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Supreme Court of Appeals
Richmond, Va.

Record No. 7403

In the
Supreme Court of Appeals of Virginia
at Richmond

CEMETERY CONSULTANTS, INC.

v.

G. H. WARE

FROM THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

RULE 5:12—BRIEFS

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

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

HOWARD G. TURNER, Clerk.

IN THE

NOTICE TO COUNSEL

This case probably will be called at the session of court to be held MAR 1971
You will be advised later more definitely as to the date.
Print names of counsel on front cover of briefs.
Howard G. Turner, Clerk

Record No. 7403

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 19th day of January, 1970.

CEMETERY CONSULTANTS, INC., Appellant,

against

G. H. WARE, Appellee.

From the Circuit Court of the City of Virginia Beach
Paul W. Ackiss, Judge

Upon the petition of Cemetery Consultants, Inc., an appeal is awarded it from a decree entered by the Circuit Court of the City of Virginia Beach on the 24th day of July, 1969, in a certain chancery cause then therein depending, wherein the said petitioner was plaintiff and G. H. Ware, also known as Gordon H. Ware, was defendant; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said court below in the penalty of $300, with condition as the law directs.

RECORD

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DECLARATORY DECREE

This day came the parties on the Petition for Declaratory Judgment heretofore filed, the defendant's Answer, the evidence heard *ore tenus* on January 16 and 20, 1969, on the exhibits filed, and on the arguments of counsel.

It appearing to the Court that in the contract of March 10, 1964, the term "undisclosed liabilities" when read as a part of the entire contract, did cover federal and state income taxes, the Court doth ORDER and ADJUDGE that Clause 3(b) of the Contract of March 10, 1964, covered federal and state income taxes for periods of years prior to the sale; and, further,

The Court doth continue this matter on the docket for such further relief to which either party may be entitled; to all of which action of the Court the defendant by counsel duly excepts.

Enter. 1/29/69

P.W.A.

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FINAL DECREE

This cause came on this 3rd day of July, 1969 to heard on the Complaint and Exhibits attached thereto; on the Respondent's Answer; on the discovery deposition of Gordon H. Ware dated September 30, 1968; on the Petition for Further Relief Pursuant to §8-581 of the Virginia Code; on the evidence heard *ore tenus* and Exhibits introduced on January 16 and 20, 1969; on the Declaratory Decree entered January 29, 1969; on the evidence heard *ore tenus* and the Exhibits introduced on March 20 and 21, 1969; on the Affidavit of Attorneys Fees filed July 2, 1969; and on the arguments of counsel; and,

page 143 } NOW THEREFORE, it is ADJUDGED, ORDERED and DECREED that judgment be and the same is hereby entered for the Defendant herein, with costs.

To which action of the Court Complainant objects and excepts.

There being nothing further to be done in this cause, the same is ended, and the Clerk is ORDERED to place the papers in this cause among the ended Chancery Files of the Court.

The Complainant having indicated its intention to appeal, no appeal bond shall be required.

Enter: 7/24/69

P.W.A.

Seen:
Richard B. Spindle, III p. d.

Seen and Excepted to:
Robert R. MacMillan p. q.

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NOTICE OF APPEAL

Notice is hereby given that Cemetery Consultants, Inc. appeals from a final Decree rendered by this Court on the 24th day of July, 1969, and announces its intention of applying for a Writ of Error and *Supersedeas* to the Supreme Court of Appeals of Virginia.

ASSIGNMENTS OF ERROR

1. The decision of the Chancellor is contrary to the law and the evidence in this case.

2. The Chancellor erred in permitting the Defendant to introduce parol evidence to explain and vary the terms and meaning of the express provisions of the sales agreement dated March 10, 1964.

3. The Chancellor erred in permitting Defendant to introduce evidence attempting to show that the settlement effected

by Complainant with the Federal Government of the Federal income tax liabilities of Rosewood Memorial Park, Inc. for the fiscal years ended July 31, 1959 through 1962, was unfavorable to the Defendant where Defendant admitted he was called upon to conduct such settlement negotia-
page 147 } tions and refused.

4. The Chancellor erred in permitting Defendant to introduce evidence of alleged Federal income tax benefits which the Complainant supposedly received after it purchased Defendant's stock on March 10, 1964, in order to mitigate the damages incurred by Complainant as a result of Defendant's breach of the sales contract dated March 10, 1964.

5. The Chancellor erred in relieving Defendant of his clear contractual liability for undisclosed Federal income tax deficiencies of Rosewood Memorial Park, Inc. because Complainant will supposedly receive income tax benefits by assuming such Federal income tax deficiencies.

6. The Chancellor erred in failing to hold the Defendant liable under the contract of sale dated March 10, 1964, with Complainant, to pay the Federal income tax liabilities of Rosewood Memorial Park, Inc. for the fiscal years ended July 31, 1959, through 1962, and which income tax liabilities were not reflected in any way on its certified balance sheet dated December 31, 1963, expressly made the basis of said contract of sale.

7. The Chancellor erred in failing to hold the Defendant liable under the contract of sale dated March 10, 1964, with Complainant for all costs, expenses, including reasonable attorneys' and accountants' fees, and other damages which Defendant caused the Complainant to incur in litigation and settlement of litigation with the Federal Government as to income tax liabilities of Rosewood Memorial Park, Inc. for the fiscal years ended July 31, 1959, through 1962.

8. The Chancellor erred in allowing the Defendant to advance at trial defenses never pleaded in his Answer and defenses not asserted at the taking of Defendant's discovery deposition.

page 148 } 9. The Chancellor erred in applying the doctrine of mitigation where no proof or computation of mitigation was offered and where Defendant had assumed the primary duty to pay all undisclosed liabilities not shown on the balance sheet attached to the contract of sale of March 10, 1964.

Cemetery Consultants, Inc.

Filed 9-19-69
P. Newman

By George H. Bowers, Jr.
Of Counsel for Complainant

Gordon H. Ware

* * * * *

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Deposition of the defendant before Mary B. Alfriend, a Notary Public for the State of Virginia at Large, at the law offices of Lam, Hudgins & Mann, 2469 Courthouse Drive, Virginia Beach, Virginia, September 30, 1968, at 2 p. m., taken by the complainant in the above-entitled pending cause.

APPEARANCES:

Messrs. Breeden, Howard & MacMillan (by Mr. Robert R. MacMillan and Mr. George H. Bowers, Jr.), Attorneys for the complainant.

Messrs. Lam, Hudgins & Mann (by Mr. Henry L. Lam and Mr. J. Cameron Mann), Attorneys for the defendant.

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GORDON H. WARE, the defendant, having been first duly sworn, testified as follows:

By Mr. MacMillan:

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* * * * *

Q. Now, did anyone ever have any interest in Rosewood besides you?

Gordon H. Ware

A. Yes.
Q. Did you ever have any partners?
A. Mr. Raymond Bryant owned 50 percent of it.
Q. From what period to what period?
A. Oh, from the inception until I bought out his interest. I have forgotten how long ago it has been.

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Q. Was it immediately before you sold or had it been some time before you sold?
A. Oh, it had been, oh, at least a year or two. I don't remember the exact dates on that.
Q. What activity did he have in the business?
A. None; just an investor.
Q. So you ran the business really from its inception until you sold?
A. Right.
Q. And he was a silent partner?
A. Right.
Q. Or a partner. Had Rosewood ever had any federal tax deficiency served against it at any time prior to sale?
A. Yes.
Q. During what periods?
A. Well, it was during—let me see. From—I think it was between—let me see. I really have forgotten. I believe it was between roughly I would say '55 to '60.
Q. Somewhere during that period it had a deficiency?
A. Yes. '59. It was a five-year basis that the taxes were filed on.

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Q. Well, the dispute here involves '59 to '63. Does that help you?
A. Yes. Well, if it did, the last adjustment was in '58 or '59.
Q. Sometime during '58 or '59?
A. Yes, that is right. It would probably be—the cutoff period would be July. That is July 31 I believe was the fiscal year that they closed the books.
Q. And so for the previous years, five years before that—
A. Right.
Q. —they would have audited the account?
A. Right.
Q. And made any adjustment?
A. That is right.
Q. And that occurred?
A. Yes.
Q. Had it ever occurred prior to that?
A. Let me see. I believe it had. I believe they had adjusted—no, they hadn't. That was the first time.

Gordon H. Ware

Q. In other words, no previous adjustment, no tax deficiency?

A. No.

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Q. In other words, on the previous audit before that there was no tax due, is that correct?

A. To the best of my knowledge. I don't remember the exact—this has been ten years ago so I really don't remember exactly the situation on it, but to my knowledge this was the first time that the company—

Q. The first time?

A. They had been in before and audited but everything seemed to be all right, so—I remember one time they came in on one specific item; I have even forgotten what the specific item was now but they just checked that item and left.

Q. When the deficiency was determined, '58 or '59, whenever it was, for the previous five years, had there been waivers filed for those years?

A. What do you mean "waivers"?

Q. Where the Government takes a waiver to permit them to go in and audit your books for previous years so that the limitation won't run.

A. Oh, yes; yes.

Q. You had filed those waivers?

A. Yes. They had to be filed, to be able to file your taxes, the way you do.

Q. The way you do?

A. Yes.

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Q. And do you know whether a waiver was filed by you for the period '59 and '60? In other words, you were in the habit of filing waivers, were you not?

A. Well, the revenue service made you file them. There wasn't any question, you had to file them.

Q. If you wanted to continue on that basis?

A. If you wanted to continue on that basis you had to file a waiver.

Q. And you had filed one then for '59, '60, and that was the normal way each year that they would ask you to do it, you would file it?

A. That is right.

Q. And I assume when these deficiencies were assessed, you had to pay them?

A. That is right.

Q. And did pay them?

A. That is right.

Gordon H. Ware

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Q. Now, when did you conclude that you wanted to sell the cemetery? I don't mean when somebody finally offered you your price but I mean when you had it in your mind that you would sell it.

A. I would say six months to eight months prior to sale.

Q. Sometime in the summer, if it was sold in February or March?

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A. About the summer.

Q. The summer of '63 you had decided?

A. Right.

Q. What had led you to conclude to sell it?

A. Well, I don't know. I just decided that maybe it had gotten to the point where—you reach a saturation point in cemetery sales eventually, you know, or else the "honeymoon" is over, sort of. So I decided I would like to sell it.

Q. In other words, you felt that there were enough cemeteries being built that it would be more difficult to sell lots; is that what you mean?

A. That is right. Competition coming in makes it a little more difficult. That is one of the factors.

Q. Had you made Castle aware of your desire to sell? Was it generally known about people making bids to you to buy it? What happened?

A. No. I don't know how the subject came up but he asked me about it, if I wanted to sell it.

Q. What I mean is, you say you decided in the summer of '63. At that time did other people, not these people—

A. Oh, yes, I have had—

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Q. But other people—

A. I have had other people make offers.

Q. Not these, but other people did make offers?

A. Yes.

Q. Was it generally known that you were looking for a purchaser, or—

A. Well, among certain people it was. It wasn't generally known. I didn't run ads in the paper or anything. People in the trade knew I wanted to sell.

Gordon H. Ware

Q. How many people did you talk to between the summer and the time you began to discuss it with these purchasers?
A. Oh, I would say two different parties.
Q. Two different main parties?
A. Yes.
Q. Was Castle present at any time? I mean was he working for you—
A. No.
Q. —when those offers were made?
A. No.
Q. Was there any offer made or were you considering any other offer at the time you made the sale here involved?
A. No.

Dep. 9/30/68 page 20 } Q. Nobody else had made any other proposal to you, or pending?
A. No.

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Dep. 9/30/68 page 27 }

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By Mr. MacMillan:
Q. In any event, on that date you got together in Northern Virginia, in Fairfax?
A. Right.
Q. Where did you meet? Do you recall?
A. Met at some CPA's office, I believe it was.
Q. And do you recall who was present at that meeting?
A. Yes. All the principals were present, plus—
Q. I think it is important. Would that be—

Dep. 9/30/68 page 28 } Mr. Lam: What date did you say?
Mr. MacMillan: February 6th.
Mr. Lam: February 6th would have been a Thursday.

By Mr. MacMillan:
Q. Does that help you in any way?
A. (The witness shook his head negatively)
Q. O. K. Present were both Cobbs—

Gordon H. Ware

A. Right.
Q. —and Mr.—
A. —Williams.
Q. —Williams, and—
A. Winquist.
Q. Mr. Winquist. He was your accountant?
A. That is right.
Q. And Mr. Swart?
A. Yes.
Q. He was a CPA?
A. Right.
Q. He, of course, represented the—

Mr. Lam: Who?

By Mr. MacMillan:
Q. —the purchasers. Swart.

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9/30/68 (The names Vernon Winquist and Swart were
page 29 } spelled for the reporter at this time, Mr. Swart's first name being given by Mr. Cobb as Sterling.)

By Mr. MacMillan:
Q. And Mr. John Rust, the attorney?
A. Right.
Q. And Mr. Castle was present?
A. I don't remember Mr. Castle being there. He could have been.
Q. You don't have any recollection of his being present at that time?
A. No, I don't know, to tell you the truth, you know, like it is. He could have been there.
Q. Now, I forgot to ask you. How was Mr. Castle paid by you?
A. Commission basis.
Q. On the basis of sales. Did he draw any salary?
A. No.
Q. Did he have any expense account or anything like that?
A. Not from me.
Q. No expense account?
Dep. A. No.
9/30/68 Q. Now, in that negotiation could you tell us
page 30 } what happened on that night?

Gordon H. Ware

A. Well, we mainly were discussing the price and they had taken all liabilities off of the cemetery, brought it down to something like $202,000 and—

Q. When you say "they had," you mean Mr. Winquist had?

A. No, Mr. Cobb; the Cobbs and Mr. Williams had deducted to get, arrive at the final price; all liabilities were deducted.

Q. I see. How was the Higginbotham note handled?

A. I paid it myself, on discount.

Q. You ended up paying for it, didn't you?

A. Right.

Q. But wasn't it left in the purchase price for a year and—

A. That is right.

Q. —and if it wasn't collected—

A. That is right.

Q. —then you were to pay it?

A. Right.

Q. And, as I understand, you got the car; there was a Cadillac or some automobile?

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A. That is right, yes.

Q. Was anything else left out, to your recollection? I am not trying to trick you. I will get the document if you want to see it. I mean you know the contract and also Mr. Winquist—

A. Mr. Winquist had a bill, and also there was an attorney's bill.

Q. And they had to be handled?

A. Right.

(At this point there was an off-the-record discussion, after which the following occurred:)

By Mr. MacMillan:

Q. Take a look at that (handing document to witness) a minute. I know it is hard to keep those figures in mind. See if that helps you remember it.

A. I remember the meeting quite well.

Mr. Lam: What is that?

Mr. MacMillan: This is just a work sheet. You are welcome to look at it. It indicates what the gross value was and what the liabilities were and how they handled the Higginbotham note; and if you want to photostat that you are welcome to photostat it.

Gordon H. Ware

Mr. Lam: I would appreciate it. Whose writing is this? I know nothing about it.

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Mr. MacMillan: I think it is Mr. Winquist's. He was representing them at that meeting.

By Mr. MacMillan:

Q. In essence, the gross sales price was $280,000; less, rounding off, about $77,000 in liabilities, less the Higginbotham note, which brought the total liabilities to eighty-four thousand nine hundred some dollars, and leaving a balance due you of $195,000, and then the note was put back in on the ground that if it wasn't collected you would repay them with interest as the contract says?

A. That is right.

Q. Which brought the figure up to $200,076.05, and I think that is what is in the contract?

Q. Then they were to pay you $50,000 down?

A. Yes, that is right.

A. Right.

Q. And then as the contract says, they were to pay you over a period of years at a certain rate until they paid off the balance?

A. Yes, that is right.

Q. As I understand it, in that meeting, you all—Mr. Winquist had prepared a balance sheet for December 31, 1963?

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A. That is right.

Q. And it was on the basis of that balance sheet that the sale was being effected?

A. That is right.

Q. And this work sheet was taking the first figures shown on the December 31, 1963, balance sheet and showing what part of the liabilities were to be deducted from the purchase price and then how the Higginbotham note was to be treated?

A. That is correct.

Q. Now, at that time do you recall any discussion as to how undisclosed liabilities would be handled, the ones that were not shown on the balance sheet?

A. Right.

Q. Tell us what happened.

A. Well, we would—they were talking about undisclosed liabilities; mainly, the undisclosed liability would be bills that were not visible now. Any current bills that hadn't been paid I would take care of them, which I agreed to do.

Q. Do you recall any discussion with respect to taxes for prior years?

Gordon H. Ware

A. Right.

Q. Could you tell us what occurred with respect to that?

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A. Well, I believe Mrs. Cobb asked me if I—were there any back taxes due now, and I said no, not to my knowledge, that the taxes are filed on a five years' basis and that at the end of five years there would be an adjustment period.

Q. Do you recall whether or not there was any discussion from the accountants as to the audit period and whether or not—

A. They discussed the audit period on it.

Q. In other words, do you recall Mr. Swart asking you whether or not the corporation's accounts had been audited by internal revenue?

A. I don't remember exactly him asking that question. He could have and if he did I would have to say yes because they had.

Q. They had audited?

A. Yes.

Q. Didn't he ask you for what period had they not been audited?

A. If he did I told him the prior four years.

Q. You told—

A. Well, they had audited each year but the adjustment hadn't come on it until the end of five years.

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Q. That is what I am saying.

A. That is right.

Q. Let's put it this way. They were asking you whether or not it had been audited and approved, and you said yes, through a certain period but not since '59?

A. That would be logical, yes.

Q. Is that what you told them?

A. Yes.

Q. Well, do you recall any of the Cobbs asking you whether or not you had paid the taxes? Do you recall that?

A. Yes, they asked me.

Q. Is that the one you were just telling me—

A. They asked me if I had paid the last—

Q. —whether any taxes were due, in other words?

A. No; said, "Back taxes due?" And I said, "Not to my knowledge."

Q. Right. And did they also ask you whether or not there was liability for the period subsequent to the audit?

A. There was discussion on this, yes.

Gordon H. Ware

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Q. And tell us what happened. Tell us what your recollection is.

