hereof accepted this 12th day of September, 1958.

DAVID B. KINNEY
MURDAUGH S. MADDEN
By DAVID B. KINNEY

Filed Sep. 12, 1958.

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

* * * * *

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* * * * *

VIRGINIA:

ROBERT J. FRANCIS
558 Waterway Drive
Lake Barcroft
Falls Church, Va., Plaintiff.

v.

POMPONIO REALTY COMPANY,
A Body Corporate
2222 Wilson Boulevard
Arlington, Va.,

*and*

BARCROFT WOODS, INC.,
A Body Corporate
2222 Wilson Boulevard
Arlington, Va., Defendants.

AT LAW NO. 6037.

Arlington County, Virginia
Wednesday, July 9, 1958.

The above-entitled matter came on for hearing before Judge WILLIAM HENRY HOSMER, in the Circuit Court of Ar-

lington County, Virginia, Wednesday, July 9, 1958, at 10:00 o'clock a. m.

Appearances: On behalf of the Plaintiff: David B. Kinney, Esquire, Murdaugh Stuart Madden, Esq.
On behalf of the Defendants: L. Lee Bean, Esq.

page 2 } PROCEEDINGS.

The Court: All right, gentlemen, are you ready? Do you want to make an opening statement?
Mr. Kinney: Yes. I think we should exclude the witnesses, your Honor.
The Court: All the witnesses who will testify in this case, come forward and be sworn. I will ask you to leave the Courtroom, but remain where you can be called.
Mr. Kinney: Your Honor, I understand that there is one, possibly two other witnesses that I know of. One I have myself, and I understand there is another witness who promised to be here for the defendant, and when they come in, we might interrupt and let them be sworn.
The Court: When they come in, they will be sworn.
Mr. Bean: I have been advised that one of the witnesses, Colonel Barger, will be here with Mr. Andy Clark.
Mr. Kinney: Your Honor, this case arose originally back in 1955. Mr. Francis and his wife were desirous of finding a home for themselves and their family. In their search for a house, they went at one time to Lake Barcroft. In that area, among their contacts was a Mr. Lincoln Vance, who represented Pomponio Realty, who were at that time building houses in the area.
One of the houses in particular was a house called the Trendsetter. It was back from the lake, itself. It was a
page 3 } house that appealed to Mr. Francis and his wife. The sale price, I believe, was $36,950.00, possibly $36,500.00. He showed interest in that house, and informed Mr. Vance he would be interested in a house of that type; that he was interested in a lake front lot, or Mr. Vance suggested to him that a lake front lot might be an answer to his problem. He informed Mr. Vance that he had a time problem on several elements. One, he wanted to get the children in school in September, two, the house where he was living in the District, his lease was up, and possibly most important, his wife was fatally ill with cancer, so he proceeded to contract to buy the Trendsetter on a lake-front lot, and he was shown a plat by Mr. Vance of Lot 683, I believe, maybe it is 685, and was told by Mr. Vance that this lot would be the best

one. It would be away from the proposed beach. It had an approach point, out into the lake, and that he could have his choice of lots, and he would recommend that he take this particular lot.

He then contracted to buy this house and pay a premium, the difference between the Trendsetter on the property back up from the lake, and the lake front property, being approximately $10,000.00. He agreed to buy the lake front lot with the Trendsetter on it for $46,000.00.

Before signing that contract on May 18th, Mr. Francis and Mr. Vance—Mr. Francis was obviously aware that page 4 } there wasn't a lake present when he looked at the lot. He wished assurance that it would be done by the time, or as soon thereafter as his house was completed. He was taken to a Colonel Barger by Mr. Vance, and he was taken there for the purpose of reassurance that the lake would be dug out.

Upon the assurance of Mr. Barger that that Fall when the lake was lowered, he would have a lake in front of him; that it would be cleaned out. He told him that bulldozers would come in. Chemicals would be used to stop the vegitation, water would be lowered and bulldozers would come in; that he would have a lake indeed, that was twenty feet out and six feet deep, that would slope out from his very lot and would gradually after twenty feet, be over his head.

Mr. Vance, thus having reassured Mr. Francis that the lake would be there, put a provision in the contract that read: "It is understood that the lake will be cleaned out by Barcroft Lake Shores, Inc." The plaintiff takes the position that would be the same. That it is understood that Joe Blow will do the siding, and that Martin will do the roofing. He had no way of knowing what connection Barger or Pomponio or Barcroft Lake Shores, Inc. and Barcroft Homes, Barcroft Estates, what their exact connection was. He was not informed what their connection was. He was also induced to sign the contract. He did sign it, and made a pro- page 5 } vision in the contract that time would be of the essence, which is in the contract.

He proposed to pay for this house by trading another house he had in the District, and received a credit of $8,650.00 on his District house to apply to his Lake Barcroft house. He was then to pay $230.00 per month, $200.00 of which was to apply to interest, insurance and taxes, and $30.00 to principal. He signed that contract, also.

In the contract, it was provided that the house to be built would be the Trendsetter, which was a house already established. It had a bar in the basement, with all cinder block

walls in basement to be panelled. The purchaser to have the option of re-arranging first floor and basement partitions, provided no basic structural changes were involved. Sale to include certain items.

In addition thereto, Mr. Francis, after being reassured that he would have a lake, was told and accepted, and that he would not only have a lake, but have a forty-foot sanded beach in front of his property, and so placed in the terms of the contract. He wanted a lot completely sodded and so placed that term in the contract. He wanted shrubbery and have a sand beach installed.

Now, that has not been done, nor has the sodding been done.

That is part of the plan today. They contracted
page 6 } that the house would be habitable by September,
1955. As a matter of fact, he moved into the second story in November, 1955. A month later, the first floor was finished, in December, and in January, his wife passed along.

The exact dimensions of the width of the beach were also placed in the contract. Mr. Francis dealt exclusively with Pomponio Realty and Barcroft Woods, Inc. and Barcroft Estates, through Mr. Vance, and through Mr. Rocco Pomponio, to the extent they have received the entire benefit of the contract, and to our knowledge, Mr. Barger has received no benefit from the contract. Mr. Francis has received letters and was told at the time that he could be assured that the lake would be cleaned out, because the Pomponios had a much greater stake in having the lake cleaned out than he did with one lot, and has so received assurance in writing after his contract, from the Pomponio firm.

He has no privity of contract with Barger, or with a firm that Barger deals through, to-wit, Barcroft Lake Shores, Inc. He has dealt exclusively with Pomponio. They have received the entire benefits from the contract, and he looks to them for recovery, and asks that his major damage be the value of the house, as he contracted for, that is, with the lake front property being premium property, the difference between the

value of the house and the premium lot which he
page 7 } contracted for, and that which he received. We will
present expert testimony as to the value of the property as he received it, and as he contracted to receive it.

We also have claims for items that were not done, some of which have been mentioned, or were done improperly. Those particular items total approximately $3,000.00. The value of the house and lot, the lot, the lot supposedly being a lake front property and bringing a premium, and will come out in the testimony to be approximately $10,000.00, and that is the

recovery that the plaintiff is asking from the defendants today, and respectfully asks.

The Court: Your suit is against Pomponio Realty Company and Barcroft Woods, Inc., both corporations?

Mr. Kinney: Yes, sir.

The Court: What connection in the case does Lake Barcroft Estates have?

Mr. Kinney: We take the position they have no connection so far as the plaintiff is concerned. He did not contract with them. He is not the privity at all.

The Court: How did they get into the case?

Mr. Kinney: They got into the case through the defendants' demurrer and the defendants' defense. They say they are. That Barcroft Lake Shores, Inc. should bear the onus of this damage. We say they should not.

The Court: That they should bear it in what
page 8 } respect?

Mr. Kinney: That is up to them, I believe, your Honor.

The Court: What do they claim?

Mr. Kinney: They claim that Pomponio is not responsible; that someone else is, to wit Barger.

The Court: Barcroft Lakes Shores, Inc? You said Lake Barcroft.

Mr. Kinney: Yes, sir. We will show that not only is the house as he received it—

The Court: The title to the record is in Lake Barcroft at the time the contract was made, to Lake Barcroft Realty, and Pomponio Realty would build the house.

Mr. Kinney: Yes, sir. We further will show that the lot he received is not worth the value of the lot back to the lake.

The Court: Was there any purchase price on the lot?

Mr. Kinney: Yes, in this way. The house that he bought was the Trendsetter house that had an established price of $36,950.00. He bought the same lot on the lake for $46,000.00, a $9,500.00 premium.

The Court: And you mean the total price of the lot under those circumstances was $9,500.00?

Mr. Kinney: No, the house and lot for the Trend-
page 9 } setter house back up in the woods was $46,500.00.

Mr. Bean: If it please the Court, the evidence that the defendant will show in this case, if your Honor please, is that Mr. Francis is a man of considerable business experience and had some private property before and is familiar with the purchase of it and the ownership of it, and the transfer of such ownership. It will also be shown that Mr. Vance, who is a salesman for Pomponio Realty, Inc., and

that incidentally Pomponio Realty, Inc. are in this suit only as agents. Barcroft Woods, Inc. owned the property and still owns it, as a matter of fact, because it is a title not to be conveyed until payment in full is made.

There is an equity of $25,000.00, which has accumulated. They are not only owners, but builders, so Pomponio Realty, with Mr. Vance as salesman, were only the agents in the transaction. They had nothing to do with the ownership of the construction of the home owner.

Mr. Vance did meet and take Mr. Francis to see the Trendsetter and this property was on the lot that wasn't on the lake, as has been stated and apparently from what we can determine, and the fact that he went through with this contract, Mr. Francis liked what he saw. He then contracted with Barcroft Lake Shores, Inc. to sell to him this lot which has been described as on the lake, and have this home, the
page 10 } Trendsetter, built on this lot. Not just literally pick up the house and built it on this lot, but take this home and custom build it on the lot, on the lake front.

It is our position that there is no difference in the building on the lot that Mr. Francis saw or the lot on the lake shore in any sum as large as $9,000.00, as has been suggested, but rather that the value, the difference between the Trendsetter as there and on the lot as it was actually placed, is that the house is a custom-built house. It also might be submitted that any valuation that might be placed on a lot away from the lake and the house on it, and the lot and the house on the lake shore is untenable. It does not necessarily follow that one can take these values and place them down here and come up with figures that are concrete. It seems to me that the valuation of the house and lot on the shore as it was built is the criteria that the Court would need to determine if there was any value that had been lost by reason of the fact that this lake was not lowered and cleaned out, and bulldozed, as suggested.

In any event, Mr. Francis chose Lot 683. He chose it not from the plat which we will show in evidence, but he chose it by going down and looking at the lot itself at the time that the salesman from Barcroft Woods, Inc. and everybody else involved could see the amount of water that was behind that lot. It was at that point that Mr. Francis spoke to Mr. Vance, and in turn to Mr. Arthur Pomponio, and Pom-
page 11 } ponio Realty and Barcroft Woods, Inc. and asked about this lake. It was at that point he was advised, "We have nothing to do with the lake. The lake is owned by Barcroft Lake Shores, Inc., represented by Colonel Barger. We bought the lot from them. We don't know any-

thing about this lake. You will have to go to him," so Mr. Francis and Mr. Vance went to see Colonel Barger, directly, before this contract was signed, and talked with him.

The evidence will show exactly what was going to be done with the lake. It was after that that this contract was entered into between the parties. There is nothing here about Jerry Martin's putting the roof on or Joe Blow doing the paint job, but there are two very specific references in this contract to Barcroft Lake Shores, Inc. The contract states, "It is further understood that the lake is to be cleaned out up to Lot 683 by Barcroft Lake Shores, Inc." who is not a party to this contract, "By Barcroft Lake Shores, Inc." so the parties were contracting to a certain thing, yes. We are going to build a house on that lot and we will sell you the house and lot for $46,000.00 but nowhere in this contract has Pomponio Realty and Barcroft Woods, Inc. agreed to clean out the lake. They do state that they will install the beach, but the parties were dealing with a third party.

page 12 } There is evidence to the effect that Mr. Vance asked Colonel Barger to sign the contract, which he refused to do. The contract was then signed by the parties, but not until they specifically understood that Barcroft Lake Shores, Inc. was going to do something, a condition precedent. Nothing in here indicates that Pomponio Realty, Inc. or Barcroft Realty were. They specifically told Mr. Vance, as I previously indicated, that he had to go to Colonel Barger for satisfaction on it. From the letters that passed between the parties, not only at the time of the transaction, but later, that Mr. Francis wrote to Colonel Barger, he wrote and asked "When is Lake Barcroft going to do this?"

Pomponio Realty wrote asking him when they were going to do it. Never have they obligated themselves in this matter. They said, "Since we don't have any control over the lake, don't ask us what we are going to do."

Part of the purchase price was credit on a house Mr. Francis owned in the District, which was accepted by the Pomponios. There was an equity in it of over eight thousand dollars. It applied toward the purchase price.

The testimony will show when they went to see Colonel Barger, Mr. Francis and Mr. Vance, Mr. Vance represented Pomponio Realty, that Colonel Barger told them that the lake would be cleaned out; that it would be bulldozed either next fall or spring, which would the fall of 1955, or the spring of 1956.

page 13 } The evidence will indicate that Mr. Francis wrote and said, "Colonel Barger, will you agree to dredge out this property along in there so that the lake

will fill up to the height and depth that the parties could be agreed on?" It was as a result of this communication that Colonel Barger said, "I will not dredge it out, but I will clean it out and put the chemicals in and bulldoze it." All this was between Mr. Francis and Barcroft Lake Shores, Inc.

The contract was finally signed on May 18th. It was dated May 18th. Mr. Francis accepted the house on October 29th, 1955. Under the contract, completion was to have been on September 1, 1955, but the evidence will indicate that Mr. Francis, as well as Mrs. Francis, had considerable changes that they wanted made to the house. You will note in the contract that they shifted the partitions. Then there were many suggestions with respect to paints, which naturally postponed the eventuality of the completion of the house. It was occupied on October 29th, and there is a statement signed by Mr. Vance after a careful inspection of the property with a man by the name of Mr. Whetzel, and that statement said he had occupied the house in accordance with the plans and specifications, in accordance with the terms of the contract, indicating that he was perfectly satisfied with the house.

Later, there cropped up this list of items in which he was disappointed. Kitchen baseboards were not properly painted, et cetera. Our representatives have come out and examined the house as late as today so we are familiar with what his complaints are. So it was in a letter of November 7, 1955, that Mr. and Mrs. Francis were invited by Mr. Rocco Pomponio—this was a short time after October 29th—to make a list of any adjustments they wanted made to the house. It was March 27th that this list of complaints finally arrived, things that Mr. Francis wanted done to get the house in shape, and Colonel Barger to put the lake in condition.

page 14

The suit was filed as indicated, eight months later, at which time Colonel Barger and Pomponio Realty and Barcroft Woods, Inc. were made defendants. Colonel Barger was not made a defendant. A demurrer reduced the claim to $20,000.00, which it is my understanding that the complainant is asking because the lot was not a lake front lot, and the facts are that the lots have never been moved. If it were a lake front lot then, it is a lake front lot now, and certainly anything that Mr. Francis can do to improve the value of the lot as it was sold to him, we would be perfectly happy for them to make the arrangements. The other $5,000.00 was for the alleged deficiencies in the workmanship. It is the position of the defendants that the only thing we owe Mr. Francis is a forty-foot sand beach, which we would be delighted to install

at any place he wants. No one has ever told us
page 15 } where to put it.

The Court: All right, call your first witness.

Mr. Kinney: Before we proceed, was Mr. Rocco Pomponio served with a summons? Maybe, he has been out of town. I don't know.

Mr. Bean: No, he wasn't summoned.

The Court: I don't see the summons in the file.

Mr. Bean: I don't recall he stated he was served. I will be glad to get him over here. He did sign the contract. If you need him for any further questions—

The Court: It isn't in the file, probably in the clerk's office.

ROBERT J. FRANCIS,

plaintiff, was called as a witness in his own behalf, and after having been first duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION.

By Mr. Kinney:

Q. Give your name, please.

A. Robert J. Francis.

Q. Where do you live, Mr. Francis

A. 558 Waterway Drive, Lake Barcroft, Falls Church, Virginia.

Q. What is your occupation?

page 16 } A. I am in the toy business.

Q. Whereabouts?

A. We have our principal office in Shirlington Shopping Center, 489 South 8th Street, Arlington, Virginia.

Q. How many members are presently in your family?

A. I have just three children, ages: 16-15, 13, and 10.

Q. In the spring of 1955, did there come a time when you were looking for a house?

A. Yes.

Q. What were the circumstances of your house searching at that time?

A. We had been looking for a house. I particularly wanted to get a place. It was obvious my wife was dying of cancer, and I felt that we ought to get a better place for her to spend her remaining days.

At that time, we had been looking in Virginia, and we found Lake Barcroft, and went down one of the roads, Stoney-

*Robert J. Francis.*

brae Drive, and came to a house that was open, with a Pomponio sign on it. We went in and contacted an agent.

Q. What was his name?

A. Lincoln Vance.

Q. What did you do then?

A. We talked with Mr. Vance. I might say, by
page 17 } way of interjection, prior to that, we had been out in that area and talked to another agent, but he didn't seem to feel we could make a trade with the property in Washington. This was subsequent to my seeing Mr. Vance. We saw a house called the Trendsetter. It was a house up the road on Cedar Drive.

Q. Was that on the lake?

A. No, it wasn't on the lake. It was considerably away from the lake. I was shown through the house. My wife and I went through it completely. Her mother, my mother-in-law, was there at the time.

We were very much impressed with the layout, and how it would suit our needs. My wife was very feeble and couldn't navigate very well, and I liked the idea of having a house of this type. We went on to discuss the price with Mr. Vance.

Q. What was the price of that house and lot?

A. I don't know exactly. I believe it was between $36,000.00 and $37,000.00. That was with taxes, house and lot. He told me he didn't see why we couldn't make a transaction, whereby I could transfer my house in Washington, which I wasn't occupying. I had rented the house after I came back from New York. It was then occupied by a member of the German Embassy.

That vacant house could be transferred, and that
page 18 } would comprise the necessary down-payment on the house we were looking at. It was the Trendsetter on Stoneybrae Drive. After we had expressed this interest, this house was already built and ready to be occupied. That was in late April or early May, 1955.

He told me I could make an even better transaction. If I wanted to get something nice, I should buy a house on the lake front, and the payments would be no more than the payments on the house away from the lake, even though the price would be quite a bit higher, and he said they could work that out, because they had some financing arrangement he could make, so following that, we expressed an interest in this possibility. He said that the same house that was there on the hill, could be built down on the lake, and he had a number of lots he wanted to show me so we could take our choice and

figure the thing out. So he took me down and showed us the lots on Waterway Drive, and indicated that a beach was going to be built at a certain bridge.

Q. What type of beach are you referring to?

A. The beach was a public beach.

Q. That beach would be used by the general public?

A. By the members of Lake Barcroft Community; that a man from Texas owned most of the lots, and he said, "Here is the beach lot for you." We looked at the lot. It page 19 } was perfectly obvious there was no lake. It was a swamp.

Q. You were down on the lot itself?

A. We were down physically and looked at the lot, so I inquired of him why this would be a desirable lake front property.

The Court: Process is served on Rocco Pomponio, but posted on July 7th.

Mr. Kinney: He is available. I am asking him to remain so.

The Witness: He told me that regardless of the present condition of the property, that a lake was going to be constructed there; that this was a sort of delta, or sand that had accumulated, and they were going to make a nice lake there. All these lots were valuable if there was a lake, and, of course, Pomponio Realty was going to see that this was done, because they had a big stake in this, because they had built all these houses and more to come.

Thereafter, we got together and signed the contract, which forms the basis of the agreement with Pomponio Realty. Of course, my wife signed the contract, too. She has passed away since.

By Mr. Kinney:

Q. Did there come a time when you or Mr. Vance, or you and anyone else, saw any other person in regard to the condition of the lake?

page 20 } A. Yes, and I expressed a certain skepticism, which would be natural for any sensible person looking at the thing, and he said—I think he said something along this line. Mr. Pomponio wants you to see Mr. Barger, and the appointment was made, not by me, but Mr. Pomponio or someone on his staff. It might have been Mr. Vance, to see Mr. Barger on a morning, I guess it was ten or eleven o'clock. He drove me out.

*Robert J. Francis.*

Mr. Bean: Who is "he?"

The Witness: Mr. Vance drove me out to see Colonel Barger, who had an office in Lake Barcroft Estates.

By Mr. Kinney:

Q. Was this before or after you signed the contract?

A. I believe it was before I signed the contract. I don't recall the time on this. Colonel Barger and Mr. Vance discussed with me what the future was of all these properties, and how they were going to work them out. Colonel Barger went to a big map on the wall. He said, "We are going to dig all this out; have big bulldozers come in, and after they are through, we will put chemicals on the things so no future growth of plants would grow." I expressed an interest in swimming. I am familiar with being down at the Bay. I have to walk out hundreds of feet before I get to water. He said, "You will have water over your head, and page 21 } there will be water from shore line to shore line." He said, "When the lake is lowered—We lower it every fall—that will take care of all that." He said I would be entitled to build a dock or pier, but the plans would have to be submitted. It wasn't clear to me to whom I would submit them, but someone would have to approve if I built a dock or pier.

This talk only lasted ten minutes or fifteen minutes, and was for the purpose of inducing me to sign a contract to fortify my question of whether this lake was going to be constructed, and is the inducement that led me to sign the contract.

Q. At any time were you shown a plat by Mr. Vance of the lot that you were proposing to buy?

A. I recall I did see a plat.

Q. Did that have a lake area on it?

A. It had the area in front of the property, which was shown as a lake.

Mr. Kinney: I don't know whether any of these two are going to be witnesses or not.

Mr. Bean: No, sir.

By Mr. Kinney:

Q. I hand you this piece of paper and ask you if you recognize it.

A. I have seen something like this, if not exactly like this.

*Robert J. Francis.*

I have seen several, some larger. I have seen them on the wall.

page 22 } Q. Do you recall whether Mr. Vance had a map that was similar to this?

A. I believe he did, but I am not sure.

Q. Can you find Lot 683 on this?

Mr. Bean: If your Honor please, this is Lot 683. I will object to any testimony with respect to this plat, unless he can identify it as the plat he has seen, and the one that was used in connection with the sale of this property. He says he has seen similar ones on walls. I brought this at your request, as the one that was in the file of the Pomponio Realty Company. He has not stated that it was the one that he saw.

Mr. Kinney: Will you indulge me?

By Mr. Kinney:

Q. You testified, I believe, you were shown certain plats or maps. Is that correct?

A. That is correct.

Q. Who showed you these?

A. I saw them in the office of the Pomponio Realty Company, and also I saw a plat or map at Colonel Barger's office.

Q. The one you saw at the Pomponio Realty office, was this in connection with the sale of your property?

A. That is correct, yes.

Q. Where did it show the lake line in relation

page 23 } to your lot?

A. The lake line was right at my lot. In other words, the lake ended where my lot began. The lot was on the lake.

Q. When did you move into the house that you bought? Are you still living there now?

A. I am still living there.

Q. When did you move in?

A. It was approximately the first of November. I don't know the exact date.

Q. Did you have any conversation with Mr. Vance or members of Pomponio regarding the completion date of September 1st?

A. I had many conversations concerning that with Mr. Vance and others. As a matter of fact, a provision was placed in the contract that time is of the essence in the completion of the contract, and this was done for very specific reasons. It was due to the fact that my wife was dying of

*Robert J. Francis.*

cancer. I wanted to get in so she would have some opportunity to enjoy it. I wanted to get in by September 1st so the children could get into school.

I had a house in the District where the lease was expiring. It was necessary to give up the house or make other arrangements, to the disadvantage of the owner when he would want to get a new tenant. That is why we placed a page 24 } provision in the contract.

Q. Did you have any conversations when September 1st was approaching? What was the condition of the house?

A. From the middle of June and into July and August, and as September got closer, there were many conversations because I couldn't see that there was any progress being made. In fact, on several occasions, a week would pass with nothing done, or very little done in the way of building a house. I would continually discuss it.

Mr. Vance told me, as I recall, sometime in July, not to worry that the house would be finished by September 1st, and if necessary, they would put on extra crews on weekends to get it done on time.

Q. Were you ever told that this could not be done because you had made so many changes?

A. No, sir. In that connection, we dealt with Mr. Pitt, an architect working for Mr. Pomponio as a client. We gave him the changes in due course. We gave them plenty of time. They wanted to know what colors. We told them. The house, by the way, was not finished when we moved into it.

Q. What part was finished, if any?

A. In November, the upstairs was pretty nearly done, but the basement needed considerable work. It was a month later before it was finished up.

Q. What price did you contract to pay for the page 25 } house you now have?

A. $46,000.00.

Q. Was that the same house that was to be built to the same specifications as the house you originally looked at, to-wit the Trendsetter?

A. Substantially, yes. In other words, we contracted to buy the house called the Trendsetter, which was an established house. Since the house was going to be built, rather than the one already built, we asked whether we could have any right to make any changes in it, and the real estate company said, "Yes, we could make minor changes, provided we didn't change the walls and piers."

*Robert J. Francis.*

Q. Is it your idea that you were getting a custom built house or a package built house?

A. We were getting a house for the lot.

Q. Did you put that in the contract, accordingly?

A. It was put in the contract, accordingly.

Q. I will hand you a piece of paper and ask you if you can identify that.

A. This is the contract which we signed with the Pomponio Realty Company. It says, "Lake Barcroft Estates" on the two, and contains the provision which I have just told you.

Q. Were these the provisions that were in the contract, also?

page 26 } A. Yes, sir.

Q. I am referring to the back of the contract.

A. Yes.

Mr. Kinney: I will read from it. Do you object to it?

Mr. Bean: I would like to see it.

Mr. Kinney: I offer that as Plaintiff's Exhibit 1. I thought I had a non-photostat copy here, your Honor. Yes, I do. I hand you this big piece of paper and ask you if you can identify that.

The Witness: Yes, this is the copy of one we signed, and the specific terms started here (indicating) and continues on to the back page.

Mr. Bean: Yes, it is all right. No objection.

(The paper above referred to, was marked Plaintiff's Exhibit No. 1 for identification.)

By Mr. Kinney:

Q. Now, these terms and conditions that are listed on the back of this contract, are they the terms and conditions that you and the agent for Pomponio Realty agreed to?

A. That is correct. There are some over on the front, too.

Q. All right, and you contracted, am I correct, to have a Trendsetter built on your property?

page 27 } A. That is correct.

Q. That was the house you could see? Did they have a bar in the basement?

A. Yes, the house I looked at, which was referred to as the house that I would get, subject to these minor changes which I listed here, would have a bar in the basement.

Q. In the back, the house is to be completely finished, including sodding. Is the lot completely sodded?

*Robert J. Francis.*

A. The lot is not completely sodded.
Q. And I see underlined "with the sand beach installed."
A. No beach has been installed, no place to install a beach.
Q. Why is that?
A. Because there is no lake.
Q. What do you have in front of your house?
A. In front of my house, or rather in back of it is what would be the lake front, and is nothing but a swamp. Part is a swamp, and part is on high ground.
Q. I will go into that a little later. This provision, "It is further understood that the lake is to be cleaned out, up to Lot 685 by Barcroft Lake Shores, Inc." Do you know where Lot 685 is?
A. I was told it was further up Trip Run. That is, if they would have cleaned up Lot 685, my lot would have
page 28 } had a lake.
Q. Did you further enter into an additional agreement with Pomponio Realty, Inc., with an agreement commonly known as a conditional purchase agreement?
A. Yes.
Q. I hand you this paper and ask you if you can identify that.
A. Yes, this is a paper that was brought around after I—I don't know which one I signed first, but there were two papers, and this I definitely signed.
Q. Are they the same conditions, or are they different conditions?
A. They are a little more inclusive. It didn't seem to make any difference at the time. This says, "The lot is to be completely sodded."

Mr. Kinney: Any objection to it?
Mr. Bean: No objection.
Mr. Kinney: Mark it Plaintiff's Exhibit No. 2, please.
The Court: What is that?
Mr. Kinney: It is a conditional sales agreement, this being the sales contract.
The Court: Each of these are copies? They are not originals.
Mr. Kinney: At this time, I call upon the de-
page 29 } fendant to produce the originals.
Mr. Bean: I believe I have a signed contract.
Mr. Kinney: Will you stipulate that these are?
Mr. Bean: I will stipulate that the signatures are here.

In fact, I will trade you. I will let this one go in with the signatures, and I will take that one.

Mr. Kinney: Do you have the same condition on the first one?

The Court: That it was stipulated. So far as that is concerned, do you stipulate?

Mr. Bean: Yes, absolutely, that Barcroft Woods, Inc. also signed it.

The Court: That is Plaintiff's Exhibit 1?

Mr. Bean: No. 2.

The Court: Plaintiff's Exhibit 1 is a copy which you are stipulating to be received in evidence as the original?

Mr. Bean: Yes, sir.

The Court: Exhibit 2 purports to be an original. However, it is not signed by Barcroft Woods, Inc., except on a typewriter.

Mr. Kinney: I believe they stipulated that was their intended signature.

Mr. Bean: I will stipulate that was the intended signature.

page 30 } (The document above referred to, was marked Plaintiff's Exhibit 2 for identification and with Plaintiff's Exhibit 1 were received into evidence.)

By Mr. Kinney:

Q. Mr. Francis, did you comply with the terms of the contract of sale and the contract of conditional purchase agreement?

A. I have complied with all the terms of the contract. I have transferred my property to them and made the payments.

Q. Did there come a time when you attempted to seek relief from the condition of the lake through Pomponio Realty?

A. Yes, I discussed the matter by phone and by writing to Pomponio Realty on several occasions. I don't recall which dates I contacted them about it, particularly in the Fall of 1955 when the lake was lowered, but nothing was done about making it into a lake up at my end.

Q. Whom did you contact then?

A. I don't recall. It might have been Mr. Vance. It might have been Mr. Pomponio, or Mr. Dennis, whoever I could have got on the phone. If I wrote a letter, it would have been to Pomponio Realty.

Mr. Kinney: I have a copy of a letter of March 27, 1956.

*Robert J. Francis.*

page 31 } I will show it to the defendant. If he has the original, I would like to submit it. If not, I would like to submit this.

Mr. Bean: I don't have the original, and I would like permission to read it at this time. It is the first time I have seen it.

Mr. Kinney: Your Honor, this is a letter dated March 27, 1956. I understand that the defendant has no objection to its admission.

Mr. Bean: No objection.

Mr. Kinney: I will offer it.

The Court: Plaintiff's Exhibit No. 3.

(The letter above referred to was marked Plaintiff's Exhibit No. 3 for identification, and admitted into evidence.)

By Mr. Kinney:

Q. Mr. Francis, this is a copy of a letter that has been admitted into evidence. It is a rather long letter, but I would like to tell the Court what was the occasion for sending that letter, and to whom did you send it, and why.

A. This is a letter I wrote in March, 1956. We had moved in the house about the first of November, and the lake having been lowered, nothing happened, and there were a number of problems about the house that were getting difficult. By that

page 32 } time, my wife had passed away, and for a short time in 1956, I was very upset about it, although we had foreseen it, and then I got down to straightening out the problem of this house, and as I stated in the letter, although the lake had been lowered for several weeks, and although the contract has stated that I paid a substantial premium for the Trendsetter but I would be provided with a sand beach 40 feet wide on the lake.

I reviewed our history in this letter. I had seen Colonel Barger, and arrangements having been made to make them because I had dealt with Pomponio Realty Company throughout.

Q. Did you at any time deal with Colonel Barger about having the lake lowered?

A. I had no basis for seeing Colonel Barger. I had signed no papers with him, or he had signed any.

Q. Did you request Colonel Barger to sign anything?

A. No.

Q. On whom were you relying?

A. Pomponio Realty. I signed everything. Mr. Vance

was the agent for Pomponio Realty, and brought various papers that were written up by the company and for the signature of me and my wife, and they were reassuring me that they were going to have this done. They took me to Colonel Barger. Up to this time, I had never seen Colonel Barger. I could never see the relationship between Colonel
page 33 } Barger and Pomponio Realty. I didn't sign a contract with Colonel Barger. I signed a contract with Pomponio Realty. I paid the money in the light of what they said was going to happen. I only saw Colonel Barger ten minutes one night. I have seen him often since then.

Q. Did you receive a reply to your letter of April 26, 1956?

A. I wouldn't know offhand, without knowing—

The Court: March 27th.

By Mr. Kinney:

Q. Did you receive a reply to your letter of March 27th?

A. I believe I did receive a reply.

Mr. Kinney: I am showing an exhibit now to the defendant.

Mr. Bean: It is admissible, without objection.

Mr. Kinney: Plaintiff's Exhibit 4.

(The letter above referred to was marked Plaintiff's Exhibit 4 for identification and received in evidence.)

Mr. Kinney: I will read.

"Mr. Robert J. Francis
"558 Waterway Drive
"Lake Barcroft
"Falls Church, Virginia"

Dated April 10, 1956, and the letter was on the letterhead of M. Pomponio Sons, Inc., builders.

page 34 } "Thank you for your letter of March 27th which I have just placed in our warranty department, so any of the justifiable complaints as listed by you, will be given immediate attention.

"In regard to the condition of the lake, I have already put Colonel Barger on formal notice of compliance with conditions of lake area, and he has informed me he will give me a written commitment within the next thirty days as to when and what he will do to put the lake in condition insofar as Sec-

tion 7 is concerned. Rest assured that we will press him for compliance, since we are interested in getting this work done in order to satisfy our other present purchasers and potential future customers of Lake Barcroft.

"In regard to your inquiry of items which you feel should have been part of your contract, I have referred these particular matters to my Brother Arthur, who will review the conditions with you and make a commitment, as to what items are part of the contract."

"Very truly yours,
"M. POMPONIO SONS, INC.
"By Rocco Pomponio."

By Mr. Kinney:

Q. Did the receipt of that letter cause you to change your mind in any way, of whom you were looking for relief?

page 35 } A. Not in the slightest. I never looked to anybody but the people I signed the contract with. This letter will indicate they were going to see that it was done. That is what I understood all along, that what was specified in the contract they were going to see that it was done.

Q. This letter you received in April, 1956, was that after you had lived in the house for sometime?

A. Yes, I had been in the house five months.

Q. Was that after the time you signed the purported agreement of acceptance of the house, mentioned by Mr. Bean in his opening statement?

A. Yes, I think so, but I signed a statement for them to the effect that said list of items had been corrected on the punch list that I gave the superintendent, Mr. Whetzel. As a matter of fact, Mr. Whetzel came around and asked me to sign his statement that this was done. I signed this statement. I didn't sign a waiver or agreement that it was fine, because obviously it wasn't fine.

Q. What is your section of Lake Barcroft?

A. Section 7.

Q. When you received the letter from Arthur Rocco Pomponio that you have in front of you, did that serve in any way to relieve or satisfy your desire for the lake to be cleaned out?

page 36 } A. Not in the slightest. The provision in the contract was that time was of the essence.

*Robert J. Francis.*

Mr. Bean: If your Honor please, if I may object. I think the answer was "yes or no."

Mr. Kinney: Wait a minute! I will withdraw the question. The answer wasn't responsive anyway.

By Mr. Kinney:

Q. Upon the receipt of the letter you had in front of you, did you receive anything in that letter that caused you to change your mind; that you have already testified to, that Pomponio was going to be responsible to seeing this job done?

A. Not at all. The letter, it seems to me that all it is, first they accept the responsibility for doing something about it.

Q. Do you know whether or not Pomponio did, in fact, Pomponio Realty or Lake Barcroft Estates, did own some lots in the area?

A. I would assume they owned property in the area. They were doing extensive building.

Q. When you were shown around the plot by Mr. Vance, were there other lots from which you could pick?

A. Yes, sir.

Q. Were there other lots in the area?

A. Yes, I could have picked.

page 37 } Q. Are there any other houses on the lots near you?

A. No, sir. No one has built there.

Q. I have a letter dated April 20, 1956 from M. Pomponio Realty.

Mr. Bean: I have a copy.

Mr. Kinney: Do you have a copy of Mr. Francis' reply to Mr. Pomponio?

Mr. Bean: I don't.

Mr. Kinney: This will be Plaintiff's Exhibit No. 5.

The Court: Plaintiff's Exhibit No. 5.

(The letter above referred to, marked Plaintiff's Exhibit No. 5 for identification, was admitted into evidence.)