A. My recollection was at the time that they were discussing this, the fact that there would be a potential liability of the taxes, but they had made certain statements that would probably have wiped out the taxes had it gone through. Now, some of this conversation took place at the signing, too.

Q. You mean a month later?

A. Yes. Well, actually it took place quite a bit sooner than that because they operated the cemetery for about four or five weeks—

Q. What I was interested in—

A. —before the purchase price.

Q. Beg pardon?

A. They operated before they bought it about four or five weeks.

Q. I understand. We will get to that. We are still on February 6 now. I am trying to go step by step.

A. All right. O. K.

Q. In that conversation in which you said they discussed these years, do you recall one of the Cobbs saying that he would want a clause by which you would agree to be liable for any undisclosed taxes for the period?

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A. Not taxes, just undisclosed liabilities, because the taxes were—they assumed the taxes as far as I am concerned. And undisclosed liabilities, in other words, they were talking about—and we discussed it—bills that hadn't come in is the reason that clause was put in there; it was for bills that hadn't been paid. Once they took over, whether the groceryman or hardwareman or supply man sent a bill in, it would be my obligation to take care of it.

Q. For what period? Any period?

A. Twelve months. The agreement was twelve months I would take care of all of it, at the end of twelve months.

Q. Can you tell us what you mean by that? Just tell me so I will understand it.

A. Take care of any bills that came in after they bought, for a period of twelve months.

Q. If it was for a liability that occurred before the date of—

A. Anything they didn't know about.

Q. Anything they didn't know about?

A. Right.

Gordon H. Ware

Q. And it would be your understanding of what occurred there that there was no inclusion of any clause to protect against any undisclosed taxes?

A. No, sir; because I wouldn't have sold it if it was.

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Q. Do you why this Clause No. 3 was put in?

A. Hidden liabilities?

Q. Yes.

A. For the simple reason they made the statement, "Who is going to take care of the bills after you are gone that come in and we don't know about them?"

Q. How could they have known about a tax bill, Mr. Ware? You didn't know about it yourself, did you?

A. Oh, yes, I knew it. They knew it, too. They had to know it: they went through all the books, the tax records, and I left the last adjustment with them, of the adjustment to the prior years, '59 or whatever it was, and—

Q. Tell us about that. Whom did you leave that with?

A. Left it with Mavis Cobb.

Q. I say, when? That is what I—

A. Right. Well, I would say about a week before the signing.

Q. Tell us about that.

A. All right.

Q. Let's—

A. All right, go ahead.

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Q. So we don't get it all mixed up. So your understanding at that time was that undisclosed liabilities were discussed and that this clause was included but it only related to undisclosed claims that might come in after they bought it?

A. That is right. That was the agreement.

Q. Right. And you say that you were questioned by Mr. Swart and by one of the Cobbs about taxes and said that all taxes, I think you said, had been paid?

A. I said we didn't owe any back taxes as of today, that I know of. They asked about back taxes, they didn't say did I owe any taxes.

Q. They didn't ask you whether you owed any taxes?

A. No, asked me if I owed any back taxes. In other words, they were talking about this—I assume they were referring to this adjustment we had in '59.

Q. I also understood you to say that they did ask about the period during which there had been an audit and approval, is that right?

A. Yes. That was to '59. Yes, that is right.

Q. You told them that it had been audited?

Gordon H. Ware

A. It had been audited and approved as of '59.

Q. And that since that time there had been no audit, subsequent to that time?

Dep. 9/30/68 page 40

A. Not—well, there had been an audit but not by the federal government because they just come every five years.

Q. To audit?

A. Yes.

Q. You don't know, then, what happened? Was anything else discussed that night about the terms or about the conditions?

A. Yes. We discussed the terms and conditions and interest.

Q. Namely, what the price would be—

A. That is right.

Q. —how much the downpayment would be and—

A. Right. We got all that squared away that night.

Q. I imagine you went all over the Higginbotham note?

A. Yes.

Q. And a lot of other things that night?

A. Yes, we did.

Q. How long did you meet? Do you remember?

A. Oh, a couple of hours, I guess; maybe three.

Q. Was the deal agreed to right then?

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A. Yes.

Q. In other words—

A. Well, it wasn't anything signed and sealed but the terms and the price were agreed upon.

Q. Agreed to, and all that was left to be done was to have the lawyers put it in writing as to what you had agreed to?

A. Well, no. There was more to be done because they wanted to know a little bit more about the cemetery or something, and they wanted to take it over immediately.

Q. Well, how could they take it over immediately if you all hadn't agreed on the terms that night?

A. We had agreed on the terms and price but we hadn't signed it.

Q. You say you couldn't sign it because it hadn't been drawn?

A. That is right.

Q. So you had to have it drawn up by the lawyers, to sign what you had agreed on that night?

A. Yes, we had to have it drawn up.

Q. Had to have it drawn up?

A. Yes.

Q. And signed. But when you walked out of

Gordon H. Ware

Dep. 9/30/68 page 42 } there you knew that you had sold it and you knew they had to take it over and run it after this meeting?

A. Oh, no. No. They operated before the papers were signed. They operated about four weeks or five weeks.

Q. That is what I am getting at.

A. This was after they had been operating it.

Q. That is what I—

A. That is right.

Q. They weren't operating it February 6, the night you went to Fairfax, were they?

A. No.

Q. So that as a result of that meeting—

A. We didn't sign the papers that night.

Q. I understand. Is that because the lawyers hadn't drawn them?

A. That is right.

Q. But you had agreed on the sale?

A. That is right.

Q. And they then took over and ran it pending the drawing up of the papers?

A. That is right.

Q. Isn't that right?

A. Yes.

Dep. 9/30/68 page 43 } Q. So all that remained to be done was merely to sign what you had agreed to and they then took over and started running?

A. That is right.

Q. Isn't that right? And soon thereafter you entered into an agreement by which Mr. Castle was going to operate?

A. I didn't enter into any agreement with Mr. Castle.

Q. You didn't?

A. No.

Q. Let me show you an agreement and you tell me—

A. Not agreement for him to operate the cemetery for them. They are the ones made the agreement with him, not me; because when I sold out, his agreement was null and void.

Q. Take a look at that (indicating). That may not be your signature. (Counsel handing a document to the witness)

A. Yes, this is my signature. Oh, yes, during that four weeks, yes, during the four weeks there, yes.

Q. See what I mean?

Dep. 9/30/68 page 44 } A. See, normally when you say "contract," normally a contract runs a year; the cemetery—

Q. I understand. Let Mr. Lam see it; we will give him a copy.

Gordon H. Ware

A. (Witness handing to Mr. Lam)

Q. When you walked out of there that night you knew it was sold and they were going to have it operating pending the drawing of the papers?

A. I didn't know it was sold, either, because they had put a clause in there that they could back out if they wanted to.

Q. What was the clause?

A. Right at the base of it. You can read it yourself. It states in case it is not sold my liability is limited to so much.

Q. I understand that.

A. Yes.

Q. You had agreed on all the terms and conditions?

A. Yes, but it wasn't a sale until we signed the papers and the money passed; not—

Q. Of course, not if any—

A. We had no money down. It was just a gentlemen's agreement.

Q. And you, in turn, were to have no liability greater than $1,900?

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A. That is right.

Q. And what was that to represent? What did the $1,900 represent?

A. I assume it represented loss of—I don't know. I will have to read that again.

Q. Here, let me. (Handing to witness)

A. I don't know what that is for. Oh, in case I refuse to sell, the amount of liability would not exceed $1,900. In the event I refused to sell to them I would owe them $1,900. That would be the top of my liability, to take care of the lawyers and that sort of thing.

Q. Is that what the basis of that agreement was?

A. I assume.

Q. All right. Well, I mean do you recall or you just don't recall?

A. I don't recall the $1,900; that was just put in there.

Q. All right. There then came a time when the papers were drawn?

A. That is right.

Q. And where did you meet to sign the papers?

A. The cemetery office.

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Q. Who was present? The cemetery office here in Virginia Beach?

A. Yes.

Q. Who was present at that time?

A. The Cobbs and Mr. Williams, and Mr. Castle was there, too.

Gordon H. Ware

Q. Was their attorney there? I know Miss Cobb's attorney, but was Mr. Rust there?

A. Mr. Winquist was there. I don't—Mr. Rust could have come; I have forgotten. I don't think he did.

Q. All right. And on that occasion the papers were signed. As I understand it, they were signed individually first?

A. That is right.

Q. Later were re-signed in the name of the corporation?

A. That is right.

Q. Because I think Mr. Winquist recommended that it be done in a corporate name rather than individually, or something like that.

A. That is correct.

Q. Now, after the papers were signed, I assume that you were given the deposit?

A. That is right.

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Q. The downpayment of $50,000?

A. Right.

Q. At that point the Cobbs had formally purchased it and there were no changes in the agreement as drawn compared to the way it was negotiated on February 6, were there?

A. I think there was some difference to it but I did not get a copy. I asked Mr. Winquist to keep my copy, and when I went to Mr. Winquist to get it he refused to give it to me.

Q. Your copy of what, now?

A. The copy of the original agreement to start with.

Q. Which was the original?

A. That is the personal agreement. They bought it personally. Then they asked me to transfer over and sign a new agreement so they could—

Q. A novation, in other words?

A. Right.

Q. And wipe that one out?

A. Yes.

Q. And do it in a corporate field?

A. Right; go from private to corporate.

Q. Well, I say, was there any change; were the terms of the downpayment or the provisions of the agreement changed?

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A. There were some changes to it but not in the money part.

Q. What were the changes?

A. Well, if I had a copy I would come pretty close to telling you.

Q. Let me show you.

A. All right.

Q. I have never seen it. I think it was canceled and destroyed as far as I know. I have never seen it myself.

A. Mr. Winquist—I asked him to keep a copy for me and he refused to give it to me when I asked him for it. He said he didn't have it.

Q. Do you want to take a look at that? (Indicating) Look through it and see. I am showing you Exhibit A attached to the complaint, which is the agreement in dispute, and I want you to point out what if any changes are in that agreement compared to the way it was negotiated on February 6th.

A. Well, I would have to see the February 6th one to do it.

Q. Well, you told me there wasn't anything on February 6th; there was no writing on February 6th?

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A. Oh, not on February 6th. Oh, yes, it is according to the negotiations on February 6th; this is basically the same thing we agreed to.

Q. This is the same thing?

A. Yes.

Q. In other words, the lawyers just put it in writing?

A. That is right.

* * * * *

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Mr. MacMillan: I didn't ask him the entire thing. I asked him whether or not all the payments have been made, either to him directly or to the escrow agents that are called for by the agreement. That is all I asked him, He said yes. I didn't ask him whether all the terms and conditions of the contract had been fulfilled because I knew that that would be an unfair question to ask him.

Mr. Lam: Right.

By Mr. MacMillan:

Q. I think you have indicated that you had a conversation with Winquist in April of '66 when you were notified that the internal revenue had actually come in and were commencing an audit of Rosewood for the period 1959, '60, '61, '62 and '63?

A. I was notified.

Gordon H. Ware

Q. By Mr. Winquist?
A. I assume it was him. I don't know who notified me.

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Mr. Lam: It could have been Mr. Bowers. I think we were notified by Mr. Rust and Mr. White. Everybody was notified.
Mr. MacMillan: Everybody was notified?
Mr. Lam: Yes.

By Mr. MacMillan:
Q. Subsequently, when the adjustments or the deficiency assessment, rather, was made for those years, you were notified of those assessments, were you not?
A. I believe I was, yes.
Q. And I think that during that period you were notified to come in and defend those assessments or to take whatever action was necessary with respect to those assessments, were you not?

Mr. Lam: Don't answer that because that was purely and simply as arrangement between Mr. Bowers and myself from the very beginning, Bob. I think he has got letters to that effect. We said it was not our liability. We didn't prohibit him from doing anything he wanted with respect to doing it but we maintain that we weren't going to try and object to his doing anything he wanted to try to do with regard to the thing but we stated it wasn't our liability.

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Mr. MacMillan: I wasn't trying to trick him. I am saying he was notified of these claims and explained that he had a right to come in and do whatever he needed to do.
Mr. Lam: If he felt there was any liability.
Mr. MacMillan: If he felt there was any liability. We weren't trying to say he admitted liability.
Mr. Lam: Right. I wanted to make sure. This has been by agreement. George and I had agreed all along to do everything we could. We didn't want to stick our neck out saying, "Yes, we agree to any results you reach."
Mr. MacMillan: We are not trying to hold him to any more than that he was notified that he had a right to come in and participate and do whatever—
Mr. Lam: All of these things came after the initial letters regarding the claim. From that point on I think I negotiated with George or Luther, on each occasion whenever they and we were informed, yes, of the various steps of the thing, I think that—

Gordon H. Ware

Mr. MacMillan: So I assume the answer to that question is that he had notice of that?

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Mr. Lam: He had notice, yes. I know what you are going back to, the same thing you discussed with me the other day. I simply again—

By Mr. MacMillan:

Q. I think it is true, also, Mr. Ware, that notwithstanding the notice that the Government was making an assessment and notwithstanding the notice that you had a right to come in and participate and to resist those assessments, that in fact you did nothing to resist it on the ground that you felt it was not your responsibility?

A. That is basically what we said before, basically what we just said.

Q. Your answer is yes?

A. Yes, that is right.

Q. You were notified but took no action?

A. Right.

Mr. Lam: Upon the basis that it was not—

Mr. MacMillan—his liability; right.

By Mr. MacMillan:

Q. And I think you were advised that while there was an assessment of $16,295.82, this was settled for $11,555.57 exclusive of interest?

Mr. Lam: Don't answer that. Bob, of course we have never agreed to any of the amounts. We have been notified by you but we don't conclude that they are accurate or anything else. Do you follow me?

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Mr. MacMillan: That is what I want to get into. Where is the letter that says they agreed to the amount, that they don't dispute the amount?

Mr. Bowers: You have them all.

Mr. MacMillan: O. K. Off the record.

(At this point there was an off-the-record discussion, after which the following occurred:)

Mr. MacMillan: What was the last question?

(The last question was read by the reporter.)

Gordon H. Ware

By Mr. MacMillan:

Q. I say, you were notified that that was the assessment?

A. Yes.

Q. And that was the amount that was settled for?

A. Yes.

Q. And it is my understanding, Mr. Ware, that there is no dispute in this case as to the propriety of the amount of the settlement but that all other matters as to whether you owe it or whether Cemetery Consultants caused the assessment because of what they did or didn't do after they purchased it, are still very much a part of your defense to this date?

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A. Right.

Q. O. K. I think we are over that hurdle.

(At this point there was an off-the-record discussion, after which the following occurred:)

By Mr. MacMillan:

Q. Mr. Ware, I understand that the amount of the accountant's bill of $2400 for services in conjunction with this service in working with the Government on this claim on the tax claim is disputed?

A. Yes, it is.

Q. And it is my understanding that there is no dispute as to the amount of the attorney's bill of $725 except you say you don't owe it?

A. That is correct.

Mr. Lam: It comes down to a legal question. It comes down to a legal question which George has already showed me some law on that it is in there, but we do not dispute the amount if we owe the bill. That is as to George's fee.

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(At this point there was an off-the-record discussion, after which the following occurred:)

By Mr. MacMillan:

Q. Did the State of Virginia ever assess any deficiency against Rosewood while you owned it?

A. It seems to me that the auditor forgot for two years running to file taxes on money not already taxed. It is a little form there. It is $50 or $60 or $70 liability there and the third year we caught it and I had to pay up the two "backs."

Gordon H. Ware

Q. But it wouldn't have been in the same type of deficiency that resulted you told me for the years previous to 1959, is that correct?

A. It would be the same type?

Q. It would be the same type, you say?

A. No. It is tax on money not otherwise taxed I believe is what they—

Q. Which was not by the formula that the federal government allowed you to set up certain costs for these—

A. This was State? U. S.? Virginia tax? You asked the State of Virginia tax?

Q. Right. What I was getting at, it wasn't the same type of deficiency that the federal government had found?

Dep. 9/30/68 page 107

A. Oh, no. It was just a failure to file. The auditor was from Carolina and he just didn't file it.

Q. Now, during that deficiency that you had before 1959, why was there a deficiency?

A. I think one of the reasons was there were a certain number of lots that were not counted in. The lot count was bad on it.

Q. In other words, there were more, or less lots?

A. I believe there were more lots than the number showed.

Q. So that the cost per lot—

A. —decreased.

Q. Decreased—

A. Right.

Q. —for that section. From 1959 to the time of sale had you made all of the improvements that were required on an annual basis that you had set up as costs for that period?

A. Prior to when?

Q. Prior to the time you sold. In other words, had you annually made the amount of improvements that had been projected at the time you set up the cost?

A. Well, this question will be hard to answer because you don't know, really. It depends on what the bookkeeper does.

Dep. 9/30/68 page 108

Q. Can you explain that to us?

A. Well, each section has to be charged a certain amount of development.

Q. All right.

A. And if he goofs and overcharges one section, then that section won't owe any tax and the other one will owe double.

Q. Well, do I understand you to mean that you had put in all the improvements for the period 1959, '60, '61, '62, '63 to '64?

Gordon H. Ware

A. No. There were some—
Q. —that you had projected back in 1959?
A. No. There were some missing.
Q. Some improvements missing?
A. Yes.
Q. What was missing?
A. Well, one of them was a statue that I know of.
Q. What else? You mean a statue, meaning a figure?
A. Yes. Oh, I don't know what else. I would have to get the books and find out. I had a real good bookkeeper and I left that mostly up to the auditor and bookkeeper to handle this.