Mr. Kinney: This again is a letter from M. Pomponio, dated April 20, 1956. It bears the word "registered" above the address to:

*Robert J. Francis.*

"Mr. Robert J. Francis
"558 Waterway Drive
"Lake Barcroft
"Falls Church, Virginia

"Dear Sir:

"Regarding your letter of inquiry, relative to when Colonel Barger of Barcroft Lake Shores would commence improving the lake affecting Section 7, I have followed up with Colonel Barger and have been informed by Barcroft Lake Shores, Inc. that they have sought the necessary contracts page 38 } for the improvement work to begin as soon as the weather permits. Before this year is out, this section of Section 7 should be in good shape, according to the over-all lake improvement plan."

By Mr. Kinney:

Q. Do you recall writing a letter inquiring when Colonel Barger was going to do anything?

A. I don't recall. I may have. Well, in my letter of March 27th, I referred to Colonel Barger in that letter.

Mr. Kinney: I see. Do you have a copy of the original, Mr. Bean?

Mr. Bean: I don't have the original. You have in evidence as Exhibit 3, March 27th, because you referred to it.

Mr. Kinney: March 27th was the reference. I didn't know whether there was any other letter in between.

Mr. Bean: I have no other. We don't know anything about that.

By Mr. Kinney:

Q. Do you have a bar in your present house?

A. No, I do not.

Q. You said you saw one in the Trendsetter house.

A. There was one in the sample house, or one I thought was a sample house.

Q. Is all of your lot sodded?

page 39 } A. No, it is not.

Q. What part isn't?

A. There is an area in back of the house, all the way to the property line to the swamp, and one side to the other that remains unsodded. I don't know the square footage. It is probably 12,000 feet or maybe 13,000 feet. I have never been given a plat. I couldn't tell you what the measurements are.

*Robert J. Francis.*

Q. Have you attempted to receive a price for sodding the unsodded part?

A. Yes, I have discussed it with several companies.

Q. Have you received written estimates from more than one company?

A. I have written estimates from two companies.

Mr. Bean: If your Honor please, if you intend to introduce it into evidence, I will have to object, and the parties that have made the estimates should have appeared as witnesses. We have no opportunity to cross examine to find out what they took into consideration in deciding to sod this property, or whether it is the same property, or anything about it. There is no indication they would. We just need to cross examine these people in respect to the price.

The Court: It seems to me that Mr. Bean is right.

Mr. Kinney: All right, sir.

page 40 } By Mr. Kinney:

Q. Have you received prices to do certain specified work in sodding on your house? Have you, or have you not?

A. Yes, I have.

Q. What were the prices per square yard, or the total price on what they were to do?

Mr. Bean: The same objection, your Honor. If there is anyone to testify as to this, it would be admissible. It should be the parties who made the estimates.

The Court: I think he can testify to anything of his own information and knowledge, and not what requires someone else's estimate or price, or anything else.

By Mr. Kinney:

Q. Let me ask you then. Do you know how far it is from the end of the sod that was placed by the builder to the area where your lot ended by the lake?

A. As far as I could tell from pacing it off, it comes to 87 feet.

Q. How wide an area is it?

A. It is approximately 150 feet.

Q. All right, sir. Have you attempted to grow grass or other things there?

A. Yes, I have seeded it, put fertilizer down, but the first

*Robert J. Francis.*

page 41 } part of it is under water, or rather very swampy. I wouldn't say under water, very soggy, and the other portion since it is just excavation dirt, nothing will grow.

Q. Your contract provides that all the exterior walls of the basement were to be panelled. Is that correct?

A. They were all to be panelled. It didn't specify the wood.

Q. Was that done?

A. It was done in part, not completely done.

Q. Has it been done to date?

A. I have done part of the work myself, but a considerable amount remains unfinished.

Q. Were there any other items that you called to the attention of Pomponio, or his agents, as to incomplete or improperly completed workmanship?

A. Yes, there were a number of items, several large cracks in the plaster. When I called these to the attention of Mr. Vance, sometime after we occupied the house, he told me that that wasn't ordinary settlement cracks; that was something that they should take care of.

Mr. Bean: I don't find that under the particulars that were specified as items. That needs clarification. Your Honor will note the bills of particulars. Under Paragraph 6(b), there are certain items, to which he has spoken, the lot not properly sodded, and the basement (reading from paper).

page 42 } There certainly are no plaster cracks in there. I would have to object to any items that are not listed in the bill of particulars.

Mr. Kinney: Did one of these defendants, if not both of them, comply with the contract to build a house in a good workmanlike manner? If it doesn't specifically state it, the house he bought was to be one like the Trendsetter, which was the exhibit house.

The Witness: Yes, sir.

Mr. Bean: I can see he didn't get one like the exhibit house. He got one with cracks in the wall.

The Court: I think the particulars which the attorney requests—

Mr. Bean: In the case that has been brought certainly are for the purpose of clarifying the issues that are being tried today. I have heard nothing about the plaster before.

Mr. Kinney: Did your men go out there this morning?

Mr. Bean: They went out there this morning, but they didn't say anything about plaster. I will repeat my objection.

*Robert J. Francis.*

I can't see anything other than those listed here. I think it is very improper here.

The Court: As long as the bill of particulars which the plaintiff has conceded is complete, it would seem that is what you would be bound by.

Mr. Kinney: All right, sir.

page 43 } By Mr. Kinney:

Q. Is there any complaint about the guttering or flashing?

A. Yes, the paint on the flashing on the outside of the house peeled off immediately, only lasted two months. I understood the house was guaranteed for a period of time. As I recall, it was a year, against any abnormal defect. Whether it was or wasn't, it certainly wasn't properly handled. This was called to the attention of Pomponio Company in my letter.

Q. Was there any complaint about the beams painted in your house?

A. The beams were stained sort of a greenish blue color, without my approval as to the specifications, and I complained about it at the time, because we didn't want them that dark a color, or even that color, but evidently it was going to be a very expensive proposition to stain them another color. No, they didn't get around to fix them. I might say in that connection that I gave them paint specifications for the entire house, but the beams were already stained by the time I was asked for it.

Q. I hand you this piece of paper and ask you if you can recognize it.

A. I believe this is the plat that Mr. Vance showed me.

Q. Can you locate Lot 683 on that?

page 44 } A. Lot 683 is right here (indicating).

Q. Can you locate Lot 685?

A. Lot 685 is right here (indicating).

Mr. Kinney: Let me see if it is the same one you have.

Mr. Bean: You have a scale, one to one hundred, and so do we.

Mr. Kinney: It looks like a carbon copy, except for this certification on yours.

Mr. Bean: Yes, O. K.

By Mr. Kinney:

Q. Where does this show the lake line?

*Robert J. Francis.*

A. The lake line, as described to me, ran right along in here (indicating).

Q. Where are you describing it?

A. The shore line runs immediately at the edge of the property which I purchased from the Pomponio Realty Company. The lake would be out here, and the creek known as Trip Run. The lake would branch out and go this way. My property would be here on the lake 130 or 150 yards across.

Mr. Kinney: I would like to admit it, your Honor, as Plaintiff's Exhibit 6.

(The document above referred to, was marked Plaintiff's Exhibit 6 for identification, and received in evidence.)

page 45 } By Mr. Kinney:

Q. Your contract had reference to Lot 685. How far away is that 683?

A. Two lots. It was put in here to show that this delta was cleaned up so I would have a view of water at any part of my property.

Q. What do you have in front of your property now?

A. Well, there is nothing but a swamp, and through it runs a small creek known as Trips Run.

Q. At any time you have been there, has a bulldozer come in there?

A. I haven't see any.

Q. Any chemical used to kill the vegitation? I will put it this way. Is there vegitation there?

A. There is ample vegitation. On two occasions people have come in and burned and cut down vegitation, but in a period of a month it grows back immediately. Whether they used chemicals, I just don't know.

Q. What in particular is in front of your house, what type of vegitation?

A. There is a combination of swamp grass and bullrushes, and trees and frogs and snakes, what have you, a very miserable condition.

page 46 } Mr. Kinney: 7, 8, 9, 10, 11, 12 and 13, or we can say six photographs.

Mr. Bean: Sixteen.

Mr. Kinney: Seven photographs, 17 by 20, as one exhibit, or better separate them?

*Robert J. Francis.*

The Court: How many are there?
Mr. Bean: Seven.
Mr. Kinney: Seven here.
The Court: Let us mark them separately, 7, 8, 9, 10, 11, 12 and 13.

(The photographs above referred to were marked Plaintiff's Exhibits Nos. 7, 8, 9, 10, 11, 12 and 13 inc. for identification.)

Mr. Kinney: I understand, your Honor, that they have been admitted without any objection.
Mr. Bean: With no objection, without formal proof.
The Court: Of the photographs?
Mr. Bean: We will waive formal proof by the photographer.
Mr. Kinney: The date of the photograph is July 7, 1958, of premises 558 Waterway Drive, by a J. Wright Photographic Studio.
The Witness: This was taken from a point about 30 yards, 20 yards from the right-hand side of the property, on the property, looking across on what should be the
page 47 } opposite shore, and this is a view of the swamp, where the lake is supposed to be.

By Mr. Kinney:
Q. Is this photograph taken from a point on your property? Does it show a point or view of the property?
A. It shows a point or view of the property. This is a view of the porch on the upper floor of the house, looking across the lake, the property line being approximately in the middle of the picture. This entire area encompassed by the area was to have been taken care of in accordance with the contract. The lot went two notches up.
Q. Up stream or down stream?
A. Up stream. This is a little creek, called Trip Run.
Q. All right, sir. This is a view from the same porch, looking in the opposite direction. The lot line being at the end of the woods behind here, and this entire swamp area being what would normally have been lake if it had been taken care of in accordance with the contract.

Mr. Kinney: That is Plaintiff's Exhibit 9.
The Court: Nine.

*Robert J. Francis.*

By Mr. Kinney:

Q. Plaintiff's Exhibit 10 shows what? What view does that show?

A. This is a view across the swamp, again on page 48 } the lower level, rather than the upper portion.

Q. Does this picture also show where the sodding stops and what isn't sodded?

A. Yes, sir. You can see there is no sod. This is some grass that hasn't done too well, but the seeding, we haven't been able to do anything about that.

This picture is a view from the kitchen window. Similarly, this looks straight across to the opposite side. This picture was taken virtually at the property's edge, looking across the swamp. This picture would have been taken from the upper porch, looking directly across.

Q. Now, Mr. Francis, is there some area in Lake Barcroft which is actually a lake?

A. Yes, the bulk of it is very beautiful. The lake-front houses have a fine view of water, and you can have a dock and keep a boat there and go swimming when you are on the lake front. One of the inducements was that I would have a beach myself.

Q. Did you see a lake that was a lake, in contemplating buying your house?

A. Yes, I drove through the entire site.

Q. Do you recognize this scene?

Mr. Bean: I object to it, if your Honor please, unless it was taken from Mr. Francis' property. It was a page 49 } picture, a view of the lake in any place in the subdivision. It hasn't any significance. This lot hasn't moved. We could take one of the Atlantic Ocean.

The Court: I don't see how you can admit them into evidence, unless you have the photographer here. You will have to lay a foundation.

Mr. Kinney: He has waived formal proof.

Mr. Bean: Of the pictures that were introduced.

Mr. Kinney: The photographer was in my office. I couldn't get him.

Mr. Bean: You told me these pictures were of this particular lot.

Mr. Kinney: The purpose was for comparison. We couldn't take a picture of the lake as we would like it to be because it hasn't a lake, as we would like it to be in that particular spot. These pictures show how Mr. Francis was in-

duced by the fine, clear water. In that way, it is relevant. In view of the objection, I think we can have a photographer over here this afternoon.

Mr. Bean: If your Honor please, I want it understood that even with the photographer here, I have to object to it, because there has been no testimony that that was the view shown Mr. Francis, represented by the defendant that this was how his place was going to be.

The Court: We will wait until the photographer gets here.

page 50 } Mr. Bean: All right. I just want it understood that I will have further objection, even though the photographer were here.

Mr. Kinney: We will show that he was induced by the beautiful lake; that this was what was to be duplicated for him.

Mr. Bean: I understand.

Mr. Kinney: All right, sir.

By Mr. Kinney:

Q. Have you ever been able to go swimming in front of your house?

A. No, it is impossible.

Q. What is the condition of the water here, if there is any?

A. There is this very small creek, known as Trip Run, which is eight or ten feet wide, that runs through the middle of this area.

Q. Would it be possible to put a dock from your property and have the dock go into the water?

A. No, it would be impossible. You would have to build a dock out fifty feet before you get to the creek. It would be foolish.

Q. How far away are your nearest neighbors from the lake?

A. There are none nearest to the lake. There page 51 } are none within three or four blocks, or two or three blocks on the lake. There are some on Stoneybrae Beach Drive, which is two or three hundred feet, no, yards away. At this time, there is no house in sight of mine.

Q. This lake condition got better or worse in the three years you have been there?

A. They have cut down some trees and moved some stumps, but other than that, there has been virtually no change. Bullrushes remain. The mosquitoes have got worse. The frogs multiply. The fact is that we can't use the porch because of

the *fogs* and mosquitoes, that come out of the swamp, have worsened throughout the last two years.

Q. Has the remainder of Lake Barcroft rapidly become completed?

A. I would say so, with the exception of the area I am in. It seems to me all the holes have been filled up. I have noticed some activity in the last few weeks, certainly nothing adjacent.

Mr. Kinney: That is all.
The Court: Adjourn until 1:30.

(Whereupon, at 12:30 o'clock p. m., the hearing was recessed until 1:30 o'clock p. m.)

page 52 } AFTERNOON SESSION.

The Court: All right.

CROSS EXAMINATION.

By Mr. Bean:

Q. Mr. Francis, how old a man are you?

A. 43 years old.

Q. During that time, have you owned several houses?

A. Yes, I have.

Mr. Kinney: I object to the relevancy of this, your Honor.
The Court: Objection overruled.

By Mr. Bean:

Q. With respect to your business experience, you stated that, on direct examination, you owned a toy shop in Shirlington. Do you not have an interest in several of those shops?

A. Yes, sir.

Q. Six, to be exact?

A. Four, to be exact.

Q. Now, how did you come to know Mr. Vance of the Pomponio Realty Company, Inc.?

A. I came to know him by virtue of going to a house on Stoneybrae Drive, where he had the house open for inspection.

page 53 } Q. That is the first time you met him?

A. The first time I had seen him.

Q. When was the first time that you found that—the first

mention was made to you about Barcroft Lake Shores, Inc. and Colonel Barger? When was that first brought to your attention before you were involved at all in this matter?

A. That came to my attention when Mr. Vance told me, to the best of my recollection, that Mr. Pomponio had suggested that he, Vance, take me to see a Colonel Barger who was developing some lots in Lake Barcroft, and could tell me more about what was going to be done about this lake.

Q. Did you ever meet Mr. Pomponio, Mr. Arthur Pomponio, prior to the signing of the contract?

A. I believe I did. I am not certain of it.

Q. Do you recall whether he, himself, Mr. Pomponio, suggested that you go to see Colonel Barger, rather than Mr. Vance, perhaps in addition to Mr. Vance?

A. I don't recall. To the best of my recollection it is that Mr. Vance called me and suggested that in view of my concern about the lake's being developed, that Mr. Pomponio had thought it would be advisable that he would take me to see Colonel Barger, to set my mind at rest.

Q. You knew at the time that Pomponio Realty and Barcroft Woods, Inc., the owners of the lot and the real estate agents, did not own the lake?

page 54 } A. I had no knowledge of who owned what property at that time.

Q. Did you know when you talked to Colonel Barger that Lake Barcroft Shores, Inc. owned the lake?

A. I did not know the name. It meant nothing to me to say "Lake Barcroft Shores, Inc."

Q. I believe it is Barcroft Lake Shores, Inc.

A. I had no knowledge of that company, as such. I can't recall.

Q. You do recall that it was specifically mentioned twice in both of the contracts, both the sales contract and the conditional purchase contract?

A. Yes, sir. That is correct.

Q. You, at that time, knew when you signed the contract that Barcroft Lake Shores, Inc. was an entity of whom Colonel Barger represented?

A. I didn't know what Colonel Barger's relationships were with anyone. I didn't know what companies he was affiliated with in any way.

Q. Did you not know at the time you signed the contract as counterdistinguished from the time you were told to go to see Colonel Barger? Did you not know when you signed the con-

*Robert J. Francis.*

tract that Pomponio Realty Company or Barcroft Woods, Inc. did not own the lake?

A. I did not know their relationship to the lake, page 55 } except what was represented to me about what was done to the lake. I had no knowledge of what inter-relationships existed. There were four or five companies mentioned.

Q. They were the lending institutions with which you had some connection?

A. It seemed like Mr. Pomponio owned it. It was right in the office.

Q. Did anyone in his organization tell you that he owned Barcroft Lake Shores, Inc.?

A. No one told me.

Q. Did Colonel Barger tell you that he owned Barcroft Lake Shores, Inc.? Incidentally, at whose insistence was this put in the contract?

A. About what?

Q. About this Barcroft Lake Shores, Inc., about the one that would lower the lake, and the one that cleaned out the lake.

A. Something had to be put in the contract that I signed with the Pomponio Realty, what was to be done. They wrote the contract.

Q. You saw in the contract Barcroft Lake Shores, Inc.?

A. Yes, sir.

Q. Did you not ask anybody who this Barcroft page 56 } Lake Shores, Inc. was?

A. It was clear on the face that Pomponio Realty was responsible.

Q. It isn't clear. What I am getting at is, Colonel Barger, when you met him, was represented to be whom, an employee of Pomponio?

A. He wasn't represented to be anything. He obviously was selling lots or developing properties in Lake Barcroft.

Q. He wásn't selling this lot, was he, the one you bought?

A. I didn't know who owned the lot. I didn't know Mr. Pomponio was buying the lot from Colonel Barger, or already owned it. That I did not know.

Q. Did Colonel Barger represent to you at the time you came to meet him the first time that he had any connection with Pomponio Realty?

A. He did not so represent.

Q. Did he represent that he and his organization had au-

thority to clean out the lake and to lower the lake, and to raise the lake?

A. I assumed from talking with him he had certain authority over the lake. He said that the lake would be lowered, certain work would be done; that if I wanted a dock built, I had to submit plans. He didn't make clear who I page 57 } was to submit plans to. I was taken there by the Pomponio Realty Company to discuss it.

Q. Did it not occur to you that this was someone else you were dealing with that Pomponio Realty had no authority over?

A. I made no assumption.

Q. Did Mr. Pomponio ever tell you he was going to clean out the lake, or lower the lake?

A. Yes, sir. He represented to me that this was going to be done. He did not say he was going to do it. I don't remember that Mr. Pomponio said he would have the lake cleaned out, personally, or have it done by his men.

Q. Did Mr. Lincoln Vance ever make a statement to you that he or the Pomponio Realty would clean out the lake or lower or raise the lake?

A. No.

Q. That Colonel Barger was the only one who told you that he or his organization would?

A. That is not correct. He said this work was going to be done, and this was the basis for the contract, and to assure me, let me know that they owned lots of property on the lake; that it was more to their advantage to have it done, and they were going to see that it was done.

Q. Who stated that?

A. I know Mr. Vance did. Whether Mr. Pom- page 58 } ponio did, I don't recall.

Q. Do you know when Mr. Vance said he was going to see that it was done?

A. At the very beginning.

Q. Wasn't it clear to you that Mr. Vance had no control over whether it was to be done when he took you to Colonel Barger?

A. It wasn't clear to me.

Q. When you signed the contract, did you ask any questions about Barcroft Lake Shores, Inc.?

A. No, sir, I did not.

Q. Looking at the language in the contract, if you want to refresh your memory, it states that "It is further understood

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that the lake is to be cleaned out up to Lot 685 by Barcroft Lake Shores, Inc."

At the time when you signed this contract, did you not know that neither Pomponio Realty nor Barcroft Woods, Inc. were going to do that job, but that Barcroft Lake Shores, Inc. was going to do it?

A. I understand this contract. I have no knowledge of the interlocking relation of these various companies that Mr. Pomponio represented himself as handling.

Q. Didn't you try to find out what that interlocking relationship was?

A. Not with that wording in the contract. I felt
page 59 } it unnecessary.

Q. You felt it unnecessary to investigate what Barcroft Lake Shores, Inc. was?

A. Yes, sir.

Q. It was your assumption that regardless of Barcroft Lake Shores, Inc. that Pomponio Realty and/or Barcroft Woods, Inc. was going to see that this job was done, itself?

A. I understood they would see that the job was done. Whether themselves, I don't know. I did pay them. I was sure they would benefit from it and would see to it.

Q. You have introduced certain pictures here as seven through thirteen, as to the view from your back yard as it now stands from the water. Isn't it true that those pictures that you have introduced into evidence, are substantially the same as they would have been, had the pictures been taken before the house was ever placed on the lot?

A. I would say substantially the same, yes. There has been some work done, but I wouldn't say that it would amount to anything. Some bushes have been cut down. That is about all.

Q. Then you knew at the time of your purchase that you were going to have to wait at least a reasonable length of
time, or the time indicated, next Fall, or the fol-
page 60 } lowing spring before Barcroft Lake Shores, Inc.,
whoever they were, would actually clean out the lake and make it as it was described to you?

A. My understanding was that it was to be done that Fall.

Q. Now, assuming that it was done that Fall, what was described to you was going to be done?

A. It was described to me that bulldozers would be employed for the purpose of scraping out the earth in the lake bed, and that thereafter chemicals would be applied so that there would be no regrowth of the vegitation, and that this

would result in a lake being in existence from the edge of my property, across to the tree line on the opposite shore, up from lot 685, which is the second lot to the west where the creek enters the delta or swamp, all the way down to the corner.

Q. With respect to that particular statement as to what was going to be done, who made that statement to you?

A. Colonel Barger.

Q. With respect to the location of that lot, if that had been done, would you not still have been in a position where your lot would have been next to water, backed up water in a lagoon, so to speak, where Trip Run comes in?

A. I don't follow you.

page 61 } Q. I am asking you whether the presence of the lake there would have made any difference in the location of your house, insofar as the conditions that you objected to of the snakes, frogs, and the like being there? Would that condition not have existed if the lake had been dug out and put back further?

A. No, that condition would have been eliminated. The lake had to be cleared through Lot 685.

Q. Two lots beyond yours?

A. Yes, sir.

Q. Isn't it true that that would be still water, backed up water at that time?

A. Of course not. It would be lake. There was a stream that feeds into the lake called Trip Run, if the lake is there.

Q. As a matter of fact, Trip Run running through there, you now have running water through your property?

A. Not through my property.

Q. How does Trip Run get from its source, running into the lake, without going into your property?

A. It is out in the middle of the lake, and has no relationship to my property. It is a very narrow stream because of a delta. I have no abutment on the stream.

Q. You don't abut on the stream. I understand that.

page 62 } With respect to the house that was shown you, the Trendsetter on this back lot, in what respect does the house that was actually constructed for you on Lot 683 differ from that house that you were shown?

A. In substance, not at all. It has the same general outside walls, and architecturally with some minor variations of one sort or another, such as a back-door entrance.

The partition of the living room was changed to permit a change so that you would not enter a bathroom from the liv-

*Robert J. Francis.*

ing room. That was sealed off. There was a wall dividing the dining area from the living room, which was eliminated. I think those were the major changes.

Q. Did you have a daylight basement in the house that was shown to you, the Trendsetter?

A. Yes, sir.

Q. Was it as completely out of the ground as the house that was actually purchased by you?

A. No. The sample house had a different topography, and for that reason, there was a difference in the window space that would otherwise be provided, but that seemed to be axiomatic in terms of the ground that the house was to be built on, as compared with the house, the sample house.

Q. You made two or three references to a bar in the sample house, but not in yours. I find no notice of an objection for this in any of the correspondence that you had. Is
page 63 } it not true that you or your wife did not care to have that placed in your house?

A. No, we discussed that with Mr. Vance. He stated that he could arrange to have the bar, similar to the one that was in the other sample house.

Q. You never discussed it with anyone else, or complained about it to someone else?

A. I am not certain.

Q. How about the rear view porch? Was that on the original, the sample house, or was that added to your house?

A. No, there was a porch on the sample house. The design was reversed, and on the house, on the Trendsetter, I saw on Stoneybrae Drive, there was a partial porch going from the back of the house to the hill, and it was reversed on this house, placed it overlooking the lake.

When we discussed the difference with Mr. Pomponio and his architect, Mr. Pitt, it was clearly understood there was nothing done in this house that would hang the house over this other house. We were purchasing the Trendsetter with minor modifications, no structural changes, only those necessary to conform with the topography.

Q. Mr. Pomponio set the price for the house. Is that correct?

A. That is correct.

Q. You don't know what considerations were in
page 64 } his mind at the time the price was set?

Mr. Kinney: I object to that. The contract speaks for itself.

*Robert J. Francis.*

Mr. Bean: If Mr. Francis knows.

The Witness: Mr. Pomponio did not discuss with me what went on in his mind, what went on in terms of cost, except it was clear that he intended to build me a Trendsetter house which had a definite value limitation.

By Mr. Bean:

Q. With respect to the lot, that 683 that you purchased, in conjunction with the house was any price ever set on the value of that lot as it was when you first saw it?

A. No, sir.

Q. Was any price set on the value of the Trendsetter house that you looked at, on the sample house?

A. Yes.

Q. On the lot itself?

A. No, on the total house.

Q. So we have no valuation at that time placed by either of the parties, placed on either of the houses that were purchased?

A. Yes, there was. Mr. Vance told me that the premium that I would have to pay for a lot on the lake front in lieu of a house up the street, would be approximately $10,000.00.

Q. But he didn't tell you what considerations page 65 went into that premium?

A. Yes, the premium was for a lake-front lot.

Q. Was he telling you then that the lot on the lake was worth $10,000.00 more than the lot that the Trendsetter house was setting on?

A. Precisely.

Q. Do you know Mr. Tony Dennis of the organization?

A. Yes, sir, I do.

Q. Was he the sales manager of Pomponio Realty at the time?

A. I don't recall.

Q. Do you recall ever asking Mr. Dennis that he request Colonel Barger to insert any language in the sales contract?

A. I don't recall.

Q. If I refresh your memory by stating that you asked Mr. Dennis—

Mr. Kinney: Your Honor, if he is going to have some writing that this witness has made, I think he has to show the witness his writing to refresh his memory.

Mr. Bean: If your Honor please, I have a letter from Mr.

*Robert J. Francis.*

Dennis to Colonel Barger, in which is stated that he was asked to insert, further insert certain language, by Mr. Francis.

I was asking Mr. Francis whether or not he ever
page 66 } asked Mr. Dennis to insert any such language.

The Court: He said he didn't recall.

Mr. Bean: I ask him if he could refresh his memory about specific language that he may have suggested. He can answer "Yes or No" if he remembers.

Mr. Kinney: Can't impeach him.

The Court: What is the question?

Mr. Bean: I want to ask him whether or not he ever told Mr. Dennis that he would like to have inserted in the contract certain language to which Colonel Barger was to agree.

By Mr. Bean:

Q. Did you ever ask Mr. Dennis to ask Colonel Barger to permit the following language to be placed in the contract: "It is further understood that the lake is to be dredged from his lot 683, up to and including Lot 685 by Barcroft Lake Shores, Inc?"

Mr. Kinney: I have to see what that letter is, if he is going to have him saying from that the basis of a claim between a second and third party.

The Court: He is only asking him whether he made such a statement. Where he got it, such information is immaterial.

Mr. Kinney: He is reading from the letter that
page 67 } somebody else has written, you say? I definitely
want the letter in.

Mr. Bean: I am going to ask him. The question is whether or not you told Mr. Dennis you wanted the following language to be inserted in the contract: "It is further understood that the lake is to be dredged from his lot, your Lot 683, up to and including Lot 685 by Barcroft Lake Shores, Inc."

The Witness: I would say in answer to your question that I am almost positive that I made no such request of Mr. Dennis.

The Court: You are not completely positive that you did not make such a request?

The Witness: I would say not.

By Mr. Bean:

Q. Do you know Mr. Whetzel?

A. Yes, I do.

*Robert J. Francis.*

Q. Was he superintendent more or less of the construction of your home?

A. I was given to understand that he was the construction superintendent.

Q. And prior to your moving into your home, did you and he go over the home and make an inspection of it?

A. We did on several occasions, yes.

page 68 } Q. I will show you a statement dated October 29, 1955, and ask you whether or not that is your signature.

A. Yes, that is correct.

Q. At that time, you are stating that you are occupying the house in accordance with the contract between the parties?

A. That is correct. It says I am occupying it.

Q. Was there any statement made by you at the time to Mr. Whetzel of objections which you had to the manner in which the house had been constructed at that time?

A. I don't recall at this time, but I had submitted many items of incompletion, of incorrect construction, some of which I waived. I recall specifically that the chimney was not built according to specifications. I was asked whether I wanted the chimney torn down and built again. I waived that right.

The contract called for a double wall oven. I only got a single wall oven. In the interest of getting occupancy, I agreed to waive that particular compliance, but there were many others I did not waive.

Q. Were there not many instances when you called the attention of the builders to these changes that you wanted made, that they came out and made?

A. They did. There were any number of items that they corrected.

page 69 } Q. And between the time of the signing of that memorandum and March 27th, which is the date of the first letter that you objected to certain items not being completed, did you at any time during that period make any objections to the Pomponio Realty organization about any items not completed?

A. Yes, sir.

Q. Have you any correspondence of that time, or was it all oral?

A. I believe in direct answer that it may have been oral. I have searched my records. Not having kept perhaps all the records, I may have not realized this matter would get into litigation. I did submit written notes to the Pomponio Realty.

*Robert J. Francis.*

I made no carbons. I was not a typist, but in reply to those notes, they did complete about 75 percent of the list, corrected, but others not corrected, and in my letter of March, when it was obvious that they were not to be done, I put them in the letter.

Q. Any of those items listed in your letter of March 27th been completed since that time?

A. I don't recall, unless I look in the letter.

Q. That is the letter of March 27th. Will you indicate whether any of those items have been completed?

A. Yes, No. 1. The furnace was repaired. Second, the bricks were repaired.

Q. All right. The furnace was repaired. The
page 70 } bricks were replaced.

A. That is right. The molding was nailed down. The electrical outlet was covered. The metal piece in the doors was repaired, but broke immediately again. The kitchen baseboard molding was never changed. The corking in the master bathroom tub is still falling out; was fixed and remains unfixed. The settlement cracks have not been repaired. The lot remains unsodded. The basement has not been panelled. The beams have not been changed as to their paint color. I have not received a set of plans for the house.

I think that about covers it. There were other items that were discussed verbally.

Q. With respect to those items in your bill of particulars which your attorney filed in this case, he indicated that the following items had not been completed: Basement was not properly panelled. Now, that situation, in what way do you mean that the basement was not properly panelled? Was it not complete, or do you not like what was done?

A. The contract was very clear in this respect, "With all cinder block walls in basement to be panelled." Now, that has not been done.

Q. What exterior walls in the basement have not been done?

Have exterior walls not been panelled?

page 71 } A. The exterior walls comprising the storage room, running from the kitchen to the southeast corner of the house; the entire southeast wall running from the southeast corner of the house to the southwest corner of the house; the entire wall running from the southwest corner of the house to the northwest corner of the house.

I have excluded from that, however, the bathroom on the northwest side and the utility room on the northwest side, which was never panelled.

*Robert J. Francis.*

Q. They were not?
A. No, they were not. I wouldn't have expected that.
Q. Did you ever, or did your wife, so far as you know, ever indicate that she did not want the storage room panelled?
A. Not to my knowledge.
Q. With respect to the guttering not being properly painted, you really don't have any guttering at all on the house. Are you referring to something else besides guttering?
A. I am referring to the portion of the metal flashing that surrounds the entire house where the roof ends.
Q. Might be referred to as flashing?
A. Yes.
page 72 } Q. Is that not painted?
A. It was painted, but the paint has peeled. In fact, it had peeled as soon as it was there a month or two.
Q. Does that condition still exist?
A. Still exists.
Q. You own the house now almost three years?
A. That is correct.
Q. I don't see listed anywhere in this list of your letter of March 27th, the guttering not being properly painted in the molding, so that was not referred to in the letter. Was that a condition that came about after March 27th?
A. No, there were a number of items not included in my letter.
Q. Now, the beams in the house were stained the wrong color?
A. That is correct.
Q. You picked all the colors that went into the house, did you not?
A. Except the beams.
Q. That was done before your request?
A. That is correct.
Q. Is it not possible that your wife was agreeable to that color?
A. Absolutely not. She was furious when she saw the beams.
page 73 } Q. With respect to the kitchen baseboard not being painted according to specification, was it painted not the right color?
A. It was specified that the baseboard should be natural. It was painted white.
Q. Is it still white?
A. Still white.
Q. In your last item in your particulars, your attorney

*Robert J. Francis.*

shows broken bricks not replaced. That item has been corrected?

A. That is corrected.

Q. So we may eliminate Item 7, the broken bricks not being replaced.

A. I would like to check that before.

Q. Referring again to your letter of March 27th, would you read that portion of it in which you referred to Colonel Barger or Mr. Barger, the paragraph in which his name is mentioned?

A. In this connection, Mr. Vance took me to see Colonel Barger before I signed the contract, and he also advised this work should be done this Fall, 1955 when the lake was lowered. I feel it is important to make the necessary arrangement with Colonel Barger to fulfill the terms of the contract with me.

Q. With respect to that statement in the letter, it was clear at the time you wrote it that the Pomponio organi-
page 74 } zation and Barcroft Lake Shores, Inc. were looking to Colonel Barger to do this work.

A. That is correct.

Q. Did you not get that impression when you went to see him the first time; that he was going to do the work and not they?

A. I did not know what the relationship between Pomponio and Colonel Barger was. It wasn't quite clear to me, but the contract I signed was that certain work was to be done by a corporation. Who owned the corporation, I did not know.

Q. You didn't look into who owned the corporation, or what responsibilities they did have or what connections?

A. I did not.

Q. You have testified that the bulk of the property on the lake, the bulk of the property out there is on the lake's edge in general. I believe you stated that, but you had purchased this lot which was to have been made a part of the lake's edge. Did you inquire as to the cost of lots closer to the public beach, for instance, as to whether or not it would cost more money for you to build your house on a lot closer to the public beach, one that might have been more directly on the lake as it then existed?

A. No, Mr. Vance told me that certain lots were available. Why these particular lots were available, I have no way of

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knowing. Whether Pomponio owned them, I don't
page 75 } know. He showed me these various lots. He said,
"Take your pick and we will build you the Trend-setter House for $46,000.00."

Q. Any of these that he showed you, were they directly on the lake as they now stand?

A. No.

Q. All of the lots that you were shown, something would have had to be done to the lake before they became lake front lots?

A. That is correct.

Q. You testified that your nearest neighbor on the lake was two or three blocks, and your nearest neighbor was two or three hundred yards away. Is there not a house 200 or 250 feet across the street from your street at an angle?

A. There is a house at Stoneybrae Drive and Waterway Drive.

Q. How far are you from Stoneybrae Drive there?

A. 200 yards. It isn't in view at the present time from my house.

Q. There are quite a few trees on the lot 684, right next to you?

A. Yes.

Q. Do you recall a conference in Mr. Arthur Pomponio's office, attended by you, Mr. Vance, perhaps Mr. Dennis—we
are not sure of that—and Mr. Arthur Pomponio,
page 76 } in which Mr. Arthur Pomponio suggested to you
and Mr. Vance that you go to see Colonel Barger, and that is the time that you want to see him and got this matter straightened out?

A. I don't recall whether that is the time or not. I know I was invited to go by the Pomponio organization. That is all I know.

Mr. Bean: No further questions.

## RE-DIRECT EXAMINATION.

By Mr. Kinney:

Q. Mr. Francis, you have been handed a piece of paper that has not been admitted into evidence. Do you recognize it?

A. Yes, sir.

Q. Does that anywhere say that you waived any conditions or defects or improper workmanship in your house?

*Robert J. Francis.*

A. It says: "This is to certify we have occupied the property according to the terms and conditions of the purchase agreement." I would take it that we have taken occupancy of the premises.

Q. Is that a fact that you did take occupancy?

A. Yes, sir.

Q. What date was it?

A. I assume October 1st.

Mr. Bean: It does have a date, October 29th. I
page 77 } would like to introduce it into evidence as Defendant's Exhibit 1.

Mr. Kinney: I am introducing it as Plaintiff's Exhibit 13.

The Court: It is fourteen.

(The paper above referred to, was marked Plaintiff's Exhibit No. 14 for identification, was received in evidence.)

By Mr. Kinney:

Q. Mr. Francis, at any time, did any of the people in the Pomponio organization, including Mr. Vance, describe to you what the difference was between Lake Barcroft Estates, Barcroft Lake Shores, Inc., and Barcroft Woods, Inc.?

A. No, they did not.

Q. Do you know who was connected with Barcroft Woods, Inc.?

A. No, I still don't know. I have got a letter from Pomponio Realty, signed by Mr. Pomponio, asking me to make payments to Barcroft Woods, Inc. That is all I know.

Q. Have you been making payments to Barcroft Woods Inc.?

A. I believe that is correct.

Q. Your contract provided for the sale of Lot 683 in Lake Barcroft Estates. Is that not correct?

A. That is correct.

Q. Were you told at any time by anybody in
page 78 } Barcroft Woods, or Pomponio Realty, or in M. Pomponio and Sons' personnel that Lake Barcroft Estates was an entirely different organization from Barcroft Lake Shores, Inc.?

A. No, I was not told who they were, what the company was.

Q. Your contract provides that the seller is Barcroft Woods, Inc. Is that correct?

A. I believe that is correct.

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Q. And the lot to be sold is Section 7 of Barcroft Estates?
A. That is correct.
Q. Now, at any time did Mr. Vance make any representations to you that the Pomponios or Barcroft Woods or Pomponio Realty, Inc. or Mr. Pomponio and Sons would see to it that the lake was cleaned out?
A. Yes, they told me that they had a big stake in this operation, and that obviously the fact that I was buying one lot, whereas they owned a lot of property, and they were going to see to it that it was all done. How they were going to see to it, they did not say.
Q. Did they disclose to you whether they had contracted with Colonel Barger or Barcroft Lake Shores, Inc. to do this work?
A. They did not disclose to me any of their business.

page 79 } Q. Did they disclose to you how they were going to put the roof on the house?
A. They told me nothing about their operation, except I would have the Trendsetter built by such a date.

Q. You actually wrote this contract, or did somebody else write it?
A. Somebody else. I would assume it was written by Pomponio Realty, when it was handed to me.
Q. Who was the agent or the agents at that time?
A. There was an agent, Lincoln Vance, who was working for Pomponio Realty or M. Pomponio and Sons. He had a desk and an office on Wilson Boulevard that said Pomponio Realty Company, or words to that effect.
Q. Were you aware on the 20th day of May, 1955 that the Pomponio Realty Company, acting through its President, Anthony C. Dennis, had some qualms about whether or not the term, "It is further understood that the lake is to be dredged from Lot 683, up to and including Lot 685 by Barcroft Lake Shores, Inc.?" Do you know whether Mr. Dennis had any hesitancy about placing it in the contract?
A. I don't know. He didn't discuss it.
Q. Were you ever told by anybody that the lake was going to be dredged?
A. No.

page 80 } Q. Did anybody from Barcroft Woods, Inc. or Pomponio Realty, Lake Barcroft Estates, or M. Pomponio and Sons, Inc. ever disclose to you that the terms of the contract to-wit the lake was to be cleaned out, was not going to be done, that is, prior to the filing of this suit?

*Robert J. Francis.*

A. No.

Mr. Bean: I think the letter speaks for itself.

The Court: You received the letter, did you not, from one of the Pomponios saying the lake was going to be done?

The Witness: Yes, sir. That is correct.

By r. Kinney:

Q. In that letter, did they say they were not going to, or not able to have it done?

A. No, they said they were going to have it done. I assumed—

Q. The question of a public beach came up on your cross examination. Was there any discussion when you picked out the lot with Mr. Vance as to why this particular lot, 683, was more desirable than the others?

A. Yes, because the statement was made to me that there was to be a public beach constructed at what would be three or four lots removed from Lot 683, and that I might find that noisy and bothersome to be adjacent to that beach, and I better move three or four lots away.

He showed figures where this lot would be out page 81 } further in the lake, but the public beach was made clear. It was stated unequivocally that there was to be a public beach, comparable to the others in existence.

Q. Anyone in the Pomponio organization heretofore mentioned, disclose that they had no authority to lower the lake?

A. No.

The Court: Let me clear up one thing. You have mentioned several times Lake Barcroft Estates and Barcroft Lake Estates and Barcroft Lake Shores, Inc. When you mention those different organizations, are you talking about Barcroft Lake Shores, Inc.?

Mr. Kinney: One of them is Barcroft Lake Shores, Inc., Barcroft Woods is the Pomponio organization, and the area known as Lake Barcroft Estates, as it appears in the contract. I don't know whether Lake Barcroft is the corporation or not.

The Court: A copy of what contract?

Mr. Kinney: The copy of the contract of May 18th, of the Pomponio Realty Company contract. The words "Barcroft Estates" appear there.

The Court: Is that the only reference to Lake Barcroft Estates, where it appears in the contract?

*Robert J. Francis.*

Mr. Kinney: It is in the contract, Section 7, Lake Barcroft Estates, the fourth line down, purchase of
page 82 } Lot 683, Lake Barcroft Estates. Now, by hindsight, it appears like a subdivision name was used.

The Court: The correct subdivision is Section 7, Barcroft Lake Shores. Isn't it?

Mr. Kinney: He has bought a Lot 683, Section 7, Lake Barcroft Estates.

Mr. Bean: In the printed form of the sales contract, I notice Lake Barcroft Estates, Section 7 is referred to. Whereas in the purchase agreement, it says Section 7, Lake Barcroft and leaves off the word "Estates."

The Court: Well, what is the legal description of this lot?

Mr. Bean: It is Section 7, Lake Barcroft Estates, Fairfax County, Virginia, Lot 683, Section 7, Lake Barcroft Estates, Fairfax County, Virginia. The plat, which is in evidence, says: "Barcroft Lake Shores." The printed contract says: "Barcroft Lake Estates," and the other is Barcroft Lake Shores. It is one or the other. I would assume that the deed would be Barcroft Lake Shores, as the plat is set up that way.

The Court: The plat to this property is recorded?

Mr. Bean: Yes.

The Court: Is that the recorded plat?

Mr. Bean: This does not show recording data, because the original plat is, of course, in linen. This does
page 83 } show the plat recommended for approval by the Fairfax County Commissioner, September, 1953, and approved by the Board of Supervisors on September, 1953, with Carl Massey's name on it. I assume the linen on this went on record.

The Court: And the title of the subdivision is what?

Mr. Bean: Barcroft Lake Shores, and this plat is entitled Section 7, and I say this is presumably a copy of that, which has been introduced into evidence.

The Court: All right.

Mr. Bean: I want to ask three or four questions.

## RE-CROSS EXAMINATION.

By Mr. Bean:

Q. You just testified, Mr. Francis, that none of these corporations, companies, referred to, had stated that they had no authority to lower the lake.

A. That is right.

Q. So far as you are concerned, all of them had authority.

*Robert J. Francis.*

Mr. Kinney: You asked about any of the Pomponio corporations?

Mr. Bean: Any of the Pomponio corporations, and you stated that you did not know; that they did not have authority.

The Witness: That is corrcet.

page 84 } By Mr. Bean:

Q. Isn't it true that Mr. Arthur Pomponio, in his office, before you and Mr. Vance went to see Colonel Barger, stated to you that they had no authority whatsoever to lower the lake, had nothing to do with the lake, and that is why he was sending you over there? Do you recall that conversation?

A. No, I don't.

Q. When you say, "They said they had a stake in all this," referring to the correspondence you had about getting this lake lowered and getting it cleaned out, you had earlier testified, I believe, that Mr. Vance, the agent of Pomponio Realty, was the only one who had indicated to you that they had a stake in it and you now indicate that there are other people. Who are "they" who had a stake in it?

A. Mr. Vance stated, others may have stated, that in view of the homes in that area owned by the Pomponio organizations, in view of that, they were going to see to it that the lake was taken care of. They owned the lake, and could build more houses.

Q. Who are "they?"

A. The Pomponio organization.

Q. Who in the Pomponio organization?

A. Mr. Vance, I recall specifically. Others may have. I don't remember.

page 85 } Q. You don't know other than Mr. Vance?

A. It was three years ago that it came up. It made an impression on me mentally.

Q. How long have you been a business man?

A. Last four years.

Q. During that time, have you had any dealings with corporations?

A. Sure.

Q. Do you know how a corporation is set up, generally?

Mr. Kinney: I object to that. He would have to direct his questions more specifically. A corporation may be set up a number of ways. They could have intertwining directorates.

They could have the same directorate and no connection at all.

The Court: Objection overruled.

By Mr. Bean:

Q. I asked you if you were familiar generally with the way that a corporation is set up in this state.

A. No, I am not.

Q. Have you ever been involved in a corporation's being established?

A. Yes.

Q. Are you a stockholder in a corporation?

A. Yes, I am.

page 86 } Q. Do you realize that that corporation is what we call an entity? In other words, it is just as an individual and it has its own responsibilities?

A. Yes, sir.

Q. Do you realize that individuals cannot commit the corporation, but only the corporation can commit itself?

Mr. Kinney: I object to that. It is a conclusion.

The Court: Objection overruled.

By Mr. Bean:

Q. Do you realize that individuals who are with a corporation cannot commit the corporation, but a corporation can only commit itself through its authorized board of directors?

A. I don't understand that. A person who works for a corporation can commit the corporation by signing a paper or selling a lot.

Q. Does that person have to be authorized by the board of directors?

Mr. Kinney: There is no allegation of denying an agency, categorically of Lincoln Vance, whose name appeared.

Mr. Bean: It has nothing to do with denying agency. I am trying to get at this man's understanding.

The Court: I think you have developed it and that you are getting into questions that call for a legal

page 87 } conclusion.

Mr. Bean: All right, sir.

By Mr. Bean:

Q. When you signed this contract in which the words "Barcroft Lake Shores, Inc." were twice referred to, were you

*Robert J. Francis.*

familiar with the fact, in view of these words, that Barcroft Lake Shores, Inc. was a separate corporation that you were dealing with?

A. I don't know what you mean by that. I am not trying to be obstinate. I know that there were many corporations involved in this transaction. Now, who they were, or who owned or controlled them, made no difference to me. As long as Mr. Pomponio signed the contract, I felt it was a big real estate corporation.

Q. You realized you were dealing with several corporations, but you did not attempt to determine with whom you were dealing when Barcroft Lake Shores, Inc. was referred to?

A. I made no effort to ascertain who the corporations were.

Q. Did you not feel that it was important, or apparently you felt it was unimportant.

A. I felt it was unimportant. I felt I was dealing with a reputable company in Arlington, who were building several houses in Arlington. I understand they were de-
page 88 } veloping all over the place.

Q. Why did you feel that it was necessary to go to see Colonel Barger at all?

A. I did not feel it was necessary to do it.

Q. Why did you do it?

A. Because Mr. Pomponio suggested I do so.

Q. Didn't he tell you at the time? Didn't he suggest why?

A. He wanted to assure me that the lake was being taken care of, and this was his way of doing it.

Q. Didn't he want Colonel Barger to talk to you? Wasn't the implication clear that he couldn't do it, but that Colonel Barger could?

A. No, sir, it didn't imply it to me. I had no knowledge of the relationship, what the relationship was, but Pomponio was building these houses, and said that these things would be done and so I signed the contract.

## RE-DIRECT EXAMINATION.

By Mr. Kinney:

Q. You bought the lot by both looking at it and checking the plat that is now in evidence. Is that correct?

A. Yes, sir.

Q. And that plat on the bottom says what?

A. I don't recall.

*Robert J. Francis.*

Q. After ownership.

page 89 } A. It says, "Section 7, Barcroft Lake Shores."

Q. All right. You were dealing with Pomponio Realty, as a principal or an agent, or don't you know?

A. I don't know.

Q. Did Pomponio Realty or Barcroft Woods, Inc. ever disclose to you that Barcroft Lake Shores was or was not in fact the true owner of the lot?

A. I did not know who owned the lot.

Mr. Kinney: That is all.

RE-CROSS EXAMINATION.

By Mr. Bean:

Q. When you signed the contract, you knew who owned the lot, did you not?

A. I did not.

Q. Didn't you see that the owner was stated to be on the contract, Barcroft Woods, Inc.?

A. I didn't know who owned the lot. I didn't think it was material. I knew I made the assumption, perhaps erroneous, that Mr. Pomponio would not sign a contract to build a house on a lot he didn't control or own, or acquire. I felt I was dealing with a large, responsible building organization in Arlington County. I didn't ask for a resolution from the board of directors who could sign it. I went through the normal procedure of any purchaser.

Q. You did read the contract before you signed

page 90 } it?

A. Yes, sir.

Q. You saw that Barcroft Woods, Inc. was the owner?

Mr. Kinney: Wait a minute!

Mr. Bean: May I see the original exhibit? I want to make sure that exhibit—not the plat, now, but the sales contract. I guess that would be Exhibit 1.

By Mr. Bean:

Q. Looking, if you please, to Exhibit 1, Mr. Francis, which is a sales contract, you will note that the date on the sales contract is May 18th. Then at the bottom of the page, do you find the date beside your name?

A. Yes, May 18th.

Q. What is the date beside the date of the seller?

*Lincoln P. Vance.*

A. May 27th.

Q. That meant from the 18th to the 27th there was a lapse of nine days. Do you know what was done during that period of time before Barcroft Woods, Inc., by Rocco Pomponio, signed the contract?

A. What happened?

Q. In that nine-day period from the time you signed the contract until it was signed by Barcroft Woods, Inc., do you know why they didn't sign it?

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

page 91 } Q. Wasn't it true that during that interim period you were to go to see Colonel Barger? Do you know when you went to see him?

A. No, I was in his office ten or fifteen minutes. I went with Mr. Vance.

Q. Was not that visit to Colonel Barger made prior to the signature of May 27th by Rocco Pomponio?

A. I would assume so. It would have to be.

RE-DIRECT EXAMINATION.

By Mr. Kinney:

Q. When you signed that contract, did you actually know who the owner was?

A. No, I didn't.

Mr. Kinney: That is all.

The Court: You may step down.

(The witness was excused).

Thereupon,

LINCOLN P. VANCE,

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

DIRECT EXAMINATION.

By Mr. Kinney:

Q. Give your name, please, sir.

A. Lincoln P. Vance.

Q. Where do you live?

page 92 } A. 1316 Barger Drive, Barcroft.

Q. How long have you lived there, sir?

*Lincoln P. Vance.*

A. About 2½ years.

Mr. Bean: How long, sir?
The Witness: About 2½ years.

By Mr. Kinney:
Q. In what business are you, Mr. Vance?
A. I am a real estate salesman.
Q. With whom are you connected now?
A. Arthur Levine-Murray Company.
Q. In the year 1955, with whom were you connected?
A. Pomponio Realty.
Q. For what length or period were you connected with Pomponio Realty?
A. I think about three years, up until 1957, sometime in 1957.
Q. Would that begin in what date, sir?
A. I believe I went there in 1954, March, 1954, and I think I left around April, 1957.
Q. By whom were you employed?
A. By Pomponio Realty.
Q. Pomponio Realty?
A. That is correct.
Q. Is that a corporation?
A. Yes.
page 93 } Q. Do you know who the prime factors are in that corporation, who the big guns are, so-to-speak?
A. I wouldn't know all the stockholders, but I imagine the Pomponios, of course.
Q. Did there ever come a time when you served as agent for Barcroft Woods, Inc.?
A. I believe so, yes, sir.
Q. Do you know when that was, sir?
A. I believe during 1955, 1956.
Q. What was your particular job in 1955, in the Spring of 1955?
A. Selling houses, primarily, through Pomponio Realty, and they, of course, took care of their subdivision houses, as well as general brokerage.
Q. Do you make a specialty of a certain area or type of houses at the present time?
A. I don't know if I make a specialty. It happens I sell quite a bit of property in Lake Barcroft.
Q. Did there come a time in 1955 when you met this gentleman sitting on my left?

*Lincoln P. Vance.*

A. Yes, sir.
Q. Approximately when was that, sir?
A. Sometime before May.
Q. Do you recall the circumstances of your meeting with him, and if anyone was with him?
page 94 } A. I believe the first time I saw him Mrs. Francis, his wife, was with him.
Q. What happened, sir?
A. He evinced interest in buying a house in Barcroft, the Trendsetter model. He wanted to buy a house, or considered buying a house in Lake Barcroft, a model, I believe we called the Trendsetter.
Q. Was there a Trendsetter up there, erected at that time?
A. Yes, sir.
Q. Where was that?
A. I don't recall the lot number. It was on Stoneybrae Drive.
Q. Then what happened?
A. He ended up buying a Trendsetter on a lake front.
Q. What was the price of the Trendsetter on Stoneybrae Drive?
A. I believe $36,950.00.
Q. Was that to include the house and lot?
A. That is correct.
Q. That was?
A. The house was already erected.
Q. What general type of house was it?
page 95 } A. It was a very attractive contemporary, quite a large house, exposed beams, with four bedrooms and three full baths and recreation room.
Q. Did there come a time when Mr. Francis and his wife had a meeting of the minds with you on the type of house they would like?
A. Yes, sir.
Q. Was there a time when you and they agreed where this house would be erected?
A. Yes, sir.
Q. Tell the Court, if you will, some of the circumstances before the agreement on the particular lot.
A. Some of the circumstances before the agreement?
Q. Some of the reasons that Mr. Francis selected the particular lot that he did.
A. He was intrigued with the idea of being on the water. A water-front lot was an extremely attractive lot.

*Lincoln P. Vance.*

Q. Did you have any lots available on the lake itself at that time?

A. That was supposed to be on the lake.

Q. What was the price for the house and lot that Mr. Francis finally decided on?

A. I believe $46,000.00.

Q. I just hand you a document admitted into evidence, and ask you if you recognize that document, being page 96 } Plaintiff's Exhibit No. 1.

A. Yes, sir.

Q. What is the price on that?

A. $46,000.00.

Q. Did you handle the transactions with Mr. and Mrs. Francis at that time?

A. Yes, sir.

Q. Do you recall any conversation about time being of the essence?

A. Yes, sir.

Q. What was that? Who said it?

A. Mr. Francis insisted on that being incorporated in the contract. It was very important that he get in there by September, and I believe or recall it is in the contract, yes, sir.

Q. Was he able to occupy the house on September 1, 1955?

A. I think not.

Q. Do you know how much later it was?

A. I believe it was in November or December.

Q. Did he prevail upon you prior to September 1st to complete the house, get it completed?

A. I recall we had quite a few conversations.

Q. Regarding the completion of the house?

A. Yes, sir.

page 97 } Q. From your knowledge, do you know any reason that involved him that slowed the opening of the house, or delayed the availability of it?

A. I don't believe I would be capable of answering that.

Q. Do you know of your own knowledge whether he made any structural changes that were not allowed by the contract, that would slow up the building of the house?

A. I think not. I don't believe he made any structural changes not allowed in the contract.

Q. Now, did there come a time when you and Mr. Francis spoke with a Mr. Barger, or a Colonel Barger?

A. Yes, sir.

Q. Now, at whose suggestion did you take Mr. Francis to talk to Colonel Barger?

*Lincoln P. Vance.*

A. At Mr. Pomponio's.

Q. Was that Mr. Arthur Pomponio?

A. Mr. Arthur Pomponio.

Q. At his suggestion? Was Mr. Francis present at the time he made that suggestion?

A. At the time he made it to me. I don't really recall. He may well have been. I believe the first time he made that suggestion, Mr. Francis was not present, at least the first time he made it to me.

Q. You were directed by Mr. Pomponio to take Mr. Francis to Colonel Barger?

page 98 } A. Yes, sir.

Q. Did you do that?

A. Yes, sir.

Q. Was this after May 18, 1955, being the date of the contract, or was this before?

A. I believe it was before.

Q. Well, what was the conversation at that time?

A. Between whom, sir?

Q. Between Mr. Barger, yourself, and Mr. Francis.

A. Colonel Barger was telling us of the various things that he planned on doing to Lake Barcroft, in general and specifically to the lake as regards the lots Pomponio had, and more specifically as regards to the lot Mr. Francis was buying. I believe he told us that he would at first put a chemical to destroy the vegitation, and he informed us that the lake was lowered every two or three years when they had sufficient requests of the property owners, when they wanted to build docks. It was lowered in the summer time. He informed me that the lake would be lowered that coming winter, subsequent to putting a chemical in there to kill the vegitation.

He said at that time he would put bulldozers onto the property, into the lake, to clean the lake out. I recall Mr. Francis was concerned as to the safety factor to his children, and Colonel Barger said he would be able to wade out

page 99 } into the lake twenty feet before the lake was over his head. I think at that time he also informed us that there would be gates to every entrance to the lake, and that was the purpose for the $60.00 assessed to all property owners, and also for the stickers for all automobiles.

Q. Did you have available with you a plat or a map of the area, when you were talking to Colonel Barger?

A. There was a plat on the wall in Colonel Barger's office, and, of course, I had worked with Mr. Francis from a copy of that plat at the time Mr. Francis picked out his lot.

*Lincoln P. Vance.*

Q. Where did that show the lake line to be with relation to Lot 683?

A. At the foot of Mr. Francis' lot, and also extended, I would say, 100 yards beyond it.

Q. That is the lake?

A. That is correct.

Q. Would I be correct in saying that the map showed that the lake was lapping the lot?

A. Oh, yes.

Q. I show you this plat that has been admitted into evidence. You are familiar with that?

A. Yes, sir.

Q. Was either this one or a copy of it, used to show Mr. Francis where his property would be?

page 100 } A. Yes, sir.

Q. Whose name appears on the bottom of the plat?

A. Barcroft Lake Shores.

Q. Was there any discussion regarding the distance the lake was to be cleaned out, how far up or down stream?

A. Yes, I believe the lake extended at least one hundred yards down stream, I guess up stream, from Mr. Francis'.

Q. Do you want to look at the plat and see if you can refresh your memory?

A. Yes, sir. This shows that the plat shows it.

Q. Was the terms of that extention so placed in the contract? You can look at the contract, Mr. Vance, the third from the last item.

A. Yes, sir.

Q. Did you have any doubt in your mind what cleaning out meant after talking with Colonel Barger?

A. None whatsoever. That was a term used by Colonel Barger.

Q. That was just what you have described, the vegitation killing with chemicals and the bulldozers and the depth?

A. Yes, sir.

page 101 } Q. Do you recall any conversation with Mr. Francis wherein you indicated to him the amount of premium that he would have to pay for lake front lots, as opposed to one in back?

A. Yes, sir

Q. What was that?

A. $10,000.00.

Q. He accepted that figure, did he?

A. Yes, sir.

*Lincoln P. Vance.*

Q. Did you specifically tell Mr. Francis that Barcroft Lake Shores was or was not the owner of this property?

A. I did not tell Mr. Francis that Barcroft Lake Shores was the entity, as Colonel Barger was the owner. I told Mr. Francis that we owned, the Pomponios owned it; that we had bought it; that Pomponio had bought it.

Q. Through a corporation?

A. I don't think so, and also told him that we had bought it with the expectation that this property at the lake would end up like that. Colonel Barger had intimated that, or told us that at the time he more or less oriented us.

Q. When you say, "He more or less oriented us," when was this and where?

A. That was shortly after Mr. Pomponio had acquired the property and started to build houses on it.

page 102 } Q. When, in relation to May, 1955, was that?

A. I would say almost a year prior to that. Colonel Barger attended a sales meeting.

Q. Where was that?

A. It was held at the Hot Shoppe at Glebe Road.

Q. What were the representations made at that time?

A. Similar representations that we have discussed. He also told us that there was a beach installed at the foot of Rusticway Lane. He described the various benefits to be derived at Lake Barcroft, as quite a few. He made it so attractive, I bought a house out there.

Q. Were you ever told by a person in authority in the Pomponio Realty Company that you couldn't make the same representations that Colonel Barger told you with respect to purchasers?

A. No, sir.

Q. Did they tell you whether or not you could make them?

A. No, sir. They did not tell us that we could not or could.

Q. Did you have any reason to believe in the passing of a year, 1954 to 1955, that those things would not be done?

A. No, sir.

page 103 } A. As a matter of fact, I had no doubt in my own mind. He was certain they would be done as late as last year.

Q. Did you know of any reason why the parties to the sales contract could not perform in conveying the property, or conform to the terms in the contract and signed by the parties themselves?

A. So far as the beach was concerned, I believe they were unable to perform until the lake was cleaned out.

Q. That is the forty foot beach?

*Lincoln P. Vance.*

A. Yes, sir.

Q. That is as to the digging out of the lake? Did you have any doubts about its being done? We are speaking about 1955. You know now?

A. No, sir, I don't.

Q. At no time did you convey to Mr. Francis that you had some doubts about it?

A. No, sir. As a matter of fact, I indicated to Mr. Francis that Mr. Pomponio had a much greater stake than he did.

Q. What was the implication that he was certain that Mr. Pomponio would prevail on Colonel Barger to go ahead? Do you recall. Take a look at the contract. Who signed here, the purchaser or did the seller sign first?

A. Oh, the purchaser signed first.

page 104 } Q. Was there a delay of any time before the seller signed? You can take a look and see what it says.

A. Yes, sir. Here is it, a nine-day delay.

Q. When you dealt with Mr. Francis, did you speak of various corporations that Pomponio had, as Pomponio, or did you designate specifically between Barcroft Woods and Barcroft Lake Shores, or did you tell him the difference between Barcroft Lake Estates, that is, Lake Barcroft Estates?

A. I believe in speaking, I said M. Pomponio Construction in that, yes.

Q. This is before he signed?

A. Before he signed. I think we might have discussed the fact that, or I believe we may have discussed or I may have told Mr. Francis that Mr. Pomponio was extremely able, an extremely able builder. He had been extremely successful in his field. It may have come up that the house may not have been built. It would not be built by Pomponio Realty as such, but it would be built by one of the Pomponio industries.

Q. When Mr. Francis signed the contract, did he know who was going to sign as owner?

A. I think not. I believe he knew it was going to be an entity of Pomponio.

Q. Was this Trendsetter house built to specific specifications of Mr. Francis, or was the house already in

page 105 } design and construction; that plans had been drawn?

A. There was a basic design that had already been drawn. There were some changes, according to Mr. Francis' specifications. I believe the contract permitted them, providing there were no basic structural changes.

*Lincoln P. Vance.*

Q. Are there any houses along the shores next to Mr. Francis' house?

A. Next to Mr. Francis' house?

Q. Or next to the immediate vicinity, along the supposed lake shore?

A. Not within several blocks.

Q. Do you know, from the course of your real estate transactions, who now owns the lots on each side of Mr. Francis?

A. I am not sure of that, but I believe either Larchmont Realty, Berman or Hoerwitz.

Q. Is that the same? Do you know if Mr. Pomponio, or one of his entities, has in fact sold or liquidated those lots?

A. I have no way of knowing what they have sold or retained, or disposed of them.

Q. Have you seen any of their lots for sale in that area near to Mr. Francis, with the Pomponio Realty sign on them?

A. I try to avoid it. I am a bit embarrassed
page 106 } by the whole thing.

Q. What are the general conditions in front of Mr. Francis' lot? What does it look like there?

A. There is definitely no lake shore.

Q. In your opinion, as a real estate salesman, would the same lot be worth more or less if it were back from the area where it is now? Do you follow my question?

Mr. Bean: Objection. I don't think that a proper ground has been laid for it, and experience in appraisal.

The Court: Objection sustained.

By Mr. Kinney:

Q. You sell lots as well a houses?

A. Yes, I specialize in houses, though.

Q. Have you sold lots in the Lake Barcroft area?

A. Yes, sir.

Q. Without houses?

A. Yes, sir.

Q. In your opinion would the lot that Mr. Francis is now on be worth more or less, given the same size and slope conditions if it were somewhere else in the Lake Barcroft area?

Mr. Bean: Don't answer the question until I make my objection. The objection is repeated that the witness, if the Court please, is not properly qualified as one who can ap-

*Lincoln P. Vance.*

praise the value of a property. He is a salesman.

page 107 } Mr. Kinney: I don't think there is any rule of law that any man in the real estate business cannot testify to the value of property.

The Court: He hasn't testified that he knows the value of the property. The objection is sustained.

By Mr. Kinney:

Q. You know the value of the lots in the Lake Barcroft area?

A. Yes, sir.

Q. How long have you been dealing in Lake Barcroft property?

A. About three years.

Q. Can you answer my other question?

Mr. Bean: I object. Do you know the value of Lake Barcroft property? I think the further question would have to be asked in order to properly qualify him.

By Mr. Kinney:

Q. Do you know the value of Lake Barcroft properties on the lake proper, the existing lake?

A. I know the prices.

Q. The prices?

A. Yes, sir.

Q. What is the range of price?

A. Presently, up to $15,000.00.

Q. They vary from lot to lot. Is that correct?

page 108 } A. That is correct.

Q. You know what the price or value of a lot similar to Mr. Francis' lot is in comparison with a lot on the lake? I have asked you if it is higher or lower. I have not asked you to place a total value on it.

A. You asked if Mr. Francis' lot, if the value of Mr. Francis' lot is higher or lower than a lake-front lot?

Q. Yes.

A. Under its present conditions, I presume?

Q. Yes, sir.

A. I would say that it is lower.

Q. Do you know the value of lots a block or two away from the lake?

A. Yes, sir.

Q. Would Mr. Francis' lot be worth more or less on it, than the lot back from the lake?

*Lincoln P. Vance.*

A. I believe the possibility of the lake being fixed would add value to it and I would say that the lot in its present condition is worthless.

Q. All right. Mr. Vance, was there ever any doubt in your mind that you were indeed selling a lake-front lot?

A. No, sir.

Q. All right. I believe you testified you did
page 109 } not know of any reason that Mr. Francis held up construction. I hand you this piece of paper, and ask you if you can identify that.

A. Yes, sir. I believe it is the work order issued to the construction superintendent out there. I have a copy, as a matter of fact.

Q. Does that indicate to you that Mr. Francis was holding up any construction?

A. Let me see that.

Q. There were four copies of that made, according to that.

A. Yes, sir. No, sir.

Q. All right. Mr. Vance, did the Trendsetter sample house have a bar in it?

A. Yes, sir.

Q. Do you know whether or not Mr. Francis' house was completed with a bar in it?

A. I am afraid I don't, sir.

Q. You have been in his house since it was finished?

A. Yes, I think I have been in there a couple of times, but it has been sometime ago. At that time, I don't believe the house had been totally completed.

Q. Do you know whether or not he now has a beach in front of his area?

page 110 } A. I think not.

Q. Have you had occasion to quote prices for beaches in your work with Pomponio?

A. Have I had occasion to do what, sir?

Q. To quote prices on beach work.

A. No, sir.

Q. Do you know what it would cost to put a beach in?

A. No, sir.

Q. Do you know whether or not anybody except the various Pomponio corporations derived any benefit from this sales contract, to-wit did Colonel Barger that you know of receive any benefit from this contract?

A. I am not aware as to whether he received benefit from this particular contract. I believe Mr. Pomponio had ac-

quired the land prior to the time I sold the property, property or house.

Q. Do you know whether or not Mr. Pomponio owned the land?

A. I don't know whether he owned it or had an option on it. I believe that he did.

Mr. Kinney: Now, that concludes my examination on it. I wonld like to introduce Mr. Murdaugh Madden, co-counsel, who was delayed this morning.

Mr. Bean: Mr. Vance, that field memorandum page 111 } you referred to, dated June 17th, signed by Mr. Pomponio, I would like to have that introduced into evidence. Is there any objection?

Mr. Kinney: No.

Mr. Bean: I believe that the memorandum you testified to a moment ago as being handed to you—

The Witness: Yes, sir.

Mr. Bean: I would like to have that introduced as Defendant's Exhibit 1.

The Court: All right.

(The memorandum above referred to, was marked Defendant's Exhibit 1 for identification and received in evidence.)

## CROSS EXAMINATION.

By Mr. Bean:

Q. Mr. Vance, with respect to the conference that you referred to that Mr. Barger had with the salesmen at the Hot Shoppe, you say this was one year, approximately, prior to the sale of the property, Lot 683, to Mr. Francis?

A. I believe it was probably six months. That would be closer to it. It was shortly before Pomponio acquired the property.

Q. You do know that Pomponio owned the property prior to the time that you showed it to Mr. Francis, or one of his corporations did?

A. He owned it, or had agreed to buy it. It was page 112 } my impression that he owned it.

Q. At this meeting of Mr. Barger and the salesmen—

A. Yes, sir.

Q. —I believe you stated that Colonel Barger stated, had

*Lincoln P. Vance.*

stated substantially the same thing with respect to the development of the lake that he stated when Mr. Francis and you went to see him?

A. Yes, sir.

Q. At that time, is it not true that Mr. Arthur Pomponio stated to the salesmen that if any questions arose with respect to the development of the lake, they were to go directly to Colonel Barger about the purchaser, because Mr. Pomponio had nothing to do with the lake's development?

A. I believe that is correct.

Q. Then when you met Mr. Francis and showed him this lot, were you following out the instructions of your principal when you were going to see Colonel Barger about this lot and the lake development next to it?

A. No, I did that at Mr. Pomponio's suggestion at that time before Mr. Pomponio signed the contract.

Q. Before he signed the contract, did Mr. Arthur Pomponio suggest you take this gentleman to see Colonel Barger?

A. Yes, sir.

Q. Do you recall what was stated at that time when it was suggested by Mr. Pomponio that you should go

page 113 } to see Colonel Barger?

A. Mr. Pomponio told me he had bought the lots under those conditions. However, Colonel Barger was supposed to develop the lake and complete the development there. However, since Colonel Barger was supposed to do it rather than Pomponio, they preferred that I take Mr. Francis to Colonel Barger so that Colonel Barger could tell him exactly what was going to be done, and more or less get the bit to the horses mouth.

Q. Was Mr. Francis with you when you were so instructed?

A. I believe not, sir.

Q. Was there a time when Mr. Pomponio saw you and Mr. Francis together?

A. I think he had seen us together many times.

Q. Prior to your going to Colonel Barger, or after?

A. I am afraid I can't answer that accurately. I would hesitate to say, because they had seen us together many times. Whether it was prior to or subsequent, I don't know.

Q. On the occasion the three of you were together, do you recall Mr. Pomponio's saying to you or to Mr. Francis while you were there that Colonel Barger had the responsibility with respect to the lake, and Pomponio and his

page 114 } organizations had nothing to do with the development of the lake?

*Lincoln P. Vance.*

A. I believe—I think—would you repeat that?

Q. During any of the meetings that you stated that Mr. Arthur Pomponio had with you and Mr. Francis, did Mr. Pomponio state to you or to Mr. Francis, while in your presence, that the Pomponio organizations had nothing to do with the development of the lake?

A. It was apparent that the Pomponio organizations were not going to clean up the lake or the development.

Q. Was that made very clear to Mr. Francis by Mr. Arthur Pomponio?

A. I don't know if Mr. Pomponio made that clear to Mr. Francis. It was clear to me.

Q. Did you make that clear to Mr. Francis when you met?

A. I believe I did differentiate the builder and the developer.

Q. Did you say that Barcroft Lake Shores, Inc. was a different entity than Barcroft Woods, Inc. or Pomponio Realty?

A. I think I told Mr. Francis that Colonel Barger had nothing to do with Pomponio. He was no part of the Pomponio organization.

Q. You are quite sure you told him that?

page 115 } A. He was a developer of the property; that he had acquired the property from the developer.

Q. You made it quite clear to Mr. Francis that Mr. Pomponio was not the developer?

A. When you say "quite clear," I made no specific issue of it. There was no doubt in my mind at the time that the lake was going to be cleaned out and developed. We were informed it was going to be. We had acquired the property with that understanding.

Q. Did anyone in the Pomponio organization tell you that Pomponio was assuming the responsibility for the cleaning out or lowering of the lake?

A. No, sir.

Q. Did they, on the contrary, tell you that they were not responsible for it?

A. No, Colonel Barger was.

Q. I will ask you whether or not you recall writing a memorandum to Tony Dennis, the sales manager of the Pomponio organization, after you returned from your conference with Colonel Barger. I will ask you that by showing you this and ask you if you recall. On the other side, I would like to have that in. It is a letter we have discussed previ-

ously of the 20th of May, 1955, from Mr. Dennis to Colonel Barger. I would be glad to have it in also, but neither one of the principals at this time are here to testify
page 116 } with respect to it.

Mr. Kinney: Put it in.

Mr. Bean: Subject to Mr. Dennis' indicating that he wrote the letter, because it is written on the back.

The Witness: I do recall.

By Mr. Bean:

Q. You do recall that memorandum? Was that written prior to the time that the contract was prepared?

A. The contract, yes. It was written prior to the time that the final contract was prepared. It was written immediately after, I believe.

Q. Immediately after your conference with Colonel Barger?

A. Yes, sir.

Q. And that was prior to the preparation of the final contract?

Mr. Kinney: The date will have to speak for itself, and the thing is in evidence.