Dep. 9/30/68 page 109

Q. So you know that even during the period that you ran it, improvements had not been put in as projected in 1959?
A. I wouldn't say I knew it. I would have to go back and look at the books to check to see.
Q. To find out?
A. Yes.
Q. My understanding from your testimony is that when you settled the tax deficiency for the period prior to 1959 with the federal government, the state government never made any assessment against you for any tax deficiency because the cost or the improvements did not equal what had been projected as the cost of each lot?
A. I wouldn't be able to answer that because I don't even remember whether the State assessed me or not.
Q. In other words, you don't have any recollection of any assessment?
A. From the State, I don't know. I leave that up to the auditor. He would be able to answer that question. If there is any assessment he usually handles it. I just sign the papers, write the check and that is it; but he handles all of that. I didn't attempt to do it.

Dep. 9/30/68 page 110

Q. Now, Mr. Ware, in your own answer you list certain affirmative defenses and one of them is—let me read the whole thing to you so you will get the context. It is Paragraph 16 of the answer. (Reading)

"Your respondent"—that is you, Mr. Ware—"denies that your complainant"—and that is Cemetery Consultants—"is entitled to the relief prayed for or any relief, and by way of affirmative defense states that any tax liability which may have been assessed was disclosed, and further states that any tax liability which may have been assessed was not the re-

sult of the actions for which your respondent was or is responsible.

"Your respondent further avers that your complainant will suffer no damage as a result of any tax liability which may be assessed and/or collected under the facts as pleaded by your complainant."

Now, could we take up each one of those affirmative defenses; and the first one is that any tax liability which may have been assessed was disclosed.

Now, I think you have told us that you learned that this assessment was made—

Mr. Lam: I think I am going to have to shorten this answer by saying "Pursuant to advice of counsel."

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Mr. MacMillan: That what?

Mr. Lam: The affirmative defenses were by reason of counsel, not by reason of—

Mr. MacMillan: I understand that.

Mr. Lam: So I think the only answer he can give you is that "As advised by counsel"; or I don't know as I have advised him of the thing at this point. I think simply he can say that, "Pursuant to the feeling of my counsel"—

Mr. MacMillan: I don't propose to make a lawyer out of him but I would like to get what facts he knows. I am only interested in facts that he has of his own knowledge.

By Mr. MacMillan:

Q. I repeat that question.

Mr. Lam: I think he has got the question, or your first question. Excuse me.

By Mr. MacMillan:

Q. The question I had for you was: You learned that the Government was making this assessment in April 1966, you have told us, and that the deficiency was assessed on January 26, 1968?

A. I have no knowledge of that.

Dep. 9/30/68 page 112

Q. You have no knowledge of when the assessment was made, only that there was an assessment?

A. Right.

Q. All right, sir. Well, I say, the Government did not begin its investigation until 1966. How could you have disclosed to

these parties that that assessment, that deficiency assessment, was due?

A. How can I disclose to them?

Q. How could you have disclosed to them before they purchased this that that deficiency assessment—

A. They knew it was coming.

Q. In other words, your first statement is that—

A. I warned them that it was coming.

Q. In other words, you knew that it was going to be a deficiency assessment?

A. No, I didn't. I didn't have any way of knowing whether it was going to be deficient or an overage, but if it was an overage I guarantee I wouldn't have got any back; but if there was deficiency now, it is mine. All right. Basically, the reason I told them, so that they could be braced for it. And they knew that this adjustment was coming up. Now, I had no way of knowing whether it was going to be deficient or overage.

Dep. 9/30/68 page 113

Q. I see. So that you would agree, then, that prior to the contract you had no knowledge yourself that there would be a deficiency here?

A. Well, no. I had no knowledge there would be a deficiency.

Q. So obviously you couldn't have disclosed it to them because you didn't know it yourself?

A. They knew there was possibility of deficiency, though, because I had one the last time.

Q. And had you told them that there had been the previous deficiency?

A. Yes. I gave them all the papers. I handed Mavis all the papers, everything the Government gave me I handed, gave to her so she could look it over to see how the thing was working.

Q. And you say that was at the time you signed the contract on or about March 6, 1964?

A. Yes, on or about March 6th.

Q. And was that in Norfolk, or was it up in—

A. Virginia Beach, in the cemetery.

Q. Did you ever go to Fairfax other than that one occasion? You told us you went once on February 6, 1964. Did you ever go back?

A. Yes, it seems to me we did go one time in the daytime. This was a night meeting. I went with Charlie Castle I believe one time up there, yes.

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Q. Was that to sign the papers?

Gordon H. Ware

page 114 } A. No. I don't even know what it was for now; some discussion. I will try to remember it. Right now I remember going—I remember where we ate lunch, and Mr. Castle was along. It might have been a purpose of carrying some of the papers or records up, or something, of the cemetery.

Q. So you did not know whether or not there would be a deficiency before the sale?

A. You can't tell until the end of the period.

Q. Until they audit?

A. Well, you can tell a little bit—

Q. Where you say that there was a disclosure, what did you disclose? That is all I am trying to get. Factually, what did you disclose?

A. The fact they might be liable for taxes.

Q. And you disclosed that, you say, by giving them the records of the previous—

A. No. I disclosed it by word of mouth because that is why the concern was, before they signed the agreement on the taxes. This is a big concern to them. And also I disclosed to them the $6900 which I mentioned before four

Dep. 9/30/68 page 115 } times, to them, and the fact that they were going to spend forty, fifty thousand dollars on the development immediately.

Q. Who told you that? You were going to tell us who told you that.

A.Well, it was one of the—I guess it was—it could have been Norman or Mavis, one. I don't know which one said it but I do remember the statement being made because it must have been Mavis, maybe, because I said if that happened your tax liability chances are, if it is any at all, the $6900 would cover it, if they had spent that much money on it.

Q. And you told them that, you say, before the contract was closed

A. Right.

Q. And that is what you mean when you say here that you had fully disclosed that tax liability?

A. I didn't disclose the amount of it but the potential I disclosed.

Q. All right, sir. Now, the second point in your answer was: (Reading)

"And further states that any tax liability which may have been assessed was not the result of actions for which your respondent was or is responsible."

Gordon H. Ware

Dep. 9/30/68 page 116 } Is there any factual basis for that allegation as far as you know?

A. That I am not responsible for the taxes?

Q. No. Let me read it to you again because I realize you probably—

Mr. Lam: I think you are getting into a legal thing, Bob, that I have got to explain to him, because I wrote the thing.

Mr. MacMillan: Right; and I have no objection. I am not trying to trap him, just trying to get ready for trial.

Mr. Lam: I don't want to be giving him the answer but he has got to know what my answer was. I am going back to the expenditure if it was made.

By Mr. MacMillan:

Q. Do you want me to read you the question again? (Reading)

"And further states that any tax liability which may have been assessed was not the result of actions for which your respondent was or is responsible."

Dep. 9/30/68 page 117 } What is the factual basis for that? What is it that you claim that was not your action, that resulted in the tax liability?

Mr. Lam: Again I have to keep interjecting. Part of the defense I would say at this point is unknown to Mr. Ware, the legal defense which, as you know, I have a full right to set forth. So I think to his knowledge is the only way that he can answer that question. I am sure he isn't fully cognizant of some of the things that I hope or intend to do.

Mr. MacMillan: If I understand the rules, we can proceed by a motion for more definite statements, or we can discover the party. And the party is bound; if he says he has nothing and we come to trial and are not given an opportunity to prepare, then he has nothing. I don't mind your talking to him. All we want is to know what we are going to be met with and not play cat and mouse between now and the day of trial.

Mr. Lam: I wasn't playing cat and mouse. I say I think a lawyer has a right to take his client's case and develop from the facts as he knows them any legitimate defense. I think you agree. For instance, a man may have—

Dep. 9/30/68 Mr. MacMillan: Off the record.

Gordon H. Ware

page 118 } (At this point there was an off-the-record discussion, after which the following occurred:)

By Mr. MacMillan:

Q. Back on the record. As I understand it, Mr. Ware, your attorney indicates that what you know about that affirmative defense which reads, "And further states that any tax liability which may have been assessed was not the result of actions for which your respondent was or is responsible" refers to the fact that if this corporation had made improvements there would have been no tax liability?

A. That is correct, and charged it to the proper sections.

Q. And charged it to the section.

Mr. Lam: I think you should put my statement in there that this is with respect to that averment, what he knows, his knowledge, not what counsel knows or may plan to prove.

Mr. MacMillan: Right. And it is my understanding, then, that you contend that the complainant in their agreement with you agreed to expend certain money after the purchase?

Dep. 9/30/68 page 119 } Mr. Lam: Wait a minute. I would object to that. The agreement is the March 10th thing. He has never stated the agreement. I think you may get him off base. There is no agreement that they made with him to do these things. I don't want your putting it down as an agreement with him.

By Mr. MacMillan:

Q. In other words, you don't contend that they made any agreement to make any expenditures, any specific expenditures after they purchased it?

A. Not—it was just a verbal—

Q. Well, tell us about it.

A. They just said they were going to spend between forty and fifty thousand dollars the next four months.

Q. They made no agreement to do that in this contract?

A. No. They just stated they were going to do it.

Q. But they made no agreement with respect to it?

A. No. It wasn't anything written and at the time I could care less because it had no effect on me.

Q. And you say that that statement was made at the signing and was not made on February 6th when the price was negotiated?

Dep. 9/30/68 page 120 } A. No, that wasn't made then. Q. It was made on March 6th, I think you said?

Gordon H. Ware

A. Either the first assignment—either March 6th or March 10th, I don't know which one. It was one of the two.

Q. That that statement was made?

A. Yes.

Q. All right, sir. Do you know anything else which you contend was done that caused the tax liability, that was not chargeable to you?

Mr. Lam: I think that is too broad a question, Bob.

By Mr. MacMillan:

Q. I am asking for a fact. Do you know of any other fact or facts or events that occurred which caused the tax liability, which are not chargeable to you, which you feel are not chargeable to you; anything anybody did or didn't do or should have done?

A. None of them are chargeable to me as far as I am concerned.

Q. So you know of no other facts that occurred other than the ones you have just told us about?

A. Well, I would have to think about that a little bit because I don't know exactly the question.

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Mr. Lam: We don't know what your records disclose. As you know, we have been moving to try to see them and so this is part of our defense, that we still don't know.

Mr. MacMillan: You have had full access to Rosewood.

Mr. Lam: Have had full access to what?

Mr. MacMillan: To Rosewood Cemetery, the Rosewood Cemetery, the Rosewood Cemetery Corporation's files.

Mr. Lam: I have?

Mr. MacMillan: Yes, at all times.

Mr. Lam: I haven't seen it yet.

Mr. MacMillan: Of course you did. We told Judge Wahab in this last hearing that those records are not resisted, anything we have got that is there.

Mr. Lam: Let's go back to the factual situation.

(At this point there was an off-the-record discussion, after which the following occurred:)

By Mr. MacMillan:

Q. Back on the record. The next affirmative defense, Mr. Ware, is: (Reading)

Gordon H. Ware

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"And your respondent further avers that your complainant will suffer no damage as a result of any tax liability which may be assessed and/or collected under the facts as pleaded by your complainant."

In other words, could you tell us what facts you have to show that if "Cemeteries" must pay this claim it will not suffer any damage, will not lose any money as a result of paying it?

Mr. Lam: He can't answer that. It is purely legal.

By Mr. MacMillan:

Q. In other words, you don't contend that there is any factual relationship between the parties that is the basis of—

Mr. Lam: That is known to him—no, sir. I mean I can answer that he has no knowledge of that.

By Mr. MacMillan:

Q. Do you understand that as to the second defense, Mr. Ware, which related to whether you had any facts or any actions that occurred that caused the tax liability which you say you are not responsible for, the only one that you have any factual knowledge of is with respect to not making the improvements after the year purchased?

Dep. 9/30/68 page 123

A. I wouldn't know.

Q. You have no other facts yourself?

A. Not to my—I don't know.

Mr. Lam: Excuse me. As to your question you said "after" the year of purchase. This is not what he has testified to. In other words, again I go back and relate so he knows what we are talking about: Fifty and sixty thousand dollars that was going to be put in it coming after the year of purchase would have no bearing on this particular tax thing. This was with respect to within the tax period that his answer has previously been given. You are asking is that the only thing he has any reference to. I think that is all he knows.

Mr. MacMillan: That is all he knows about it?

Mr. Lam: Yes. Your second question covered something that had not been introduced in any of the previous ones. After the year of purchase; that isn't what he has testified to. What you have reference to is when he spoke of putting the money into it which would change the tax cost on the thing. This is his limitation of his particular—

Gordon H. Ware

Dep. 9/30/68 page 124

Mr. MacMillan: My understanding is that the defendant in this case is telling us on discovery deposition that he knows of no facts which caused this tax liability for which he says he is not responsible, other than the fact that this complainant failed to make improvements, projected improvements, which he says should have been made after purchase. That is the only fact he knows anything about.

Mr. Lam: Which he says that they said would be made after purchase. He has no control over what they do. He has stated that. This was in the discussions that if they did it, it would wipe out a deficiency if it existed, plus he did state the $6900. If you were looking at it you would have two things there.

Mr. MacMillan: O. K.

By Mr. MacMillan:

Q. Mr. Ware, do you know of any witnesses to any of the negotiations other than the parties that have been discussed this afternoon in this discovery deposition? That is, Miss Mavis Cobb, Mr. Cobb, John Rust, Mr. Swart, Ray Winquist, Mr. Castle, yourself—Mr. Ware, and Mr. Williams? Do you know of anyone else who participated?

A. Not right offhand.

Dep. 9/30/68 page 125

Q. And did you have any negotiations with any of these people on any matter which you have not already told us about this afternoon?

A. Not to my knowledge. I don't know what you mean by "negotiations."

Q. Well, any discussions with respect to sale other than what you have told us about?

A. Oh, no.

Q. I mean you have told us all the conferences?

A. Right.

Q. And all the events that happened as you recall it?

A. Yes.

Q. We have asked your attorney to produce this afternoon all correspondence that you had, between yourself and any of the parties that we have mentioned; yourself and any of the attorneys and accountants; yourself and Mr. Castle or anyone else. Have you produced that correspondence?

A. If I have any more at home—I will check again. He has nearly everything I have.

Q. We would ask you to produce this at this time.

Gordon H. Ware

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Mr. Lam: Well, Bob, the only thing I can recall in going through here that you have asked us to do, there was a letter to Mavis Cobb, apparently, or a transaction of letters there, something to do with the $8,000, which we don't have, which we—

Mr. MacMillan: We are going to try to get it.

The Witness: I didn't have a copy of it. I don't remember making a copy.

Mr. Lam: There is a copy of a check on or about March 3rd, $5,000 to Castle. Was it a note?

Mr. MacMillan: It was a note, Castle gave him a note. He gave Castle a check.

Mr. Lam: You asked for the check and we were going to try to get that.

Mr. MacMillan: We wanted the note and the check on that transaction.

Mr. Lam: The other note for Castle in the amount of $5,000. You were to give me a photostat of the work sheet. And they are the only things I had in here. He was supposed to find the date of the first meeting.

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Mr. MacMillan: The first two meetings before February 6th. What I say now is, we are calling for him to produce all correspondence between the parties involved in this transaction or memoranda of any conferences or any other written documents.

Mr. Lam: Leading up to the sale is what you are talking about?

Mr. MacMillan: Yes. Not that they might have had on any subject in the world, but on the subject of this dispute.

Mr. Lam: Right. Well, I will look through mine. I will try to get him to get his. I will call you and I assume we are dealing at arm's length there, vice versa.

Mr. MacMillan: Right.

Mr. Lam: Anything I have got that you haven't got I am glad to give you, and you respond to me.

Mr. MacMillan: What we wanted to do was to question him this afternoon. Otherwise, we will have to bring him another day.

Mr. Lam: I have told you I have gotten every piece of correspondence I had in the thing and I have that here.

Mr. MacMillan: That is what I want to see.

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(At this point there was an off-the-record discussion, after which the following occurred:)

Gordon H. Ware

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Mr. MacMillan: Let the record show that counsel called upon Mr. Ware to produce all writings, memoranda and correspondence between himself and any of the purchasers, himself and any of the accountants, lawyers; himself and Mr. Charles Castle, that were in existence from 1963 to the time of sale in March 1964 and he stated that he had no such letters except such as might be in the records of Rosewood Cemetery correspondence file.

The Witness: There could be one or two at home that I didn't think were pertinent. I will bring them all in, any correspondence I have. I think you have most of it. There might be one or two.

Mr. MacMillan: Let the record show that he has several at home and he will bring them to his attorney for photostating and sending to us.

The Witness: O. K.

Mr. MacMillan: That if we need to question him any further on that, we will.

By Mr. MacMillan:

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Q. Now, Mr. Ware, was there any itemization of improvements that would be made after purchase that you were told about?

A. Not specifically that I remember, except going by on paving the roads, road work. I had practically no contact with them as to—

Q. You said they said they were planning to make some improvements after purchase?

A. Right.

Q. Did they itemize what improvements they proposed to make?

A. Not to my knowledge.

Q. They didn't tell you what they proposed to do?

A. No.

Q. I assume that you have no written memoranda made of any telephone conversations or any memoranda or notes made by you of any conferences that you had with the purchasers?

A. I would have to look through my diary to check, see if I have any.

Q. Made any notes?

A. Yes.

Q. We ask that they be produced and that we have an opportunity to see those.

Gordon H. Ware

Dep. 9/30/68 page 130 } Mr. Lam: If he has them.

A. If I have any. I would have to go through the diary. Sometimes when I go off I write down what I did so I can get recall on it.

By Mr. MacMillan:

Q. All right. Do you have any records at home or any other place indicating what improvements you projected in the 1950's or '59 that would have been made, from '59, '60, '61, '62 and '63, that were not reflected in the records of—

A. The only records I have at home is personal correspondence files that I took out, just personal. Anything that—pertaining to the business, I left it for their information.

Q. I say do you have in your possession any projections of improvements you were going to make or that were to be made during that period?

A. I don't have any at home, no.

Q. I mean do you know of any? That is—

A. I know of some that should be done.

Q. Could you tell us?

A. One is the statue.

Q. You told us that.

A. And the roads.

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Q. Statue; roads; and what roads would they be?