The Witness: It was written after the conference with Colonel Barger. I do recall.

By Mr. Bean:

Q. It was written apparently after the conference with Colonel Barger?

A. Yes, sir.

Q. But you don't know when that conference
page 117 } was held?

A. No, sir.

Q. But you know it was held prior to the signing of the contract? Do you know whether that memorandum was prepared prior to the signing of the contract by Mr. Rocco Pompino or Barcroft Woods, Inc.?

A. No, sir. I wasn't aware of this letter.

Q. You wrote on the back of it though.

A. I don't recall reading it.

Q. With respect to this memorandum which you had written, will you read it to the Court and into the record at this time?

A. "Tony: Colonel Barger explained that the lake is to be cleaned out by lowering the water level so they can first

chemically kill the vegitation. Following that, they will burn it and finally bulldoze it out. This will be done sometime in the fall or early spring.

"We don't have to install the beach until after this beach is lowered, and furthermore, the beach only has to be forty feet wide. He suggested placing it approximately in the center of the lake frontage. However, this may be subject to change after the house is built. Because of the view and other aesthetic considerations, suggest that we take Francis' house and tell Shannon and Luchs to get on the ball."

page 118 } Q. That is in reference to the house trade that was being made in order for Mr. Francis to build the house?

A. Yes, sir.

Q. That was made after your conference with Colonel Barger and Mr. Francis?

A. That is correct.

Mr. Bean: I would like to introduce that at this time.

(The memorandum referred to was marked Defendant's Exhibit No. 2 for identification and received in evidence.)

By Mr. Bean:

Q. In your memorandum, Mr. Vance, you refer to the word "bulldoze." Do you recall any conversation about dredging, that is, between Mr. Francis, Colonel Barger and yourself?

A. Colonel Barger used the terms dredging or bulldozing, together, and he did specify that he would not bring dredges into the lake, but after the lake was lowered, he would put the bulldozers in, rather than the dredges. He used the term "dredged," and then he specified rather than being done by dredges, that would be done by bulldozers.

Q. Do you know whether he has done that work?

A. I believe he has not, sir.

page 119 } Q. Did Barcroft Woods, Inc., the owner, or Pomponio Realty, Inc., the real estate broker, at any time, or anyone representing either one of them, represent to Mr. Francis that they would have this bulldozing done or this dredging done, or cleaning out of this lake?

A. I have never done so.

Q. Do you know if anyone else has done so?

A. No, sir.

*Lincoln P. Vance.*

Q. Who drew these contracts in the organization? Do you know who normally would draw them?

Mr. Kinney: I object to that "normally".
The Witness: I believe I did.

By Mr. Bean:
Q. You drew these yourself?
A. I am quite sure. I think the original. There is a handling copy there somewhere.
Q. I show you now a printed form entitled "sales contract" with the Pomponio Realty, Inc. with Lake Barcroft Estates at the top, and ask you whether or not the handwritten portions of that instrument are in your handwriting.
A. Yes, sir.
Q. Is this the original of the contract that was signed by the parties, copies of which were mailed after that had been signed?
A. Yes, sir. I am not sure whether copies of this were mailed, or whether this was made up from it. This is a sales contract.

page 120 } Q. There are two different instruments in the record. With respect to this, it is noted in each instance your handwriting has been placed on the contract; that there have been initials placed by the items in certain instances and not in others.

It is noted, for instance, that the initials of Mr. Francis and apparently Mrs. Francis, appear before this portion of the contract which states: "It is further understood that the lake is to be "—and the word "dredged" is crossed through, and "cleaned" put in—from Lot 685, and the beach is to be 40 feet wide and not to be installed until the lake * * *" Once again it is initialled, apparently by Mr. and Mrs. Francis.

Do you know whether or not those provisions were placed in there at the insistence of Mr. and Mrs. Francis or were placed in there by you and they initialled it, or do you recall the sequence of events there? I would call your attention to other initials which appear on the contract. I don't mean to say that these are the only two. I want to know the manner in which they were placed, and ask the manner in which they were placed there.

A. I believe this was placed—this was added after we saw Colonel Barger.
Q. At whose request? Would you know whether or not

Mr. Francis or Mr. Pomponio, or yourself decided these should be added to the contract?

page 121 } A. As I recall, I believe it was everybody's. I don't recall. I believe Mr. Pomponio probably, but I also think Mr. Francis.

Q. You think Mr. Pomponio and Mr. Francis, both, wanted the provision in there. As you recall it, they both did?

A. Yes.

Mr. Bean: I would like at this time to introduce this as Defendant's Exhibit 3.

(The document above referred to, was marked Defendant's Exhibit 3, and received in evidence.)

By Mr. Bean:

Q. You recall specifically why the word "dredge" was crossed out and the word "clean" was put in there? Do you recall?

A. Mr. Barger had arbitrarily used the word "dredge," and then had told us he would not use a dredge but a bulldozer, and as a matter of fact, when they cleaned out, in quotation marks, at the beginning we understood he was going to use dredges. He said it was much too expensive to do it in that fashion. He said, "After the lake had been lowered, it would be much easier and much faster to be bulldozed."

Q. It was your understanding it was dredge and you crossed it out?

page 122 } A. Yes, sir.

Q. The reverse side of the sales contract was taken from the memorandum of your conversation with Colonel Barger and Mr. Francis, and words were put on the back of that contract and initialled by the parties?

A. No, sir. They were taken directly from the conference with Colonel Barger.

Q. You stated that both Mr. Pomponio and Mr. Francis insisted on this language being in there to make it clear as to what was to be done?

A. Yes, sir.

Q. At Mr. Francis' insistence that this language go in here, did he indicate to whom he was looking for this cleaning out to be done, or the lake to be lowered, other than Barcroft Lake Shores, Inc.?

A. He was under the impression that probably due to—I may contribute it to that impression that Mr. Pomponio was

*Lincoln P. Vance.*

after Mr. Barger to do it inasmuch as he had a much larger stake in Mr. Barger's doing that than Mr. Francis had.

Q. You mentioned that you stated to him he had a much larger stake in it?

A. That is true.

Q. You are referring to similar lots which are located there?

A. Yes, sir, and also had an affect on the value
page 123 } of the other lots which we had.

Q. When you originally showed the lot to Mr. Francis, did it look much as it does today in the rear or front, depending on the so-called lake site?

A. Mr. Francis bought the lot primarily from the plat, rather than seeing the lot per se.

Q. You say that, but he did see the lot, did he not? Did he not go down and see the lot with you?

A. He drove by. He did not get out and examine the lot. The way the lot was at that time, I would say it was in the same condition that it is today.

Q. You did see it?

A. We drove by it. We did not walk over the lot, because he was buying from this plat and with the expectation of what Colonel Barger was going to do; that this would be a lake-front lot. As a matter of fact, before he signed the memorandum copy, he hadn't seen the lot.

Q. It was on your advice that he bought away from the supposedly public beach to get to this end of the water?

A. That is correct.

Q. Did you advise him that the land at the point of where he actually purchased, that is 683, was as valuable as other property that would have been more directly on the lake at that time?

A. It is my opinion that that property would be
page 124 } as valuable when they had completed the lake.

Q. It would have been? It would be as valuable when it was completed, but at the time you showed it to him and sold it to him, it wasn't as valuable?

A. You misunderstand, Mr. Bean. This was all supposed to be done within the immediate future.

Q. The lake was to be lowered that fall, and you sold it in May?

A. That is correct.

Q. You both were depending on this future thing to happen in order to create the value which you say would make this lot as valuable as some others?

*Lincoln P. Vance.*

A. Yes, sir.

Q. Did Mr. Arthur Pomponio figure the price of this lot himself?

Mr. Kinney: I am going to object to that, unless he knows. Mr. Arthur Pomponio is in the courtroom today. He can testify to it.

The Court: He can ask whether Mr. Arthur Pomponio set the price.

Mr. Kinney: Ask him.

Mr. Bean: Ask him later.

By Mr. Bean:

Q. Did Mr. Pomponio compute the price of the lots, or the houses on the lots? Would he be the one to fix

page 125 } the price of these houses?

A. I don't know whether he did it or not. We were informed that the lake-front lots carried a $10,000.00 premium, and the lots across the street carried a $6,000.00 premium.

Q. You were informed of that?

A. That is correct.

Q. Who informed you of that?

A. I don't know whether it was Tony Dennis or Mr. Pomponio. That was the price of those houses. These were considered the premium lots.

Q. But the placing of those houses upon the lots that are referred to by price at $10,000.00, were prices computed by Mr. Pomponio and not by you as a salesman, correct?

A. Oh, of course not, definitely not.

Q. So the price of a development, or a particular house on a particular lot, would depend on the computation of Mr. Pomponio and not on the salesman?

A. Of course.

Q. You don't know what considerations went in the computations of the so-called premium you referred to?

A. No, sir.

Q. You don't know what was in Mr. Pomponio's mind when he said that the price was $46,000.00?

A. I could hardly know what was in Mr.

page 126 } Pomponio's mind.

Q. Was there any difference in the value of the house and the value of the lots? Were you selling lots or selling lots and houses?

A. Selling houses on lots.

*Lincoln P. Vance.*

Q. You weren't authorized to sell a lot, as such?
A. There were no lots for sale.
Q. No lots for sale without a house on them?
A. No, sir.
Q. I believe you stated that you discussed with Mr. Francis that an entity of Pomponio was to sign the contract, as owner.
A. Probably co-owner.
Q. But you are quite sure that you did tell Mr. Francis that a corporate entity under the Pomponios' supervision or owned by them would convey title to him?
A. That is correct.
Q. Did Mr. Francis at any time discuss with you who Colonel Barger was, what connection he had, if any, with this entire development?
A. I believe I told him that Colonel Barger was the developer of Lake Barcroft.
Q. Did you volunteer that, or did he ask that?
A. I believe I volunteered that.

page 127 } Q. Did he inquire further that you told that Colonel Barger was the developer and responsible for the lake.

Mr. Kinney: Wait a minute.
Mr. Bean: He had earlier told that Colonel Barger was responsible for the Lake Barcroft Development. Did he inquire further of you as to Colonel Barger, when you advised him that Colonel Barger was not a part of the Pomponio organization?
The Witness: I believe that I told him that Colonel Barger was the developer and Colonel Barger was going to take care of the lake and that was the reason for going to see Colonel Barger.

By Mr. Bean:
Q. That was the reason you all were going?
A. So that he could be sure of exactly what was going to be done. Mr. Pomponio says, "Get the answer directly from the horse's mouth."
Q. Later on after this transaction was completed, and Mr. Francis was in the house, did he ever contact you and ask you to get in touch with Colonel Barger about the fact that the lake had not been lowered?
A. No, sir. He never asked me to contact Colonel Barger. I believe his contact after that was with Mr. Pomponio.

*Lincoln P. Vance.*

Q. You did not have any more connection in the matter after he got into the house so far as Colonel
page 128 } Barger was concerned?

A. I had plenty of complaints. As a matter of fact, I received quite a bit of ribbing, teased quite a bit in the neighborhood. They were under the impression I hadn't done right by Mr. Francis. Of course a great many of the neighbors—

Q. The specific question was whether Mr. Francis had asked you to contact Colonel Barger with respect to getting the lake lowered after he moved in.

A. No, sir.

Q. The answer is, "No"? No further questions.

RE-DIRECT EXAMINATION.

By Mr. Kinney:

Q. Mr. Vance, you indicated you signed a memorandum to Mr. Dennis, immediately after your conversation with Colonel Barger.

A. Yes, sir.

Q. And on the reverse side of that memorandum is a letter dated—what date?

A. May 20th.

Q. Is that not a copy of the letter that went to someone else?

A. Yes, sir.

Q. Does that indicate to you when you wrote that memorandum, in relation to May 20th?
page 129 } A. There could be a time differential.

Q. Do you know why someone in the firm was so hard up for paper that he had to use the same paper more than once?

A. It is possible I wrote this memorandum in a couple of days after I saw Colonel Barger.

Q. That would be after May 20th. Is that correct?

A. I think I had seen Colonel Barger prior to the 20th.

Q. On what date?

A. Sometime between the 18th and the 27th.

Q. That would be after Mr. Francis had signed, and before Pomponio had signed. Is that correct?

A. That is correct.

Q. That would indicate to you that Mr. Francis signed before the conversation with Mr. Barger?

A. Mr. Francis, I believe, yes. No, wait a minute. Mr.

*Lincoln P. Vance.*

Francis had signed this after the conversation with Mr. Barger, I believe, or wait. No, he had signed it before the conversation of Mr. Barger, and the additions were made in there.

Q. You say he was buying a map from the plat?

A. A lot from the plat.

Q. Lot from the plat. You didn't get out of the car. Is that correct?

page 130 } A. No, sir.

Q. You don't remember? He relied on you as a real estate salesman to pick out a good lot for him?

Mr. Bean: Objection. He doesn't know what was in his mind.

By Mr. Kinney:

Q. Did he not, or anyone else have a conference to see whether you picked out a good lot or not?

A. I am not aware of it.

Q. Did you ever at any time attempt to get Barcroft Lake Shores to sign this contract?

A. That is Colonel Barger, you mean?

Q. Or Colonel Barger.

A. I am trying to think of that entire meeting.

Q. Which meeting is that?

A. With Colonel Barger. I didn't go back to Colonel Barger. No, sir, I didn't attempt to get Colonel Barger to sign.

Q. Were you ever instructed to, or instructed not to?

A. It didn't come out.

Q. You say you told Mr. Vance that Colonel Barger was the developer?

A. Yes, sir.

Q. And what was Pomponio's position?

A. As the builder.

page 131 } Q. As the builder?

A. Yes, sir.

Q. You say you demonstrated to Mr. Vance that Mr. Pomponio owned a great many lots?

A. Yes, sir.

Q. And he was planning on building?

A. He planned to build houses on these other properties.

Q. How long did this conversation between Francis and you and Barger last?

*Lincoln P. Vance.*

A. I would say that it was a good hour.
Q. Anyone else present?
A. No, sir.
Q. How big was the bar in the Trendsetter, how high and how long?
A. It is about five feet long, as I recall, probably 48 inches tall.
Q. Did you ever sell any Trendsetters on non-lake front lots?
A. On nine.
Q. On non-lake front lots, back from the lake?
A. Oh, yes.
Q. What price did you get for those?

Mr. Bean: I object to that, your Honor, unless it can be indicated that each one of these that were on these
page 132 } other lots were revision plan lots, with the same topography as these.

By Mr. Kinney:
Q. Were the prices different for different lots on a Trendsetter? Was Lot A priced at a higher price than the one next door, on Lot B, on a Trendsetter?
A. The Trendsetters we had at the time were priced the same.
Q. How many were sold?
A. We only built two. There were two. There were two for sale at the time.
Q. What was the price on those? Were the prices different on those two?
A. No, sir.
Q. What was the price?
A. $36,950.00.
Q. Mr. Vance, I believe you testified earlier that there was a $10,000.00 premium on lake-front lots.
A. Yes, sir.
Q. Was that principle applied to Mr. Francis' purchase?
A. Yes, sir.
Q. Has that, to your knowledge, ever been offered to be returned to him?
A. No, sir.
page 133 } Q. Does he have a lake-front lot?
A. No, sir.

*Lincoln P. Vance.*

RE-CROSS EXAMINATION.

By Mr. Bean:

Q. Did he have a lake-front lot when he bought it?

A. No, sir.

Q. And he doesn't have one now?

A. No, sir.

Q. Then the $10,000.00 that you were talking about as a premium, was based upon its becoming a lake-front lot later. Is that correct?

A. That is correct.

Q. Isn't it true that each one of the Trendsetter houses were sold for a different price, and were differently located?

A. I am not aware of what the different ones sold for. The ones I sold, sold for $36,950.00.

Q. How many did you sell for $36,950.00?

A. One.

Q. Was that one that you sold for $36,950.00, originally priced at $42,000.00?

A. I don't know.

Q. You don't know, or no, sir?

A. I am quite certain it wasn't. It was $36,950.

Q. That was the sample house that you sold for
page 134 } $36,950.00?

A. I did not sell the sample house.

Q. Was the $36,950.00 house that was sold, one that was sold with the house already on the lot, and the purchaser came on and bought it?

A. Yes, sir.

Q. How about the other houses that you have sold, the Trendsetters? Were they similarly already on the lot and sold by you?

A. No, sir. I only sold the one Trendsetter.

Q. Just the one for $36,950.00?

A. Yes, sir.

Q. Do you recall that the plan of the Trendsetter house that you sold for $36,950.00 was reversed in order to place it upon Mr. Francis' lot that he picked out?

A. Do I recall? I don't understand.

Q. The plans were reversed. In other words, the house wasn't just picked up, so far as the plans were concerned, but they were reversed in order to fit the topography of the land.

A. On Mr. Francis' lot?

Q. Yes, sir. They were reversed?

*Lincoln P. Vance.*

A. Yes, sir.

Q. That required the architectural drawings to be done over again, and new plans drawn up?

page 135 } Mr. Kinney: Object to that unless he qualifies the architect. One is coming on pretty soon. He is asking him architectural questions. How long does it take an architect to draw up and make a complete new set of plans to reverse a floor plan in a house.

Mr. Bean: I asked him the question whether or not first, the Trendsetter he sold for $36,950.00, did not have to have a reversed plan in order to place it upon Mr. Francis' lot. He said, "Yes." I asked him whether or not the reversal of the plan would not require that they be redone by the architect; that the plans and specifications would have to be adjusted according to the reversal of the plan.

The Witness: They were redone.

By Mr. Bean:

Q. You know that by the architect?

A. Yes.

Q. And the plans and specifications of that particular house were rewritten to suit Mr. Francis. Is that true, too?

A. I am not aware of that.

Q. The house built on the lot that Mr. Francis bought, is not identical with that you sold for $36,950.00?

A. That is true.

Q. In what ways is it not identical, what additions to the Francis house that you recall?

page 136 } A. The carport was placed on the other side of the house, as I recall. The recreation room was placed in such a fashion to take advantage of the view of the lake to the rear of the house, rather than the front of the house, which way the original Trendsetter was, and I believe the contract sets forth the problam, therefore, the objection to rules providing no basic structural changes are involved. Kitchen to be so arranged so that an automatic clothes washer and drier to be installed.

Q. Do you recall any other changes that were made in the house as it was being constructed, which were not indicated by the contract, or were not indicated by a change in the price? Were there any other changes that were made that were agreed to by the parties at no additional cost?

A. No, sir. I believe Mr. Francis and Mr. Pomponio drafted it.

*Lincoln P. Vance.*

Mr. Bean: That is all.

RE-DIRECT EXAMINATION.

By Mr. Kinney:

Q. Is this the first house in that area, that particular area?

A. You mean on the lake?

Q. Supposedly on the lake.

A. The only one.

page 137 } Q. Were you anxious as a salesman, as a member of the Pomponio firm, to get some houses there?

A. I was anxious to sell houses.

Q. Anxious to sell this one, too? Is that correct?

A. Yes.

Q. You were selling Trendsetters. You would also like to have a pace-setter or an initial house in the area. Is it easier to sell when there are neighbors, or easier to sell when separated by woods and distance?

A. That varies with the neighbors.

Q. On your cross examinatioin, you stated that this house was a little different. Do you still say that the premium for a lake-front lot was $10,000.00?

Mr. Bean: If your Honor please, I believe that has been gone over several times.

The Court: Yes.

RE-CROSS EXAMINATION.

By Mr. Bean:

Q. Was the storage room in the Trendsetter that you first showed, when Mr. Francis came up the first time, panelled in the basement?

A. There was a panelled study in the basement.

The Court: Panelled what?

The Witness: Study or den.

The Court: Study.

page 138 } By Mr. Bean:

Q. There was a panelled study?

A. There is a panelled room in the basement.

Q. But the entire basement of that Trendsetter wasn't panelled. Is that correct?

A. It wasn't. The entire basement wasn't panelled.
Q. Have you ever seen any of these houses in which the storage room was panelled in the basement?
A. No, sir.

Mr. Bean: That is all. Thank you.
The Court: Do you want this witness to remain, or be excused?
Mr. Bean: I will excuse him. I want to know if he will be in town tomorrow.
The Witness: I will be in town, if necessary.
Mr. Bean: I would like to call him if something develops. I don't believe I would have to, but thank you, sir.

(Witness excused).

Thereupon,

MATTHEW R. WEST,
was called as a witness on behalf of the Plaintiff, and after having been first duly sworn, was examined, and testified as follows:

page 139 } DIRECT EXAMINATION.

By Mr. Kinney:
Q. What is your name and address?
A. Matthew R. West, 7214 Brook Drive, Seat Pleasant, Maryland.
Q. What is your occupation, Mr. West?
A. Builder.
Q. How long have you been in the building business?
A. About 25 years.
Q. Any type? You do specialized building? Do you ever do any home repairs business?
A. Home repairs.
Q. Do you know a Mr. Francis?
A. Yes, I do.
Q. Have you done work for him in the past?
A. Yes, I have been doing work for him for the past fifteen years.
Q. What kind of work is that?
A. Cabinet work.
Q. Did you have occasion to examine Mr. Francis' house at 558 Waterway Drive, Falls Church, Lake Barcroft?

*Matthew R. West.*

A. Yes, sir, I did.
Q. Did you examine the basement?
A. Yes, I did.
page 140 } Q. Did you see whether or not the basement was completely panelled around the outside walls?
A. No, the basement wasn't.
Q. What kind of panelling was in there?
A. Surf wood.
Q. Have you made an estimate of what it would cost to complete the panelling, the surf wood, around the exterior walls in the basement?
A. Yes, sir, I have.
Q. What is that?
A. The estimate was $385.00.
Q. Have you had occasion to examine the guttering or the flashing on the house?
A. Yes, sir, I did.
Q. Tell the Court the condition of that guttering or flashing?
A. The condition? The paint was peeling off the plaster.
Q. How long ago did you first see this?
A. I saw it around the third of June.
Q. What was your estimate for repairing the flashing?
Mr. Bean: Objection, your Honor, for this reason. The evidence is that only—that the flashing or guttering paint, *et cetera,* is now peeling. Three years had passed.
page 141 } Mr. Kinney: Mr. Francis, I think, had it started immediately thereafter.
Mr. Bean: But his evidence, if your Honor please, indicated that he did not object, did not list these as one of the damages as late as March, 1956, several months after that, and I then tried to clarify that thing, and the only thing he said he saw was the peeling. I don't think we should be responsible for the condition of the peeling of the paint.
The Court: I understood his testimony that it started peeling a month after it was put up. It was substantially the same condition now as it was a month later. I will overrule the objection.

By Mr. Kinney:
Q. What was the cost for doing that?
A. $140.00.
Q. Did you notice whether or not Mr. Francis' house had a bar in the basement?

*Matthew R. West.*

Mr. Bean: Objection, if your Honor please. It isn't specified in the bill of particulars.

Mr. Kinney: If your Honor please, I think we are entitled to that, as a matter in the contract. The testimony is that there was a bar in the Trendsetter, and there wasn't one in the house that he bought, and he bought a house to be the Trendsetter.

The Court: He filed a bill of particulars, in page 142 } which that is not listed as one of the items claimed.

Mr. Kinney: However, I would like the Court, in the interest of substantial justice, to take cognizance of the testimony here today, that the man bought a house, had a Trendsetter without a bar in it, and he was entitled to the bar, being shown that house, and not be too harshly penalized for failing to put that particular item in.

The Court: Well, we are in the midst of a trial and the issues have been made; that the case be tried in accordance with the specifications of the bill of particulars, and that you have failed to list an item, to permit you to do it now without some penalty, which might be involved by reason of amendment, I don't think it would be fair.

Mr. Kinney: All right, your Honor.

By Mr. Kinney:

Q. Did you examine the outside area of the house to see whether or not a lawn sod was completely on the lot?

A. I noticed the sod.

Q. You did what?

A. I did notice the sod.

Q. Did you notice anywhere where there was no sod?

A. Yes, I did.

Q. Where was that?

page 143 } A. In the rear.

Q. Would that be between Mr. Francis' house and the swamp, out in front?

A. Yes, sir.

Q. Would you know, from your business experience, what it would cost per square yard to put sod down there?

Mr. Bean: I have to object to that, unless he has examined this particular property and determined what it would cost to sod, in view of the area around it, and where he might have obtained it, the price in Virginia.

The Court: He is testifying about this particular job.

*Matthew R. West.*

The objection is sustained. A proper foundation hasn't been laid, whether the sod was delivered to that place.

By Mr. Kinney:

Q. Are you able, in your building experience, to know what it would cost to have sod delivered to Lot 683, Section 7, being Mr. Francis' home, per yard, square yard?

Mr. Bean: Objection, unless he said he figured this job, and he says he has not.

Mr. Kinney: He did not say whether he figured it or not.

The Court: It seems to me you are going at it backwards. However, I think the testimony is material. It is pertinent to what sod was delivered to the location of this
page 144 } place, at this lot, the cost per square yard. Objection overruled.

The Witness: I hadn't figured on it.

By Mr. Kinney:

Q. Am I correct? You have not figured the cost of installing the beach. Is that correct?

A. No.

Mr. Kinney: That is all.

CROSS EXAMINATION.

By Mr. Bean:

Q. How much panelling in the basement per square foot, per square yard, do you anticipate is needed to complete this job?

A. There were 26 pieces of surf wood needed to complete the panelling.

Q. 26 pieces of surf wood?

A. That is four by eight, a sheet.

Q. At how much?

A. $7.60.

Q. $7.60 per piece?

A. That is right.

Q. Where would this surf wood be placed? What portions of the basement did you find are not surfaced with panelling?

A. That would be in the south end of the ma-
page 145 } jority of the west front of the house and the north.

*Matthew R. West.*

Q. What rooms are those?
A. Which would be the recreation room, bedroom, and furnace room. I would call one small closet a laundry room.
Q. As a builder, have you ever panelled a furnace room?
A. I measured the outside walls, which are supposed to be fire proof in the furnace room.
Q. That is not panelling. That is fire proofing.
A. No, sir.
Q. Have you ever panelled a furnace room?

Mr. Kinney: He didn't say he was, the outside walls.
The Witness: The outside stair walls.

By Mr. Bean:
Q. Isn't it true that the recreation room and bedroom are already completely finished, panelled?
A. No.
Q. What portion is not panelled in either one of those rooms?
A. Well, I think the west portion, the front of the house.
Q. Do you panel over a dry wall?
A. You can.
page 146 } Q. But do you? Have you ever panelled over dry wall?
A. Well, no, I haven't. I have done the further walls.
Q. With respect to this panelling you expect to do in the basement, are you panelling portions that are not usually panelled in the trade?
A. I am panelling only exterior walls.
Q. Indulge me, your Honor. Looking at the contract we have in evidence, a contract which says that a house is being built with all cinder block walls in the basement, to be panelled.
Is any of this panelling which you intend to put in, in this estimate of $385.00, going to be over cinder block?
A. Yes, sir.
Q. What portion is going to be over cinder block, and what portion is to be not?
A. Like I said, next to the carport, the room.
Q. That is the storage room or laundry room.
A. And recreation room, and the maid's bedroom, and another room, another side. I measured a square footage. I was told to.
Q. In measuring this, have you gone over cinder block or some dry wall?

*Matthew R. West.*

A. There is some dry wall there, yes, but only
page 147 } in the bedroom.

Q. The entire recreation room was dry wall before it was panelled, wasn't it? So let me sum this up. Are the entire 26 pieces of the surfacing, of the surf wood at $7.60 a sheet, to go over cinder block? I mean right against the cinder block, or against dry wall, or what?

A. No, it isn't, because the majority is over cinder block.

Q. With respect to the painting of the flashing or guttering that you mentioned, you said $140.00. What would you intend to include in that job? What would be done?

A. Scrape all paint and give the wood two coats of paint.

Q. Two coats of paint? What is the life of the paint on something like this; that you would normally anticipate on this?

A. I couldn't say the life of the paint, but it is the Moore's paint, the finest paint for exterior work.

Q. For exterior paint, how much did you place in that $140.00 for paint?

A. For paint, $25.00.

Q. I anticipate you know how much a gallon is to cost per gallon.

A. $5.50.

Q. Then, that means you would be leaving
page 148 } roughly $110.00 in labor.

A. For scaffolding and labor.

Q. Is this a one-man job?

A. Two-man, originally, 350 feet.

Q. 350 feet of guttering?

A. Yes, sir.

Q. Of flashing?

A. Yes, sir.

Q. There is no real guttering there at all. It is a flashing. 350 feet of flashing takes 25 gallons of paint. It is a two-man job?

A. Yes, sir.

## RE-DIRECT EXAMINATION.

By Mr. Kinney:

Q. Did you notice a dry wall along the outside of any of these walls? Is that the dry wall you are talking about that you would have to panel over? They were on the outside?

*Matthew R. West.*

A. Outside, yes, sir.

Q. I would overlook this painting of beams. You didn't mention anything on the beams on cross examination. I would like to ask the price.

Mr. Bean: This should have been brought out on direct examination. I object to anything new on redirect examination.

page 149 } The Court: This witness estimated the painting of the beams?

Mr. Kinney: Yes, he did. I didn't ask him on direct examination.

The Court: Yes, well, go ahead and ask him.

Mr. Bean: Note an exception, please.

The Court: All right.

By Mr. Kinney:

Q. Did you make an estimate on painting the beams?

A. Yes, sir.

Q. What was that?

A. $125.00, the plastering and beams. The house settled.

Q. Just for the beams?

A. I think there were two figures for the plastering and painting of the beams.

Q. What would be your estimate for repainting the ceiling beams. First describe those beams to the Court, if you would, what they look like, and how big they are.

A. They are five by six.

Q. How many of them are there?

A. I really didn't count them. Judging from the—I don't have that. I wouldn't like to guess at it.

page 150 } Q. Just give me an estimate of the cost of repainting the *celing* beams. Forget the plastering of the ceiling.

A. I made a mistake on that. I do have the price on that. Two coats of paint in the upstairs room was $250.00.

Q. You have that on your estimate?

A. You didn't want the plastering?

Q. The plastering is a separate item, for which you haven't given me the price.

A. That is right.

Mr. Kinney: That is all.

*Matthew R. West.*

RE-CROSS EXAMINATION.

By Mr. Bean:

Q. You started out by saying that you added the beams and plastering together for $225.00.

A. It wasn't on here. I had $250.00 for the painting of the beams and $125.00 worth of plaster.

Q. $250.00 for repainting the beams? You don't know how many beams there are?

A. I did count them. This is my estimate.

Q. The interior paint don't cost you more than your exterior paint?

A. I wouldn't say that.

Q. You have approximately doubled the labor and the price for this, as you did for the flashing.

page 151 } A. It takes more time to do the beams, because you have a two-tone effect. Your beams are one color, and your ceiling another color.

Q. You painted just the beams and not the ceiling?

A. I am painting the side walls, painting just the beams now.

Q. For $250.00?

A. Yes, sir. That is throughout the house.

Q. Your computation is based apparently on not only the beams but the ceiling and side walls. Has Mr. Francis asked you for a price for the repainting of these rooms?

A. All the beams through the house.

Q. All the beams throughout the house is $250.00?

A. Yes, sir.

Q. You have prices there, I believe, on the side walls, too?

A. That was included in my plastering, to repaint where it is replastered. It has to be painted after replastering.

Mr. Bean: No further questions. That is all.

The Court: The Court will recess until tomorrow morning at 10:00 o'clock.

(Whereupon, at 5:45 o'clock p. m., the hearing was recessed, to reconvene at 10:00 o'clock a. m., Thursday, July 10, 1958.)

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page 153 } Virginia:

In the Circuit Court of Arlington County.

Robert J. Francis, 558 Waterway Drive, Lake Barcroft Falls Church, Va., Plaintiff,

*v.*

Pomponio Realty Company, A Body Corporate 2222 Wilson Boulevard, Arlington, Va., and Barcroft Woods, Inc., A Body Corporate 2222 Wilson Boulevard Arlington, Va., Defendants.

AT LAW NO. 6037.

Arlington County, Virginia
Thursday, July 10, 1958.

The above-entitled matter came on for further hearing before Judge WILLIAM HENRY HOSMER, in the Circuit Court of Arlington County, Virginia, Thursday, July 10, 1958, at 10:00 o'clock a. m.

Appearances: On behalf of the Plaintiff: David B. Kinney, Esquire, Murdaugh Stuart Madden, Essuire.
On behalf of the Defendants: L. Lee Bean, Esquire.

page 154 } PROCEEDINGS.

The Court: All right, call your first witness.

Mr. Madden: If your Honor please, I reached Mr. Richard Parli on the phone. He thought it was 10:30 instead of 10:00. He just misunderstood. He will be here in a few minutes.

The Court: All right.

Thereupon,

RICHARD L. PARLI,

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

DIRECT EXAMINATION.

By Mr. Kinney:

Q. Give your name, please, sir.

A. Richard L. Parli.

Q. What is your occupation, Mr. Parli?

A. Architect and Real Estate Appraisor, with offices in the Radio Building here in Arlington.

Q. How long have you been employed as an architect and real estate appraisor?

A. 1946.

Q. During that time, have you had occasion to appraise houses in the northern Virginia area?

A. I have.

page 155 } Q. Approximately how many?

A. It is a somewhat difficult question to answer. I have been appraising for FHA and VA. I have been appraising for VA since 1946, and the VA volume would run I would say between—an average of 300 houses a year for ten years would be 3,000, so I would say between five and six thousand, altogether.

Q. All right, sir. You say you are also an architect?

A. I am a member of the American Institute of Architects.

Q. Are you a member of any appraisors' societies?

A. American Real Estate Appraisors W. H. I. and the American Real Estate Appraisors, H. R. A.

Q. Have you had an occasion to appraise the property belonging to Mr. Robert Francis at 558 Waterway Drive, Falls Church, Virginia?

A. I have.

*Richard L. Parli.*

Q. When was that, sir?

A. I appraised it in July, the morning of July 4th, at 10:00 o'clock in the morning, July 4th.

Q. Have you reached an opinion as to the value of the property as it now stands, and if you have, how did you reach that opinion?

Mr. Bean: If your Honor please, I will have page 156 } to object to any appraisal of the house and lot. I think we are confined here in the issues of the case, to the valuation of the lot, because the value of the house, if it has any relation to the purchase price, is one of those things that would differ with people and circumstances.

Mr. Kinney: It is all part of the realty which he bought. Separate the house from the lot, all one entity.

The Court: Objection overruled.

Mr. Bean: Note an exception.

By Mr. Kinney:

Q. I will narrow the question down to the value of the lot.

A. Your question was as to the total value of the property. I have arrived at an opinion of value, as $34,000.00 for the land.

Q. Land and building?

A. Land and building.

Q. How did you arrive at that?

A. I appraised the house as 1578 square feet. The basic house was 1578 square feet. At $15.00 a square foot, it gave me a value for the house, without any finish in the basement. It includes the cost of building the basement, but no finish in the basement. The $15.00 rate gave me a figure of $23,870.00. To that figure, I added for the finished work in the basement, $5,000.00. I added a value for the page 157 } rear balcony and porch of $1,500.00, a value for the carport and storage room that is attached to the house, of $1,000.00, and furthermore added special equipment in the kitchen, particularly the kitchen. On special equipment, there is a GE dishwasher which I valued at $225.00, a kitchen ventilating fan at $35.00, an 11 foot GE refrigerator that I understood this value does not apply to the refrigerator that is in the house, and applies to the refrigerator that I understood was to go in the house in the contract price, a value of $225.00, added the ventilating fan of $150.00 and the present oven and burners, $275.00. This

equipment comes to $910.00, giving me a total for improvements of $32,080.00. To that I added a value of the lot, $5,500.00. That is 2100 square feet of ground at approximately 25c a square foot, plus approximately $250.00 for on-site improvements, and that gave me a total reproduction cost value of $37,580.00, from which I deducted depreciation for the adverse effect of the swamp which this property abuts, and I deducted $3,580.00 from that for adverse influence and came up with the present value of the property as it stands of $34,000.00.

Q. Are you familiar with the land values in the Lake Barcroft area?

A. I am, I believe.

Q. What have you done there to familiarize yourself there?

page 158 } A. I have made quite a number of appraisals in the Lake Barcroft area. In other words, I have been an architect for several very nice homes that have been built at Lake Barcroft.

Q. Have you reached an opinion on the value of the house and lot and/or the value of the lot based on the premises that instead of what is now abutting the lot in its front, that there would be a lake six feet deep, beginning at the property line of Lot 683, with a slope to a depth of 20 feet, and continuing as a lake across to the other side?

Mr. Bean: If your Honor please, I will have to object to that, because I believe there is no testimony that the lake would commence six feet deep and slope to twenty. Rather, out in the lake, the depth would reach a depth of twenty.

Mr. Kinney: The lake would start at Lot 683 and slope twenty feet, and at the end of the slope, the water would be six feet.

Mr. Bean: What would be the width of the water?

Mr. Kinney: To the opposite shore line?

The Witness: Yes, sir. In other words, you are talking about a nice water-front lot which there are many out there. My opinion is that the lot would be worth $12,600.00 for 21,000 square feet.

By Mr. Kinney:

page 159 } Q. What is the value you place on the lot as it is now?

A. It is hard. It is impossible to break the lot down separately.

Q. Why is that?

A. You are appraising an entity. It has improvements on it at the present time, and it is impossible or difficult to break it down. I put a value of $5,500.00 on the lot and then deducted depreciation on the entire property for the adverse effect of the swamp of $3,580.00, so actually I am giving the lot $1,920.00, you might say, in its present condition.

It is possible under this approach to the value that you could end up with a minus lot value. When you are appraising an entity today, taking off for depreciation, you could end up with a minus value.

Q. Are you familiar with real estate values in the Lake Barcroft area, and have you been so familiar since 1955, until the present date?

A. I feel that I am. I purchased a lot in Lake Barcroft. I am one of the purchasers of a lot in Lake Barcroft. I purchased Lot 571.

Q. In your occupation as an appraisor or an architect, do you have to receive bids from subcontractors for your client?

page 160 } A. Yes.

Q. In general, and specifically as to this house, has the market conditions changed radically between 1955 and the present?

A. In my opinion, it has not. There would be very little change in value between 1955 and the present.

Q. That is due to market conditions?

A. The cost of construction has tended—the cost of materials has tended to creep up a little bit, but actually it is difficult to state that there is any appreciable amount. I would say that values today are about the same as they were in 1955.

Q. What would be your opinion as to the total value of the house and lot with the lake in front of it?

A. $44,680.00.

Q. How did you arrive at that figure?

A. My replacement cost value of the improvements is $32,080.00. That is the cost at $15.00 per square foot, plus the items. It came out to $32,080.00, plus 1280 square feet for $12,600.00. That gives me $44,680.00.

Q. What is your figure for the value now?

A. $34,000.00.

Q. $34,000.00 even?

A. $34,000.00 even.

Q. That makes a difference of $10,600.00?

page 161 } A. And eighty.

Q. In your occupation as an architect, have you had occasion to know whether or not there is a standard price to lay sod in this area?

A. I wouldn't say it was standard, but the going price is thirty to thirty-five cents per yard, depending on the quantity you are buying. I think some of the speculating subdivisions are getting the sod laid for thirty cents a yard. I would say thiry-five cents a yard is a good figure for laying sod.

Q. Did you observe in your visit to Mr. Francis' lot whether the entire lot was sodded?

A. It was not.

Q. What part was not?

A. The rear portion, which I would estimate would be approximately sixty per cent of the lot.

Q. What was the total dimension of the lot?

A. 21,000 square feet. Sixty per cent of that would be 12,-600 square feet.

Q. How many cubic yards is that?

Mr. Bean: I have to object to this inquiry, unless Mr. Parli was out there and actually measured the amount and took into account the forty foot sandy beach, which wasn't mentioned.

Mr. Kinney: I am getting to that.

page 162 } Mr. Bean: He didn't testify how many square yards are out there.

By Mr. Kinney:

Q. Will you take a look at the plat there, and tell me whether you took your measurements from that plat, Lot 683?

A. The lot has a tendency, seen out there, to pie out and widen out. In the back, it has 86 feet of frontage across the rear to a depth of 155, 172, an average depth of approximately 163 feet. I think the figure would be around 12,000 square feet.

Q. How many square yards would that be?

A. Around 1300.

Q. 1300 yards?

A. 1300.

Q. Multiply that by thirty cents.

A. Thirty cents?

Mr. Bean: If your Honor please, I must renew my objec-

tion at this time. The witness is computing from a visual sight of the land, without any measurements in the field, but is computing in the Courtroom the number of square yards that is not sodded on this property. I have to object. If he wants to go out and measure it, that is all right. I don't believe from a visual computation we can get any conclusion as to value.

page 163 } The Court: I don't understand his testimony is so based. I heard him testify he had seen the lot and viewed the area that was not sodded.

Mr. Bean: He stated he had seen it, but he also stated he had not gone out and measured it. I question the ability of a witness to look on an unsodded area and tell anyone how many square yards or square feet there are, unless he goes out there and tapes it off.

Mr. Kinney: He has a map that gives the number of square feet, and he is here as an expert witness. He says sixty per cent.

Mr. Bean: The plat does not show a house location.

Mr. Kinney: Of course, he has seen the house and the lot. If you have any evidence to the contrary, you are welcome to put it on.

Mr. Bean: My case will come on at the proper time. If you have a witness here to testify to the square feet and square yards, he should go out—

The Court: Tell me how you have arrived at the figure 12,000 square feet that you say is not sodded.

The Witness: The lot has an average depth of 163 feet. I assume that a 44 foot setback from the street for the house and the house is 28 feet in depth, which gives me a depth to the back of the house of 68 feet.

I had 163. I took the rear 90 feet of the lot,

page 164 } with a width of 120 feet. We do it in FHA, in our FHA appraisals.

Now, very frankly, we did not measure it. I am not competent to go out and measure the exact square footage. I wouldn't say I am not competent, but it isn't in my work to go out and measure the amount of sod required. We do it in FHA regularly. Appraising isn't an exact science. We can't pinpoint it to the dollar. We try to come up with a figure that is within the realm of reason.

The Court: Why do you take the 90 feet of the rear to estimate the unsodded portion of the lot? Is that what you saw visually when you went to the lot to see, and saw the area which was unsodded?

The Witness: That is right.
The Court: Objection overruled.

By Mr. Kinney:
Q. Multiply the number of square yards by thirty cents a foot.

Mr. Bean: If your Honor please, may I interject this one comment that the basis, as I understand it, of his testimony, a portion of which is assumption, that the setback in the front, the house in the front line is forty feet. I would like to hear him testify as to that.
The Witness: That figure, using a figure of 1300 yards at 30c a yard, is $390.00.

By Mr. Kinney:
page 165 } Q. Did you observe the lot marker line when you were present?
A. I observed two stakes, but I had no definite knowledge that they were the corners. I was told they were the corners, but I had no definite knowledge that they were.

Mr. Kinney: Your Honor, we don't know how to subtract the sand beach, because we don't know how wide it is. According to the contract, it is forty feet long. I can assume the beach is forty feet long. Subtract it from the sod figure, and obviously it wouldn't be sodded, there should be some figure for the sand beach that is contracted for.

By Mr. Kinney:
Q. Let me ask you, Mr. Parli, in your experience is the cost of placing a sand beach six inches in depth, approximately the same cost that it would cost to sod or to put sand down, not naturally a sand beach?

Mr. Bean: Is this an inquiry about the value of sand for a sand beach?
Mr. Kinney: I want to see if it is the same as sand, so we have a figure for the sod.
The Court: I don't see the materiality of that. Does the witness have any experience in the average width of sand beaches of that nature?
The Witness: I would prefer not to testify on that.

*Richard L. Parli.*

By Mr. Kinney:

page 166 } Q. Do you know how much sand costs a yard delivered?

A. I prefer not to testify on that.

Q. All right. Mr. Parli, is it expensive, or is it minor, or is it in what proportion of cost for an architect to take the plan of a house and then reverse it? Is that an expensive item or is that a reasonable item?

A. No, that can be done relatively inexpensively. It is primarily a drafting job, and the drawings, the original drawings actually can be taken to Cooper-Trent, and they can make a print which you can actually make erasures on and change the print. In other words, you get a reverse print, but you get the printing reversed also. You can wipe off the printing and do the printing over and get it to read right.

Q. Does that process of Cooper-Trent cost as much as $50.00?

A. No. It is the time spent in the office in changing the printing that would be the cost of it. I would think in reversing drawings, it depends on the number of sheets. About $50.00 or $75.00 would cover the actual cost of reversing drawings.

Q. What is your definition of a custom built house?

Mr. Bean: Objection. I don't understand the

page 167 } basis for the question.

Mr. Kinney: The basis is the opening statement of counsel, wherein he stated that this was a custom built house. I want to show that it wasn't a custom built house. I want to show that it was built from an established house; that the plan was made for several people, and it wasn't made for the specifications of this particular buyer.

Mr. Bean: The Testimony was that the changes were made, and the reversed portions were changed; that the interior was changed and that the carport was placed on the front of the house, rather than the rear. The changes have been extensive, and it is in the evidence.

Mr. Kinney: There are no plans in the evidence.

The Court: Objection overruled.

By Mr. Kinney:

Q. What is your definition of a custom built house?

A. In my opinion, a custom built house would be an individually designed home, built for a specific owner.

*Richard L. Parli.*

Q. Does that design go from basement to roof, too, or—

A. Not necessarily completely designed. I think you could actually take a picture out of a magazine of a house built in Detroit, and modify it and build it here, have an individual contractor here build it for you, and consider page 168 } this to be a custom built house, but I don't think you could say that a house that is being duplicated in a common area in the immediate locality, put on this lot and a few modifications made in it, would necessarily be considered a custom built house.

Mr. Kinney: That is all.

CROSS EXAMINATION.

By Mr. Bean:

Q. Mr. Parli, would the reversal of plans for a particular house, mean reversal of the house?

Mr. Kinney: There is no admission in the contract that this is going to be a house reversed in any way.

Mr. Bean: The evidence has been that it was reversed. Mr. Francis so testified, and also Mr. Lincoln Vance. Assuming the house is reversed, the plans for the house were reversed, and the cinder blocks in the basement are to be panelled, and the purchaser has the option of re-arranging the first floor and the basement partitions, providing no basic structural changes are involved, and assuming further, that the carport in the house is placed upon the front, rather than on the side—

Mr. Kinney: I will object. I would like to ask him in fact whether the carport was placed in the front or whether it was on the side.

Mr. Bean: —and the addition of a balcony and page 169 } a porch on the rear, whether or not you might not consider that to be a custom built home, rather than a sample reproduction of the home that was referred to?

Mr. Kinney: I want to object. Make sure that all those premises he put in have been established. For example, the carport's being on the front. When I observed it, it was on the side. Of course, they may have changed it. He is asking a hypothetical question, and I think the foundation should be laid for that.

The Court: What about the carport?

Mr. Bean: The carport, sir, he saw it. Is it on the front or the side, Mr. Parli?

The Court: You are asking him to assume that it was?

Mr. Bean: Yes, sir. As opposed to it, if it were on the side, as the original Trendsetter was.

The Court: Are you changing your question to asking him?

Mr. Bean: I can start. Where is the carport on this house?

The Witness: I would say it is both on the front and the side. Actually, it comes out at approximately a 45 degree angle. I took some pictures of it. It is the entire front, sticks out in the front. You can see it is both on the side and the front. Probably for your consideration, it page 170 } is a little more on the front than the side.

By Mr. Bean:

Q. Did you see the original home from which this plan was said to have been taken?

A. I did not.

Q. Well, assuming that home—

Mr. Kinney: I object to that.

Mr. Bean: Well, sir, if your Honor please, Mr. Parli has testified to his definition of a custom built home, and I am trying to find out whether that definition, based on certain assumptions, based on the evidence, would apply to this home.

The Court: What is your contention with respect to the location of the carport on the original home?

Mr. Bean: That is on the side.

The Court: You contend that it isn't on the side?

Mr. Kinney: My contention is like he said, partly on the side and partly in the front.

The Court: We are not talking about the house he didn't see.

Mr. Kinney: The house that he didn't see had a balcony. He is asking a hypothetical question. He doesn't know.

Mr. Bean: I believe Mr. Francis' testimony outlined what he saw with respect to the first house, and what page 171 } he got in the second that was built for him.

Mr. Kinney: I think you should stick on cross examination to the subjects on direct examination.

The Court: Is it your contention there is no evidence in

the case, locating the carport on the original home? Is that what you are saying?

Mr. Kinney: Yes, sir, and the balcony.

The Court: What do you say as to whom testified to the location?

Mr. Bean: Mr. Vance.

The Court: Mr. Vance?

Mr. Bean: Yes, sir. I think Mr. Francis described generally the house he saw, but I think Mr. Vance was more specific. Particularly on cross examination, when I asked him what differences there were in the house that was built for Mr. Francis, from the house that Mr. Francis saw, and Mr. Vance went into some particulars about what those differences were. He said the carport was on the front, instead of on the side.

Mr. Kinney: Has he changed this house, or changed the house on the contract? It is to be the Trendsetter, with all cinder block walls in the basement to be panelled.

The Court: That is what he is saying. The only question is the relationship to the changes that were made in the house that was actually built from the Trend-
page 172 } setter model.

Mr. Kinney: He is saying that has been given something different from what he contracted for, in your line of questions. The more probable question was to read the hypothetical question from the contract, and ask if that constitutes a custom built house.

Mr. Bean: I made that part of my questions. The rest of my question was the changes that were agreed to with respect to what Mr. Vance testified to.

Mr. Kinney: I don't think Mr. Vance testified to a thing about the balcony. They both testified as to the bar. Mr. Vance said he didn't know whether there was a bar there, and Mr. Francis said he did. The balcony and the garage, no, except that the plan was reversed.

By Mr. Bean:

Q. Would a reversal of the plans of a house for a purchaser, and the construction of a house in accordance with the reversed plans, create a custom built house in your opinion?

A. It would not.

Q. Would a reversal of the plans of a house with the statement contained in a contract that all cinder block walls in the basement to be panelled, purchaser to have the option to rearrange the first floor and basement partitions, providing no

basic structural changes are involved, constitute
page 173 } a custom build house in your opinion?

A. It would not, unless new drawings were required. If this house of which you speak, required new drawings, you have to show on this new layout more detail, and it could conceivably be considered certainly more custom built than if you just work from this model plan.

Q. I believe you testified you saw Mr. Pitt with respect to this house.

A. I have not.

Q. Now, with respect to simply—I believe you testified that simply changing by reversing the plans, would cost around $50.00 to $75.00. Would that be true if the topography of the lot on which the house was to be placed, was such as to require some basic structural changes in the home?

A. You mean going from an eight inch cinder block foundation wall to a twelve inch foundation wall, or wiping out a window?

Q. No, I am thinking in terms of a lot going down to a street, as opposed to one that drops off the street.

A. I have—

Q. Whether or not reversing the plans to a house, you don't take into consideration the topography of the lot on which the house is going to be located.

A. My answer was $50.00 to $75.00 for revers-
page 174 } ing the plans.

Q. Just a paper job in the office?

A. Paper job that doesn't involve any re-finishing, adding two windows or making any partition changes, or anything of that nature.

Q. Would you, as an architect, make such a reversal without going out and looking at the lot on which the house was to be placed?

A. As an architect, I would be extremely reluctant to do so. As an office job, a man comes into the office. He says, "Parli, I have a set of plans. I want you to reverse them." If I have a man that isn't busy, and if he has fifty or seventy-five dollars, my answer to the question is "Yes, I will do it."

Q. If you were asked to do that particular reversal with respect to a particular lot?

A. You are getting into architectural services rather than drafting services. If I go to a lot and get a topographical survey and see where the trees are, then the fee can run up.

Q. How much?

*Richard L. Parli.*

A. Run up.

Q. Several hundred dollars?

A. Depends on the time. My rate is $7.50 an hour. If you spend a considerable time, say a week, forty hours, it is $300.00, if you spend a week on it.

page 175 } Q. With respect to the sod, I believe that you stated that your assumption was in fixing that value of $390.00, that the house had a forty foot setback from the lot line in the front.

A. I estimated forty. I didn't measure it. I estimated forty. I believe forty is pretty customary. I believe 35 is the minimum permitted by the county, and I believe most of them are back forty.

Mr. Kinney: That is right. Forty, it is.

By Mr. Bain:

Q. I will ask you to look at this plat, and ask you whether or not the front line of the house is forty feet back from the front of the lot line?

A. The carport, the front corner of the carport is forty.

Q. Would you be able to estimate what the front lot line is back to the house, excluding the carport?

A. I didn't bring a scale, but your question is—

Q. What is the area from the front lot line to the front line of the house, excluding the carport?

A. To the front corner of the house, it is about 65 feet.

Q. And to the back corner of the front of the house, is the house sliding away from the street?

page 176 } A. It is.

Q. It runs down to 75 feet at one point, from the front line?

A. Yes, sir.

Mr. Bean: I would like to introduce the plat in evidence.

Mr. Kinney: What is the scale?

Mr. Bean: That number is—

The Court: No. 4.

Mr. Bean: I had thought that the contract that Mr. Vance testified to that was initialled, *et cetera,* was four. If your Honor will excuse me, the memorandum of Mr. Vance on the back of the letter which was one exhibit at the present time. You are quite right. Excuse me, your Honor.

The Court: Defendant's Exhibit No. 4.

*Richard L. Parli.*

(The plat above referred to, was marked Defendant's Exhibit No. 4 and admitted into evidence.)

By Mr. Bean:

Q. Mr. Parli, with respect to sodding of the houses, and the houses that you have appraised, some five or six thousand that you have appraised, have you ever seen one sodded all the way back to the back line?

A. No, sir.

Q. Does that have to be done by such contract?

page 177 } A. No, it is being done more frequently all the time because of more stringent VA and FHA regulations on sodding. If a man only sods 15 feet, then FHA and VA makes him do a lot of work back there, fertilize and seed it. They find out if they go ahead and sod it, they save time.

Q. Back in 1955, were the regulations such that only 10 feet was needed in back of the house?

Mr. Kinney: It is not a matter of a regulation. It is the contract. The lot is to be completely finished, including the sodding.

Mr. Bean: We admit that is in the contract. We don't admit that we should sod back to the beach.

The Court: Objection overruled.

By Mr. Bean:

Q. Was that requirement in 1955 to sod back only ten feet from the back line of the house?

A. You are speaking of a speculative building?

Q. I am speaking of the customary building in a trade. This is a subdivision.

A. I don't think you can say that there is anything customary in speculative houses that are going through FHA. They make you spell out in black and white how far back of the house you are going to sod. If they aren't satisfied with that distance, they change what you state you are going to do.

page 178 } Q. FHA and VA requirements in 1955 were only ten feet in back of the line of the house?

A. I believe at that time they were ten feet.

Mr. Bean: Thank you.

Mr. Kinney: This is not an FHA or a GI house by any means. It is a $46,000.00 and he says a custom built house.

*Richard L. Parli.*

By Mr. Bean:

Q. With respect to your value placed upon this house and lot, you stated that the lot, in your figure of $37,580.00, was $5,500.00.

A. $5,500.00.

Q. And you further testified that you had subtracted $3,580.00, because of the presence of what you described as swamp.

A. That is right.

Q. So, am I correct in deducing that the value of the lot is $1,920.00, as you saw it?

A. The value of the property is reduced once you put a house on a property. It is impossible to separate it, to pinpoint the two values.

Q. But you did separate them. You said the house was so much.

A. That is the approach to the value, but in your thinking, if you want to attribute all the detrimental in-
page 179 } fluences, attribute that all to the lot, which conceivably it should be.

The Court: Then $1,920.00?

The Witness: $1,920.00.

By Mr. Bean:

Q. Looking at it from that standpoint, if you were asked to go out and appraise the lot without the house upon it, 21,000 square feet, at Barcroft, Section 7, at this particular location, would you have valued it at $1,920.00 for an almost one-half acre lot?

A. I don't think so. Before you put that house on there, the lot has a lot of flexibility, and you could put a $19,000.00 or $20,000.00 house on there. You wouldn't have the detrimental influence on that property that you have to a supposedly $45,000.00 house. It is like putting a $45,000.00 house up alongside of any detrimental influence that adversely affects it. Whereas, you could put a $20,000.00 house on the same lot and it might not have any detrimental effect on it at all.

It is difficult to say. If that lot were raw, I don't think we could appraise it, if you could find a buyer for it that would pay more than $2,000.00 for it.

Q. Would you appraise it at $2,000.00, just a raw lot, setting there as it was?

A. That is a difficult question to answer, Mr.
page 180 } Bean. From what I know or heard about this lot, it certainly has a lot of detrimental factors.

Q. It isn't what you heard about it. It is at what you appraised the lot.

Mr. Kinney: If he had seen the lot before the house was built—ask him about the one next door.

The Witness: I cannot testify to what I would appraise that lot for without a house on it.

By Mr. Bean:

Q. When you get to a reproduction cost value of $37,580.00, could you build that house for $37,580.00 today?

A. I am not a builder. Other builders are doing it. I have no reason to think that any builder couldn't. I think my figures are right. That is all I can say.

Q. You don't think they are conservative?

A. $15.00 a square foot for this type of construction. A six-room, two baths, literally, a frame house is what it is, with the additions in the basement.

Q. With respect to the statement that you made, detailing the items that went into your figure of $32,080.00, I believe you testified that one of the items that you added was the finished basement.

A. Finish in the basement.

page 181 } Q. Finish in the basement of $5,000.00.

A. There are two bedrooms, one den, a recreation room and a bath down there.

Q. There is a furnace room and a storage room, are there not?

A. There are.

Q. Are those customarily finished in the trade with knotty pine panelling?

A. No.

The Court: Mr. Parli, you started off with a valuation of the property now of $34,000.00. You have an item, the first item, the house, 1578 square feet at $15.00 a square foot, $23,670.00, finished work in the basement, $5,000.00, and the next item was $1,500.00. What was that?

The Witness: The rear balcony. There are two levels. There is a porch and balcony on the rear of the house, and the carport and storage.

The Court: And special equipment in the kitchen consisting of—the total was $910.00, consisting of what?

The Witness: A GE dish washer, kitchen ventilating fan, an 11 foot GE refrigerator. Would you like a breakdown on each of these?

*Richard L. Parli.*

The Court: Yes, sir.

The Witness: Dish washer $225.00, *kithen* vent fan $225.00, GE refrigerator $225.00, attic ventilating fan $150.00, and a Hot Point Built-in Oven and Burners $275.00. That totals $910.00.

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The Court: $910.00. All right. Do you have any further questions?

Mr. Bean: No further questions.

RE-DIRECT EXAMINATION.

By Mr. Kinney:

Q. Is panelling and dry walls the same thing?

A. Panelling and dry walls, no.

Mr. Kinney: That is all, no questions. That is the Plaintiff's case.

Mr. Bean: I would like to ask for a recess for five minutes, your Honor.

The Court: All right.

Mr. Kinney: At this time, we would move for a viewing, if your Honor please.

(Discussion off the record).

The Court: We will recess for ten minutes.

(After intermission).

Mr. Bean: I would like to make a motion at this time. I would like to move to strike certain of the testimony that has been placed in evidence on behalf of the plaintiff, in respect to the claim for $15,000.00 damages, the premium, because the lot wasn't a lake front lot.

I would like to observe that the testimony of Mr. Francis indicated that he owns four stores; has had considerable business experience, is familiar with real estate transactions, and with the organization of corporations, and he realized, he stated, that in dealing with corporations, he is dealing with a separate entity, the same as with that of any personality who may represent himself, except in the area of agency.

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When Mr. Vance suggested going to Mr. Barger, why Mr. Francis freely went there and discussed the development of the lake with him. There is a disparity in the testimony

on that point. Mr. Francis said only fifteen minutes. Mr. Vance said it was about an hour. I don't think the time is important, but I think it is significant that they did go to Mr. Barger. They did talk to him, and Mr. Barger did make these statements as to the development of the lake. It suggests some lack of knowledge of what Mr. Barger was, in view of the testimony of Mr. Vance, who was the plaintiff's witness.

The evidence, unconverted, is that Mr. Francis signed the contract and later, that was on the 18th of May, not until the 27th of May was it signed, nine days later, by the owner. What transpired in that interim period? According to Mr. Vance, this delay, which has been confirmed to some extent, was due to Mr. Francis' attempt to add to the language that went into the contract. They did not report by the secretary or any of the witnesses, just what Barcroft Lake
page 184 } Shores, Inc. would do. Therefore, it seems clear that the parties, when they signed the contract, if they read it, as Mr. Vance said he certainly did, realized that the development of the lake rested on Barcroft Lake Shores, Inc. and not on Pomponio. This is the only time that it was mentioned in the contract, and when one reads the contract, it is so clear it does not call for any interpretation of it. It is further understood that the lake is to be cleaned out up to Lot 685 by Barcroft Lake Shores, Inc., nobody else but just them. The beach is to be 40 feet wide and not to be installed until the lake is lowered by Barcroft Lake Shores, Inc. Once again the obligation by the sellers, but after the lake is lowered by Barcroft Lake Shores, Inc. Certainly it is a condition precedent to the action of the seller to install the beach.

In his letter of March 27, he did not write it to Pomponio Realty or Barcroft Woods, Inc. saying, "Lower the lake. Dredge out my lake. Clean out my lake." He said, "When is Colonel Barger going to do this job?" He mentioned Colonel Barger's name twice in this letter, fully realizing he is relying on Colonel Barger who was to do this job, and realizing that Pomponio Realty had a stake in his doing this job. It would improve their sales' position. They were interested just as Mr. Francis was interested, because he was the owner of the lot. He was calling on them to
page 185 } assist him in getting Colonel Barger to do this job, which Colonel Barger said he would do in his conference with Mr. Vance and Mr. Francis. It was only as he found out later—I make reference to the reply of Mr.

Rocco Pomponio on May 20th to Mr. Francis. He mentioned the fact that he contacted Colonel Barger and said, "We are interested in seeing this thing done. In neither letter, consistent throughout, did the vendors indicate "We are responsible to see this thing done." They placed the responsibility, as the parties did in the contract, on Barcroft Lake Shores, Inc.—that placing that provision in the contract put him in privity of contract with Mr. Barger that he felt that he had to sue Pomponio and Barcroft Woods, Inc. in order to get this lake developed as he wanted it.

When we come to the testimony of Mr. Vance, and therefore we are not bound by his testimony, he speaks of the meeting in the Hot Shoppe, and he stated that at the Hot Shoppe, Mr. Pomponio and Colonel Barger were there and Colonel Barger explained substantially the same thing that he had explained to Mr. Francis when he and Mr. Francis went to see Mr. Barger. Substantially the same things were said and Arthur Pomponio instructed the salesmen of Pomponio Realty, Inc. "If any questions came up about lake development, don't come to us, because we don't own the lake. Go to see Colonel Barger."

page 186 } What happened when Mr. Francis came along? He said, "You take Mr. Francis to Colonel Barger and get him to tell what he is going to do. That is the lot we own."

There was conversation about putting a Hot Shope or shopping center up on the land. "We don't own the Hot Shoppe or shopping center land. Colonel Barger owns the land." "Any question about making the lake deeper, go to him," so they did go and it is very clear that Mr. Barger advised Mr. Vance and Mr. Francis was there when he advised him as to exactly what he, Colonel Barger, intended to do. Mr. Vance made it extremely clear in his testimony, because he said Mr. Barger wasn't connected with the Pomponio organization. Mr. Francis said he was confused. He did not know of these organizations, and this from a man who was in business for years, and Mr. Vance told him he didn't have anything to do with it, only with the selling of this lot and and this house.

It is on that basis that Mr. Vance wrote this memorandum that was written between May 18th and May 27th. He is not sure which, but on the back of this letter in which he outlined the Pomponio organization's position, which was that Mr. Barger told him and Mr. Francis that the lake was to be cleaned out by Barcroft Lake Shores, Inc. He said, "Let us get rid of this house, by Shannon and Luchs that Mr. Francis

owns. There is no question that this memoran-
page 187 } dum was written at the time and indicates what
the parties intended to do at the time.

I think it is very significant that the contract had the word "dredged," which was stricken, and changed to "cleaned out," using the specific words that Colonel Barger said. We don't want Colonel Barger to be placed in the position to have agreed to something that he didn't. I think it was most significant that Mr. Vance's testimony is that Mr. Francis and Mr. Pomponio put this in the contract.

Mr. Pomponio—Mr. Francis knew that he had no control over the lake—said, "If you want to know anything about lake development, some third party, not us, is going to do it." So it went in that way, and Mr. Vance testified that Mr. Francis insisted that this language go into the contract. Why, because he assumed it was going to be done. To do this and this was the only way to firm it up, but certainly if he were relying on Pomponio Realty, Inc. and relying on Barcroft Woods, Inc. as authorized to do this job, he wouldn't have insisted on this language being in the contract. In fact, he would have insisted it come out. He would have said, "I don't want this language about Barcroft Lake Shores, Inc.'s doing this work. You are the ones to do this work. I don't want anything about anybody else doing the work," but since
Mr. Pomponio said that this wasn't going to be
page 188 } done by the Pomponio organization—he said,
"Have the Barcroft Lake Shores, Inc. do it,"—he
knew that he wasn't going to rely on them, but on Colonel Barger.

I believe the testimony about the stated additions in the contract that are being asked by both parties, Mr. Francis and Pomponio, made it amply clear that since this language went into the contract, and it wasn't signed by Mr. Francis until it was in there, that it was clear they were relying on the third party.

Then, about the acceptance of the house. Mr. Vance, at that time, was through with Mr. Francis, and when he accepted the house and said that he was occupying it in accordance with the terms and conditions of the contract, he was making it very clear he was going in, except for some minor deficiencies which were brought out in the testimony with respect to the bricks that were broken, which have been repaired, which he outlined in his letter of March 27th, and is the second issue in the case, to the extent it was done at the time the contract was signed, were substantially attended to, as with any owner-builder who sells to a vendee in order to

keep in the good graces of his purchaser, and those things were considered by Colonel Barger and Mr. Pomponio to be completed.

I am sure that a man of his personal experience, Mr. Francis' business experience, would not have page 189 } signed such a statement without noting at the bottom: "You haven't lowered the lake, put in the sand beach, and I will occupy the house on the condition that these things be done," because what happens when one accepts settlement of a house? You are accepting the contract as being complete, and he does not at that time unless he specifically indicates that he intends to have further things done. Does he say, "Let us escrow $500.00 to see that these things are done?"

The law in this connection has been outlined in a very recent case, that of the Hall Case, 191-666. It is stated: "The ascertainment of the intent of contracting parties is the cardinal right in the construction of agreements, and to that the court will put itself in the situation occupied by the parties, and then look to the language employed, the subject matter, position of the parties, and/or other pertinent circumstances. Occupying that status, it will apply the language to the subject matter and objects sought to be accomplished, and so judge and determine its meaning."

So the court is asked in settling these cases of interpretation of agreement between the parties, to place itself in the parties' position and see what was intended, and see what was their purpose. Obviously, their position and purpose in placing these additions in the contract, referred to a party that was not the secretary, in order that a third page 190 } party was to do this job, and Mr. Pomponio, or his organization, were not responsible for something over which they had no control, and which Mr. Francis was determined that they were not in control, because Mr. Barger was, and the failure to perform a promise, the performance of which is a condition precedent, is an excuse for nonperformance of the promise or promises made between the parties.

In this case, Mr. Pomponio, as I stated in my original statement, is ready to put in the beach as soon as the lake is lowered, and the location of the beach is designated. That is the condition, the only condition that the contract remains unfulfilled, to put that beach in there, and obviously will remain so until Mr. Francis says where he wants it put in.

Likewise, in 12 American Jurisprudence 370, it is stated: "In respect to the act of a third party that such a promise

is conditioned upon the act or consent of a third party, the condition must be performed," and they cited the case of the *Lehigh-Portland Cement Company* v. *Va.* 132 Va. 257. These parties are dependent in this question of the lowering of the lake and the cleaning out of the lake upon the act of a third party, and certainly the only thing that Pomponio has to do is put in a beach, but they can't put it in until these things are done by the third party with whom they have
page 191 } contracted.

As to the claim for the $5,000.00, there is no evidence about the value of the sodding. The only evidence of sodding in the record is of Mr. Parli. When he saw a plat of the property, he realized it was 65 or 75 dollars, which he stated, and his figures did not take into consideration a sand beach, and he didn't testify how much of the back yard sod was needed. It isn't ten feet beyond the house.

The other evidence is with respect to the value of the beach and with respect to broken bricks. Mr. Francis admitted they had been repaired, and those items listed in the letter of March 27th are the only ones, and Mr. Francis detailed in here those that were done and which were not done.

The Court: It seems to the Court that your argument is directed to the weight to be given to the evidence, rather than to the question, the proposition that there is no evidence to support the contention of the plaintiff in this case. It seems to the Court that the evidence of the plaintiff is not inconsistent with his theory of the case, and does support it. The motion is overruled.

Mr. Bean: All right, your Honor. I would like to call Mr. Pomponio to the stand. I would like to note an exception to the Court's ruling. I did make an agreement that we would place Colonel Barger on the stand, by reason of
page 192 } the fact that he can't be back.

Thereupon,

JOSEPH V. BARGER,

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

*Joseph V. Barger.*

DIRECT EXAMINATION.

By Mr. Bean:

Q. Colonel Barger, would you state your full name?

A. Joseph V. Barger.

Q. Mr. Barger, your address is what?

A. 711-14th Street, N. W., Washington, D. C.

Q. Do you have an interest in the Lake Barcroft area?

A. Yes.

Q. What interests are they? What corporation do you operate from out there?

A. Lake Barcroft Estates.

Q. What about Barcroft Lake Shores, Inc.?

A. Barcroft Lake Shores, that is another company, too.

Q. Is that one of your companies?

A. Yes.

Q. Who are the stockholders of Barcroft Lake
page 193 } Shores, Inc.?

A. Myself and a Mr. Dockster, and his secretary.

Q. Does Mr. Arthur Pomponio and Mr. Rocco Pomponio have any interest whatsoever in Barcroft Lake Shores, Inc.?

A. No.

Q. Have they ever had?

A. No.

Q. Did there come a time, sir, when you were approached with respect to the sale of certain lots to Mr. Pomponio, or one of his nominees?

A. Yes.

Q. Did you, in fact, sell certain lots to him?

A. Yes, we did.

Q. Were the lots in Section 7 of Barcroft Estates, included in those sales, all of them or part of them?

A. Yes.

Q. After that sale was—during the transaction involving that sale, was any discussion had with respect to the development of the lake that was the responsibility of Barcroft Lake Shores, Inc.?

A. Not particularly, no.

Q. Did there come a time when the development of the lake was discussed with either Mr. Pomponio or his salesman, by you?

page 194 } A. Well, at one interview, I think the salesman came in. It was a short interview, maybe ten or

fifteen minutes, in my office. He came in one day with his client, and I think his client was Mr. Francis.

Q. Prior to this meeting with Mr. Vance and Mr. Francis, I believe you referred to a prior meeting. Did you meet with the salesmen at the Hot Shoppe? Do you recall any such meeting?

A. No.

Q. You don't recall having a meeting with them?

A. Yes, we had a few meetings at the Hot Shoppe. That was in regard to the purchase of the property, itself.

Mr. Kinney: I would rather he didn't lead this witness quite so much.

Mr. Bean: I asked him if he attended a meeting. I will ask him what transpired at those meetings with respect to statements made as to the development of the lake by Barcroft Lake Shores, Inc.

The Witness: I don't recall any statements that were made at the time.

By Mr. Bean:

Q. At the time that Mr. Francis and Mr. Vance— were those the two whom you mentioned came to your office and stayed some ten or fifteen minutes?

A. Yes, sir.

page 195 } Q. Is this the gentleman to my right?

A. I believe so. He had on some old clothes then. I am not positive that it is.

Q. Whom, if anyone, did Mr. Vance say he was representing, the gentleman, other than Mr. Francis? Did he identify himself to you?

A. Yes, he said he was Mr. Pomponio's salesman.

Q. Did he introduce Mr. Francis to you?

A. Yes, he did.

Q. Did he identify him in any way when he introduced him?

A. He said Mr. Francis was planning to build a house on Lot No. 683, I think the lot was.

Q. Then did Mr. Francis ask you any questions?

A. He may have.

Q. Do you recall any of them?

A. No, not particularly.

Q. Did Mr. Vance ask you any questions?

A. Yes, he did.

Q. Do you recall what they were?

*Joseph V. Barger.*

A. He asked me whether or not we were going to dredge the lake. I told him, "No, we don't do any dredging of the lake. Never will because of the mud." We have never dredged the lake and never will.

page 196 } Q. Did you at any time give Mr. Vance or Mr. Francis any assurance as to what was going to be done to the lake?

A. Yes, I told him I would do some clearing from 683 to Lot 685. In fact, I made a record in front of Mr. Francis and Mr. Vance. I called my office and dictated a message in my office over the telephone.

Q. Do you have that message that you dictated?

A. I have a message from the file.

Q. When was this memorandum prepared? You stated it was dictated.

A. I dictated this in the presence of Mr. Vance and Mr. Francis. I picked up the telephone, called my office, and do you want me to read it?