A. That would be the road back of the singing tower, going around the singing tower.

Q. Do you remember what sections that would be?

A. No. I never went by sections as far as describing is concerned. I would have to have a map. Any time I want to find out which section it was, I would have to look at the map.

Q. All right. What other improvements besides that?

A. Oh, gee. I don't know. It has been about—

Q. How about the singing tower itself?

A. It was already constructed.

Q. It had already been constructed?

A. Right.

Q. All right. What else?

A. I would have to look at the engineer's estimates and all, to do that.

Q. Had you made any projection of those improvements or, rather, had you completed any of those projected improvements during 1959, '60, '61 and '62?

Gordon H. Ware

A. Well, we completed some. Now, I don't know what you are talking about or where it is located. We had completed some.

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Q. I don't mean any particular thing.

A. Sure, we completed some.

Q. I say what did you do during those years? Do you remember? '59, '60, '61, '62 and '63.

A. Oh, gee, I would have to go back and look at the records. I really don't know. Because basically the auditor and bookkeeper handled most of the improvements and which section they went into. See, they would have to ask the workers which section they were working in that day.

Q. Were you represented by any attorney in the negotiations? I know you told us Mr. Winquist went to a couple of meetings with you but did any attorney—

A. No; only I got advice from Earl Woodhouse.

Q. Did he participate in the negotiations?

A. No. He looked at the agreement but he did not participate in it.

Q. Did he talk to anyone?

A. Who?

Q. Did he talk to any of the attorneys or any of the purchasers?

A. Not to my knowledge.

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Q. Any accountant?

A. Yes, he talked to Mr. Castle once or twice.

Q. When did he talk to him?

A. This was prior to the sale.

Q. What was the occasion for that?

A. One of them was paying for some of the work he had done, and the other—

Q. By "he had done", you mean that Mr. Woodhouse had done?

A. Yes, wanted to get that out of the way. And I have forgotten. If it was anything else I don't remember offhand.

Q. Is Mr. Woodhouse living or—

A. He is still living but he no longer practices.

Q. No longer practices law?

A. No.

Q. All right, sir.

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page 1 }

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page 2 }

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The Court: Gentlemen, are we ready to proceed in the matter of Cemetery Consultants against Gordon H. Ware?

Mr. MacMillan: Complainant is ready, your Honor.

Mr. Lam: We are ready, your Honor.

The Court: Parties going to testify in this matter please stand and be sworn.

(Whereupon, the witnesses were duly sworn.)

The Court: Mr. MacMillan, do you wish to make an opening statement?

Mr. MacMillan: Yes, sir.

Your Honor, Mr. Lam tells me that he has the desire to have an expert in the room and I told him naturally if he has one, I have got to have one, and, as I understand it, it's agreed that the principals of my company would be permitted to stay in the Courtroom, and the principal of his—his principal would stay in the Courtroom and all other witnesses would be excluded.

Is that what we agreed?

Mr. Lam: I think this is what we have agreed to
10/17/68 and what is appropriate under the rules of Court,
page 3 } anyway. You want to exclude the rest of the witnesses?

Mr. MacMillan: Yes.

(Whereupon, the witnesses were excluded from the Courtroom.)

The Court: Gentlemen, by way of recalling the issues raised in this case from a motion which the Court heard, I believe, earlier this week and the latter part of last week, I understand that it resolves around whether or not the defend-

ants are indebted to the complainants for certain back taxes under the clause in the contract of sale, namely, Clause 3(b), whereby it is provided "The seller hereby assumes responsibility for any and all undisclosed liabilities of the corporation and agrees to save the buyer harmless should any such liabilities be discovered." Is that correct?

Mr. MacMillan: Yes, sir.

The Court: I will be glad to hear anything from you.

Mr. MacMillan: Your Honor, if I might, I know you have had several hearings in this matter and I hesitate to bore you with the complaint. If it will be of any assistance this morning, we will review what we deem to be the

10/17/68 highlights.

page 4 } Mainly, the dispute involves a sales contract entered into between Cemetery Consultants, Incorporated and G. H. Ware. Ware owned a hundred per cent of the stock, represented by 35 shares—

The Court: Is there a copy of the contract in evidence?

Mr. MacMillan: Yes, sir.

The Court: Yes, as an exhibit with your bill of complaint. All right, sir, dated the 10th day of March, 1964.

Mr. MacMillan: Yes, sir.

The Court: All right, sir.

Mr. MacMillan: He owned 35 shares, which was a hundred per cent of the capital stock of Rosewood Corporation, which was a cemetery, and the—

I think certain matters are stipulated as a result of this discovery we had, namely, that he doesn't deny the contract was entered into and was signed by him. He admits that he was notified of the audit commenced by the Internal Revenue Service; that he was notified when the audit was concluded; that there was an opportunity for settlement of the deficiency claim; that he was notified of the opportunity; that the claim was, in fact, settled, and that notice of the settle-

10/17/68 ment was given to him, and that he concedes that

page 5 } the amount that it was settled for is proper.

But he denies that *te* was liable for the amount of the settlement; that it was not his liability. It was—

He also stipulates that the attorney's fee to George Bowers, who was the attorney in the settlement with the Government, of $725 was fair, but again he denies that he owes that attorney's fee.

He admits that there was an accounting expense of $2,400 in handling the tax matter with the Government on the tax deficiency, but again denies both that that bill is reasonable and also denies that he has any liability on that bill.

The Court: Which is the one that he denies? What liability does he deny the reasonableness of?

Mr. MacMillan: The accountant's bill of $2,400.

The Court: I see. We have two issues. One is whether he is liable and, if so, for how much as pertains to the accountant's fee.

Mr. MacMillan: He admits there is a controversy, he contending that he has no liability under the contract with respect to these deficiency taxes, we contending that he does.

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page 6 } He further admits that demand has been made upon him under the terms of the contract to pay this deficiency assessment, plus interest in penalties and attorneys' fees and accounting fees and everything that resulted from it.

The contract, itself, your Honor, briefly contemplated that the purchasers, who were a corporation known as Cemetery Consultants, Incorporated would pay a purchase price based on the difference between the liabilities shown on the balance sheet and an agreed total value of the corporation, and that's set out in the contract as to how that sum is to be paid, that total sum is to be paid, that there was to be an initial payment of $50,000 and then there were to be annual curtails subsequently all as shown in Paragraph 2 of the contract, and I think it is conceded that all of those payments have been made, either directly to Mr. Ware or have been put in an escrow account after the deficiency arose, in which Mr. Ware's attorney, Mr. Lam, is one escrow agent and Mr. Bowers was the other escrow agent, and that is in the Mutual Federal Savings & Loan in Norfolk—at Virginia Beach, excuse me.

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page 7 } Mr. Ware also concedes that in the course of negotiation he was assisted by Mr. Vernon Winquist of Edmondson, LedBetter & Ballard at the time the contract was being negotiated and that Mr. Earl Woodhouse was his attorney who reviewed the papers.

Now, other than those basic things, your Honor, that have been stipulated, the dispute is whether or not under the terms of this contract this deficiency assessment for the years 1959, 1960, 1961 and 1962 were a liability which Mr. Ware assumed under the contract, even though assessed in—well, the audit started in '66 and the assessment was in January of this year—whether or not under the terms of the contract he was liable for the payment of those assessments as an undisclosed liability.

Now, in order to assist the Court—

The Court: How much was the assessment for back taxes? How much does it amount to?

Mr. MacMillan: The current aggregate sum is around 16,000. The assessment was—I don't know whether we have got the total, but we set it out year by year at Page 4 of the complaint and the aggregate is $15,628.25, for those four-year periods.

It's the position of the complainant, your Honor, that the question of whether taxes constitute a liability under Clause 3 has been before the Court and settled and we have
10/17/68 cited in Point 1, the leading case on the subject,
page 8 } which I won't bother to read, your Honor, at this time, but was a factual situation almost identical in that it occurred in a sale on December 31, 1940, involving—and was not assessed until '45, and it involved taxes for the years 1938 and '40 and the Court had the question before it whether under the terms of this sales contract in which the seller had agreed individually and as a stock holder corporation to pay all outstanding accounts or bills payable against the corporation accruing up to December 31, 1940, within one month from the date of the execution of that agreement except those in dispute—whether he was liable for the taxes which had accrued prior to the time of sale.

And the Court, without reading the opinion, held that he was, and that the words—that in the contemplation of parties buying stock of a corporation, they naturally want to be protected against any undisclosed liability and that under the language of that—of the contract in that case, the seller would have to pay the prior taxes, even though assessed some five years after the date of sale.

We have also commented to your Honor on the
10/17/68 question of whether a tax for a year prior to sale
page 9 } is a liability at the time of sale. And we have cited the opinion of Chief Justice Whittaker of the United States Supreme Court on Page 4, in which he says that the tax becomes a liability when it was due and by "due," it means in the year in which it was payable. And the liability existed, he says, for the 1938, '39 and '40 tax at the time of sale, even though it wasn't assessed by the United States until 1945, five years after sale.

So on the question of whether or not—our position is on the question of whether or not this language would reach taxes and whether these taxes would be an undisclosed liability within the meaning and contemplation of this contract and these authorities and under the Internal Revenue Service Code, we say there could not be any questioning of that proposition.

The Court: What was the purchase price as arrived at by

subtracting the liabilities shown on the balance sheet at the day of sale from the—

Mr. MacMillan: I can give you that, your Honor. At Page 2 of the contract, your Honor, it talks about a $50,000 down payment and the balance of $200,076.05 and that was the difference between liabilities and assets. In other
10/17/68 words, $200,076.05 was the difference between the
page 10 } value, asset values, and—

The Court: Less liabilities?

Mr. MacMillan: Less liabilities. You will see the figure at Page 2.

And, of course, your Honor, there was attached to the contract and made incorporated therein and made a part thereof—

The Court: Would you wait just one minute. You referred to Page 2 of the contract.

Mr. MacMillan: Yes, sir.

The Court: I don't see that figure.

Mr. MacMillan: It's the beginning.

The Court: One hundred fifty thousand plus fifty thousand?

Mr. MacMillan: Yes, sir.

The Court: The purchase price of $150,076.05, that is the balance after the down payment? That is where you get your $200,000?

Mr. MacMillan: On the first page it gives the total and I explained to your Honor how it was being paid. The first part right under the word "witnesseth", second line. But it was to be paid $50,000 down.

10/17/68 The Court: I understand.

page 11 } Mr. MacMillan: The second point we think is pertinent, your Honor, is whether or not your Honor is required to, or has the authority to sit here today and hear what the defendant has to say about prior or contemporaneous oral testimony or negotiations that led to the making of the contract.

Our position, strong position, is, your Honor, that when parties arrive at a contract which is clear on its face, that it is the contract before the Court. And as our Virginia Supreme Court has said in these cases that we have cited to your Honor, that it's not within the power of the Court to even listen to it unless somebody can show there is some ambiguity—

The Court: Fraud, misrepresentation—

Mr. MacMillan: Or ambiguity.

And we say we have tried to cite as courteously as we can to the Court that those cases say that it's the duty of the

Court to construe and uphold it, not to listen to what attacks it, where the language is clear and free from doubt and where in this case it's within the common sense of everyday business practice that if someone was going to buy stock of a corporation they are going to want to know

10/17/68 what they bought and they agree on a balance
page 12 } sheet and they agree on the clause that if there is any undisclosed liabilities beyond this contract, that it shall be the burden of the seller.

And we have cited a 1953 case, we have cited your Honor a 1962—

The Court: Well, that is a question of law.

Mr. MacMillan: The third point we would make, your Honor, is that the question might arise in the Court's mind of whether even if he agreed by his contract to be liable for liabilities such as this deficiency assessment, does that entitle the complainant to also say, "Oh, well, but the Government not only came after us for the assessment, we then had to defend that assessment, we called upon you to defend and you didn't so we had to hire attorneys and accountants to go into defend this and worked out this settlement," which was approximately a 30 per cent reduction over the original assessment.

In other words, the settlement was approximately 30 per cent less than the original assessment. And we say on that—

And which I might say that the defendant concedes that the amount was proper. In other words, he doesn't contest a bad settlement was made. Just says he is not

10/17/68 liable for it.
page 13 } And our position on this is, your Honor, that we have again cited your Honor the leading case on the subject which says that if in a sales contract the purchaser—seller agrees to pay undisclosed liabilities—I think in this case it didn't say undisclosed liabilities, it said debts —whether or not the purchaser can recover not only the tax deficiency and the interest and the penalties that follow from the taxes, but had a right to recover his attorneys fees and accounting fees which obviously any tax payer is going to have, which get into a deficiency audit situation with the Government.

We have cited that case which says that those fees—

The Court: Which page is it on?

Mr. MacMillan: It begins at Page 6, your Honor, Point 3. Page 6.

And, of course, we—the Virginia case isn't a tax case. The Virginia case was a case of where a defendant had breached his contract to perform, whether the plaintiff in

such a case could also recover the attorneys' fees he was put to, to defend a third party claim which the defendant had promised to discharge. And our Virginia Su-
10/17/68 preme Court said that attorneys' fees in such
page 14 } cases are proper.

So, your Honor, we are—we feel and I make no —from our point of view we are here on a declaratory judgment as we have throughout represented to your Honor. We don't think we are here on any contested issue of fact because we respectfully submit the Court is without the authority to hear any contested issue of fact until there is a finding of ambiguity.

We say that nothing could be broader than the word "liability" and we have cited to your Honor, Black's Law Dictionary which says liability is the broadest possible word that can be used by way of protection as to what claims could be. There is no broader word than liability. Undisclosed liability is the broadest word that can be used. It's broader than suits, it's broader than claims, it's broader than demands, it's broader than debts. It's the broadest possible coverage and we submit that there can be no ambiguity based on the cases and on the law and on the facts of this case.

And we respectfully submit that while we, on our part, have a burden to go forward and put on certain evidence in order to bring this matter to the attention of the Court,
10/17/68 we submit that anything, any testimony, offered to
page 15 } vary the written contract cannot be admitted and we both now and throughout the trial would like to have the record show that we have resisted any effort to vary the terms of the contract.

We think that when someone in reliance upon the words of a contract, promises to pay $200,000, he should not have to come to Court—and after he, on his part, has paid some $150,000 and has another sixty-nine thousand to pay and has made every timely payment, should not have to come to Court and, in effect, have the Court negotiate a new contract based on what was said or what was done or was inferred prior to the making of the contract.

That is our position, your Honor.

The Court: Mr. Lam, Mr. Hudgins?

Mr. Lam: May it please the Court, I first would like to say that I was trying to follow Mr. MacMillan's concessions that we made and I think he made a remark with respect to an amount which is not conceded and I should first start out by correcting that.

The argument was asked—or your Honor asked the question with respect to amount of the assessment of

10/17/68 $16,628, Mr. MacMillan said, and may it please the
page 16 } Court, we do not contest that this was the amount
that the Government assessed. We do contest the
fact that—of course, naturally we contest the fact that we owe it as a liability proposition, but additionally we contest that it was arrived at properly because for the simple reason when they—as an *exmple* of what I have reference to in this particular respect, Judge, at the time this audit was made, an audit was made for five years. The four years which they assigned to Mr. Ware as his liability, there was some assessment found in each of those years. The fifth year, as an example, which they assumed the responsibility for, no assessment or tax was found so there is a question of gerrymander in the round, and we, of course—

The Court: There wasn't any refund in five years, was there?

Mr. Lam: I don't know whether there was any refund or not, your Honor. But there was no tax assessed to them.

Mr. MacMillan: No, sir. there was none that I know of. Mr. Bowers handled it.

Mr. Bowers: In 1963 there was no tax because the fiscal
year ended July 31, '64—I mean '63, which ended
10/17/68 prior to the date of the purchase of the stock, so
page 17 } there was no tax for that year. That is the only
reason we haven't charged him with it. Our client
did assume and pay the tax for the fiscal year—

The Court: I just wanted to know, was there any refund due as a result of this audit for this period covered?

Mr. Bowers: No, sir.

Mr. Lam: Your Honor, I should like to—I don't really know what *Mc.* MacMillan is moving towards when he refers to the contract. But let me just go on, I think the opening statement pretty much will be a factual proposition of what we intend to prove and this I should like to review to the Court.

The Contract was entered after a period of negotiations. In this proposition Mr. Ware was the sole owner of Rosewood Memorial Park, which was a corporation, held all the stock of this corporation.

In approximately November or December of 1962, a Mr. Cassell, who was a salesman in the selling of cemetery lots, came to work for him. He came from prior employment in Fairfax County where he had a like position there in the
cemetery.
10/17/68 In that particular cemetery, and it's connected in
page 18 } with this, was one man, Mr. J. D. Williams, who

was also an owner of that particular cemetery up there.

After coming to Virginia Beach and working with Mr. Ware, where he was employed by Mr. Ware, he learned that Mr. Ware was interested in selling this.

Now, he had two friends, Mr. Cobb and his sister, I understand, Mavis Cobb, in Fairfax, who he had known for a number of years who had indicated to him previous desires to get into the cemetery business. He knew the value of this cemetery from working at it and contacted them about possibly coming in and buying the thing.

At a subsequent time in this thing, of course, the Cobbs came down and met Mr. Ware, saw the cemetery and then negotiations began moving along with various meetings between the parties and so forth, relating to the sale that was to take place, or eventually took place.

Mr. Cassell, after getting initially involved with the Cobbs, was requested by them, because of the circumstances—apparently after he had left them in Fairfax County,

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some question arose in their mind, and he referred them to Mr. Williams for reference to them then Mr. Williams became interested in it and that's where Mr. Williams, Mr. Cobb and Miss Cobb came into the purchase of this thing.

Now, we will show that the negotiations regarding the assets of this corporation, that is, Rosewood, were conducted through Mr. Ware and through the accountant who was working for him and who continued to work for the new owners, and that was, I think, Mr. Winquist.

At a subsequent time, then, there was—they started into operation, this new unit started into operation.

Now, at this time, your Honor, there was in effect—now, we are now moved up until about the period of February or March of '63. The contract that you have before you is dated March 10th—of '64, excuse me. So we have moved up into that period.

The new purchasers went into the operation apparently, that is, took over the actual operation of the cemetery, approximately a month prior to the time that the sale was actually consummated. They operated under a thing where they would take the profits and the losses and if, for

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any reason, that Mr. Ware declined to sell after they had gone in there, he was to pay a liability not to exceed $1900 for that period. That would be the extent of his liability.

Now, there was in effect at this time, that is, chartered, a corporation named Cemetery Consultants. I think it was

chartered in roughly 1962, but it had apparently no assets. An initial contract was entered in which Williams and the Cobbs purchased the stock of Mr. Ware. That is, they as individuals were going to buy the stock of Rosewood Memorial Park. We haven't got this contract and we haven't been able to find it but it was pre-dated some several weeks prior to the time of the one you have there, and apparently the contract—nobody seems to know where it is at this time.

But it was subsequently decided by the purchasers and for probably obvious tax reasons, that the better thing to do was to purchase it as a corporation rather than purchasing the stock. This is for a tax proposition which I will show to your Honor later. I am sure your Honor has knowledge of that particular aspect of the tax law, anyway.

But, anyway, Mr. Cassell had formed this Cemetery Consultants. The *the* Cobbs and Williams took over
10/17/68 Cemetery Consultants and the contract you have
page 21 } entered there was a purchase by Cemetery Consultants of Mr. Ware's stock.

Now, there is a tax factor that if after one corporation buys another corporation within a period of time as set forth by the—by the tax code, if they liquidate the corporation that they acquired, then their basis of their assets is the amount that they paid for the stock, rather than what the assets were of the former corporation.

Now, if I might briefly explain that, if, as you might see from the balance sheet, that I think—if it hasn't been introduced it will be introduced—there was a value there in land of approximately some $38,000, I believe, land that had not been used, and depreciated fixed assets there was some $20,000 worth of assets.

Now, as Rosewood operated this thing, these cost factors plus the cost of development were their costs that they used in arriving at a tax figure on what they sold the lots. Now, if we will say Mr. Williams and the Cobbs should purchase Mr. Ware's stock, regardless of what amount they paid for that stock, then they still continue to have this cost basis that he had in the acquisition of the assets and the
10/17/68 development of them. However, if they purchase it
page 22 } as a corporation and they liquidate the former corporation, then regardless of what he paid for his fixed assets, if he went out and bought the field that he was developing for $30,000 and he sells corporate stock for $200,000, and they liquidate the corporation, Rosewood, then their basis becomes $200,000 rather than the $30,000.

Now, this sale took place in March, we will say. Actually

the contract is dated March 10th and I think, your Honor, that that was for reasons that are not quite clear to me at this time.

Excuse me one moment, your Honor. The actual transaction took place, that is, the transfer of the money and so forth, at the end of March of that same year, although the contract is back-dated to March 10th.

In October of the same year, October of '64—'65, within the period allowed by the Revenue Department, Cemetery Consultants dissolved Rosewood Memorial Park and then took the assets at that basis.

Now,—excuse me, was it '64 or '65? September of '65 is right.

At this point there is a unique feature that comes into play in this whole situation and was probably the crux of the thing.

10/17/68
page 23 } First of all, when Mr. MacMillan talks about the clarity of the contract, I don't think I am contesting the clarity of the contract, but when you refer to undisclosed liabilities—and I assume what he is trying to keep us from discussing is whether they were disclosed or not—that is not varying the terms of the thing because the question of whether they were disclosed or not is—of course, the position we take is they were and they would have to show, the burden would be on them, that they were undisclosed.

There was no mention made of these taxes but the interesting thing that comes to bear at this point is this: In the cemetery business, and it is peculiar only to some land development schemes, you have your normal taxes that you file each year but you estimate by sections what you are going to—you take your cost factor, you take your estimated cost of sales, your cost of development, and you say that then, "If I am going to sell a lot for $200, I estimate that over this period of time my costs are going to run fifty or a hundred dollars, so, therefore, in the first year that I operate I charge off so much cost and my profit is the difference."

10/17/68
page 24 } Now, by a unique feature of the code, and with respect to this type of thing, particularly to cemeteries, they are given a five-year period in which to adjust these taxes. For instance, if, as an example, on a section you say, you estimate overall that your cost factor is going to be a hundred dollars and you are going to sell it for two hundred dollars in the first year of development, you still, for your tax purposes, would probably use, when you paid your taxes that year, your cost basis as a hundred, which would mean you had under-paid your taxes for that year.

Now, if in the second year you spend $150 for your cost still in development of this same section, then you even it out when you pay your taxes at that point so that the two years are level.

But you go on with this thing and you have this right because of this special tax concession. You have this right to adjust this cost factor throughout the term of this five years and at the end of this term of five years on this particular section that you are dealing with, then the audit is made.

10/17/68 page 25 } All right, now, at the time, then, that they took over, development was being done in sections 3 and 4. If there became the termination of the five-year period on one of the sections, they could have, by putting so much money into development within the period of time that was left, offset any tax deficiency, and we have evidence to the fact that this was agreed, this is what they would do to offset it. But what would have occurred is that if they would have continued, if they had operated under Rosewood Memorial Park, that corporation, and continued it, then each year as they go along they have a right to up or lower their development costs in these sections to offset these taxes, or tax burdens that may crop up. It can work both ways. They can over-estimate it. But what it does, it gives them a chance to up and lower their cost factor each year to try to come out on an adjusted thing when it's all over and done with.

What has happened, when they dissolved this corporation then the game comes closed at that point and everything comes to a head. That is the time they take the position to voluntarily dissolve it. Why? Because they want this new tax basis of what they paid for the stock rather than the assets that were in the original corporation.

10/17/68 page 26 } So instead of developing—if I can explain it briefly to your Honor, instead of dealing with a sale of land, regardless of how much it's divided up, where they have a cost factor—and I will take simply the initial figures revealed in the settlement sheet of, say, $50,000—and only a portion of that was not subject to sale. I am speaking of the fixed assets, the buildings and improvements. The land value of thirty-eight thousand, roughly, I think it showed in the balance sheet—when they take this, have a voluntary dissolution, when they dissolve, liquidate their corporation, they jumped from $38,000 to $200,000 in any future taxes that they pay on their sales, divided proportionately, of course, to the lots they are doing.

Also when they do that they call to an end any rights they have on this tax structure of balancing these back and forth to work out the taxes.

We contend, and I think we will be able to show, first of all, that the sale—there was nothing undisclosed about any taxes; that Mr. Winquist, who worked for both the defendant and continued to work for them, was the adviser of both; that he was perfectly familiar with this tax structure because he had been in it; it was his job and he had been in
10/17/68 it, been doing it; that they operated the thing for
page 27 } a month or so before they entered into the contract to even purchase the thing; that they dissolved the corporation and that they changed the original contract from individuals buying the stock to the corporation buying the stock, in order that they might take advantage of this dissolution; that they went through with the liquidation of the initial corporation and, in doing so, brought it to an end, thereby bringing the tax burden to a head at that point, creating their own tax burden; and that in addition to this, in so doing it was not anything that Mr. Ware—in other words, even if it were undisclosed, if it had never been discussed, it was not his fault that they took the voluntary method they wished to do and brought upon themselves the tax burden.

This says "undisclosed liabilities." There was no liability at the time that they purchased it for these taxes because these tax liabilities didn't develop until they took the voluntary steps to liquidate the Rosewood *Memoraal* Park.

And on that basis, your Honor, we seek to prove that—I think we can prove to the Court—that first of all, it was not undisclosed; second, that the tax liability, if any,
10/17/68 was brought about by their own desire to change
page 28 } the basis of their assets factor by reason of the liquidation.

The Court: Mr. Lam, do I understand you to say that subsequent to the purchase of this cemetery property that Cemetery Consultants, Incorporated was dissolved?

Mr. Lam: No, sir. Cemetery Consultants, the purchasing corporation, dissolved the corporation that they bought. They buy the stock of the Rosewood Memorial Park. Then there is a corporation owning all of the stock of Rosewood. In September of '65 they liquidated Rosewood Memorial Park, they being the sole owners of all the—

The Court: Was this a corporation?

Mr. Lam: Yes, sir. Both were corporations but, see, one corporation can buy another one and under the law it can dissolve it and if it assumes all the liabilities of this corpora-

tion that is dissolved, then it takes as a new basis what it pays for the stock rather than what the assets of the corporation actually were.

The Court: What is the name of the corporation?

Mr. Lam: Rosewood Memorial Park, Incorpor-
10/17/68 ated, spelled out, was the corporation that was
page 29 } purchased. That was the one that Mr. Ware owned.

The Court: Rosewood Memorial Park, Incorporated?

Mr. Lam: Comma, incorporated, spelled out.

That was dissolved on September 16, 1965, and the purchasing corporation is as they have there, Cemetery Consultants.

The Court: They did this so they could take advantage of a new cost basis in the sale of property?

Mr. Lam: Yes, sir. If I could—

The Court: Let me ask you this: Is it your contention that this was not in the contemplation of the parties at the time this agreement was entered into?

Mr. Lam: I think, your Honor, it was definitely in the contemplation of the parties.

The Court: I mean, the mutual contemplation of the parties.

Mr. Lam: You mean did Mr. Ware have anything to do with whether they did dissolve or liquidate?

The Court: Right.

Mr. *Lame*: I don't think it mattered to him. He had a contract initially with the individuals.

10/17/68 The Court: We are not dealing with that con-
page 30 } tract.

Mr. Lam: No, sir. But I think where it comes into play is that money was paid on it which he repaid back to them, you see, the $50,000 was paid by the individuals to him under this former contract. He returned that to them because they had concluded in the meantime they would rather operate as Cemetery Consultants, purchase it that way in order to, I am sure, liquidate and do precisely what they did. So he returned the funds to them and they in turn made out new checks to him.

The Court: Is it your contention, then, that if the purchasers of the stock of Rosewood Memorial Park, Incorporated had continued to operate the business under that corporate structure that they could have avoided these taxes?

Mr. Lam: Completely.

The Court: By the provision in the Internal Revenue Code whereby they can adjust the cost of these lots upwards and downwards?

Mr. Lam: That is correct, sir. Completely. Completely.

The Court: Mr. MacMillan?

Mr. MacMillan: Your Honor, you have heard an
10/17/68 explanation by Mr. Lam of extra contractual re-
page 31 } sults. He does not *po-nt* to a single clause in the
contract which precludes the purchaser of the stock of Mr. Ware from doing with that asset they bought, anything that they wanted to do.

In other words, he did not—there was nothing in the contract, they just told you, Mr. Ware didn't care what they did with it. He sold them the assets. They became the owner of the stock and the right to acquire the stock and to hold the stock and dissolve was not contracted against in the contract. The contract does not prohibit the dissolution of the corporation.

The Court: Well, I don't think that is the point, Mr. MacMillan. As I understand it, for the purpose of argument and dividing the issues in this case, assuming that this clause covers indemnifying the purchaser against undisclosed liabilities covers the tax assessments or deficiencies for prior years, doesn't the question arise as to whether or not it was within the contemplation of the parties that the corporation whose stock was purchased would be continued to *operated* on the same basis as it was when the stock was purchased. It would certainly seem that the purchasers could not, by dis-
solving the corporation, which the stock was pur-
10/17/68 chased from Mr. Ware, create a tax liability which
page 32 } *otehrwise* would not have been incurred.

Mr. MacMillan: I understand your Honor's question, but, of course, it didn't. The Government audited the account on the basis of the facts as they existed at all times while he was the owner. In other words, these deficiency assessments would have fallen in the same way for the years involved.

The Court: Let's assume that the corporation had not been dissolved in 1965, September 15th of '65, could not have the principals of the Rosewood Memorial Park, Incorporated, a corporation, at that time in the year of '65 or '66, have made certain adjustments which would have eliminated these tax assessments for 1959, '60, '61 and '62?

Mr. MacMillan: No, sir, those years were audited to the basis of the facts as they were controlled by Mr. Ware during the time he was the owner.

The Court: All right.

Mr. MacMillan: In other words, let me explain to your Honor. Every five years—he had been audited—

The Court: Let me just ask Mr. Lam.

10/17/68 page 33 } Mr. Lam, suppose that the corporation had not been dissolved. How could the taxes have been eliminated or minimized or made less than they were?

Mr. Lam: All right, sir.

All right, now first of all, Judge, let's go back to '59 and take that. Now, when they purchased in '64—

The Court: 'Fifty-nine there was an assessment of how much?

Mr. Lam: Two thousand dollars, I think.

The Court: Let's take that as an example.

Mr. Lam: Now, our evidence will show that in the discussions it was contemplated that they were going to make certain improvements, expenditures, after they took over.

You see, the fiscal year ran to July 31st, and it was discussed that these physical improvements would offset any deficiency for '59.

Now, you see, all you are working with at that time is the year '59. That is all they had been working with. Next year, in '65, they would have been working with 1960. But they had a whole year to go to adjust for that, if there was any adjustment needed.

The Court: How far can you carry back the

10/17/68 page 34 } adjustment of your prorata cost?

Mr. Lam: Five years, this is the thing, and each year, unless you close out a section.

Now, if you still have—if you finish a section—a section, as I understand it, Judge, and I have been trying to learn a little bit about cemeteries, is that normally you take about a five acre plat or five acres and this is developed into probably three or four sections.

Am I correct, about an acre to a section?

But the whole five acres is considered a section and this is what you set your cost factor up on. Now, if you sold and completed everything and sold all the lots within a section within a three-year period, you would close it out at that point because it would have terminated. But since these sections go on and on in development and in sales and so forth, by this special feature it goes five years and you give them the right to go back five years by signing a waiver, and you have the five-year term in which to adjust all your cost factors.

Now, when they took over Rosewood, if they had spent some money which they had—we say our facts will show that they had discussed about doing it, there would have been no loss or no difference in the '59 tax, '61, '62 and '63

10/17/68 wouldn't even have come to a head at that time
page 35 } because the section wasn't completed until each of the following years. In other words, in '65 they would have adjusted '60 and in '66 they would have adjusted '61 and so on down the line.

The Court: Do I understand you can carry back the cost of lots that were sold in '59 on your tax returns, say, for 1964?

Mr. Lam: Yes, sir.

The Court: Then therefore reduce the tax, your income upon which taxes were paid in '59.

Is the accountant here that can answer that question?

Mr. Lam: Mr. Godwin can answer the thing, sir.

Mr. Godwin: Your Honor, I think Mr. Lam is a little bit confused. If I understand it correctly, the section has five years, and Mr. Winquist can probably verify this, at the end of five years then they compare the actual cost with the estimated cost and then in your adjustment either for or against the tax period is taken into consideration. So at July 31, 1964 this particular section had to be closed because it expired, that five-year period expired. And
10/17/68 those—that section would be pertaining to years
page 36 } '59, '60, '61, '62 and '63.

The Court: All at one time?

Mr. Godwin: All at one time.

The Court: Has to be within a five-year period?

Mr. Godwin: That is correct.

The Court: Let me ask you this, sir: I am just trying to get oriented, gentlemen.

You say you have a chance to adjust your estimated costs, is that right, within a five-year period? That is the costs of cemetery lots or plots or whatever you call them, that were sold back as long as five years previous to that?

Mr. Godwin: Your Honor, it's based on an estimate and this estimate is compared with the actual cost that is incurred at the end of this five-year period.

The Court: Why is it when you sell a cemetery lot in the Year 1959 at the end of that year you do not know what your cost has been?

Mr. Godwin: That being so you just estimate it.

The Court: Because you are going to have to continue to improve in order to sell the rest of the lots in that
10/17/68 section; is that correct? Is that the idea?
page 37 } Mr. Godwin: Yes, sir.

Mr. Lam: It isn't a question, Judge, that you don't pay any income tax that year.

The Court: I understand. I am clear on it.

Mr. MacMillan: Now, and to clear it up further, Mr. Ware, himself, in 1959 estimated what improvements he was going to make. But he pocketed that money, put that money right in his pocket and didn't make those improvements in 1959, '60, '61 and '62, and the reason there was a tax deficiency is because Mr. Ware hadn't made those improvements.

This sale occurred in March of 1964 and the closing of that period was in July. And there is nothing in this contract by which these parties were obligated to make any investments for him that he hadn't made in the previous four years in order to keep him from having the tax deficiency.

The Court: Wait just one minute now. When did the five-year period close for this—where these lots are being sold?

Mr. Godwin: Section Three, I believe, was July 31, 1964.

The Court: Are we dealing with Section Three?

10/17/68 Mr. Bowers: Yes, sir.

page 38 } The Court: Section Three was closed when?

Mr. Godwin: July 31, 1964. And I believe according to the waiver, they had until—was it October of '65 to make the adjustment?

Mr. Winquist: They had extensions.

The Court: Extensions to October 31st?

Mr. Winquist: 'Sixty-five.

Mr. Lam: Yes. To October 31st of 1965.

The Court: Nineteen sixty-five.

Mr. Lam: In other words, Judge, the language of this, the amount of any—

The Court: Wait a minute.

Mr. Lam: Excuse me.

The Court: Now, at this point I fail to see how the dissolution of Rosewood Memorial Park, Incorporated, on September 15, 1965 could possibly affect the tax liability for the years in question, for the reason that the year ended on July 31, 1964 and was extended only to October 31st, some six weeks after the corporation was dissolved. How can it possibly affect it?

Mr. Lam: Excuse me, your Honor.

Mr. Hudgins: It didn't, Judge, for one particu-

10/17/68 lar year only, 1959. You have this five-year pe-

page 39 } riod—

The Court: This gentleman just told me that they close it out for all those years.

Is that correct, sir, or not?

Mr. Godwin: Are you speaking to me, your Honor?

The Court: Yes, sir.

Mr. Hudgins: We are only speaking of one section in '59. We were only using one year as an example, Judge.