Q. Please.

Mr. Kinney: I would like to see what it says first. No objection.

By Mr. Bean:

Q. Read it, if you please.

A. "Subject: Pomponio, for our files regarding dredging of Lake Barcroft from Lot 683 up to and including Lot 685. At my office, the Brentwood Office, I had a meeting with the salesman from the Pomponio Office and his client who was going to build a house on Lot 683, Section 7. I said I didn't consider Lot 683 as a water-front lot. We wouldn't do any dredging of the lake. I would agree that

page 197 } my crew of colored men would burn the overgrowth of grass there."

I just dictated that to the girl in front of Mr. Francis and in front of Mr. Vance at the time.

Mr. Bean: If Your Honor please, I would like to introduce at this time the memorandum that has just been read from by Mr. Barger.

The Court: Marked Defendant's Exhibit No. 5.

Mr. Kinney: Is that a carbon copy?

The Court: No, both here.

(The memorandum above referred to, was marked De-

fendant's Exhibit No. 5 for identification, and received in evidence.)

By Mr. Bean:

Q. Your memorandum, Mr. Barger, indicates that this conference took place on May 26, 1955. Is that correct?

A. Yes, sir.

Q. And the only ones present were Mr. Vance and Mr. Francis, as I recall your testimony?

A. That is right.

Q. Did you hear anything further, either with reference to Mr. Vance or Mr. Francis, in reference to this particular conference you had, during the rest of the year, 1955?

A. Not that I recall. I don't know.

page 198 } Q. Did Mr. Vance have with him a copy of the contract at that time, that he had with Mr. Francis?

A. He may have had it.

Q. You don't recall seeing it?

A. He may have had it. I don't know.

Q. Did Mr. Vance ask you to put in writing what the essence of your conversation was?

A. I don't think so.

Q. What caused you then to dictate the memorandum over the telephone to your office?

A. I do that at all times. I make a record of what I say I will do on the property. I call and make a record of it. They give it to me when I go to Washington.

Q. Did Mr. Francis indicate to you that he wished you to put anything in writing?

A. I don't believe so. I don't believe so.

Q. What, if anything, have you done to the lake or to the area in front of Lot 683, since the execution of that contract? Could you tell me of any action that Barcroft Lake Shores, Inc. has taken since the date of May 26, 1955 with respect to the property off Lot 683?

A. I believe in 1955, we did a little burning and a little clearing. 1957, I don't think we did anything. In 1958, I believe, in February, we went out there when the ground was frozen. We did some work. We did quite a

page 199 } bit in May, this year, not only in front of this lot, but the area all through there that covered this lot.

Q. According to the memorandum, you were in 1956 to have cleared, cleaned out the lake. Is that right?

*Joseph V. Barger.*

A. No. I don't know what you mean "cleaned out." We cleared it. We cleared the brush. We burned it. We were going to use some chemical to stunt the growth. We decided against it, because it might polute the water and kill the fish.

Q. Did you ever use a bulldozer in there?

A. That wouldn't be the equipment to do it. In any part of the lake, I think you would lose it.

Q. Did you say anything to Mr. Pomponio or Mr. Francis about using a bulldozer in there?

A. I don't know. It wouldn't be the equipment to use for clearing the lake. We don't use a bulldozer in the lake, or any part of it.

Q. Do you recall Mr. Francis' asking you about the safety of swimming off of the lot?

A. I don't remember anything about that.

Q. Do you recall stating to him that the water wouldn't be six feet deep until he had got 20 feet off shore?

A. No, but I believe 20 feet or 30 feet off shore there is a channel there. We may have been discussing
page 200 } the channel. Right there today, there is five feet of water in there.

Q. Is that Trip Run?

A. No. It is Trip Run.

Q. It is Trip Run, not the lake? Has either Mr. Arthur or Mr. Rocco Pomponio the authority to raise or lower the lake, or to dredge or clean out the lake? Do they have any right to do it?

A. Not to the lake itself, unless they come to us and get approval. We have a group of engineers who approve it.

Q. Does Barcroft Lake Shores, Inc. have authority to clear the lake, or dredge out the lake?

A. Not unless they have approval.

Q. How is title held to the lake?

A. That is held by Barcroft Beach, Inc.

Q. How does Barcroft Lake Shores, Inc. have any responsibility?

A. They sell the land. We just sell the land. The lake has nothing to do with the purchase of a lot of land.

Q. In order for one to raise or lower the lake, to have that done, or in order to be able to dredge out the lake, which is, I believe you testified, owned by Barcroft Beach,
page 201 } Inc.—

A. Correct.

Q. —whose permission would have to be obtained, individually?

A. They would clear it through me, and I would take it up with the board of directors of Barcroft Beach, Inc.

Q. And Barcroft Beach, Inc. are who?

A. Five members. Richard Mansfield is one, and four others.

Q. Is either Mr. Arthur Pomponio or Mr. Rocco Pomponio members of this board?

A. No, not at all.

Q. In the spring of 1956, around March or April, did you have any calls or letters from Mr. Rocco Pomponio as to when you were going to take certain action with respect to the lake?

A. Yes, we did. I recall several pieces of correspondence back and forth and calls.

Q. Did he indicate at the time in whose behalf he was calliing?

A. I don't know, and then again it is possible he did. I didn't bring the file. I didn't know anyone would want to go this far into it.

Mr. Bean: No further questions.

CROSS EXAMINATION.

page 202 } By Mr. Madden:

Q. Colonel Barger, how long have you been engaged in the development of Lake Barcroft?

A. This is our tenth year.

Q. Did I understand you to say you have mentioned three different corporations: Lake Barcroft Estates, Barcroft Lake Shores, Inc., and Barcroft Beach, Inc. Is that correct?

A. Yes.

Q. Does Lake Barcroft Estates today own any of these lots?

A. No. These lots came under Barcroft Lake Shores.

Q. That is, the lots in Section 7?

A. Yes.

Q. How many of those were contracted for with the Pomponio firm?

A. I think I made a record somewhere. There were 72 lots.

Q. All in Section 7?

A. In Section 7. There may be a few in other sections. I don't know where they are, but I know they were in Section 7. This is only Section 7.

Q. This is Lot 683 and 685, and this is Trip Run here (indicating)?

page 203 } A. Oh, I don't know, but I think they were down through here (indicating).

Q. You are indicating through Stoneybrae Drive, then Waterway Drive?

A. I don't remember.

Q. How many lots in all?

A. 1100 at the lake.

Q. That Mr. Pomponio contracted for?

A. 72.

Q. He contracted for those, or bought them outright?

A. No, contracted for them.

Q. When was that?

A. In 1954, in June.

Q. Did he get the whole group at the time under contract, the 70 some odd lots?

A. Yes, I believe he did.

Q. Was the value placed on each lot, or was it a back and forth deal?

A. It was more or less a back and forth deal.

Q. If he bought them or contracted for them, somewhere along the line he would have to decide how much each lot was worth, if he wished to convey it out. Isn't that correct?

page 204 } A. No, we just placed one figure for everything, for 72 lots, whatever the total was. We did arrive at one.

Q. Did he pay for all the lots at the same time?

A. No, took them as he required them.

Q. Then that indicated you and he reached a value of the lots if he assumed title.

A. I and he put the same value on all lots for a convenient basis. Some lots were worth more money, and some were worth less.

Q. You are the prime developer of Lake Barcroft?

A. Yes, sir, I am.

Q. Other people have developed in there with your permission, taking 70 lots and developing them?

A. They have taken lots. I don't know whether seventy, maybe twenty.

Q. Is this the biggest developer?

A. I don't think so.

Q. There have been others who were bigger?
A. I don't know.

Mr. Bean: May we object? I don't know what his opinion as to what Mr. Pomponio was, has anything to do with this case.
Mr. Madden: Were any of your corporations going to develop any of these seventy lots?
The Witness: No.

By Mr. Madden:
page 205 } Q. Was it your understanding when they were sold that the Pomponio organizations were going to develop them?
A. They were going to build houses on them. We were through when we sold them lots.
Q. You sold 1100?
A. I would say 1,000.
Q. Lake front lots got more than the other lots?
A. Yes, very much more.
Q. Lake view lots, do they get more, too?
A. Yes, they do.
Q. What group of lots would you say get the least amount?
A. All are quite expensive, but a lot that is located away from what we call the shore line, away back, they average $5,000.00, even in the back, and up.
Q. Lot 683, do you have any record to show when that was contracted for?
A. Not here. I don't know when it was contracted for.
Q. Do you know when it was paid for?
A. No, I don't know.
Q. Was Lot 683 contracted for when the rest were?
page 206 } A. No, it might have been in a series of 8, 10 or 15, whichever way the contract was prepared.
Q. Do you know who was the recorded owner of Lot 683 in May, 1956?
A. No, not unless we check it.
Q. Do you have anything there in which you could check it?
A. No. My comptroller would have to check. We have five girls in the office and my comptroller.
Q. You sold seventy lots to one purchaser. That is a rather large purchase.
A. Not in particular.

*Joseph V. Barger.*

Q. Next to the biggest?

A. No, I said there were others. There were several larger than that. There was a transaction in which sixteen, twenty lots that we received more money than we received for the 72.

Q. What was the per lot price that Mr. Pomponio paid you?

A. Is it all right to say that?

Mr. Bean: I don't think it is material. It is just some more testimony in the record. He said their average lot sales. It doesn't mean anything. It is irrelevant.

The Witness: I believe it was $3,100.00 per lot, for 72 lots.

page 207 } By Mr. Madden:

Q. Do you put any value on the lots along the head of the lake by Trip Run?

A. No, we didn't value them that way, but as Mr. Pomponio knew, as he went around, some were worth considerably more and some he didn't like at all in the back because they didn't have a view. He was out for view, trees, *et cetera.*

Q. When did you receive payment for the 70 lots?

A. I wouldn't know.

Q. Was it this year?

A. I don't think so. I think it was last year. I couldn't answer truthfully.

Q. Was it as long as two years ago?

A. I don't know. My comptroller does.

Q. What is your comptroller's name?

A. Mr. Wolf.

Q. Would he be available this afternoon?

A. I doubt this afternoon, but maybe tomorrow. We only operate in the summertime.

Q. You only have two lots left?

A. Exactly two.

Q. You can't be too busy with two lots.

A. We have several other interests.

Q. Sold 1100 odd in ten years?

page 208 } A. Approximately, yes, sir.

Q. You say Lake Barcroft Estates. Now, that is a corporation in which you are one of the prime stockholders? Is that correct?

A. Yes.

Q. The same for Barcroft Lake Shores and Barcroft Beach, Inc.?

*Joseph V. Barger.*

A. No, I am not a director or officer of Barcroft Beach.
Q. But you are an officer and director in Barcroft Estates?
A. Yes, indeed.
Q. Any question about whom you refer in your conversation with Mr. Vance and Mr. Francis? Did anyone ask you?
A. What?
Q. Did anyone ask you in front of Mr. Francis? Did Mr. Vance ask you in your conversation whom you represented?
A. I represent myself. I don't represent anybody.
Q. What is the answer to that question? Were you asked specifically, Mr. Barger, if you represented Lake Barcroft Estates?

page 209 } A. I don't think anybody ever asked it. I don't know the necessity for it, or why they would, particularly.

Q. You say you are not a director of Barcroft Beach, Inc.?
A. That is correct.
Q. That is the entity that owns the lake?
A. Yes.
Q. As a matter of fact, you spoke completely without authority as to the development of the lake?
A. No.
Q. Why not?
A. I am the operation manager of the lake.
Q. You do have an interest in Barcroft Beach, Inc.?
A. Yes, I am a salaried operating manager.
Q. You are the force behind Barcroft Beach, Inc.?
A. With the directors.
Q. You are works manager?
A. That is correct.
Q. If I understand you correctly, you have two more lots left. You have been there ten years. This is the tenth year, and so far as you are concerned, all the development of the lake as to dredging, all chemicals or bulldozing you were going to do has been done. Is that correct?

page 210 } A. We have never said what we were ever going to do particularly. We never said we were going to dredge. We just met the conditions as they came up. We met three or four times a year. There are two citizens on the board, and we looked over these things at that time.

Q. As a matter of fact, you are prepared to relieve Barcroft Beach of its burden of maintaining this land?

A. No.
Q. You are not?
A. No.
Q. How about Barcroft Lake Shores, Inc.?
A. No.
Q. Lake Barcroft Estates?
A. No, sir.
Q. Are you contemplating leaving the area soon?
A. No. If I do go, I might go to Florida.
Q. Might go to Florida, the Indian Head Estates?
A. No, I thought I might, but I am not going there at all.
Q. You are currently discussing something about Indian Head Estates?
A. We were six months ago. We were invited to join in and participate, and we didn't accept it.
Q. Did you ever give the Pomponio Realty Company orders to sell Lot 683, Section 7, under the name of Lake
page 211 } Barcroft Estates?
A. To sell it?
Q. Yes.
A. No, I don't believe they did sell it under that name.
Q. If they did, would that, in your opinion, be a proper sale? Under what name were they supposed to trade?
A. Their own name. They had Barcroft Woods, and different names. Whatever it was.
Q. What is the date of that memorandum, Colonel? Is that May 26th?
A. Yes, it is on May 26th.
Q. About how many corporations are there in that area that have the name Barcroft Lake or Lake Barcroft?
A. Quite a few.
Q. As many as eight or ten?
A. Yes, there are.
Q. As many as fifteen or twenty?
A. I would say there are more than five that I can recall quickly, but I don't know how many there are.
Q. You recall Mr. Francis' specifically questioning you for whom you were speaking?
A. I don't believe so, at all. I don't remember that coming into the conversation. They were more interested in finding out whether I would do the dredging.
page 212 } Q. You don't do dredging?
A. I don't do dredging. We do clearing around the lake at different times. We don't do any dredging.

*Joseph V. Barger.*

Q. You wouldn't clean it out with a bulldozer?

A. I don't see how you could get a bulldozer in there. You would lose it.

Q. Is it swampy?

A. It isn't swampy. It is soft as you come in. You would have a—

Q. You would have to have a coffer dam put out there and pump it out?

A. You could. It wouldn't be the equivalent to using dredging. They use buckets.

Q. I believe you were asked on direct examination if you received some correspondence from the Pomponio firm regarding the cleaning out of the lake.

A. We did. I remember some.

Q. Has that been going on over a period of two or three years?

A. There have been several letters. How long it has been going on—we get so many letters—I don't know.

Q. From whom were they, from Arthur and Rocco Pomponio?

A. I believe they were from both. I have talked with both over the phone.

page 213 } Q. What was the gist of the conversation with either Arthur or Rocco Pomponio, concerning the cleaning out of the lake?

A. I don't remember exactly what that would be, but I have some notations in the office. It was about clearing the lake, what our plans were.

Q. Did they tell you that you had to do it, or that you had promised to do it?

A. No, they didn't put it that way.

Q. How did they put it?

A. If we were doing it, or when.

Q. Did they ever tell you that they were being sued, and they wanted you to do it?

A. They told me they were being sued about six or eight months ago. We didn't have too much discussion about it. They simply told me about it.

Q. With whom was that discussion?

A. I think Arthur and Rocco Pomponio.

Q. About what was the discussion?

A. I don't recall this minute.

Q. You are sure about that?

A. Very.

Q. You have some notes on that at your office?

*Joseph V. Barger.*

A. I don't think so.

Q. I thought that you took notes on all your
page 214 } conversations?

A. I didn't say that. I said when I had something to do, I would call my office. I didn't say it quite that way.

Q. You say in this Barcroft Lake Shores. Where are the records kept?

A. On that, 711-14th Street.

Q. Is there a secretary there?

A. That is our office.

Q. That was where the records would be, where the correspondence would be from Pomponio?

A. Either there or my office in Virginia.

Q. Where is that?

A. At the post, itself.

Q. You used to have two offices, and you have only one now?

A. On Brant Road.

Q. Would you instruct one of the secretaries to bring one of the files over here this afternoon?

A. Not this afternoon.

Q. You won't do that?

A. We haven't got the time. I would have to dig them out myself.

Q. You are the only one who knows where they
page 215 } are?

A. No. They are scattered around here in my office in Virginia. I have an apointment with the Fairfax Engineers that we set up two months ago, and we must keep it.

Q. You said that the Pomponio Brothers or their corporations have no authority to lower or dredge the lake. Did they ever ask for authority to do that?

A. No.

Q. Did they ever ask for authority to clean it out?

A. No, but they asked me to clean it out.

Q. Did they ever ask to do it?

A. No, I don't think they did.

Q. Do you know of any reason why if they offered to do it, you would refuse?

A. We always clear it with our engineers. We don't let anyone touch the lake. We are afraid to touch that lake.

Q. Do you see any reason, not the engineers?

A. Yes. I could say "Yes and No." If the engineers said,

"Let them do it," I would do it. If they said not to, I wouldn't pass on it. It is too dangerous.

Q. When can you produce the records and contracts and correspondence in relation to Pomponio, and the development?

page 216 } A. I don't think it could be this week. When? Oh, maybe the first of next week. I just haven't the time, and weekends are our big business.

Q. You were here yesterday?

A. Not all day. I was here an hour and a half. I had to get out and go to Fairfax.

Q. You didn't bring your records with you?

A. No, nobody told me to.

Q. Did you know what the case was about?

A. I knew Mr. Francis was suing the Pomponio boys, and I knew it had something to do with the lake. I knew all that. I didn't know exactly what the details were.

Q. You think that Monday is the soonest you can bring these records and contracts in?

A. If you tell me what you want, I will try and have them here Monday.

Q. You keep a file system. Isn't that correct?

A. Depends on what you want to know. If you want to know about the accounting?

Q. I want to have an account of Pomponio and Barcroft Woods. I want correspondence between you and Pomponio Realty cncerning Mr. Francis' problem from the 18th day of May to the present.

A. The 18th day of May, when?

Q. 1955.

page 217 } A. I might get it in by Monday. I thought you got something in the last four or five minutes. We will have to go to our storage room. We don't keep our files that long. I will bring in everything you want. I can't do it this afternoon. I hope to do it Monday. I don't think there is that much to take out. I don't think we have had over three or four letters from the Pomponio people, so far as the records show. We can dig them out of the files.

Q. Did you ever know Mr. Francis before this first meeting?

A. I believe so. I think Mr. Francis bought a lot from us. Didn't you?

Mr. Francis: No.

*Joseph V. Barger.*

By Mr. Madden:

Q. You don't know whether you knew him or not? You may have known him. Did he not call you?

A. Yes, he may have been over to the office.

Q. Colonel Barger, you had a brief interview, say fifteen minutes, you say?

A. I would say ten minutes.

Q. Did Mr. Francis and Mr. Vance, the salesman, leave satisfied, as far as you could see?

A. I don't know. The main thing with them, we shook hands. We didn't have any words. I think the reason I did

page 218 } the dictation was that I wanted them to know about the burning. I made a record right in front of them.

Q. It wasn't with reference to the cleaning out of this lake? The words "cleaning out" and "dredging" were used definitely? You don't recall any conversation as to a certain depth of water after a certain distance, and as to a dock, whether Mr. Francis can put in a dock?

A. Of course, he knows that we have to approve cat walks or docks.

Q. According to this memorandum, you said you did not consider this Lot 683 a water front lot. Is that correct?

A. I told Mr. Francis we considered a lot that has water on it. This lot had water in and out of it.

Q. The plat in your office, did that show the lot being on the water?

A. No, it shows it on the shore line.

Q. It shows it on the shore line?

A. That is right.

Q. The same as that one? Is that correct?

A. Yes.

Q. A shore implies where the water meets the land, doesn't it?

A. No, not if you read all the notes.

Q. Is there some fine printing on there?

A. No fine printing. You find the shore line of

page 219 } Lake Barcroft property, line of water-front lots. See in our lettering "Line of Water Front Lots," there is a notation on the plat.

Q. This isn't the right one to use.

A. It is just a sectional one.

Q. This section of Lake Barcroft property, there is an arrow that points to 683.

A. No.

*Joseph V. Barger.*

Q. This arrow doesn't point to the main line?
A. It points to the whole.
Q. It points to an unbroken line, Lot 685 down to 625.
A. It has no such reference to the main road.
Q. You say Pomponio has nothing to do with that. Are you clear now what we would like in the way of records, Colonel Barger?
A. No.
Q. You are not? I will leave you this memorandum.

The Court: Let us understand this. I am not going to direct Colonel Barger to produce any records, unless they can be specifically identified. I am not going to require him to go and pile all of his records together and bring them altogether and find out whether there is something you want in them.

Mr. Madden: Well, I want at least the contract he had with M. Pomponio and Sons or Pomponio Realty, page 220 } or one of their entities, on the purchase of the land.

Mr. Bean: Could we get the relevancy of that, your Honor, not that I could?

Mr. Madden: I think the relevancy is quite clear on the face of the contract. Mr. Francis has bought a lot in Lake Barcroft Estates, signed by Barcroft Woods. Lake Barcroft Estates is an entity that Colonel Barger has an interest in, and Pomponio has not. The question is, is it an agent or principal?

The Court: I understand that Lake Barcroft Estates to be the subdivision name of Section 7.

The Witness: It is Barcroft Estates at Lake Barcroft.

Mr. Madden: It is a separate entity, Barcroft Estates, Inc.?

The Witness: Yes, it is.

By Mr. Madden:

Q. In our contract, you either agree or did not agree to clean out any lake front property. Is that correct?

A. There was no reference in any of our contracts to do anything about the lake. You buy the lot, no reference about the lake at all.

Mr. Bean: I have a photostat of the contract. I would rather have the original. I believe we have a page 221 } copy of the contract.

The Witness: I don't know whether the ori-

ginal is in my Washington office, Virginia or Boston office. It might take another day or two. There is no question about it.

Mr. Bean: It looks like what I have here is not complete. I have signatures on something. They are not complete. I have on that is signed by the purchaser, Arthur Pomponio, but another signed by Barcroft Lake Shores, Inc., President.

By Mr. Madden:

Q. You sell these lots by written contract, or oral contract?

A. Written.

Q. Your sale to Pomponio Realty, Inc. was—

A. Written.

Mr. Bean: This is not a complete copy of the contract of sale. I have a photostat that came out of their files.

Mr. Madden: We are calling on the defendant to produce it.

Mr. Bean: I will produce it, but I will do it over my objection, because it isn't signed by the parties.

The Court: Let me see it.

Mr. Madden: I think we can solve this problem if the defendant will have his side of the correspondence here this afternoon when Mr. Arthur Pomponio is testi-
page 222 } fying.

Mr. Bean: I have the correspondence that we have in my files and ready when Mr. Arthur Pomponio is ready to testify.

Mr. Madden: Those are the records of the Pomponios, Barger and Francis, the three parties? That is all I have, your Honor.

The Court: You may be excused. Recess until 1:30.

(Whereupon, at 12:30 o'clock p. m., the hearing was recessed, to reconvene at 1:30 o'clock p. m.)

page 223 } AFTERNOON SESSION.

(1:30 o'clock p. m.)

The Court: All right.

Mr. Bean: Mr. Pomponio, will you take the stand?

Thereupon,

ARTHUR POMPONIO,

was called as a witness in his own behalf, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Bean:

Q. What is your name and address?

A. Arthur Pomponio, 880 North Jackson Street, Arlington.

Q. Mr. Pomponio, you have been a resident of Arlington County for what length of time?

A. About fifteen years.

Q. During that time, in what business have you been engaged?

A. Building, real estate, mortgage, banking, and engineering.

Q. Are you a licensed engineer?

A. Yes, sir.

Q. Where did you receive your training for that?

A. The University of Alabama and the State of New Jersey.

page 224 } Q. Do you have an interest in Pomponio Realty, Inc.?

A. I do.

Q. What responsibility, if any, do you have with respect to that organization?

A. I founded it years ago, and as my construction interests grew, I divorced myself from the physical activity and others actually run the entity.

Q. All right, sir. Now, M. Pomponio Sons, Inc. is that a corporation that does construction work?

A. Yes, sir. That is a construction corporation.

Q. Are you connected with that?

A. I am the President.

Q. Barcroft Woods, Inc., what corporation is that?

A. Well, that is a development or housing development corporation that develops subdivisions.

Q. And with respect to Barcroft Woods, Inc. would you recall when that corporation became an entity, when it was established?

A. Right after we bought this property.

Q. You have heard Colonel Barger, Mr. Barger's testimony this morning, that you purchased that property from him. Is that correct?

*Arthur Pomponio.*

A. That is correct.

page 225 } Q. From him individually, or from one of his corporations? Do you recall?

A. I negotiated with him, and I understood from him it was in one of his corporations, but I negotiated with him.

Q. In conjunction with and in connection with the purchase of these lots that he has referred to, were there 72 as he testified to?

A. Approximately 72 or 75.

Q. Did you take title, or did you sign the contract yourself, personally?

A. Yes, sir, I signed the contract myself, personally.

Q. Was title taken by you personally, or by Barcroft Woods, Inc.?

A. Barcroft Woods, Inc. and I had the authority to turn it over to any assignee.

Q. When you took title to these lots, did you take title to any part of Lake Barcroft itself?

A. No.

Q. At the time these lots were purchased by you, did you have any consultation with Mr. Barger with respect to the development of the lake by him?

A. Yes.

Q. What, at that time, if anything, did he tell

page 226 } you with respect to the development of the lake?

A. Well, he first pointed out where the beach would be for Section 7. All the lots were in Section 7, and told me, explained the manner in which all the residents would have the privilege of using that beach, and outsiders couldn't come in, and they had a system whereby they got stickers, and they and their families and guests could use the facility, and he told me that at this end of the property—

Q. When you say "this end," what lots are you referring to?

A. I would have to look at the plat. That somewhere around Lots 680 or 669, he was contemplating building another public beach and that would augment the other beach that he already had in operation.

Q. Did he at that time indicate that he had any plans for developing the lake along Lots 683, 684 and 685?

A. No, he didn't talk about it.

Q. Did Mr. Barger meet with your salesmen and describe the development of the lake area, the beaches and so on, that you have indicated?

A. He certainly did.

*Arthur Pomponio.*

Q. When was that?

Mr. Madden: I think I object to that, unless he was there and can testify that he was present.

By Mr. Bean:

page 227 } Q. Were you present at the time he had this meeting?

A. I certainly was. I brought the salesmen.

Q. What, if anything, was done at that meeting of your salesmen, yourself and Mr. Barger, with respect to the development of the lake? What was said? When was this?

A. He recommended Lake Barcroft and told the salesmen all the advantages of living around a lake, and the advantages of the view of the lake and the advantages of the lots that were, that approached the lake, had a larger expanse of view and that they were desirable locations, and he talked about this future beach, public beach at that end of the property, and told about the fishing possibilities and the swimming, and what have you in Lake Barcroft, and he also told them, tried to give them the benefit of his sales experience as to how this type of property should be sold.

Q. Now, when was that, incidentally? When was that first meeting that you took all the salesmen to Mr. Barger?

A. That was sometime in April, 1954.

Q. This was about the time that you purchased the property?

A. Right.

Q. Were other meetings held after that, at

page 228 } which you were present?

A. Yes.

Q. Do you recall how many?

A. Yes. We had one more meeting at the Hot Shoppe.

Q. Was Mr. Vance at both of these meetings that you referred to?

A. He sure was.

Q. Did there come a time when Mr. Vance, or anyone in your organization, called to your attention a proposed contract with Mr. Robert J. Francis and Margaret B. Francis?

A. Yes, Lincoln Vance came in and told me that he had a purchaser who wanted a house on this particular lot, and I said, "Forget about it."

Q. And why?

A. Because, first, it would be a custom built house, and we weren't in the custom building at that time, and secondly, I

had no control over the lake and didn't know what the character of the lake would be behind this lot.

Q. Now, when you say it would be a custom built house, what did Mr. Vance tell you that Mr. Francis wanted on that property?

A. He told me he wanted the Trendsetter. He identifies the Trendsetter, so that he sets the floor plan and page 229 } typical elevation in my mind, and, however, the Trendsetters that we had were set on rough ground. They start at the street and went up, and this particular site starts at the street and goes down to the lake shore's edge, so that they get into an entirely different topography. That means a completely new design to fit that topography, and I have been in it so many years, I knew what complications are involved, and the fact that we were getting into custom building and I didn't want to do it.

Q. Ultimately, you or Mr. Rocco Pomponio signed a contract to build that house and convey that property to Mr. and Mrs. Francis for $46,000.00. What caused you to change your mind with respect to the original contract?

A. Lincoln Vance kept prevailing upon me that Mr. Francis wanted this particular lot, wanted this house, and wouldn't I make an exception to the rule and go ahead and build the house, and at that time I told him specifically to be sure that he contacted Barger, and get me off the hook, so-to-speak, with this lake condition, that we had no responsibility whatever, and I couldn't assume that responsibility to pass it on to a client, and everything I have ever done in my life has been honest and above board, and my conscience wouldn't permit it, unless he knew, the individual knew exactly what he was doing, and was willing to go ahead with page 230 } it.

Q. With respect to the purchase price of $46,000.00, which was ultimately placed in the contract, and ultimately accepted, did you set that price yourself?

A. Yes, sir, I did.

Q. When Mr. Vance came to you with the proposal originally, that Lot 683 be sold and developed with the Trendsetter that Mr. Francis had seen, was any price at that time on the lot and the house as such?

A. No.

Q. Did you ultimately set the price yourself?

A. Yes, and Lincoln Vance asked me for a price, and I said, I would defer the price, because I had to visualize in my mind the house, because at that point we didn't have plans

*Arthur Pomponio.*

and it wasn't necessary to have plans, but my experience in this type of work indicated approximately what it was to be, and I arrived at a price.

Q. With respect to the house which Mr. Francis has testified he was shown; that Mr. Vance was sitting on when Mr. Francis arrived, and which it was testified was $36,950.00, was that price also fixed by you?

A. Yes, that was fixed by me, but the price on that house was $42,000.00. We work on a ten per cent margin, and that house was $42,000.00, and I recognized after we built it that we were building the neighborhood. At least that was my opinion, and I felt we wouldn't duplicate it again.

page 231 } I wanted to move the house quickly and took a licking on it. I cut the price to $36,950.00 to move that particular house.

Q. When you cut the price to $36,950.00, this lot is not a lake view lot then?

A. No.

Q. Did you, in fact, when you agreed to this $46,000.00 price, employ an architect to reverse the plans for Mr. Francis?

A. I did.

Q. And the name of that architect is what?

A. Edward Pitt.

Mr. Madden: Same objection I have to this. Is that Mr. Pitt with the bills and estimates on the side? I object unless this man is here.

Mr. Bean: This is not an estimate. This is a bill. I will withdraw the bill, and say, "How much did you pay Mr. Pitt to produce the plans?"

The Witness: $350.00.

Mr. Bean: I would like to introduce the bill, to indicate the corroboration of that statement.

Mr. Madden: Other things on here that have nothing to do with the case.

Mr. Bean: Other things that have nothing

page 232 } to do with the case. That is one item that Mr. Pitt billed, among others.

Mr. Madden: There is another thing, "Royalty and revision." That has not been explained.

Mr. Bean: It has nothing to do with the $350.00.

Mr. Madden: Lot 683, Royalty and Revision.

The Witness: That is produce it on another record. That

*Arthur Pomponio.*

is our terminology. I can't tell why they use it. They all use the word "royalty."

Mr. Madden: Use it every time you put a new Trendsetter up?

The Witness: Yes, if they drew plans and did work on them.

Mr. Madden: May I examine him a minute on it?

Mr. Bean: Later on, you may.

Mr. Madden: To find out what the costs are.

By Mr. Bean:

Q. So you paid him $350.00, as you testified to, to redraw the plans?

A. Yes, sir.

Q. Do you have the plans for the home that is there?

A. I couldn't find the blue prints, but I have the original that the architect drew himself, and from which the blue prints were made.

page 233 } Q. Would you examine them and refer to them as to the lot number and so on, to tie this in with Mr. Francis' lot?

A. Yes, on each sheet, you will see 683, 683, 683.

Q. What are the dates that are indicated on those plans?

A. I don't know whether they dated them. I don't see any dates on them.

Q. Is the name "Francis" on them?

A. No, I don't see the name "Francis" on it.

Q. Are the plans that you hold in your hand the plans that were used to build the house that Mr. Francis is now in?

A. Yes, sir.

Q. To your knowledge, when were those plans put together by Mr. Pitt?

A. Between the signing of the contract, May 27th and 28th and—I don't remember exactly. I believe it took them about 2½ weeks. We got it about the 16th or 17th of June, I believe.

Q. All right, sir. What differences are there in the home which you constructed for Mr. Francis and the Trendsetter that he saw?

page 234 } A. First, because of the topography, or one of the things that I told Lincoln Vance, that in order to make the sewer, and the fact that the ground fell off, was that we would have a story underground. You lose a story to get your footing, to bring us what was going

*Arthur Pomponio.*

to be the basement high enough for the sewer, so that entire building has an extra story that was lost underground.

I knew that when I estimated this total, and the first floor floor rear, the basement, the entire rear and two sides of the basement, are completely out of the ground, and as a result of being out of the ground, we finished the exterior with brick so that it would be similar to a building—what people normally expect from the first floor up, and one of the reasons for that is, well, that Mr. Francis wanted that basement light.

Now, if you check the house, you find two bedrooms completely finished, as you would find upstairs, a library, completely panelled, two complete baths, a huge recreation room, with a raised fire place, and we installed twelve-foot sliding doors so that he had a beautiful view of the area behind his house, and the convenience of being able to be able to step out onto the patio that was built there.

Q. Let me interrupt here. These sliding doors that you referred to, were they in the original Trendsetter?

A. No.

Q. Would you go on to name other differences between this house and the original Trendsetter he saw?

page 235

A. Then I knew I was getting into another set of plans that was going to cost me money. I knew, as an individual house, it would require more supervision than one man. That is why I got out. One supervisor could take care of 25 houses as easily as one, and if you prorate his cost over the 25, we could deliver houses more economically to the public. That is why.

Q. Who was the superintendent, if anyone was, for this particular job?

A. Whetzel was the superintendent, and Ray Favali was the general superintendent.

Q. Any other differences now?

A. Then, again, because of the topography, that fell off on the rear of the house. We had to put this large second story at this end, which is a sizable portion and railing, completely around it, he wanted the carport located in the front of the house at an angle, but principally in front of the house, and again, we had to go down another story to bring it up to a proper footing, to bring that to the level as it presently exists.

We had to put on the masonry side, a little side porch

of masonry to get to the kitchen and rail that completely. That was about it.

Q. Were there any partitition changes?

page 236 } A. Oh, yes, sure. I didn't recite those because they have been recited. His wife wanted the kitchen arranged to suit herself, and so they held conferences directly, both Mr. Francis and Mrs. Francis, with the architect Pitt, and I said that was perfectly all right, to go ahead and make the changes in the kitchen, and also the changes in the dining room and living room, which Pitt drew up, and we made those changes, as well as the complete layout of the basement.

Q. Was the basement of the Trendsetter panelled that he saw, the Trendsetter that he first saw that Mr. Vance was on? Was that panelled?

A. No, the only thing that was panelled there was the recreation room, and panelling each side was a four-foot wainscoating. It could be that type of wood declined and the sale is dry wood, except the library. It is all drift wood. It is all wood.

Q. Was there anything over the walls in the furnace room or the storage room in the Trendsetter that Mr. Francis saw?

A. No, it is never put in. Nobody ever puts any finish in a furnace room or utility room, or storage room. We have never done it in the thousands of homes we have delivered, and I don't intend to do it either.

Q. With respect to sodding around the home,

page 237 } the sod was in this case how far back?

A. Ten feet behind the house, and that has been our practice ever since I have built in this area, and that has been the practice of about every builder I know, so much so that it has been made part of the specifications of FHA and VA requirements.

Q. Was the Trendsetter that Mr. Francis saw sodded ten feet behind?

A. Yes, sir.

Q. The contract, which is in evidence, indicates that Mr. and Mrs. Francis signed the basic contract on May 18, 1955, and that contract indicates that he signed, but that Mr. Rocco Pomponio for Barcroft Woods, Inc., did not sign until May 27, 1955. Do you know what transpired in that nine-day period, and why?

A. I certainly do. I told Lincoln Vance he shouldn't build a house or have anyone sign a contract of authority until Mr.

*Arthur Pomponio.*

Francis was perfectly satisfied; that Barger and his outfit would satisfy him, more what he wanted, with the shore line, and I asked to see Mr. Francis and they brought Mr. Francis in the office, and I said, "Mr. Francis, we will not build your house until you go to see Colonel Barger," and right then and there while he was standing there alongside the desk, I called Colonel Barger and made an appointment page 238 } with him, and that is when he and Lincoln Vance went to see Colonel Barger.