The Court: I see.

Mr. Hudgins: In other words, they purchased in March of 1964 and they had from March until July of 1964 to spend to affect the tax liability.

The Court: For 1959 only?

Mr. Hudgins: For 1959.

Mr. Godwin: 'Sixty on through.

The Court: Did they have additional time to make expenditures which affects their tax liability for 1960 after that date?

Mr. MacMillan: Your Honor, this accountant is here that represented Mr. Ware.

The Court: Let this gentleman answer my question.

Mr. Godwin: Me, your Honor?

10/17/68 page 40 } The Court: Yes, sir. I understood you to say that it was cut off then as to all of those years.

Mr. Godwin: I meant cut off in that the Revenue Agent comes in—

The Court: Was it cut off as to just 1959 or also as to 1960, '61 and '62?

Mr. Godwin: This section had until July 31, 1964 to run. This was the five-year period which would include 1959, '60, '61, '62.

The Court: I thought that was what you said, sir.

Mr. MacMillan: That is our position. Here is the man who handled it for Mr. Ware.

The Court: And it could not—you did not have any further time after that date, extension, October 31, 1965, to make any improvements which could have affected your tax liability as to that section for either 1959,'60, '61 or '62?

Mr. Lam: Yes, sir. I still think this is quite complicated, your Honor.

The Court: Gentlemen, am I right?

Mr. Lam: No, sir.

The Court: Just a minute, now, you don't know.

10/17/68 page 41 } Mr. Lam: Well, I have the—

The Court: I have two tax men here.

Mr. Godwin: It's my understanding if expenditures were expended in this section, this would have decreased this liability.

The Court: Up to what time?

Mr. Godwin: Up to July 31, 1964. But it would reduce the section which would be pertaining, if I understand it correctly, through the five years from '59 on. Is this clear?

Am I in error here?

Mr. Winquist: It affects all years inclusive.

The Court: After July 31, 1964 or the time to which it was

extended, October 31, 1965, there was no way to make additional expenditures that would affect this particular section for '59, '60, '61 or '62?

Mr. Godwin: After July 31, 1964.

The Court: That is what I thought you said.

Mr. Hudgins: That is one section. It's in this one section.

Mr. Godwin: Are we talking about this one section?

The Court: You are clear to me. Yes, sir. But apparently not to Mr. Lam and to Mr. Hudgins.

10/17/68 page 42 } Gentlemen, we will—

Mr. Lam: Let me suggest this simple thing—

The Court: Well, we will recess at this point and see if—

Mr. Lam: I have got to get my accountant straightened out.

The Court: All right, we will recess and give you an opportunity to confer.

(Whereupon, a short recess was taken.)

The Court: I believe we are ready to proceed. Mr. Lam, take up where we left off with reference to the provisions of the Internal Revenue Code as far as carrying back capital improvements to adjust costs for a five-year period, with reference to a particular section of the cemetery.

Mr. Lam: Let me suggest—

The Court: I think we are agreed as far as 1959 is concerned the cut-off was October 31, 1965, the extension from July 31, 1965.

Now, about 1960.

Mr. Lam: Let me try to explain it to you in my way, if I may.

10/17/68 page 43 } First of all, we are dealing in this particular instance with only one section. This is Section Three. You see, there are several sections under development, all of them having their separate years that they started and so forth. Now, under a normal tax set-up, you have without any waiver such as was signed here with respect to this particular section—you have a normal three-year period in which you can go along any way adjusting your taxes.

Now, what occurs is here that Mr. Ware signed this waiver which when he signs this waiver it gives him an advantage of two additional years on this particular section and for the years only according to this waiver of '59 and '60, which means that for Section Three for the years of '59 and '60. Then they would come to a termination point. The five years

on them would come to that point. But that would be all, see. The taxes on those two particular years for that one particular section. There may have been under development at that time Section Four and Section Five, all in that same period of time, because they don't usually start with one and they have several going at the same time.

Now, all this would have done if there had been no dissolution or liquidation of the thing, would have brought
10/17/68 to a head the two years for Section Three and all
page 44 } they would have had to have done to offset any potential taxes on those two years for that particular section would have been to make some expenditure that would have covered those two years. The next year, the following year, they would, presumably by the same type of waiver process.

Then you would come to the year '61. And you could spend in the next year some to offset that, if you needed to do it, and you could be working on two or three sections at the same time.

So this tax proposition only was for the two years for this particular section. This is all that is cut off at that time because of the running of the time limit. It didn't cut off anything else.

But once this liquidation came about, it cut off all sections for all years, and this is why I say the liquidation creates the liability. He didn't have to go in and spend a great deal of money to—

The Court: All right, sir. Let's go back then.

If it made no difference we wouldn't have to worry about it. But if there is a question as to whether or not it does, we come back to this basic question, it seems to me,
10/17/68 that is, whether it was within the contemplation
page 45 } of the parties, mutual contemplation of the parties, that any capital expenditures would be made to reduce contingent tax liabilities for the years in question, '59, '60, '61 and '62.

Mr. Lam: We have evidence that this was going to be done.

But, again, Judge, the only particular thing is this, if they do something which is of their own desire, do you see what I am driving at—they—what they did, when they decided that "we want to take the advantage of what we paid for the stock by liquidating this corporation—"

The Court: I understand.

Mr. Lam: This was a voluntary thing.

The Court: I understand what your position is, that by dissolving this corporation on September 15, 1965, that they took advantage of a new tax basis.

Mr. Lam: Yes, sir.
The Court: Based on the cost—
Mr. Lam: Price.
The Court: —of the property.
Mr. Lam: Of the stock.
The Court: Well, of the stock.
10/17/68 Mr. Lam: Yes, sir.
page 46 } The Court: But was there anything—there is certainly nothing in this contract as written that prevents them doing it, is there?

Me. Lam: That prevents them from doing it, no. None whatsoever. Except that they had to get Mr.—I think it's either in the Court in some subsequent paper—get Mr. Ware's consent to accept the stock of Cemetery Consultants rather than the Rosewood stock which he was holding as the collateral in the thing.

You see the contract, if you read it, he is holding the Rosewood Memorial stock until it's paid for. This is his collateral, and when this liquidation came about, he was written by Miss Cobb or—Mrs. Cobb or Miss Cobb—and offered and requested to exchange the Rosewood stock, which he was holding, for the Cemetery Consultants stock and this was done.

In other words, he acceded to their request and accepted the Cemetery Consultants stock rather than the Rosewood stock which he was holding.

But I think, your Honor—

The Court: Let me ask you this: How can you show that what the complainant did in this case was a breach of their contractual obligation?
10/17/68 Mr. Lam: Don't say that it was, your Honor,
page 47 } but the question is if you bring on your own liability, it's not his fault. You see, this is what they are trying to say. When they do this thing and they create this immediate liability for taxes—

The Court: They didn't create it. It was already there, wasn't it?

Mr. Lam: No, sir.

The Court: They just didn't do anything to minimize it, which you say they might have done. Did they have any obligation to do it? Was that *winhin* the contemplation of the parties?

Mr. Lam: You come down to the question of liability at the time. An undisclosed liability. It's not a liability until they put it into this process themselves.

For instance, your Honor, if I can go back and explain it, —you were asking me about '59 and '60 becoming due because of the waiver thing in those two years. Now, let's assume

that at this point the taxes, I think, that were assessed for '59 was $2300; for '60, $2600, plus the penalty and so forth.

Now, that for the over-all profit of the corporation during that year for the development of all the sections, the only thing that came due so far as Mr. Ware was con-
10/17/68 cerned at this particular time would have been on
page 48 } that particular section for those two years. They could have made just a minimal expenditure and covered that particular thing.

But when they undertook to liquidate the corporation they brought everything to a screeching halt for all sections for all years. Now, they did it because they wanted to, rather than say "I am selling a lot that I have got a hundred dollars profit on it, I have only got $25.00 by taking the new asset basis by reason of the liquidation."

They do this for their own benefit for future taxes, and it's done all the time. I mean, that is why the tax code is set up; that if you want to liquidate this corporation, you can take it then at the purchase price that you bought the stock at. And so then they have rather—if they were using for, as an example—suppose when they bought it they had a profit of one hundred dollars on a lot and by this liquidation they cut it down, they haven't got but $25.00 profit on a lot. Then for all these future years that they are selling these lots, they have only got $25.00 rather than $100 profit on each lot. And when they cut it off this would have come due, but with a little bit of expenditure, which was discussed,
10/17/68 it would have removed any tax liability on that—
page 49 } those back years, anyway.

But when they came forth and liquidated, it cut it off not only for these two years on this particular section, it cuts it off on all sections for all years—because this is what happens when you terminate the corporation. Then the Tax Bureau comes in and assesses the whole works.

The Court: Were the assessments for back taxes any of these years due to sales of any of the lots except those in Section Three?

Mr. Lam: Oh, yes, sir. They were probably working on probably Section Four, probably Section Two. All of these are carried over because you don't—

The Court: You have similar waiver agreements permitting this carry-back for five years for others?

Mr. Lam: He had signed other waiver agreements previously for other sections in other years, yes, sir. I would imagine it is almost automatic each year, if you want to do it.

The Court: Was it done?

Mr. Lam: I think it was done in several instances. Whatever they requested be done, they did it. Because

10/17/68 page 50 } it's an advantage of the tax payer to have five years to work his profits and loss rather than three years.

The Court: Let's get back to the vital question and, that is, were the purchasers obligated to continue to operate this cemetery within the framework of the corporation whose stock was purchased from Mr. Ware.

Mr. Lam: Your Honor, I would say that they were and I will tell you why, unless they did it with his permission.

Give me a chance just to look through the contract.

On Page 2 of the contract, it's not a numbered paragraph, but the last paragraph in there, "Until such time as the aforesaid obligation," that was the payment of this amount of money and, of course, they could pay it in an amount of $20,000 a year for the rest of that $150,000 to go for how many years, twenty into a hundred fifty. Seven or eight years, all right, sir. Until that he was to hold this stock as collateral for the payment pursuant to that thing.

The Court: That provides that until the purchase, balance of the purchase price is paid, with interest, that

10/17/68 page 51 } the party of the second part, that is, the purchasers, agrees to deposit with the seller or his authorized agent as collateral security for the payment of such obligation to Mr. Ware, the outstanding shares of capital stock of Rosewood Memorial Park, Incorporated, which shall be pledged or sold by Mr. Ware except in the event of a default hereunder, and on failure to respond according to the tenure of this obligation.

That doesn't say that the sellers can't sell that stock or their equity in it.

Mr. Lam: That stock, no, it certainly does not say they can't sell their equity by subsequent contract which would all be subject to this contract, of course. They could sell it to you or me or anyone else. But that stock was pledged and Mr. Ware held it until—

The Court: But this was only for the purpose of security for the purchase price of the stock, was it not?

Mr. Lam: Right. But if your Honor—

The Court: Is there anything in here in this language which prevents them from liquidating the corporation after making satisfactory arrangements with Mr. Ware to accept a substitute collateral?

10/17/68 page 52 } Mr. Lam: No, but in this particular thing when you say "make satisfactory arrangements", this is then that they want him to accept the other stock in the place, instead of this particular stock.

The Court: I understand that he did and agreed to do so.

Mr. Lam: That is right, he wasn't trying to block them from doing it.

The Court: Is there anything in this contract which requires the purchasers to continue to operate this cemetery under the name or within the framework of the corporation whose stock was purchased by the complainant?

Mr. Lam: Well, I would suggest to your Honor—

The Court: Have they done anything by way of a breach of a contractual relationship illegal or inequitable by liquidating this corporation? If they haven't, where is your defense to this?

Mr. Lam: I don't even think I have to defend it. You pledge to me stock for something. Now, if you went voluntarily against my knowledge and liquidated the corporation so the stock was worthless, then you would have breached your contract.

The Court: No question.

10/17/68 page 53 } Mr. Lam: Now, if you ask me, will I accept one stock in place of the other and I agree to it, I see nothing wrong with that. This is what was done. But if you ask from this particular contract, they wouldn't have the right to do it under the contract to dissolve the corporation and therefore render the stock void, without at least the consent of him to do so.

Now, I think—you asked me did the contract prevent them doing it. I would say it prevents them unless they have his consent to accept the other stock in the place of it.

The Court: But you are saying this is what caused the deficiency.

Mr. Lam: No, sir. This is what brought forth the termination, the voluntary liquidation, so that they could get the advantage of what they had paid for the stock rather than the assets of the corporation as they were on the Rosewood books. When they took that voluntary thing to get the higher basis then they brought to an end all of these tax improvements and tax lay-over they could do, continued on down through the years. And it terminated it all as of this one time and that was at the point of liquidation.

10/17/68 page 54 } Each year if they—and I assume they must do the same thing, if they use this five-year plan, then each year as they go along—and this is if they continue to operate under Rosewood Memorial Park, they would have done it.

Now, they didn't want to do it, quite obviously, because on the balance sheet, which was the basis of this thing, and he has referred to it and made reference to it in his opening statement and in the pleadings, the land held for future de-

velopment at this time was $38,000. The office buildings, *et cetera,* depreciated, came to $20,000. So the fixed assets probably at that time were roughly in the neighborhood of $60,000. Of course, they got costs of development that they can add onto it. But for this they are paying $200,000 and they are getting assets worth roughly $60,000. They up their base, of course, on the sale of lots by the improvement they make.

The Court: The purchasers thought that the property was worth a lot more than its book value and certainly any prudent business man is going to set up his books on the basis of his costs to minimize taxes after he has paid—Mr. Ware got the benefit of the actual market value of the property in the purchase price for the stock, did he not?

10/17/68 page 55 } Mr. Lam: Yes, sir. There is no question of that. If he could have sold it for a million dollars I guess he would have tried to do it. But they don't get the advantage of what they pay for it in their asset thing until they do what they did, which is liquidate.

The Court: And of course any prudent businessman would contemplate that they were going to set up a corporate structure or different business structure so as to take advantage of the higher cost?

Mr. Lam: Right. But when they do so, then they bring all this particular tax burden on them by doing it.

The Court: Where is there anything in the contract or in the contemplation of the parties which prevents them doing exactly what they did?

Mr. Lam: Judge, if I can only answer your question, they pledged Rosewood Memorial stock and this was a pledge to Mr. Ware.

The Court: But this was only for the security of payment of the purchase price?

Mr. Lam: Well, if you had no—

The Court: This would not prevent them from changing the corporate structure?

10/17/68 page 56 } Mr. Lam: But if they do it on their own, they have to have his agreement that he would accept the one stock for the other stock.

The Court: Which he did?

Mr. Lam: Right. And they did it for their own advantage, and the only thing I am saying is they create their own liability when they do it with regard to all of *thes* taxes because they cut off all the development years.

The Court: You say they create the liability?

Mr. Lam: Yes, sir.

The Court: They haven't created a liability. The liability was already there?

Mr. Lam: No, sir.

The Court: They just prevented by this liquidation the opportunity for minimizing or reducing these taxes which would have otherwise—they otherwise would have had by continuing to operate under the original corporation. But they had every right in the world to do this unless you can show me something to the contrary.

Mr. MacMillan: Your Honor, could I say one thing here?

10/17/68 page 57 } Mr. Ware had a tax deficiency because he didn't make these improvements in 1959. He, himself, did not make the improvements by '59 and paid the Government a deficiency. He admitted in discovery that he did not put in the roads and he did not put in the statues that were required in order to get the business that he had projected. He could have put in those improvements without any agreement on my clients part to put the improvements in for him. Which he had had five years to do.

Now, the waiver, your Honor, let's get to the waiver just one minute. All the waiver does, the Government has got three years, they don't need any waiver for three years. They can go back three years. The waiver just allowed them to go back the five years.

And your Honor has got—there is nothing I can add. We acted the same in the operation, the same as he had. We conducted the thing. He had operated from '59 to '64 without making the improvements. His tax liability was fixed because he hadn't made those improvements. We didn't agree to make them for him.

The Court: Mr. Lam, I don't see—it seems to me that all you are saying is that if they had continued to operate under

10/17/68 page 58 } the original corporate structure that there was an opportunity, there may have been an opportunity, to reduce this tax liability by the investment of further capital toward the improvement of this property. And that is about all, it seems to me, that you are saying.

Let's assume that they had continued to operate and didn't do it, didn't put out any additional money for capital improvements, is there anything that would require them to do so?

Mr. Lam: Our evidence, your Honor, will show that this—we are going back to the question of undisclosed liabilities. Our evidence will show that the question of this taxation problem existed.

It will show, number two, that in the discussion of the thing that they planned to offset this thing by making certain additional improvements.

The Court: Who did?

Mr. Lam: The buyers. Now, you see, this is not undisclosed if they know what they are doing.

The third thing is that when they bought the thing and came down there, they looked over it, they saw what it was. Like he says, if Mr. Ware was supposed to put in a road back here, if this is what he originally contemplated and hadn't done it—I am selling a used car and they take it out there, they don't say, "Come back later," and say, "It

10/17/68 doesn't have an air conditioner" when they have

page 59 } seen it and they ran it.

The Court: Are you telling the Court that this tax liability of course, was recognized by the parties?

Mr. Lam: Yes, sir.

The Court: And that the purchasers agreed that they would make capital improvements?

Mr. Lam: Yes, sir.

The Court: Which would minimize these taxes.

Mr. Lam: And it's not undisclosed if they know about it and if they know about it and they had planned to offset it.

The Court: May I ask you one question?

Mr. Lam: Yes.

The Court: Why wasn't that put in the contract if that was the intention of the parties?

Mr. Lam: Your Honor, if I were drawing the contract—hindsight is always better than foresight. Why Mr. Ware—I think he took the contract to Mr. Woodhouse. I couldn't answer that.

The Court: If that was the contemplation of the parties, it should have been put in this contract. Otherwise is not the Court estopped from hearing any parol evi-

10/17/68 dence? That is contrary to the expressed and

page 60 } clearly written terms of the contract—

Mr. Lam: I would agree with you.