Q. Did you, at that time, tell Mr. Francis, what connection, if any, Mr. Barger had with your organization?

A. I let him know that I had no control of the lake or Mr. Barger, and had no connection with it, other than buying the lots from him, and any arrangement he worked out with Barger was perfectly all right with me, because we are in a different entity. For that reason, I didn't accompany him.

Q. Did you ever see Mr. Francis, except that one time, between May 18th and May 27th with respect to the Barger contact? In other words, you made the appointment you stated, in your office. Who was present in your office at the time? Do you recall?

A. Well, there may have been a lot of salesmen, but right around us was Francis, Tony Dennis, Lincoln Vance, and myself.

Q. Tony Dennis is who?

A. He was at that time the manager of Pomponio Realty.

Q. Now, so far as you know, did Mr. Francis and Mr. Vance go to see Colonel Barger? Do you know whether they went to see him, Mr. Francis, the two of them?

A. Yes.

Q. What, if any terms did he ask be placed in page 239 } the contract before it was signed, in addition to those you first saw?

A. I insisted that they put in the terms as indicated on—can I look at that contract?

Q. Yes, please look at Exhibits 1 and 2.

Mr. Madden: I did not get the date.

Mr. Bean: I asked prior to.

The Witness: "It is further understood that the lake is to be cleaned out up to Lot 685 by Barcroft Lake Shores, Inc." and then, "A beach is to be 40 feet wide, and not to be installed until lake is lowered by Barcroft Lake Shores, Inc."

*Arthur Pomponio.*

By Mr. Bean:

Q. Did you discuss those two provisions personally with Mr. Francis?

A. I certainly did. I let him know in no uncertain terms that we had nothing to do with it, and we could at no time get into the lake, and was he sure that is where he was located.

He came back with Lincoln Vance, and he said he was perfectly happy with Colonel Barger, and Colonel Barger satisfied him and the next step, he wanted me to build a house.

Q. The contract was signed and initialed by the parties afterwards. Did Mr. Rocco Pomponio sign the

page 240 } contract?

A. No, he still didn't sign it then. I believe it was the next day, because Mr. Francis and his wife had to initial these requests that he wanted, these two additions to the contract.

Q. I want you to look at the letter of March 27, 1956 from Mr. Francis to your organization.

A. Yes, sir.

Q. Did that letter ever come to your personal attention?

A. Yes, sir.

Q. When was the first time that you recall having seen that letter?

A. Wait a minute! I never saw this letter, this letter, itself. I never saw it until yesterday.

Q. I see.

A. I thought this was the one with the—one of those that we had of the complaints.

Q. Do you note in this letter any reference to the fact that the flashing or guttering had no paint? Read the letter through, if you will.

Mr. Madden: I think that has already been admitted into evidence. It speaks for itself.

Mr. Bean: I am just asking him to read it.

By Mr. Bean:

Q. When Mr. Francis called to your attention,

page 241 } at that time, the fact that the guttering that he alleges, had not been painted.

A. I never heard of it until yesterday during his testimony.

Q. Do you normally paint the gutters?

*Arthur Pomponio.*

A. There is no guttering in the house. There is no flashing. It is what we call the gravel stop. It is a two inch galvanized recess to keep the gravel from rolling off the roof. It will stop it there. We don't normally paint it, but Mrs. Francis told me to.

Mr. Madden: Any testimony, or anything of a person now deceased, in the record, requires the corroboration of two witnesses, under the Code of Virginia. I am going to object to any testimony that Mrs. Francis gave or may have said to anybody.

Mr. Bean: I would say in response to that, that may be true that the witness is attempting to corroborate one that you would have methods of substantiating, but in this case, we are testifying or he is now testifying to statements of one who is not one of our witnesses, and no way to corroborate.

Mr. Madden: Not a party to this suit?

Mr. Bean: She was until her death. She was at that time. I am asking for statements that bear upon statements at the time she was a joint owner to a joint contract.

page 242 } Mr. Madden: The code is explicit on that.

The Court: You don't contend that he can't testify to the conversation. What you are contending is that in order for the statement to be effective, it must be corroborated. Isn't that what you contend?

Mr. Madden: That is what the code says.

The Court: So his testimony is admissible.

Mr. Madden: If they intend to corroborate it at a later time.

The Court: We will pass on it when and if it is corroborated.

Mr. Madden: I want to call upon him to ask if he intends to corroborate it.

Mr. Bean: I have other witnesses in the organization to this effect. I don't know whether I can produce two. I think the testimony can be stricken if we can't do so. I make the point, under the particular circumstances, this code is not applicable.

The Court: Objection overruled.

Mr. Madden: Exception.

By Mr. Bean:

Q. You may answer the question as to what Mrs. Francis said.

A. She called and just happened to get me. She asked

me about it. She was very unhappy about its
page 243 } being not painted. I told her to just rest easy.
I would see that my painter gave it a coat of paint, which he did.

Q. Did you note in this letter of March 27, 1956, that Mr. Francis complains about the color scheme that was used, the specific blue stain that was used in connection with the beams in the house? What arrangements, if any, did you have in connection with the construction of this house, with the painter?

A. Well, our policy is, when a house isn't completely painted, we will tell the purchaser to get in touch with the painter. At the same time, we advise the painter to get in touch with the client. They select their own colors.

In this particular case, we went further. We told Mrs. Francis and Mr. Francis that they could select the exterior colors of tile in the bathroom or the interior colors, and we never entered into the discussions at all. We just turned the painter over to both of them. They made all the selections of all colors that are in the house.

Mr. Madden: No objection.

By Mr. Bean:

Q. I show you a memorandum entitled "Painting Selection," dated 9/28/55, relative to Lot 683, and purportedly signed by Mr. Francis. Is that the manner in which you
normally and customarily handle the painting se-
page 244 } lection?
A. Yes, so we can have a record, and the people don't come back and say, "You put on purple, and we asked for white," and get into a squabble.

Q. I note nothing is stated about the beams, so far as I can read about it, as being completed, as being painted the wrong color. Where in this memorandum would one note what color to paint the beams?

A. Mr. Francis is making an issue about it. Mrs. Francis made a selection of the color. There were only a few exposed beams in the living room, and she wanted, I believe, a bluish color. It is a stain, and we had difficulty in getting a stain to match what she wanted. Again, it is such a small item. We list the principal items. If you want to get each item in the house, you would get 500. That is how extensive it would be.

*Arthur Pomponio.*

Q. Is it your testimony that Mrs. Francis approved of the color that went on these beams?

A. Yes. We didn't know that she was sick, and—

Mr. Madden: I put the same objection in. Now he said, "We didn't know that she was sick," and we have testimony that time was of the essence. The same objection is to what Mrs. Francis was thinking, and she is now deceased.

Mr. Bean: I would like to introduce that as our own exhibit, your Honor.

page 245 } The Court: Defendant's Exhibit 6.

(The memorandum above referred to, was marked Defendant's Exhibit No. 6 for identification, and received in evidence.)

By Mr. Bean:

Q. With respect to the installation of the beach that was called for in the contract, have you at any time told Mr. Francis you would not install the beach?

A. No, sir. I talked to him on many occasions about it. We said we would install the beach when he was satisfied the water was where he wanted it.

Q. Did Mr. Francis at any time talk to you with respect to these matters after he had occupied the house in October?

A. No, he talked to me about these matters when he sued me.

Q. In other words, you have no—you had no contact with him from the time he occupied the house until this suit was filed?

A. I talked to him once on the telephone.

Q. And do you recall what that conversation was about?

A. Yes, it was in relation to some minor complaints that I don't remember just what they were right now, but I know they were minor complaints, and I told him I would call Ray or Whetzel to take care of it, which we did.

page 246 } Q. Did you talk to Mr. Francis concerning this suit since it was filed?

A. Certainly have.

Mr. Kinney: This is in regard to a proposed settlement. I don't think it is proper.

Mr. Bean: I think it is with respect to a proposed settlement, and I think it is proper at the present time.

*Arthur Pomponio.*

Mr. Kinney: I think I have correspondence which says it is all without prejudice.

Mr. Madden: If you want to open all this conversation between counsel, let us open it all up and get it all in, but not piece meal, not one item at a time, and not one of a number of settlement negotiations.

Mr. Bean: This item had nothing to do with what we discussed at settlement negotiations. This is an individual conversation that we are asking be brought into evidence that Mr. Francis and Mr. Pomponio had without the knowledge of us.

Mr. Kinney: He arranged their conference.

Mr. Bean: I beg your pardon. The conference we arranged was with Mr. Tony Dennis, and that was had. The conversation with Mr. Pomponio, I had nothing to do with.

Mr. Madden: That was after suit was filed?

Mr. Bean: That was after suit was filed.

page 247 } Mr. Madden: If you want to have settlement negotiations, or have party negotiations admitted for themselves, let us have them all in, but not take them in one by one. The theory is the same whether it is between counsel or parties. It is either they stand or go.

Mr. Bean: If the Court please, a conference certainly was arranged, and it is a confidential arrangement, that had to do with a settlement negotiation between Mr. Dennis and Mr. Francis. The conference that Mr. Madden was telling about was made without my knowledge, and I didn't learn until recently what it was.

The Court: What was the purpose of the conference? Did it comprise a settlement of this?

Mr. Bean: It amounted to a dismissal of this suit.

The Court: Objection overruled. I don't think it is proper.

By Mr. Bean:

Q. Mr. Pomponio, when was the last time that you visited the home of Mr. Francis?

A. Yesterday morning.

Q. Yesterday morning, and in whose company were you at that time?

A. Tony Dennis, Ray Favali, Mr. Vance and

page 248 } Mr. Francis.

Q. Did you examine the house at that time?

A. Yes, I did.

*Arthur Pomponio.*

Q. With respect to the basement that was not properly panelled, what had been done?

A. The basement is actually another house. There is a full bath. It was tiled. There are two bedrooms, which are bedrooms, and they are finished as bedrooms should be finished with dry wall, because the rest of the house is dry wall on plaster, because we use dry wall. The library is finished with drift wood. It is a plywood panel with raised grain, and looks very attractive. The bar is dry wall, and the room is completely finished, all walls, ceilings and floors.

Q. With respect to those two bedrooms, did Mr. Francis ever ask you to panel those?

A. No, sir. The plan that was drawn for Mr. Francis, which I have here, show them. Then there is a storage room and a laundry room, and as I said, we never finish off a storage room or laundry room. The laundry room is used for laundry purposes, and the storage room is used to store garden equipment and the like of that.

Q. So some of the basement is not panelled, and you have heard no objection to that portion that was not?

A. Never did until the suit was filed, and then I heard about it. I said he was crazy.

page 249 } Q. The kitchen baseboard was not painted as specified, an item which you and I have not discussed at this time. Do you know anything about the kitchen baseboard from the painting selections? Does that indicate what the painting selection would be?

A. Yes. There is a baseboard. In his particular house, we used a bellow, that is about three-quarters of an inch high. We have what we call ship's molding.

Mr. Madden: I think we can fix all this. We haven't put any evidence in as molding.

The Witness: That is what you are referring to.

Mr. Bean: I am referring to the kitchen baseboard's not being painted.

Mr. Madden: We dropped that.

Mr. Bean: I think Mr. Francis said something to me, and I am not clear on it. That is all I have of Mr. Pomponio at this time.

CROSS EXAMINATION.

By Mr. Madden:

Q. Going back to the testimony of this witness, Colonel

Barger, who testified this morning, he testified that he had made no promises to you when you bought that property about what he might do about the lake, and what he would do to the lake. You heard him testify to that effect this morning?

page 250 } A. I heard him.

Q. Was that true or false testimony?

A. I would say it was false testimony.

Q. There was testimony that you were induced to buy that property, partially at least, because of his representations to you?

A. Not about the lake.

Q. About what?

A. About the area being developed as a fine residential area.

Q. Are you saying that it didn't matter what he said about the lake, itself?

A. No, it didn't matter. He said he was going to clean out all the lake, and he was going to put a public beach down there at this end, and being a purchaser of a group of lots, I wanted to find out just what he intended to do with all of it.

Q. And just what did he tell you that he intended to do?

A. He was going to take one of these lots and make a public beach out of it. He owned these lots that weren't part of my group, and he was going to clean out the lake where it needed cleaning out.

Q. What did you pay for these lots, your total?

A. I don't know. I can't remember what I paid,

page 251 } $223,200.00.

Q. All right. My previous question was: What did he tell you about what he would do to develop or change the contour of the lake, or keep the lake up, anything with respect to the lake? He said he wanted to clean it out and have a beach. Is that what he told you that he would do?

A. That is right.

Q. So that on a $223,200.00 property, that is a lake property, you meant to use the name when you developed it. There were no more discussions about the lake with him about it. Is that correct?

A. He talked about boating on the rest of the lake, and how big the rest of the lake was. I think he mentioned that it was a couple of miles long, and I don't remember. He also

talked about the expanse of sewer line, and he had maybe a dozen beaches, but he kept them in sections.

Q. He talked about boating and beaches? Did you talk *abour* private docks, for instance?

A. No, he wasn't interested. I was, yes.

Q. Did you discuss private beaches?

A. No. I didn't know that he would allow private beaches, because I want down and saw this public beach that he had.

Q. Then why did you contract to put a private beach on Mr. Francis' property?

page 252 } A. I expected that, because he went to Barger and he was satisfied with what Barger told him. All I was buying was 40 yards of sand and dumping it up on a man's property.

Q. Why didn't you call it a sandpile?

Mr. Bean: I think if counsel is going to take this attitude toward a witness, we should stop and wait for him to calm down.

Mr. Madden: Mr. Bean, when a witness is an expereinced man in the real estate—

The Court: Ask your question of the witness, and if you have any objection to make, make it.

By Mr. Madden:

Q. Now, Mr. Pomponio, does the word "beach" have any connotation, other than a pile of sand?

A. Yes, sir. I was going to spread out 40 yards of sand.

Q. Was it going to connect with some water?

A. It was right at the shore line. After he was satisfied and Barger had done what he promised that man to do.

Q. You were in a position to agree to put in a beach, but you couldn't tell whether the beach was within an eighth of a mile of the gate?

A. I was going to dump the sand.

page 253 } Q. You were satisfied that it would be a beach whether it was near water or not?

A. Exactly.

Q. I want to see this memorandum from Vance. Now, Mr. Pomponio, when did this memorandum come to your attention, or did it, like you claim?

A. That is right.

Q. When were you first told what Colonel Barger told Mr. Francis and Mr. Lincoln Vance?

*Arthur Pomponio.*

A. They came back and told me, Mr. Francis, himself.
Q. Now, when?
A. Right after they saw Barger.
Q. That would be on the 25th of May?
A. I don't know.
Q. Colonel Barger testified it was on the 25th or 26th.
A. It was between the time he signed the contract and we signed it. I didn't keep a momorandum as to dates.
Q. You do recall pretty well what they told you?
A. Yes.
Q. What did they tell you?
A. He told me he was satisfied with what Barger told him he was going to do with the lake, and he stated, "Go ahead with the contract," and have me build a house.
page 254 } I didn't ask him any more about it, and we signed the contract.
Q. You didn't ask him what Barger told him?
A. Yes, he told me verbally.
Q. What did he tell you?
A. That Barger would clean out the lake, just what we have in the contract here.
Q. There was no discussion at that time as to where the beach would be?
A. Of course not.
Q. Now, you recall a letter that went from Mr. Dennis to Colonel Barger, dated May 20, 1955, which would be a couple of days after Mr. Francis signed the contract, asking Colonel Barger to send a letter, stating that he would carry out this work? Do you recall that?
A. No, I don't recall it, but I saw it here.
Q. Was it a custom of yours to try and have Colonel Barger confirm these things in writing?
A. This was the only one, and Tony Dennis was there when I saw Barger and Vance. He knew I was very upset about what was to be done, and he, as manager, was following directions.
Q. You got a copy of it when it was sent? I am just reading from the letter in the file.
A. I probably did, but I don't remember it.
Q. Did you ever get a letter back from Colonel
page 255 } Barger?
A. I never got a letter, no.
Q. Now, Mr. Pomponio, you are Arthur Pomponio?
A. That is right.
Q. Did Rocco Pomponio get a letter?

*Arthur Pomponio.*

A. I am sure we didn't.

Q. Are you speaking about your whole organization when you speak of "I"?

A. I am sure we didn't.

Q. You wrote to Barger and asked for a specific answer in writing, and your testimony is that you got no response?

A. Yes.

Q. Did you expect to get any response?

A. Yes.

Q. Why?

A. Because he was the responsible party.

Q. He was the responsible party?

A. Sure.

Q. And you thought you had a right to get a letter from him?

A. Right.

Q. You thought this whole matter was one that belonged in his lap, so far as doing the work?

A. Right.

page 256 } Q. And you couldn't operate unless you had him behind you, agreeing to do this work?

A. That is correct.

Q. You couldn't in all conscience sell these lots as lake front lots without relying on Barger's previous statement?

A. You said, "In all conscience" as lake front lots. I wasn't selling lake front lots. You will notice this was the only one there. If we were advocating lake front lots, we would have them all built. They selected the lot, and I would put it there if he satisfied himself as to what Barger said he would do in the area.

Q. It is your testimony you sold a lot with a beach on it that wasn't a lake front lot?

A. We didn't sell a lot. We sold an entity, a lot and a house.

Q. What about a beach?

A. I said I would provide sand. I was going to provide the lake with sand. I am a builder. I have access to it.

Q. It is your testimony that the word "beach" is meaningless. It is a pile of sand.

A. Not a pile of sand.

Q. It is beach sand, but it says a sand beach.

A. Oh, why do you want to play on words,

page 257 } beach sand or sand beach? What do you want me to say?

*Arthur Pomponio.*

Q. I want to know, is it your testimony that you did not agree to put in a beach for this man at some time or other.

Mr. Bean: The contract states that he agreed to install a sand beach as soon as the lake was lowered. I don't know why we should go into what he intended to do. I stated and Mr. Pomponio stated that he intended to put in a forty foot beach.

Mr. Madden: The whole controversy, Mr. Bean, is a meeting of the minds. We have got away from the contract entirely.

By Mr. Madden:

Q. Now, Mr. Pomponio, this contract with Mr. Francis was signed by Mr. Rocco Pomponio, as signatory for Barcroft Woods, Inc.

A. That is correct.

Q. Why was that? Why did that corporation appear here?

A. Well, Barcroft Woods, Inc. owned and built the properties.

Q. Over on the special provision of this contract it says that the lake to be cleaned out by Barcroft Lake Shores, Inc. Why was that name inserted there?

A. Because that is Barger's firm.

page 258 } Q. Now, Mr. Barger said he had a lot of firms. Is this a Barger firm?

A. Here is a contract with Barcroft Lake Shores, which is Mr. Barger's.

Q. You are referring to this document?

The Court: Which exhibit is it?

Mr. Madden: It isn't in evidence.

By Mr. Madden:

Q. That was why you put it in? That was the thing at the head of your contract with Barger?

A. Exactly.

Q. I want to ask you, isn't it true that Barcroft Lake Shores, Inc. didn't own the lake?

A. I didn't know that.

Q. You didn't know what Mr. Barger's incorporated dealings were?

A. Of course not. Mr. Barger is Mr. Lake Barcroft, in my opinion. How he spun off these entities is something else.

Q. You have become known as Mr. Section 7?

*Arthur Pomponio.*

A. Right.

Q. And Mr. Barger testified that he didn't direct those entities in this corporation.

A. I didn't know that.

Q. He did use a corporation; that the testimony
page 259 } has been they did not own the lake and did not have any right to do any work on the lake.

Mr. Bean: I think I will have to object, because I think the question has been projected incorrectly. It was testified by Colonel Barger that the beach corporation, I think Barcroft Beach, Inc., owns it, but that Barcroft Lake Shores, Inc. was the manager.

The Court: I don't recall that testimony. He said he was not interested in and an officer of Barcroft Beach. Barcroft Beach owned the lake, and he was the managing director of it.

Mr. Madden: As I understood the testimony, it was that these various other corporations had to get permission from Barcroft Beach, Inc. to do anything with reference to the lake. Was that your understanding of the testimony?

The Court: That is what I heard him say.

By Mr. Madden:

Q. It turns out now, Mr. Pomponio, that the corporation, that both parties understood was to clean out the lake, wouldn't clean it out by and on its own authority and power.

A. No, I can't answer that, because Barger didn't tell me anything about another beach corporation, and it was Barcroft Lake Shores that I bought the property from, and he seemed to have all the authority to do every-
page 260 } thing there. He talked with authority. That is where I left it.

Q. You didn't ask him for any corporate resolutions to show that he had authority to do what these contracts were about?

A. Of course not.

Q. People don't do that when they are dealing with responsible business people?

A. No, that is right.

Q. You testified on your direct examination that you arranged for Colonel Barger to talk to your men about the property and about the development he was going to do.

A. Right.

*Arthur Pomponio.*

Q. I take it that was to indoctrinate them so they would be better salesmen?

A. Right.

Q. You also testified that he could give them the advantage of his experience.

A. Right.

Q. And that subsequently, they went out and sold, using this data that they got from these conferences?

A. They sold houses that I had built.

Q. They sold one that you didn't build, Mr. Francis'?

A. Right.

page 261 } Q. So they sold one that hadn't been built?

A. Yes, sir.

Q. Did you use Colonel Barger, or his facilities, or experience, in any other way to sell these lots?

A. No, sir.

Q. Well, look at that plat, for instance. Whose plat is this?

A. This is Colonel Barger's.

Q. Don't you use that with your potential customers in your office?

A. Of course, he sold many completed lots, and with completed lots came plats, because it is required by the county. We had to use those to meet county regulations, sewer, water, *et cetera,* so he furnished me with these plats.

Q. You use them in your office for potential customers, and they are labelled "Barcroft Lake Shores"?

A. Right.

Q. And it was Barcroft Lake Shores, Inc. that was about to clean out the lake?

A. Yes, sir.

Q. And Mr. Francis was supposed to know that?

A. He knew, because I told him.

Q. You have told me that you don't know what Mr. Barger told him. You have testified to that.

page 262 } A. I wasn't there when he talked to Colonel Barger, but I know what he told me when he came back.

Q. What was that?

A. That Colonel Barger was going to clean out the lake, and he was perfectly satisfied with what Colonel Barger was going to do, and he wanted me to go ahead and build the house.

Q. Did you say to him, "You know, Mr. Francis, we have no legal liability to do this?"

*Arthur Pomponio.*

A. I certainly did. I told him we were sending him to Colonel Barger; that we didn't want any liability with any lake, that we didn't have a right to assume.

Q. Why didn't you say that in your contract? The seller had no authority under the contract.

A. Because Mr. Francis is a very smart man. He is an attorney, and a very active business man, and he, with me, wanted this language, and we put it in here. We wanted to make it as simple as possible. We didn't anticipate a suit. This is the first time, because I do things properly.

Q. You say Mr. Francis is a lawyer? Was the answer that we have no liability? You wouldn't have sold him the lot because he would know that there was no conflict.

A. Yes, because we discussed that.

Q. There was a conflict between your testimony
page 263 } and his.

A. I don't know of any conflict.

Q. With reference to Plaintiff's Exhibit 4, Mr. Pomponio. It is a letter from Rocco Pomponio. I take it you will feel free to discuss this letter, under date of April 10th. You wrote to Mr. Francis on that date, didn't you? "Rest assured we will press him for compliance, since we are interested in getting this work done to satisfy our future customers."

A. My brother did. I am sure he did.

Q. Why were you interested in getting it done, to satisfy, that you now say that you had an obligation to us?

A. Say that again.

Q. You write in this letter to Mr. Francis that we shall press Barger to live up to his obligation to us so we can satisfy our purchasers.

A. I am very zealous about public relations. He is a customer. That is our bread and butter, so anything I could do to help any client, we go out and do it.

Q. This had nothing to do in any sense of obligations to public relations?

A. To public relations, exactly.

Q. On May 18, 1955, who was the contract owner of this particular lot 683? Do you have any records to show that, and show that for sure?

page 264 } A. No, this contract, Barcroft Woods, Inc., we sold it.

The Court: What date?

Mr. Madden: May 18th.

*Arthur Pomponio.*

By Mr. Madden:

Q. You are using the contract to refresh your recollection? I wonder if you have any records that show when Barcroft Woods took control of that particular lot?

A. You take it out of the contract.

Q. All these lots transferred finally under the date of this contract?

A. That is right.

Q. So there was no period of release of certain parts of the other? I thought that was what Colonel Barger said it was.

A. Read it. It would spell it out.

Q. Does this give all the lot numbers?

A. Just those, all in there.

Q. This does not say anything about Lot 683.

A. It says a schedule on the front. The schedule isn't attached.

Q. From the schedule attached, do you have that schedule?

A. Yes, we have listed it. There are the lots.

Q. So you got that in February 6, 1956?

page 265 } A. Might have been. That is it.

Q. And sold it in May, 1955. Is that right?

A. I don't know.

Q. Is that the way it looks to you?

A. I don't know of this note.

Q. Does this note come under date released?

A. This don't necessarily mean released. I would have to get the bookkeeper to tell me what this means here for us.

Q. You mean the date released?

Mr. Bean: Let us put the contract in the record. Whatever it is, it indicates a conveyance with a release clause under a master trust.

By Mr. Madden:

Q. Mr. Pomponio, do you know when you got released? Do you, or one of your corporations, know when you got released from this lot?

A. I don't know.

Q. And how can you find out for us?

A. We could check with the attorney who was doing the legal work. What connection has that got to do with me?

Mr. Bean: Well, that is his counsel.

*Arthur Pomponio.*

By Mr. Madden:

Q. Now, Mr. Pomponio, the testimony has been
page 266 } that Mr. Francis signed the contract on the 18th of May. Is that correct?

A. That is correct.

Q. And left it with you until it was signed on the 27th?

A. Right.

Q. Is this the only time that this question of Barger's nonperformance to you, has come up, that is in relation to this case?

A. You mean today?

Q. No, no. In relation to this case, is that the only time that the question of Barger's obligation to you has come up, or have there been other instances of it?

A. He sued me.

Mr. Bean: I object to it. It denotes obligations to him which are not in the suit.

The Court: Objection overruled.

By Mr. Madden:

Q. When he sued you, you had no other problems with Barger, except with this? Going back to the house, itself, Mr. Pomponio, you have described it as a house that has been completely turned around and created all sorts of special problems in building.

A. Right.

Q. The whole Lake Barcroft area isn't row upon row of identical houses in a subdivision?

page 267 } A. No, we rather planned it, and before we started construction, we knew exactly what house was going where because of the topography, so we could do it identically and the next person did.

Q. Did you also have a house for this lot?

A. No, sir.

Q. You did what you would do in all instances for this lot?

A. No. I wasn't going to do any building on this lot.

Q. What were you going to do?

A. Just sit on it. Then I built the house.

Q. When you do building, you have to have a plan?

A. Yes, it has to be land planned. In this case, we fitted the house to the lot, which is absolutely contrary to good practice.

Q. How much excavating did you do here?

*Arthur Pomponio.*

A. Ask me how much fill. There wasn't much excavating. The ground fell from the street, down to the water, and we excavated the front portion and set deeper in fill. We got in another expense for fill furnished.

Q. How much excavation did you have to do on the original Trendsetter?

A. Do I have to answer that?

page 268 } Q. It would be a good idea if you know the answer.

A. I wouldn't be right about the yardage. I don't go around—I have records on yardage. I can tell you that approximately in time. The equipment for his place to excavate, took about one day, with a piece of equipment, and our other basements, 2½, with other pieces of equipment.

Q. His took one day, compared with two or two and one-half?

A. His took additional time when we had to fill and grade and back-fill.

Q. On this sodding of 15 feet—

A. Ten feet back.

Q. —you testified that that is standard procedure for Pomponio Realty?

A. No, that is standard procedure in the trade.

Q. How about your company?

A. That is our company. If they want extra, they pay extra.

Q. Do you know how they described it in the contract? Can you tell us that?

A. That I don't know.

Q. I wonder if it is by saying, "Lot is to be completely finished, including sodding"?

page 269 } A. I am quite sure that is the way we indicate it, if it is indicated here in that manner. It was just taken, as I said, routinely off of our other contracts, but there was nothing *controversable* or different with them than all the other houses we build.

Q. This was a standard routine house?

A. No. It was a Trendsetter which we built, but custom built to this lot, because the lot wasn't condusive to this type of house.

Q. Mr. Pomponio, you testified that the only contact you had with Mr. Francis on the phone was, as I indicated it, direct. He called you about some minor complaints, and you sent somebody out to take care of them, and you described

*Arthur Pomponio.*

them several times as minor complaints. You don't get all the phone calls in your company?

A. Of course not.

Q. In fact, it would just happen you would be there to take one.

A. I think on this particular day he wanted to talk to me.

Q. You think that because of what he said in the conversation?

A. Yes. He asked me, "Will you please get these done?" I said, "I sure will."

Q. Your testimony, Mr. Pomponio, with reference to these beams, the color of which is not described in this
page 270 } chart, there were just a few of them, as you described everything. How many beams are there?

A. They are on four-foot centers, the living room, all the house.

Q. Did you ever count them?

A. Oh, I counted them lots of times.

Q. Did you count them yesterday morning?

A. No, I didn't.

Q. Would you be surprised to know that there were 31 beams?

A. No, it wouldn't surprise me.

Q. So that to your mind is just a few?

A. Yes.

Q. Your testimony with reference to this painting, was that what you do with your customers is to say, "Work it out with the painter."

A. Yes.

Q. And you further stated here that we have nothing to do with the color?

A. That is right.

Q. That is between your customer and the painter?

A. Right.

Q. It is pretty much like the position you are taking about Colonel Barger, that that is something between Mr. Francis and somebody else?

page 271 } A. We find that people like it better. They are not working directly with a third party. They are working directly with the painter. We try to get reputable people to work for us.

Q. You found the people's talking with the painter, get the right color?

A. Yes.

*Arthur Pomponio.*

Q. That isn't the reason Mr. Francis went to Mr. Barger.

A. No, because I didn't want to build the house and told him so. I said, "Go to Mr. Barger and see him, and after you get squared away, come back to me," which he did.

Q. Do you recall at what time you took Mr. Francis' house as the down-payment or part of the down-payment in this transaction?

A. Yes, it was a dog. Is that the expression? Yes.

Q. When was that?

A. I don't remember the date.

Q. You are dissatisfied with that deal you made on that house?

A. No, I wasn't dissatisfied. It developed to be a dog.

Q. A dog? To a layman, a dog connotes some type of dissatisfaction.

page 272 } A. I didn't go to see the house. I took Lincoln Vance's word that it was a saleable house. Because of the confidence we had in Lincoln Vance, we accepted the house in trade, and when we went out to look at it, it was nothing like he said it was. If my memory serves me right, we lost money on the sale, considerable money.

Q. You had a lot of confidence in Lincoln Vance, didn't you?

A. Sure did.

Q. He was one of your desirable men at that time?

A. I wouldn't put—do you mean he was a good man?

Q. He was perfectly responsible, and did his job, so far as you know?

A. So far as I know, yes.

Q. You have testified about this dry wall being in these bedrooms, and how you know they look like bedrooms to you, the way most people would like them, but it is correct, is it not, that there is a considerable amount of outside wall, cinder block wall, that is dry wall and is not panelled in that basement? Is that correct?

A. They are bedrooms. That is what I said.

Q. Mr. Pomponio, there has been a little difference of opinion on that as to whether or not some of these

page 273 } outside cinder block are not covered with plaster board.

A. The laundry room and furnace room, we never do it. It isn't done in the trade. We never do it. It is throwing money away.

Q. How about the bedrooms, are they not dry walls?

A. They are finished walls.

*Arthur Pomponio.*

Q. The bedrooms, are outside walls with cinder block walls, dry walls?
A. Certainly.
Q. Where are the bedrooms in the other Trendsetter houses?
A. Upstairs.
Q. What do you mean by upstairs?
A. First floor.
Q. What is down below?
A. What we call a study and recreation room.
Q. What is up above?
A. Three bedrooms and three baths, dining room, living room and kitchen.
Q. There are just two floors?
A. Yes.
Q. And there are just two floors in his house?
A. Right.
Q. Same number? They are identical in that
page 274 } sense in that you just have two floors?
A. Right.
Q. Going back to Mr. Pitt's work that you testified he had to do those revisions to these plans, I wish you would tell me what the word "royalty" means in reference to "royalty and revisions"?
A. Well, royalty, as I said, he is placing this house on this Lot 683, so he has to make a site plan which I think he has to draw, and it is required by the county and loan companies that he draws, and that is what they have reference to as "royalty," and then those plans.
Q. Well, now, you would have to do this whether Mr. Francis did the most minor of changes, wouldn't you? You would have to put it on a plat for the county, and your architect would have to do it?
A. As I said, we had our little plans all done.
Q. You didn't have any house on the lot.
A. No.
Q. This wasn't something that came up because of the revision of the plan. This was something that came up because you sold the lot and had to build.
A. Say that again.
Q. What I am trying to get at is, you make one of these for every plot area where you are going to build a
page 275 } house.
A. Right.
Q. Up until the time that Mr. Francis came along and

*Arthur Pomponio.*

decided to take a Trendsetter, whether he had the normal Trendsetter or the reversed Trendsetter, you would have to have one of these?

A. Yes, sir.

Q. How much of the $350.00 did it cost?

A. I don't know. I don't separate the man's building.

Q. It could be $300.00 or $350.00?

A. I know in the trade they charge us $25.00 apiece for the land plan.

Q. The standard land plan?

A. Yes.

Q. And this was a standard plan?

A. Well, I don't know whether you should call it standard.

Q. You get the normal, nominal rate, and you think that is what you paid?

A. No, I think I paid more.

Q. How much of the $350.00 did you pay for it?

A. Oh, I paid for it, I think, $100.00 for his house and $250.00 for the plans.

Q. I didn't follow one portion of your testimony, sir. You testified that you told Lincoln Vance that you
page 276 } didn't want anything to do with selling this lot, and you didn't want to put a house on it, because you would lose a story because of the topography. Is that correct?

A. No, I said I didn't want to put a house on this lot, selling it, when he posed one of the reasons we would lose a story, because of the topography, and he didn't have a clear concept of what was going on back of the lot in the lake.

Q. You don't know what all Mr. Vance told Mr. Francis before May 18th, do you?

A. No. How could I know?

Q. In fact, you never talked to Mr. Francis about the house before May 18th?

A. Oh, yes. I think it was before May 18th. It might have been the day before, but it was just about when he signed the contract.

Q. Isn't it correct that it was shortly after he signed it and you said to Mr. Vance, "For heavens sake, get him down to see Colonel Barger"?

A. Yes, I told him to go and see Colonel Barger, and I arranged to meet him.

Q. And they went down that day, or the next day, or very shortly thereafter?

A. Yes, sir.

*Arthur Pomponio.*

Q. So, it was after May 18th?

page 277 } A. May have been.

Q. I want to know if you don't mean what you meant when you testified that you told Lincoln Vance to be sure and go and see Barger and get you off the hook. What hook were you on?

A. I wasn't on any hook. Didn't want to be on any hook. Again, I wanted to be clear on what was going to be done, and I wanted to get clear from the horse's mouth. I didn't know anything about it.

Q. Didn't you testify that you said, "Go down and see Barger and get me off the hook"?

A. I don't remember whether I used a "hook" or not. Maybe I did. That is what I meant. I did not want to be on the hook by promising something I couldn't deliver. I said, "Go down and see Barger," and while he was standing there, and to be sure I wouldn't get in the conversation and be implicated, I didn't go, because I wanted him to be satisfied.

Q. Well, I take it you said you did not go, but one of your agents went. There is no difference in your company's doing it and one of your agent's doing it?

A. We back them up.

Q. Do you know how many corporations there are that use the word "Barcroft" in any part of it?

A. No.

page 278 } Q. Would there be a dozen?

A. I have no idea. I have no reason to be interested.

Q. There are lots of them?

A. I don't know. I never investigated. Why should I?

Q. For instance, you might have said you signed a contract with the company which apparently legally had no authority to do what you said they were promising to do, and I am thinking that Barcroft Lake Shores, Inc. did not have authority to clean out the lake.

A. I don't know that.

Q. And Colonel Barger, who was your witness this morning, testified to that effect. Is that incorrect?

A. Sure, that is an incorrect statement so far as I am concerned. I knew that Colonel Barger was Mr. Lake Barcroft. That is all I knew. I wasn't responsible for anybody else, and Mr. Barger, and he told you here this morning that he is responsible for everything. Whether because of

business reasons he spins off many of these entities, that is his business.

Q. I take it you think people should take a direct approach and shouldn't spin off corporations with similar names; that the man who deals with you should be direct. That is your philosophy?

page 279 } A. No, it isn't. Don't give my philosophy for me.

Q. What happened to all the purchase money for this house, the $46,000.00, insofar as it has been paid?

A. He didn't pay anything.

Q. What do you mean by that?

A. We took a house in trade. We had to wait until it was sold.

Q. What happened to the money for that sale?

A. It went to Barcroft.

Q. Don't you know without referring back to these intricate corporations?

A. I am doing business all the time. I am selling houses for multitudes of people. I don't remember. Why should I? It was Barcroft Woods, Inc. that has it.

Q. And that is a company with which you are intimately connected. Is that correct?

A. Intimately connected to the point where they employed M. Pomponio and Sons to do the building, and they do the building, and I am doing the building.

Q. You are not on the board of Barcroft Woods, Inc.?

A. I don't think so.

Q. How about Rocco Pomponio?

A. Rocco is.

page 280 } Q. You are here speaking for him, just as if he were here?

A. Not for Barcroft Woods, no, I can't.

Q. You aren't here speaking for Barcroft Woods? I think I started my examination by asking, could you speak for all these corporations that are in this contract?

A. I don't know whether he has my confession about my being an officer for the corporation or not an officer of the corporation. Is it necessary that I be an officer of the corporation?

Q. So far as I am concerned, it is not. I just want to know that when we get answers to these complaints, we get answers that will bind the parties.

A. Sure. I am no officer.

Q. To your own knowledge, all of the purchase price here

has already come to you or will eventually be paid to Barcroft Woods, or its assigns. Is that correct?

A. That is right.

Q. Nobody else got any part of the purchase price out of this contract?

A. That is right.

Q. And Colonel Barger had no interest so far as you were concerned, in getting any money out of this contract?

A. That is right.

page 281 } Q. So for his obligation to clean out the lake, he doesn't get paid under this contract? Mr. Pomponio, you have testified about this house and how you fixed the price on it and set the price on it and were familiar with the work that had to be done in connection with it. What price at that same time in 1955 would you have set on this identical house on the same lot with the same topography, several streets back?

A. If we had to duplicate the house he saw?

Q. And topography.

A. And topography, and no changes, no flop-overs, and nothing, $42,000.00.

Q. 42 instead of 46?

A. Yes, sir.

Q. And so having it up on the so-called lake front added in your opinion, $4,000.00?

A. No, sir.

Q. What?

A. The topography of the lot, falling away from the street, required this extra circumstance of another story, and all these necessary effects which we had to do.

Q. Let me ask my question again. Take a lot with the same topography.

A. Right.

Q. And the same size and the same area, and

page 282 } the same shape.

A. All right.

Q. And take this same house and build it in the same months in 1955, on that lot a quarter of a mile back from the lake, two or three streets back from the lake in that area.

A. No, put it on the lake.

Q. No, put it away back from the lake.

A. $4,000.00.

Q. Everything, in your opinion, being equal, there would be a $4,000.00 differential in price between a lake front and one considerably farther back?

*Arthur Pomponio.*

A. No, sir.

Q. I don't understand your answer.

A. If I took my original house and put it on my lot, even on this lake, if the topography was identical with the other topography, and we set it exactly as we set that house, it would be $42,000.00, $4,000.00 before the additional construction costs that went into the house.

Q. Then apparently I didn't make myself clear. I want you to take the houses that you did build. Take the Francis house and put it back four or five blocks from the lake. What price would you put on it?

A. $46,000.00.

page 283 } Q. The same price, $46,000.00? So when Mr. Francis testified there was a $10,000.00 premium on a lake front house, as against these considerably back, that was false testimony?

A. I don't know where he got it.

Q. So when Colonel Barger testified the lots next to the lake were considerably more, that was false testimony?

A. Yes. In fact, there are lots of the same house with this price because of the size of the lot and the topography, requiring additional work on the building, so most of those houses were priced alike.

Q. It was your testimony there was no difference in values between four or five blocks and one right next to the lake front?

A. No difference in price.

Q. You don't sell at this price?

A. Not because of lake front and land lots, no.

Q. Am I correct in my recollection of your testimony that you never did talk to Mr. Francis before he signed this contract, and the conversation you had between him and his signing time and your signing time, was always in the presence of Mr. Lincoln Vance? Was that your testimony?

A. Correct.

page 284 } Q. One final question regarding the sodding that you testified you put on ten feet. That was done in the trade. No matter how big a man's lot is, you put ten feet around the house. But you built a lot of houses on Slate Run Drive.

A. Lots of them.

Q. Do you know what Slate Run Drive is?

A. That is Sleepy Hollow, another subdivision.

Q. You built all those?

A. I built all those.

*Arthur Pomponio.*

Q. You sodded them right to the property line.
A. They paid $250.00 extra, as part of their mortgage.
Q. That was what the VA made you do?
A. No, they didn't make you do it. It was optional with the people. VA requires 10 foot and then VA allowed a flat amount of so much money. As I remember, it was $250.00 if the lot was sodded, and VA won't allow you to take one lot and charge them $150.00 and another lot, a lot bigger, and charge them $300.00. They figure a builder in a subdivision should average out. They do that. You don't have to charge the people that and add it to the mortgage, but if you give it to them, you add it to the mortgage.
Q. Do you know whether you said the lot should be completely sodded?
A. We used the same language.
page 285 } Q. You sodded the whole thing?
A. But they paid extra in every instance.

Mr. Madden: I have no further questions.
The Court: Any further questions?
Mr. Bean: No, sir.
The Court: Do you offer the contract in evidence?
Mr. Bean: I should like to under the circumstances.
The Witness: Leave this here?
Mr. Madden: No objection.
Mr. Bean: May I offer the photostat and let us keep the original? I think it would be better for his file.
Mr. Madden: I apologize to the Court, but I have omitted one area I would like to ask about.

CROSS EXAMINATION—Resumed.

By Mr. Madden:
Q. Mr. Pomponio, do you have any other correspondence between you and Colonel Barger regarding his obligation with reference to the lake, other than those few letters you have in evidence?
A. Only those letters.
Q. That is all the correspondence from one and to the other?
A. Yes.

Mr. Bean: That is all we have been able to find. You may step down. I don't want the plans in. I think
page 286 } there has been sufficient testimony with respect to them.

The Witness: This wasn't the original one.

Mr. Bean: Is there any dispute that those plans were drawn by Mr. Pitt for Lot 683? I am just wondering if Mr. Francis can advise you that these are the plans.

Mr. Francis: This was the original.

Mr. Madden: I don't think there was any dispute that there was some revision work done on the plans.

Mr. Bean: I would like the evidence to show that the plans were drawn for Mr. Francis by Mr. Pitt.

Mr. Kinney: For which he paid $250.00.

Mr. Madden: Can there be a stipulation that they are plans which reflect revision in the original Trendsetter plans that were prepared.

Mr. Bean: That is correct; that the revision was testified to by Mr. Pomponio.

Call Mr. Groves.

Thereupon,

ELMER P. GROVES,

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

DIRECT EXAMINATION.

By Mr. Bean:

Q. State your full name and address?

page 287 } A. Elmer P. Groves, Fairfax, Virginia.

Q. Your age, sir?

A. 72.

Q. In what business are you, sir?

A. Real Estate Broker.

Q. For what length of time have you been a real estate broker?

A. 20 years.

Q. Licensed to be such a broker in Virginia?

A. Yes, sir.

Q. Is there any phase of the real estate brokerage business with which you are particularly concerned?

A. Ground, land.

Q. Land?

A. Yes, sir.

Q. As opposed, as land to improvements?

*Elmer P. Groves.*

A. All lands.

Q. How many appraisals have you made, sir, in your twenty years in the brokerage business of land and/or improved or unimproved?

A. I couldn't calculate that. I would say a couple dozen a year. I couldn't make a statement to that effect.

Q. Included among those appraisals, have there been any of those dealing strictly with lots?

page 288 } A. Oh, yes.

Q. With the improvements on them?

A. Yes, sir.

Q. With reference to without improvements, you have done those?

A. Yes, sir.

Q. Are you familiar with the Lake Barcroft area?

A. Yes, sir.

Q. Have you seen the property known as 558 Waterway Drive?

A. Yes, sir.

Q. And when did you visit that property for the first time?

A. Day before yesterday.

Q. Day before yesterday?

A. Yes, sir.

Q. Did you observe it as property that was improved?

A. Yes, sir.

Q. Did you make an appraisal of the property as it stood at that time without improvements, or with the improvements?

A. Without the improvements.

Q. You valued the land itself?

A. Yes, sir.

page 289 } Q. What valuation, sir, did you place upon the land itself?

A. $5,000.00.

Q. Were you advised to place an appraisal upon the property if a lake had been dredged out or dug out, and the waterway, the lake, in other words were brought up to the water line of that lot?

A. I wasn't advised. I said that there was a valuation of $6,000.00 if there was water there.

Q. That would be your valuation if water were behind the lot?

A. I don't think it was very deep water, and that is why I put $1,000.00 more on it.

Q. Explain why you placed only $1,000.00 on it.

A. It was shallow.

Q. If it were dredged 20 feet out from the shore, water to be six feet deep, would your valuation be different?

A. I think it would be different.

Q. Would you be able to state how much more it would be if it were dredged out six feet deep from the land?

A. $2,500.00 more.

Mr. Bean: No further questions.

CROSS EXAMINATION.

By Mr. Madden:

page 290 } Q. How many appraisals have you done this year so far, sir?

A. About 12 or 14.

Q. Up to the present time?

A. Yes, sir.

Q. What previous appraisals have you done in the Lake Barcroft area?

A. I have never appraised any in the Lake Barcroft area. I have had lots for sale over there, but never appraised any.

Q. How many water front lots have you sold over there?

A. I haven't sold any.

Q. How near the water have you sold a lot?

A. Sleepy Hollow.

Q. That isn't in Lake Barcroft, so you have never sold a lot in the Lake Barcroft area, and you have never appraised any?

A. No, sir.

Mr. Madden: No further questions.

RE-DIRECT EXAMINATION.

By Mr. Bean:

Q. You have just stated you never appraised a lot in Lake Barcroft. That is prior to this one?

Mr. Madden: I am sorry. Except for this one,

page 291 } that is the first.

Mr. Bean: No further questions. Thank you, sir.

Thereupon,

ANTHONY DENNIS,

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

DIRECT EXAMINATION.

By Mr. Bean:

Q. State your full name and address, sir.

A. Anthony Dennis, 1314 Stoneybrae Drive, Falls Church, Virginia.

Q. Mr. Dennis, with what organizations are you connected?

A. First, Pomponio Realty, Inc.

Q. What was your connection with Pomponio Realty, Inc. in May, 1955?

A. At that time, I was President and Sales Manager.

Q. At that time, do you recall a purchase by Mr. Arthur Pomponio of certain lots from Lake Barcroft Estates, or from one with whom Colonel Barger had some connection?

A. I do.

Q. Do you recall at the time whether any conference was had? I am asking you of your own personal

page 292 } knowledge if you attended any conference at which a Colonel Barger and salesmen of the Pomponio organization were present?

A. Yes.

Q. You attended those personally?

A. Yes.

Q. Or that one personally?

A. Yes.

Q. Do you recall how many there were?

A. I, myself, scheduled a meeting with Colonel Barger at one of our regular sales meetings, where he was to be our guest speaker.

Q. Did he attend?

A. Yes, he did.

Q. What did he say, if anything, to the salesmen at that time, in your presence?

A. He was asked by me.

Mr. Madden: Your Honor, there has been considerable testimony in all this, but I don't think it was relevant. Mr. Francis wasn't there, and I don't see the relevancy of what Colonel Barger told the salesmen out of Mr. Francis' presence, without any reference to Mr. Francis or his contract, or, I am quite sure, to this lawsuit.

Mr. Bean: Your Honor, Mr. Vance testified to this. Mr.

Pomponio has testified, and I think it comes a little late, when the objection comes at this time. I think it is
page 293 } relevant.

The Court: Let us tie it up to relate to some information that was generated in that way, to tie it to this case or the time. Of course, it won't be considered. Go ahead.

By Mr. Bean:

Q. Was Mr. Lincoln Vance present during this conference?

A. To the best of my knowledge, he was.

Q. Did Colonel Barger, at that time, indicate to the salesmen involved—tell me what he indicated to them at the time with respect to ownership of the lake and its development?

A. Well, that meeting, as I recall, was primarily one of a guest, invited to a sales meeting, to address the salesmen on methods of salesmanship, and how to create more sales.

Q. Then was there another meeting after that time to which Colonel Barger was invited, of which you were aware, in which any discussion of the lake and its development was explained to the salesmen of Pomponio Realty?

A. Yes, there was.

Q. Was Mr. Vance at that meeting?

A. To the best of my knowledge, he attended that, too. That incidentally took place out at the lake.

page 294 } Q. Do you recall what, if anything, was stated as to ownership and development of the lake itself, with respect to the 70 some lots that were purchased by Pomponio, by Colonel Barger?

A. Colonel Barger at that time told us what he was doing and proposed to do out at Lake Barcroft by way of giving an additional adducement to people by being attracted to Lake Barcroft. As I recall, he went to one of the beaches and he showed us what had been done, where the sand had been brought in and a beach had been developed for swimming and other recreational purposes.

Q. Did he make it clear, or did he state anything about the ownership of the lake, who was doing the developing?

A. I believe there are several corporations involved, and whether or not he specified which corporation had certain responsibility, I am not certain.

Q. Were any of the Pomponio Corporations involved in the development of the lake?

A. No, not at any time.

Q. Did there come a time when Mr. Lincoln Vance, who was

then of your organization, you testified, brought to you a Mr. Francis, the gentleman here to my right? Have you ever seen him before today?

A. Oh, yes, many times.

page 295 } Q. Can you recall the nature of your conversations with him, insofar as the development of Lake Barcroft as a lake was concerned?

A. I don't believe I ever had any conversation with Mr. Francis with respect to the actual development of the lake, or beaches, or anything of the sort.

Q. You did not?

A. No.

Q. But were you in the presence of others there when anything with respect to the development of Lake Barcroft and the area next to his lot, with particularity, were discussed? Were you present at any of those conversations?

A. At this one meeting I referred to with Colonel Barger, we did go down to Waterway Drive, and—

Mr. Madden: Your Honor, this isn't responsive.

Mr. Bean: No, this isn't responsive. I am talking about any meeting at which Mr. Francis was present in your office, at which the development of Lake Barcroft was discussed, insofar as the lot was concerned. I will ask this specifically, whether you were in Mr. Pomponio's office at the time this matter was discussed.

The Witness: We had very little to do with the particular transaction to which you had reference, because this transaction amounted to a request by Mr. Francis for

page 296 } a custom built house, and that was beyond the scope of my activity with the organization.

Q. Who would be in charge when a request for the custom built house was made?

A. The senior man in the organization, Mr. Arthur Pomponio.

Q. I show you a copy of a letter dated May 20, 1956, from you to Colonel Barger, and ask you whether or not you recall writing that letter.

A. Yes.

Q. Do you remember the reason for your writing that letter?

A. Yes, this was sent, as I recall, to Colonel Barger at the request of Mr. Pomponio, because it apparently referred to the house to be built, in which a decision was to be made by

Colonel Barger, and certainly not a decision to be made by me.

Q. Do you recall whether you ever received a reply from that letter from Colonel Barger?

A. No, I don't believe I received a reply, because, as I recall, Mr. Vance had made this notation on the other side of the letter, or the carbon of the letter, which I sent to Colonel Barger.

Q. Did you then or were you aware of the time—this is back in May, 1955—that Mr. Vance had written this
page 297 } memorandum on the back of this letter? Did you read it at that time?

A. I expect I did, but I would in turn give it to Mr. Pomponio, who was handling this transaction certainly more than I was.

Q. As sales manager of the organization at that time, did you have occasion to review the contract between Mr. Francis, the sales contract between Mr. Francis and Mr. Rocco Pomponio of the Barcroft Woods, Inc.? Would it have come over your desk?

A. Yes, it would, insofar as my records would have to indicate that a certain piece of property would have to be sold; that we would not have to enter into another contract on a certain lot.

Q. I refer to sheets 1 and 2, which are the person's paper contracts, the reverse side thereof, and ask you whether or not the language which is contained in those contracts, which indicates that a sand beach will be installed when the lake has been lowered by Barcroft Lake Shores, Inc. and also indicates that Barcroft Lake Shores, Inc. will clean out the lake, whether that language is familiar to you. Do you recall it as of that May of 1955, as respects that was negotiated in the contract? Do you recall those going in there and the reasons for them?

A. I recall this vaguely, I would say, the very
page 298 } fact that it is in the contract.

Mr. Madden: Your Honor—

Mr. Bean: No comment on it?

Mr. Madden: Unless you recall it well enough, I don't think he can testify so far in this matter.

By Mr. Bean:

Q. I will only say, sir, to your knowledge did Mr. Arthur Pomponio agree to sign that contract prior to this language that I have referred to, going into the contract?

A. No, I don't believe so.

Q. You were, as I say, sales manager of the organization at that time. I believe you testified to that, and with respect to the lots that were sold in that connection, did you have any problem such as this with respect to having to write Colonel Barger with respect to cleaning out the lake, with respect to any other house that you have?

Mr. Madden: I don't think that is relevant to this lawsuit.

Mr. Bean: I think it is. The customs that might be established in the office are important. I think you asked questions of another witness whether this was the type of thing that you did or not.

Mr. Madden: This was on cross examination. You are asking this on direct, when it isn't material to the

page 299 } issues which would not be a test on cross examination.

Mr. Bean: I think the test on cross examination is you are able to direct questions—

The Court: They are both out in cross examination. Objection overruled.

By Mr. Bean:

Q. You recall any other lots in which Colonel Barger was checked, let us say?

A. No, I do not.

Q. Did Pomponio Realty, Inc. have anything to do—to you as sales manager, did you know whether it had anything to do with raising and lowering the lake, or cleaning out Lake Barcroft?

A. We had nothing at all to do with that.

Q. With whom, if you know, would you have had to clear any raising or lowering of the lake, if that was any part of any contract? With whom would you have to clear it?

A. Colonel Barger.

Q. Was Colonel Barger a part of your organization?

A. Not at any time.

Q. Did he have any interest at that time with any of the Pomponio corporations?

A. No interest at all.

Q. With either Pomponio Realty, Inc. or Bar-

page 300 } croft Woods, Inc. or M. Pomponio and Sons, Inc.?

A. No interest whatsoever.

Q. Did he have any interest in this contract? Did you pay any money to him, or give him any financial assistance?

*Anthony Dennis.*

A. None, other than there was one of the lots purchased by one of the Pomponio corporations.

Mr. Bean: No further questions.

CROSS EXAMINATION.

By Mr. Madden:

Q. When did Lincoln Vance bring Mr. Francis in to you?

A. I don't believe Mr. Vance brought Mr. Francis in to me, personally. I recall seeing Mr. Francis and the late Mrs. Francis in the office on a number of occasions, and they were introduced to me at one time or another, but the transaction which took place, was pretty much directly between Mr. Pomponio and Mr. and Mrs. Francis.

Q. Which Mr. Pomponio?

A. Mr. Arthur Pomponio.

Mr. Madden: I have no further questions.

Mr. Bean: You may step down.

(Witness excused)

Mr. Bean: Mr. Whetzel and Mr. Ray Favali, frankly their testimony would relate to Mr. Whetzel's going
page 301 } through and inspecting it with Mr. Francis before the signature was placed on the document of October 29th, and no testimony would relate to the list of work to be done.

Mr. Madden: On the document of October 29th, surely that document would transcend any oral testimony as to what happened before it was signed.

Mr. Bean: It would not explain the fact that Mr. Francis did stipulate they did go through the house prior to their signing.

Mr. Francis: Certainly, we did.

Mr. Bean: It would not explain that the repairs are overvalued; that the $250.00 to be charged for painting the beams and other things, are more expensive than normal.

Mr. Madden: Did he make an inspection within a reasonable time?

Mr. Bean: Yes, yesterday morning. If your Honor please, they are on their way and will be here in fifteen minutes. I can only say they took too long with respect to the cross examination. Mr. Madden will submit the case without argument?

Mr. Madden: I think I better.

Mr. Bean: With the understanding that we will have to argue the case?

Mr. Madden: Don't make me tie the two things in together.

page 302 } The Court: We will take a fifteen minute recess. These are all the witnesses you have?

Mr. Bean: That is correct.

The Court: Do you have any rebuttal?

Mr. Madden: I have to check with Mr. Kinney. The only conflict I would have would involve Mr. Lincoln Vance.

Thereupon

RICHARD WHETZEL,

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

DIRECT EXAMINATION.

By Mr. Bean:

Q. Have you ever testified before?

A. No.

Q. I will tell you that I am the attorney for Mr. Pomponio and the defendants in this case, and I am going to ask you some questions, and Mr. Madden or Mr. Kinney has the right to ask you some questions.

Will you state your full name and address?

A. Richard Whetzel, Fairfax Station, Virginia.

Q. By whom are you employed?

A. M. Pomponio and Sons.

Q. How long a time have you been employed by them?

A. 11½ years.

page 303 } Q. What, during that time, has been your capacity with the organization?

A. Carpenter *Forman* and Superintendent.

Q. Carpenter *forman* and superintendent? Have you had anything to do at any time in supervising any of the painting work done in any of the various and *sundary* houses?

A. Yes.

Q. Did there come a time when you superintended the house at 558 Waterway Drive of Mr. Francis?

A. This gentleman? I don't exactly remember the number.

*Richard Whetzel.*

Q. In connection with that house, do you recall that there was a pebble guard or a flashing around the roof's edge?
A. Yes.
Q. Gravel guard, I believe they call it. Was that, as you recall it, painted when the house was under construction?
A. Yes.

Mr. Madden: I am sorry. I didn't hear you.
The Witness: Yes.

By Mr. Bean:
Q. It has been testified here that there was 350 feet of that flashing or guard. Would it be your estimate
page 304 } that that is correct?
A. Let us say it is around that.
Q. What would your estimate be as to the cost of painting that with outside paint?
A. I don't have anything to do with cost.
Q. You don't have anything to do with cost? Could I have the memorandum of October 29th, the certificate of occupancy?

Mr. Madden: Which one?
Mr. Bean: This is the one with respect to occupancy.
Mr. Madden: Is this it?

By Mr. Bean:
Q. I show you a paper which has been identified as Plaintiff's Exhibit No. 14 and which reads: "This letter is to certify that we have occupied the property known as Lot 683, Lake Barcroft, Waterway Drive, on the 29th day of October, 1955, according to the terms of our purchase agreement, signed by Mr. Robert J. Francis."
Mr. Francis has admitted signing this statement. I would ask you whether or not you recall the instance in which this was signed?
A. No.
Q. You don't?
A. No, sir.

Mr. Bean: No questions.
page 305 } Mr. Madden: No questions.

(Witness excused)

Thereupon

RAY FAVALI,

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

DIRECT EXAMINATION.

By Mr. Bean:

Q. Mr. Favali, have you ever testified in a case before?

A. No, sir.

Q. I am the attorney representing Mr. Pomponio, the defendant, and these gentlemen are representing Mr. Francis.

Will you state your name and address?

A. Ray Favali, 7709 Old Chester Road, Bethesda, Maryland.

Q. By whom are you employed?

A. M. Pomponio and Sons.

Q. For what length of time have you been employed by them?

A. The 11th year now.

Q. As such, have you had occasion to do any estimating for them?

page 306 } A. Occasionally, yes.

Q. Have you ever estimated any painting jobs for them?

A. Oh, yes, occasionally.

Q. Are you familiar with the home at 558 Waterway Drive, owned by Mr. Francis?

A. Yes, I am.

Q. Have you ever seen the home?

A. Yes, sir.

Q. Have you ever been through it?

A. Yes.

Q. What was the most recent time you went through it?

A. Yesterday morning.

Q. With respect to the paint on the so-called flashing or guard that runs around—

A. Gravel.

Q. —gravel guard, I will ask you if there are approximately 350 feet of that guard on that house.

A. Roughly, I would say, yes.

Q. Would you be able to make an estimate of the labor and paint? In other words, I want the paint cost and the labor cost of doing that job, not including the property.

A. Well, I would say it wouldn't take a man a day to go around it. You almost have to figure a man for a

page 307 } day, $30.00 or $35.00, paint and material, labor and material.

*Ray Favali.*

Q. What would be an additional fair mark-up for property?

A. Ten percent or fifteen.

Q. With respect to the beams that are in the home, it has been testified to that there are 31 of those beams that have been painted, and Mr. Francis wishes to have them repainted. Would you be able to estimate the cost of repainting those beams, labor and materials, if you have them, with respect to the flashing?

A. It would take a little longer. I would say two days at the most.

Q. Then what would your labor cost be for two days?

A. Two days for a man runs $16.00 or $18.00 a day, and the material there would be much more, less than on the outside. It is cheaper material.

Q. In other words, your interior paint is not as expensive as the exterior?

A. That is stain. The exterior paint runs more per gallon.

Q. Can you stain over the stain that is there with only one coat?

A. Depends on the color selected. You can on
page 308 } most colors. On some colors, you can't, depending
on the color they want.

Q. You would estimate two days for labor, $36.00. Your paint would cost how much?

A. $5.00 per gallon.

Q. Then, in addition, you would charge ten per cent or fifteen percent mark-up over that?

Q. With respect to the panelling in the basement of this home, did you notice whether or not it was completely panelled?

A. It is all completely panelled, all except the furnace room and storage room.

Q. Are they panelled in any of the homes?

A. In any of the homes I have had, it is the first one.

Q. Have you ever seen a home where they were panelled?

A. Not in the furnace room or storage room.

Q. With respect to the sodding at the house, do you recall how far back the sodding goes at this home?

A. I would say ten or twelve feet at this home, if I remember.

Q. Would that be beyond the front or land line of the house?

page 309 } A. Line of the house is what we do.

Q. Does any customer of Pomponio, you have dealt with, have to pay extra for that?

*Ray Favali.*

A. Pay an extra sod man by the day.

CROSS EXAMINATION.

By Mr. Madden:

Q. On that sodding, when you do make an arrangement for them to pay for extra sodding, do they say something in the contract similar to: "Lot to be completely finished, including sodding"?

A. Well, it is finished, including sodding so far as we are concerned. That is the way I have been doing it all the time.

Q. Where does the shrubbery go when you have it?

A. The shrubbery goes around the perimeter of the house. We leave it up to the landscape man. It is his job.

Q. I take it you didn't actually measure this flashing when you were out there?

A. No, sir.

Q. And you didn't actually count the beams?

A. No, I know roughly the dimensions of the house, and that sounds about right.

Q. And that sounds about right? Is that what you are basing it on?

page 310 } A. I imagine it was less, if anything.

Q. Did you put anything in your estimate in painting the flashing for scraping off the paint that is on there now?

A. If you want to scrape it off, but we would never scrape it off when you want to repaint it. I doubt if you would either. What would be the point?

Q. The point is, if paint is chipped or peeling, some people might want it scraped down so it would stick there.

A. As I remember, that was not chipped or peeling.

Q. If it were, that would change the entire scope of that job, because that would be more trouble than the painting itself?

A. I guess it would.

Q. How near did you get to it?

A. I am six feet tall and that is twelve feet.

Q. And looking straight up, it wasn't chipped or peeling from where you saw it?

A. No, sir.

Q. I take it your estimate was just for one coat, wasn't it?

A. One coat, if you want it on the first one. You go around the house. You figure a man. The gravel stop, that is what you are figuring? You can go around that three

page 311 } times in a day easily enough.

Q. This would include scraping?

A. There wouldn't be any scraping. You would do it on the rough

Mr. Bean: That is our case.

Mr. Madden: Your Honor, I would like to put Mr. Francis back for two questions, and after Mr. Bean has cross examined him, submit the case. Mr. Francis, would you take the stand?

Thereupon

ROBERT J. FRANCIS,

plaintiff, was recalled as a witness, and testified further as follows:

DIRECT EXAMINATION.

By Mr. Madden:

Q. Mr. Francis, you have heard the testimony that came on following your testimony in the main case here. I wanted to ask you two final questions. First, did you have any contract with any person in the Pomponio corporations, other than Lincoln Vance, before you signed the contract on May 18th?

A. To the best of my knowledge and belief, I had no contacts with anyone, except Mr. Vance.

Q. The second question is this. Did Mr. Vance or Mr. Arthur Pomponio, or anyone else in the Pomponio page 312 } company ever tell you that they had no liabilities or responsibilities regarding the work necessary to make yours a fine lake front lot?

A. No.

Mr. Madden: Thank you.

CROSS EXAMINATION.

By Mr. Bean:

Q. I will have to call you after this cross examination as my witness. I would like to call him for my own witness for one question, which has not been raised, but has been mentioned.

With respect to the statement that you just testified to, Mr. Francis, that you had no contacts with anyone but Mr. Vance, you have testified to that fact. Mr. Pomponio, you heard make the statement that he, himself, in his office, arranged the appointment for you to go and see Mr. Barger. Do you deny that?

*Robert J. Francis.*

A. My recollection of the situation is that Mr. Vance told me that Mr. Pomponio wanted me to see Mr. Barger. I have no recollection of that appointment being made in Mr. Pomponio's office.

Q. If Mr. Pomponio made that statement, he is wrong, in your opinion?

A. That is correct. I believe that is the truth.

Q. Then you are not absolutely positive that
page 313 } that is the truth, but it is your belief?

A. That is correct.

Q. With respect to further testimony of Mr. Pomponio that you and Mr. Vance came back to his office after having seen Mr. Barger, and you stated to Mr. Pomponio that you were satisfied with what Mr. Barger was going to do about the lake, and therefore, it was all right to go ahead and sign the contract and put in these additional improvements, that was Mr. Pomponio. Do you recall any phase of that?

A. I believe we came back to the office. I am not sure whether it was then or another time, after seeing Colonel Barger. Up to March 18th, or rather May 18th, I had been dealing with Mr. Vance entirely, and I had then signed a contract on May 18th to purchase the property and was going to have a lake front lot. Mr. Vance told me, to reiterate this thing, that he wanted me, that Mr. Pomponio wanted me to see Colonel Barger. I said, "What is it all about?" "Well, Colonel Barger will tell you what is going to be done about the lake, and how they are going to work it, so you will be satisfied," so I went over and saw Colonel Barger and I came away satisfied.

Wait a minute! What Mr. Barger said on the witness stand is not what he told me in his office, what he was going to do.

page 314 } Q. Did you tell Mr. Pomponio that you were satisfied from what Mr. Barger told you?

A. I was led to believe that Colonel Barger was just another person who was doing things at Lake Barcroft. He later sent me to the seller. I later found out he was responsible for what the seller did and responsible for cleaning out the lake.

Q. Did you see a Mr. Pomponio out at the lake?

A. Mr. Pomponio was then building thirty or forty houses at Lake Barcroft. It was a very large operation that was going on.

Q. But the office you went to was not his but Mr. Barger's, wasn't it?

A. That is correct.

*Robert J. Francis.*

Q. Did you notice any names on the door when you went in?

A. It said something, Barcroft Lake Shores, or something of that kind. I don't recall what sign was on the building. It looked like a little shack, a little, tiny house.

Q. Mr. Vance testified that you stated that you were advised that Mr. Barger had no connection with any of the Pomponio organizations. That was his testimony as I recall it.

page 315 } A. I don't believe he said it. My recollection of his testimony is he said that Colonel Barger was a developer, or the developer. In any case, he never made any statement to me that the Pomponio organization was not responsible or liable for this activity.

Q. I didn't ask you that, sir. I asked you whether or not Mr. Barger was at any time represented to you as a member of the Pomponio organization.

A. No, he wasn't represented as a member of the Pomponio organization.

Q. Do you recall then having a conversation with Mr. Pomponio about this Colonel Barger problem at any time? You said to me, I believe that you did not recall the first statement, but you did recall coming back and talking to him later.

A. I am not certain, but I think I came back and, no, Mr. Vance and I came back and I was satisfied. It seemed like everything was O.K.

Q. You told Mr. Barger that?

A. I don't know whether I told Mr. Barger. I came back to the office and thought everything was satisfactory. I thought. The contract was signed. I found out later it was signed.

Q. Didn't you initial two points put in the contract in respect to Barcroft Lake Shores, Inc. after you signed it?

page 316 } A. I am not sure what points were put in the contract after I signed it.

Q. Wouldn't it have been peculiar to have signed at one time and then initialled all these changes?

A. There were a number of points. I guess what happened was when Mr. Vance took the contract from me to the Pomponio office, they weren't overly satisfied with what I had written in the contract. They wanted to make some changes in it, and I initialled those changes.

Q. Didn't those changes include the Barcroft Lake Shores, Inc. cleaning out the lake?

A. I believe that was added, yes.

Q. You stated that Mr. Pomponio has testified that he indicated to you that the Pomponio organization had no liability

or responsibility in connection with this lake. Do you deny that he made that statement to you?

A. Yes, I do.

Q. The question which I wish to ask the witness, which has been averted to, is this. It was referred to by Mr. Pomponio, that Mr. Francis is an attorney. Is that correct?

A. Yes, I am an attorney and a member of the Bar of the District of Columbia.

Q. When did you pass the bar?

A. 1938 or 1939, I don't recall.

page 317 } Q. Have you practiced?

A. Never have practiced.

Q. In your legal training in order to become an attorney, did you ever take a course in corporations?

A. I studied corporate law, yes, but I don't know how much of a course I had. It was at the National University Law School. I don't think it was anything, other than a smattering of corporate law.

Q. Was your testimony yesterday with respect to your knowledge of corporations, all that you were able to retain of corporate practices?

A. I don't know what you are getting at.

Q. Yesterday, you didn't understand how a corporation is set up. You understood it was—

A. I know what you are getting at.

Mr. Madden: I think the question is argumentative. He has told you he is a lawyer.

Mr. Bean: I am satisfied. It came as a surprise to me when Mr. Pomponio stated it. I had not realized it.

The Court: All right. Does this conclude the testimony now in the case?

Mr. Madden: Yes.

The Court: You suggested yesterday that you wanted the Court to view the property. What is your reason for that?

Mr. Kinney: It is only if the Court feels that

page 318 } it is necessary to do so. We have no urgent desire for the Court to do it.

The Court: There doesn't seem to be any area in the testimony that the Court would be aided by taking a view. The photographs and pictures and the testimony concerning the situation and the condition of the property, seem to be definite, and I don't know of anything that would require a view of it. You have agreed to submit the case?

Mr. Bean: Correct.

Mr. Kinney: That is right.
Mr. Madden: Correct.
The Court: The Court will take the matter under advisement at this time, and Court now stands adjourned.

(Whereupon, at 5:00 o'clock p.m., the hearing was conclued.)

9/15/58.

DAVID B. KINNEY
Of Counsel for Robert J. Francis.
L. LEE BEAN
Of Counsel for Barcroft Woods, Inc.

Tendered and signed this fifteenth day of September, 1958.

EMERY N. HOSMER, Judge

Filed 9/15/58.

E. N. H., Judge.

page 319 } Virginia:

In the Circuit Court of Arlington County.

Robert J. Francis, Plaintiff,

*v.*

Pomponio Realty Company, et al., Defendants.

AT LAW NO. 6037.

PROPOSED CORRECTIONS OF TRANSCRIPT (Suggested by Counsel for Defendants):

(1) Add to first full paragraph on page 9: , "until payment in full is made."
(2) Page 15, line 9: Change "find" to "sign."
(3) Page 43, line 4: Change "plaster" to flashing."
(4) Page 55, lines 3, 4: Strike "the fund companies" and place period after "mentioned."
(5) Page 90, line 2: Change "sub" to "owner."
(6) Page 146, line 14: Change "$280.00" to "$385.00."

(7) Page 150, line 1: Strike word "tax" and comma thereafter.
(8) Page 158, line 23: Change $1260.00" to $12,600.00."
(9) Page 161, line 18: Change "six" to "sixty."
(10) Page 191, line 23: Change "stant" to "stand."
(11) Page 221, line 6: Change "here" to "complete."
(12) Page 224, line 9: Change "in" to "M."
(13) Page 238, line 8: Change "little" to "different."
(14) Page 262, line 9: Insert "no" before word "legal."
(15) Page 266, line 21: Change "descrived" to "described."

Respectfully submitted,

BEAN AND SIZEMORE
By: L. LEE BEAN
Counsel for Defendant
Barcroft Woods, Inc.

cc: David B. Kinney, Esq.
Murdaugh S. Madden, Esq.

9/15/58.

The corrections indicated above have been made in the record by agreement of Counsel.

E. N. H., Judge.

* * * * *

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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