The Court: —in the absence of some allegation of fraud, mutual mistake, or misrepresentation.

Mr. Lam: No, sir. I don't think so.

The Court: Will you give me some law?

Mr. Lam: I certainly will. I would like to offer this argument to you. The question is—he referred to liability. I don't question liability covers everything *conceiveable*. Undisclosed is the thing. Undisclosed is not spelled out. Undisclosed is something that is hidden.

If at the time, your Honor—this oftentimes comes up about the liability function in many contracts particularly in businesses about some liability arising probably from an automobile accident or something that hasn't been determined, and so forth.

The Court: Doesn't undisclosed include undetermined?

Mr. Lam: No, sir. If there were an accident and we knew there might be some claim about it and we discussed that thing, then you have full knowledge of it when you

10/17/68 go into the thing. The question of undisclosed is

page 61 } something that is hidden, not known, not discovered and the parties have no knowledge of the thing. If they have knowledge, there is nothing undisclosed about the thing. The fact that it may be more, the fact they could offset it or any of the other factors is not pertinent. The question is whether it was a hidden thing they had no knowledge of, and, of course, our evidence will show that they did have knowledge of it, discussed it frequently. And if this is the case, then there is nothing undisclosed about it. The fact it may be bigger than they thought or anything else, it still doesn't.

You go down here and, Judge, you have got some—the buyer must take some risk in any—

The Court: Then you are saying now that there is no liability on the part of the defendant because the save harmless clause, namely, Paragraph 3(b), which reads, "Seller hereby assumes responsibility for any and all undisclosed liabilities of the corporation and agrees to save the buyer harmless should any such liabilities be discovered," does not include undetermined taxes.

Mr. Lam: No, sir. Undetermined—

10/17/68 The Court: Is that the issue here?

page 62 } Mr. Lam: There is another provision in here which I would mention to you, also, at the top of Page 2 which is another way that they went into the thing.

"In the event it is determined that the said net worth is less than the said sum, a credit shall be allowed by the seller," the seller, Mr. Ware, "on the first annual payment as hereinafter set forth to the buyer, to the extent of the loss, if any."

So in this particular clause of the thing there is a case if they turned up something that was different from the balance sheet they could deduct it or a credit would be allowed on the first annual payment. And that doesn't specify what. It just says if it was something different than what was reflected in that statement there.

The Court: Then we are coming right back, it seems to me, to the basic question as to whether or not there is liability on the part of the defendant to pay these taxes.

Mr. Lam: Yes, sir.

The Court: Assessments and the expenses incident to the negotiations to determine the tax liability under

10/17/68 Section 3(b) of the contract.

page 63 } Mr. Lam: Right, sir.

The Court: You are simply saying that undisclosed liabilities does not include undetermined back taxes.

Mr. Lam: That is correct, sir, and this is why we had moved that this was purely factual in that and moved for, first of all, in the first instance, that it was a matter at law sometime back when the pleadings were first filed, and secondly, at a later time that it was a matter that should be heard by an issue out of chancery.

The Court: Doesn't seem like the factual situation is in dispute.

Mr. Lam: I am sure they will contend that they were not disclosed and we intend to show that it was. So I say that is—

The Court: Everyone is in agreement that the taxes which had been paid in years prior or within a five-year period prior to the execution of this contract were subject to possible adjustment. So to that extent they were not undisclosed, that there may be that liability there.

Mr. Lam: Yes, sir. So if they—

The Court: But had not been determined whether

10/17/68 or not there would be any adjustment.

page 64 } Mr. Lam: Right. And also you have a right to, as I said, by using your cost basis of—

The Court: Everybody in business knows that taxes that have been paid within three years are subject to audit by the *Interal* Revenue or possible assessment. So we come down to the question of law as to the meaning of the word "undisclosed", within the contents of this contract.

Mr. MacMillan: Could we read your Honor Paragraph 1 which we think is crystal clear and very important?

Number one, first page, terms of sale:

"The sale is made in accordance with the balance sheet prepared and submitted as of December 31, 1963—"

The purchasers' accountant did not prepare that balance sheet. That was prepared by Mr. Ware's accountant and was brought and was the subject upon which this sale was concluded.

"—which said balance sheet discloses a corporate net worth of $56,959—" then goes on to say that the net worth of the corporation is not less than fifty-nine, which is in effect saying that there is nothing—

10/17/68 The Court: Fifty-six.

page 65 } Mr. MacMillan: Fifty-six. Which is, in effect, saying there are no others.

Then says in the next page that in the event it is determined within the first year it can be deducted, and then under

the general conditions you had a Paragraph (b) that said if there are any undisclosed liabilities, any undisclosed liabilities they will be the obligation of the defendant.

Our contention is, your Honor, that this was a sale by balance sheet.

The Court: You are saying that undisclosed liabilities means liabilities that are not disclosed on that balance sheet?

Mr. MacMillan: And we don't say that is a contention, we say that is what it reads. That he guaranteed that net worth and guaranteed those obligations.

And it was his balance sheet. He could have put anything on that balance sheet he wanted.

Mr. Lam: Your Honor, of course, we are ready to prove that the particular man he referred to that drew the thing was the agent of both parties in here, the balance sheet I am speaking of, and, secondly, in reading the balance sheet thing with the clause at the top of Page Two, "In the

10/17/68 page 66 } event it is determined that the said net worth is less than the said sum, a credit shall be allowed by the seller on the first annual payment—" so therefore, if there were anything different, it was to be determined in their first year of operation and allowed at that point, if he wants to stick to that clause, because it makes reference to the guarantee that that is the net worth.

Now, there is no showing that there was any less net worth. No demand was ever made within the first year. This was '64. Here we are in '68 and the first demand hasn't been made with respect to that yet.

They took it under the balance sheet and they found nothing there that showed any less net worth than was shown in the thing. And they had a year there in which to do it and the terms were put down what would happen.

The Court: Yet it seems to me that the issue here refers to the use of this word "undisclosed." I am not concerned about the word "liability" because liability certainly includes contingent tax assessments for taxes that—the possibility of tax assessment for past years.

10/17/68 page 67 } But the word "undisclosed", whether it refers to liabilities which are not disclosed on the balance sheet, liabilities which were not known by the parties or not known by the purchasers.

Now, does it mean undetermined back taxes? The memorandum which counsel for the complainant has submitted deals with the term "liability", and it is a very expressive term. It does include contingent liabilities for back taxes.

The word that seems to me to raise an issue is the word "undisclosed," Mr. Lam apparently taking the position that

it was known by the purchasers that there may or may not be assessments of back taxes, depending upon whether or not additional expenditures for capital improvements were made, and that this is a risk which the seller assumed—excuse me, the purchasers assumed—that was not within the contemplation of the parties as a responsibility of the seller under Paragraph 3(b), I presume.

That's the issue, the only issue that I can see in this matter, so I think at this point we should—unless you have some law more than the Court has had access to at this point which would make this a question of law and an issue of

10/17/68 page 68 } fact, it seems to me it is a question of what was within the contemplation, the mutual contemplation of the parties with respect to this term "undisclosed liabilities," under all the circumstances under which the contract was negotiated and formulated.

Certainly the balance sheet, I presume, does not reflect any reserve set-up for contingent back taxes.

On the other hand, both the purchaser and the seller were experienced in the operation of cemeteries and the provisions under the tax laws for the adjusting of capital expenditures so that they could be carried back to affect the taxes paid in previous years, so the taxes were—the back tax contingency was not undisclosed. Both parties were on notice that this was a contingency.

It seems to me that to be more specific the question is whether or not the word "undisclosed" means taxes which were undetermined, contingent back taxes which were undetermined. That is the only issue I see in the case.

Mr. MacMillan: Your Honor, we merely state that the discovery showed that the purchaser—the seller had owned and sold seven cemeteries and the purchasers did not own any and had not—

10/17/68 page 69 } The Court: I thought you said they had operated cemeteries up in Arlington or somewhere.

Mr. MacMillan: The purchasers here were Mr. Norman Cobb, a banker, his sisters, an attorney, Mr. J. D. Williams.

The Court: Any prudent businessman knows that there is always a contingency for back taxes in any business, so many businesses set up a reserve for it. Most do not, but it's not something that is undisclosed. Every prudent businessman knows that is a contingency. If he wants to provide for it he can do so by expressing it in the contract. Whether this is broad enough to include that or not as a matter of law is a question. At this point I could not say that it is as a matter of law, so therefore we have to resort to the intentions of the

parties at the time this contract was executed, which raises an issue of fact, which I understand Mr. Lam has requested out of chancery to determine. And I understand that he has already filed an affidavit that the evidence would render the question doubtful.

I believe that I overruled his motion for an issue out of chancery last Friday, four or five days ago, as I recall, but told him that I would keep it open until such time
10/17/68 that it appeared to the Court there may be an
page 70 } issue of fact involved.

So if you will frame the issue, namely, did the parties to this contract mutually agree that under the terms of Paragraph 3(b) of the contract that the seller would be responsible for contingent back taxes which were not determined at the time of the execution of the contract. Phrase it in more precise terminology, if you wish.

Mr. Lam: I think you said did the parties to this—parties to this contract mutually agree under Section 3(b) that the seller would be responsible for back taxes which had not been determined as of—

The Court: At the time of the execution of the contract.

Mr. Lam: All right, sir.

The Court: That is the only issue in the case.

Mr. MacMillan: We merely point out to the Court, as this case says, you must read the whole contract and we say the whole contract was a sale by balance sheet.

The Court: In the light of all the other terms of the contract and all the surrounding circumstances, this
10/17/68 is the clause which is to be determined. Not only
page 71 } within itself but in the light of all the other terms of the contract and the surrounding circumstances.

Mr. MacMillan: And I think your Honor is saying that you are not able to look at the entire contract and find as a matter of law that that—

The Court: I am somewhat disturbed by the use of the word "undisclosed." Ordinarily in these contracts it is specifically provided that any assessment of back taxes will be paid by the purchaser—by the seller.

Mr. MacMillan: That is true. But, of course, our position is that the first clause of the contract says that the contract is made in accordance with the attached balance sheet.

The Court: But it also says that any assets shown on that balance sheet found to be less than that shown on the books of the corporation will be adjusted within one year.

Mr. MacMillan: That is right, your Honor. Because in these types of transactions you have this problem, the value of the assets and the amount of liabilities. One is guarantee-

ing that the value which he had placed on these assets were what was represented in the balance sheet. The other clause comes along and says that any undisclosed liability that reduces net worth—so net worth can be reduced two ways.

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The Court: No question about that.

Mr. MacMillan: It can be reduced by values—

The Court: No question about that.

Mr. MacMillan: Our position, of course, your Honor, is that the contract makes it clear.

The Court: The first part of the contract speaks of only as to the value of assets. When it gets down to 3(b) we talk about undisclosed liabilities.

Mr. MacMillan: Yes, sir.

The Court: Now, whether or not that includes undetermined back taxes or not, I do not know. That is the question.

Mr. MacMillan: I appreciate your Honor's problem.

The Court: I don't think the terminology is precise enough in the absence of some previous Court decisions construing the use of that term with respect to the issue raised here.

Gentlemen, at this time we will have to continue this matter and set it for trial on a date when the Jury is here. The next docket call.

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You can prepare the order, Mr. Lam, submit it to Mr. MacMillan so he may note his exceptions.

Mr. MacMillan: Is there any chance, your Honor, of getting a date? They have levied on the escrow account. The Government.

The Court: I thought the taxes had been paid.

Mr. MacMillan: No, sir. We have been trying to have an early trial so we could get it decided.

The Court: Somebody has got to pay them. What difference does it make who pays them?

Mr. MacMillan: Well, the purchase money—

The Court: The purchase money has been put in escrow but the taxes have not—

Mr. MacMillan: Have not been paid. And if we could get an early date we would appreciate it. We have some several witnesses here from northern Virginia.

The Court: How much is it, $16,000? How much is in the escrow account? Why don't you pay the taxes out of the escrow account?

Mr. Lam: Because we feel like it's our money, Judge.

The Court: Well, it may very well be.

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Mr. Lam: I don't know whether they would be in a position to pay it back if we were right. I would hate for them to do that. I mean that possibility arises.

The Court: Gentlemen, I can't—we have a docket call—just had one two weeks ago. You will have no trouble in getting an early date at the next docket call, I can tell you that. But as far as the balance of October and November is concerned,—how long has this matter been on the docket?

Mr. MacMillan: Since last April.

Mr. Lam: The first time it has been set down was the last docket call, your Honor.

The Court: This is a Jury matter and apparently is going to take most of the day.

Mr. Lam: Yes, sir, it will. I will take a full day, your Honor, at best, because of all the witnesses involved. Discovery depositions of Mr. Ware took two—a little better than two hours.

The Court: When did the Government file its lien on the escrow account?

Mr. Bowers: They filed a levy on it. We had to post a bond in order to keep from having our business destroyed here by lien.

10/17/68 page 75 } The Court: How long is the bond good for?

Mr. Bowers: I believe it's good until next July, but we have got a possibility of appeal here.

Mr. Lam: Judge, we are in disagreement. I want to make sure that I got your words. I have a hard time getting straight with Mr. Bowers here.

Now, I think this is the language your Honor—

The Judge: Gentlemen, you can phrase the issue probably a lot more precisely.

Mr. Bowers: I think you did a very good job. It just talks about back taxes. We don't define whose taxes these are. It should be of Rosewood in the first place. I mean, it's not complete.

The Court: You can make it more precisely.

Court will recess.

(Whereupon, the hearing was adjourned.)

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The Court: Wait just one minute. Let me ask Mr. Lam a question at this point.

Mr. Lam, how could the records of Cemetery Consultants be material to any taxes assessed against Rosewood Memorial Park?

Mr. Lam: May I let Mr. Spindle answer that, sir?

The Court: Yes, sir.

Mr. Spindle: I think I can be helpful to the Court, your Honor. This is a continuing entity.

The business has kept right on going. Expenses have continued in developing these cemetery lots. But the purchasers for their own tax benefit have elected to liquidate this corporation which they bought. They bought the stock. Therefore, that made that corporation, Cemetery Consultants, the parent and the corporation which they bought was Rosewood. Then it became its wholly-owned subsidiary.

Now, the business goes right on. But they elected, in order to get a stepped-up, increased basis of their lots, to liquidate their subsidiary and take it up into the parent. They have continued to spend money then as Cemetery Consultants after they went through this tax manipulation and they
1/10/69 continued to spend the money and how much they
page 17 } have spent on those lots has a great deal to do with the tax liabilities over this five-year period.

Your Honor put your finger right on the point at the outset. This is a tax accounting which can be properly manipulated. You can accelerate or delay the payment of taxes in this kind of a land development and our whole defense to this case is that at the time we sold this property there was no tax liability and the tax liability has been incurred as a result of manipulation which the purchaser has caused to be done after they acquired the property.

Now, it is important that we see what they did. We want to see their business records.

The Court: All right, sir. Let me ask one other question. I understand your position. Initially it seemed to me that the proper approach to this issue in this case was to determine first whether or not this indemnifying clause in the purchase agreement applied to taxes. Now, I don't know as to whether or not we ever came to any decision. Apparently—am I correct in assuming that there is no controversy that it did?

Mr. Spindle: I don't think we are in a position

1/10/69 to concede that at the moment, that is one of our
page 18 } points, but we go beyond that, sir.

The Court: If we determine that the assessment of additional taxes for years prior to the sale was not within the contemplation of this indemnifying clause the rest of it is academic.

Mr. Spindle: That is correct, sir.

The Court: I don't want to get the horse before the cart.

Then if we determine that it was within the contemplation of this indemnifying clause then let's find out whether or not there is any back tax liability which is properly attributable to—within the contemplation of the indemnifying clause.

Mr. Lam: There is one further issue, Judge, as to whether it's undisclosed, too.

Mr. Spindle: There is the tax liability. That is a fact which we—

The Court: Why go through all of it if it's not necessary?

Mr. Spindle: Well, it may not be necessary if the Court decides that.

The Court: That is the reason I was trying to take this thing piecemeal and determine the very narrow issue as to whether or not the tax liability, the tax claim
1/10/69 which they are asserting now, or the claim to be
page 19 } indemnified for this tax liability, was within the contemplation of the sales contract.

Mr. Spindle: That could be decided by the Court, as a matter of law on a motion of summary judgment without taking evidence, I believe.

The Court: Well, that was Mr. MacMillan's position, I believe. Mr. Lam was asking that this—that there was a question of fact involved.

Mr. Lam: Yes, sir.

The Court: Which would render the factual situation uncertain and that he was entitled to an issue out of chancery. So when we were here on October 17, 1968 we framed an issue out of chancery. Which Mr. MacMillan objected to because he didn't think it was a proper matter for an issue out of chancery, which the parties which you are now representing in association with Mr. Lam and Mr. Hudgins, thought it was proper. And the issue was, did the parties mutually intend, under the terms of the contract dated March 10, 1964, that the defendant, G. H. Ware, would be responsible for the payment of Federal Income Taxes which might be assessed for the tax years prior to the sale.

So as far as the Court was concerned, that is
1/10/69 where we stood until you came into Court this
page 20 } morning. But I am perfectly willing to handle the

matter in the most expeditious way possible to minimize the litigation.

Mr. Spindle: Your Honor, what we are trying to do—

The Court: One other thing, Mr. Spindle, just for your information, I think, also I think at that time, or maybe it was at a prior hearing, there were accountants present representing both parties and I attempted to get them together to make a full disclosure of just exactly what was done, what may not have been done, and was under the impression they were going to cooperate fully to this end.

Mr. Spindle: Well, let me say this to the Court: What we are trying to do is eliminate trial time. If we came in here without fully having examined their books this thing would be drawn out by subpoena'ing those records and having a laborious trial. Now, we can examine these records and determine what they have done since acquisition which has created this retroactive tax liability and pinpoint these issues for trial and reduce the trial time to a very workable trial.

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Mr. MacMillan has not been willing to give us the records of Cemetery Consultants and these, of course, are very pertinent. So Mr. Bowers' statement that these records have been available is not quite correct.

The Court: I think he said that the records of Rosewood Memorial Park were available and not the others.

Mr. Spindle: Yes, sir, but we have to see the records of Cemetery Consultants.

The Court: I can understand your point. But, again, wouldn't we save a lot of time if we could determine first whether or not under the contract that you are liable for any tax assessment prior to the sale?

Mr. Spindle: I think it would be a very orderly way to try that issue first. And it was my understanding now that Court had—

The Court: You don't have to go into all of these accounting problems, if that is decided in favor of the defendant.

And if that was decided in the affirmative, then, of course, we would proceed to see what, if any, liability there was.

Mr. Lam: Let me just suggest one thing, Judge. I say this, coming back down to a factual situation—

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The Court: I don't want to compound the problem. I was trying to simplify it.

Mr. Lam: Let me suggest a simple thing like this—and I am trying to make simple examples because it is complicated.

Coming to the undisclosed proposition. This again is books and records to go into even to get to that part from a factual

standpoint. Suppose, for example, and this is the exact process that was followed, is my understanding in this case. Let's say this was sold March 10th. In February, a little bit more than a month earlier, the purchasers, then proposing to acquire in their individual names, took over the operation of this cemetery. We have a contract with respect to that.

The Court: Mr. Lam, I anticipate what your point is, that Paragraph 3, Subsection (b), provides the seller, he shall assume responsibility for any and all undisclosed liabilities of the corporation and agrees to save the buyer harmless should any liabilities be discovered.

Now, your point is you need this information to determine whether or not these liabilities were undisclosed. That is not my point. My point, let's assume that they were—

1/10/68 page 23 } let's assume that these taxes were properly assessed and in the normal course of the business it was contemplated that it would be carried on by the parties at the time this contract was entered into, does this term "undisclosed liabilities" cover the type of claim they are asserting here? If the answer is no, that ends it. If it's in the affirmative, then we get into the question of determining what they are and whether they were disclosed or whether they were not disclosed.

I don't believe you have to worry about going into the books to determine whether these were disclosed or undisclosed. It's a question of whether or not they were taxes within the contemplation of undisclosed liabilities.

Mr. Spindle: May I make a suggestion to the Court? Could we use this date that is now set for next week to try that issue first?

The Court: That was my thought.

Mr. Spindle: And as you say, if it's decided in favor of the defendant, it's ended. Then if it's decided in favor of the plaintiff, then we would be allowed the production of documents and a further date to determine that issue.

The Court: That is exactly what I said on October 17th, because I think that is the proper way

1/10/69 page 24 } to handle it.

Mr. Bowers: I agree with your Honor a hundred per cent, but I would like to make one statement. I think Mr. Spindle, whether knowingly or not, has misled your Honor at this point. We disagree entirely on the fact that a subsequent liquidation of the corporation by Cemetery, which it had a perfect right to do, bought the stock as a corporation, it owned the stock, had a perfect right to liquidate.

The Court: I don't think there is any question about that. We may never get to that point.

Mr. Bowers: We went over that in detail and you heard the statements and then you ruled on that and it's in the record. We had no obligation to make any improvements in that property. I know you don't—I could show you a hypothetical example real quick.

The Court: This may be a mixed question of fact and law.

Mr. Bowers: I just want you to get the point we disagree a hundred percent with Mr. Spindle on this and we can prove it.

The Court: Let's get one thing straight right now. As the record now stands there is going to be an issue
1/10/69 out of chancery to determine this question. Mr.
page 25 } MacMillan had insisted that it was a question of law and not of fact. Mr. Lam or Mr. Hudgins, I think, who was present at that time insisted that it was a mixed question of fact and law. Now, of course, I don't know because I haven't heard the evidence.

Now, all I want to know is whether you want an issue out of chancery to be heard by a Jury, or whether you want the Court to determine this, be it a mixed question of fact and law or not.

Mr. Bowers: We want the Court to hear it.

The Court: Mr. Lam, you still want your issue out of chancery or you want the Court to hear it?

Mr. Lam: Judge, I would rather you rule. If I conceded, I may—that "ain't" a fair position to put me in. The Court has already ruled on that and I think I know what I want to do but I don't want to tell the Court what I want to do because I think the Court has already ruled on it.

The Court: Well, as it stands now it's an issue out of chancery, at your insistence and—

Mr. Lam: If you narrow it down, if you narrow it down to the particular question that we are now coming
1/10/69 down to—
page 26 } The Court: This is the question as it was phrased. Let me read it to you again. Mr. Hudgins endorsed it and so did Mr. MacMillan. He took exception to it.

Mr. Bowers: Your Honor, are you overruling what you did on November 15th, that you directed no issue out of chancery?

The Court: On November 15th?

Mr. Bowers: Yes, sir.

The Court: Wait a minute. On October 17th, I think—

Mr. Bowers: Yes, sir, and that is what we filed these objections to and you had another full hearing on it on November 15th.

The Court: Did we?

Mr. Bowers: Let's get to that order.

Mr. Lam: That is why I didn't want to concede anything, you see.

The Court: Wait just a moment, sir. I beg your pardon. Maybe I am a hearing behind. I don't know how many hearings we have had in this matter.

Mr. Bowers: Too many. Ready for trial.

The Court: Was there an order entered as a result of that hearing?

1/10/69 page 27 } Mr. Bowers: I understand Mr. MacMillan was down here. I have got a copy of it, your Honor. I understand there was one entered.

Mr. Hudgins: Yes, sir, Judge, there was an order entered.

The Court: Certainly was. Just a moment. That is absolutely correct and that refreshes my recollection. It goes back to what I said a moment ago. I couldn't tell whether or not it was a proper matter for an issue out of chancery because there was a dispute as to whether or not there was going to be any conflict in the evidence as to the factual situation. So you are correct, sir. So as it stands now, then, there is no issue out of chancery.

Mr. Lam: Now, if I may go back to what was previously said, I didn't have any misunderstanding that is the way the status of the case was.

The Court: I was under the impression—I had forgotten about this November 15th hearing in which Mr. MacMillan came in and asked that—made the motion that the order—

Mr. Lam: Now, if I take what has previously been said as to the situation, it's presently set for the 16th. Of course, and we were moving for a continuance because

1/10/69 page 28 } we needed these records for the tax proposition to determine that particular issue and so forth. If I understand it, you are narrowing it down at this point to a question of whether it was an undisclosed liability.

The Court: The same question we were going to present to the Jury and that only.

Mr. Lam: On the 16th.

The Court: And that only.

Mr. Lam: Then if you determined that taxes would be, under this contract, an undisclosed liability at that point we would have the opportunity to go into their books and records to determine that specific issue?

The Court: I think that way it would be in an orderly manner and it may minimize a lot of work and expense.

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Gordon H. Ware

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page 1 }

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January 16, 1969

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GORDON H. Ware, the Defendant, having been duly sworn, was examined and testified as follows as an adverse witness.

1-16/20-69
page 47 } ADVERSE EXAMINATION

By Mr. MacMillan:
Q. What is your full name?
A. Gordon H. Ware.
Q. Where do you reside?
A. Windward Shore Drive, Virginia Beach.
Q. What is your present occupation?
A. Salesman.
Q. For what company?
A. I am with Teletrans Network, Incorporated.
Q. How long have you been in that position?
A. I just took it.
Q. When?
A. About two weeks ago.
Q. Had you been in that—you weren't in that position before two weeks ago?
A. No.
Q. Whom were you with earlier?
A. I was with Teleview, Incorporated out of Tampa, Florida.
Q. I believe in January, 1964, early '64, you were the owner of all the stock of Rosewood Memorial Park, In-
1-16/20-69 corporated?
page 48 } A. That is correct.
Q. How long had you held that stock?

Gordon H. Ware

A. Oh, for four or five years, I guess. I owned 50 per cent of it up until about three or four years prior to that and I bought out Mr. Bryan who was 50 per cent owner. I bought him out.

Q. Had you been in Rosewood since it's inception?

A. Yes.

Q. Had you been president and general manager since its inception?

A. Yes.

Q. Now, in addition to Rosewood, here in Norfolk, you had since 1964, I believe you testified earlier, been involved in various cemeteries, is that correct?

A. That is correct.

Mr. MacMillan: Your Honor, I can save time by asking him to go down this or I can bring it out—

The Court: You can probably read and stipulate.

By Mr. MacMillan:

Q. As I understand it, you were first involved with Wayne Memorial Park in Greensboro where you were vice-president and owned thirty-three and a third per cent of the stock?

1-16/20-69 page 49

A. It was Goldsboro, North Carolina. That was the second involvement I had with a cemetery.

Q. And then you had an involvement with Danville Memorial Gardens in Danville, Virginia where you were vice-president and owned fifty per cent of the stock?

A. That is correct.

Q. And then you were with Rocky Mount Memorial Park in Rocky Mount, North Carolina. You were vice-president with twenty-five per cent of the stock?

A. That is correct.

Q. Then you were with Pine Lawn Memorial Park in Kingston, North Carolina with twenty-five per cent of the stock, and vice-president?

A. That is correct.

Q. And Northampton Memorial Park, Franklin, Virginia, thirty-three and a third per cent of the stock?

A. That is correct.

Q. Then you were in Rosewood Memorial Park, Virginia Beach, and you were president and originally owned fifty per cent of the stock and then acquired and owned a hundred per cent of the stock by 1964?

A. Yes.

Gordon H. Ware

Q. I believe you testified that prior to 1964 you had sold your interest in these other cemeteries?

1-16/20-69 page 50 } A. All but one.

Q. Which one did you have?

A. Southampton.

Q. Had you been involved in any other cemetery since before 1964 or after 1964 other than the ones I mentioned?

A. I had sales contracts in various cemeteries in Carolina.

Q. Tell us about that.

A. Well, I had one at Williamston, North Carolina that was owned by Mr. Biggs, who is an undertaker. Had one at Tarboro, North Carolina that was owned by an undertaker. We had hired salesmen. Helped him from the inception to get him started. Worked six to eight months or a year and let him have it. Get him going on a good foot.

Q. I think you testified earlier this was your principal activity to 1964 when you sold Rosewood, was cemeteries?

A. No question.

Q. As I understand it, Mr. Ware, there is no question that you signed this contract and entered into this contract. There is no question?

A. No question.

Q. And can you tell us whether on or about 1959 the Internal Revenue assessed a levy against Rosewood for years prior to 1959 and had a deficiency tax?

1-16/20-69 page 51 } A. That is correct.

Q. And I think you also have testified that you signed waivers for the years involved after '59 waiving the statute of limitations as to any claim the Government might have?

A. I was forced to sign it by the Government, if I wanted to continue on with this type of tax usage.

Q. I understand that the Government as a condition to allowing you to spread these costs and sales over a five-year period requires you to sign a waiver?

A. That is right.

Q. So that they can come back and audit it. And the tax deficiency that arose for the years prior to 1959 arose because you did not make the projected improvements so that the Government came in and assessed a tax deficiency, is that correct?

A. No, sir.

Q. What did the tax deficiency at that time arise from?

A. It arose from the fact that the engineer had underestimated the number of lots in Section Two and Three, I believe. They came in and found a sizable number of lots,

maybe 20 or 30, 40 lots that the engineer had not included in his estimate, and this is what the tax was based on.

Q. In other words, when you spread the cost
1-16/20-69 that you had expended over those additional lots,
page 52 } there was an additional income?

A. Deficiency.

Q. And a deficiency assessment?

A. That is right.

Q. I think you have also testified earlier that you decided to sell Rosewood in early—in mid '63?

A. Seems that might be logical. I don't know the exact date.

Q. I think you have testified that sometime in the latter part of '63 a Mr. Castle was employed by you as a salesman at Rosewood?

A. Correct.

Q. And he learned from that employment that you wanted to sell Rosewood and he in turn got in touch with a Mr. J. D. Williams in northern Virginia?

A. Well, I don't know what he did. But I know he got in touch with three of them, the Cobbs and Williams. Mr. Williams and Mr. Cobb and Mavis Cobb.

Q. And they then came to Virginia Beach from northern Virginia sometime in January of 1964 to look at the cemetery and determine whether or not they wanted to purchase it?

A. That is correct.

Q. And subsequent to that visit you had your
1-16/20-69 accountant, Mr. Vernon Winquist, prepare a bal-
page 53 } ance sheet for December 31, 1963?

A. Yes, that was—they had been down a couple of times before that took place.

Q. Then you had him prepare a balance sheet?

A. That is right.

Q. For the purpose of negotiations for the sale?

A. That is right.

Q. How long had Mr. Vernon Winquist been your accountant in 1964?

A. He came in in the fall of '61, to the best of my knowledge.

Q. Who had represented you before '61?

A. W. L. Benson & Company out of North Wilkesboro, North Carolina.

Q. So that Mr. Winquist was not your accountant at the time of this earlier deficiency?

A. No.

Q. I think thereafter, Mr. Ware, there was a conference on or about February 6, 1964, in northern Virginia, I believe, at the office of Mr. John Rust; is that right?

Gordon H. Ware

A. That is right. That took place—

Q. Can you tell us what the purpose of that meeting was?

1-16/20-69 page 54 } A. To iron out some of the details towards the purchase of the cemetery, if they—in other words, we were getting together to negotiate to see if we could get together on it.

Q. And as a result of that conference that night, you all arrived at a price, didn't you, as a basis for sale?

A. Well, not exactly. There were quite a few things that were left out of that meeting there that were negotiated later.

Q. Can you tell us what they were?

A. Well, one of them was an attorney bill. One of them was an attorney's bill and one of them was Winquist's bill. And there were certain other smaller items that we negotiated later.

Q. Well, tell us what they were.

A. I just told you.

Q. Well, you have told us two. But you said "other." What other?

A. I am not sure about Higginbotham note, if we arrived on an exact price on it that night, and there was also—I have forgotten what other items. But I know there were other items discussed back and forth before we completed the sale.

1-16/20-69 page 55 } Q. Well, have you not previously testified that on February 6th that the deal was negotiated and agreed to and all?

A. No, sir.

Q. And that all that remained to be done was to sign—have the attorneys draw up the papers and sign them?

A. I didn't say the date, sir—

Mr. Lam: Hold it just a second, Mr. Ware.

Now, your Honor, this is going back in his memory to something that took place in '63 and '64. Now, if he has it there in it, he can refresh his memory, if that is what he is doing, rather than saying "didn't you do it." Let him read out of the book where he said something.

Mr. MacMillan: I intend to, your Honor.

Mr. Lam: It's hard for a man to remember minor details.

Mr. MacMillan: As I understand the rules that I had to learn in another case, I am required first to ask him did it happen, and then I am required to tell him when it happened, where it happened and I finally get to the point of reading it.

The Court: That is right.

Gordon H. Ware

1-16/20-69 By Mr. MacMillan:
page 56 } Q. My question to you, Mr. Ware, is whether or not at the time of your discovery deposition on September 30, 1968 in Mr. Lam's office, you did not then testify that the deal was negotiated on February 6th and that all that remained to be done was to have the attorneys commit it to writing?

A. Well, when you asked me that question on the deposition my memory was a little vague on that part of it and consequently after careful consideration and everything, there were other things to be discussed on it. And we were a long ways from being purchased, because that really is the way the thing finally turned out, but we still had some more negotiations on attorneys' fees and auditing fees on this thing.

Q. Well, let me read you this. I just want to know whether you want to now deny—

A. I would like you to read about the date because I don't remember the dates. All I remember was the conversations that took place.

Q. All right. Sir, I asked you the question on Page 40 of the transcript, "Was the deal agreed to right then," and your answer was, "Yes."

A. Well, I was mistaken because it wasn't.

Q. All right, sir. I then asked you, "They weren't operating on February 6th, the night when you went to Fairfax, were they?

1-16/20-69 "No.
page 57 } "So as a result of that meeting, that is my question," you interrupted and said, "We didn't sign the papers that night."

"Question: I understand. Is that because the lawyers hadn't drawn them up?

"Answer: That is right.

"Question: But you had agreed on the sale?

"Answer: That is right.

"Question: And they then took over and ran it pending the drawing of the papers?

"Answer: That is right.

"Question: Isn't that right?

"Answer: Yes.

"Question: So all that remained to be done was to merely sign what you had agreed to and they then took over and started running it; is that right?"

Gordon H. Ware

A. That was assumption on my part. They hadn't given me any money.

Mr. Lam: Just a moment, Mr. Ware.

Your Honor, he left out part of the reading on Page 41 which includes precisely what he has said.

The Court: Well, he will read it then.

1-16/20-69 page 58 } Mr. MacMillan: What part do you want me to read?

Mr. Lam: I think if you start at the top of Page 41.

Mr. MacMillan: Which one?

Mr. Lam: First line.

By Mr. MacMillan:

Q. "Question: In other words—

"Answer: Well, it wasnt' anything signed and sealed, but the terms and the price were agreed upon.

"Question: Agreed to and all that was left to be done was to have the lawyers put it in writing so as to what you had agreed to?

"Answer: Well, no, there was more to be done because they wanted to know a little bit more about the cemetery or something and they wanted to take it over immediately.

"Question: Well, how could they take it over immediately if you hadn't agreed on the terms that night?

"Answer: We had agreed to terms and the price but we hadn't signed it.

"Question: You say you didn't sign it because it hadn't been drawn?

"Answer: That is right.

1-16/20-69 page 59 } "Question: So you had to have it drawn up by the lawyers to sign what you had agreed to that night?

"Answer: Yes, we had to have it drawn up.

"Question: Had to have it drawn up?

"Answer: Yes. And signed.

"Question: But when you walked out of there you knew that you had *sole* it and you knew that you—that they had to take it over and run it after that meeting?

"Answer: No, no, no, they operated before the papers were signed. They operated about four weeks or five weeks.

"Question: Yes, that is what I am getting at.

"Answer: That was after they had been operating it.

"Question: That is what I—

"Answer: That is right. They weren't—

Gordon H. Ware

"Question: They weren't operating it February 6th, the night you went to Fairfax, were they?

"Answer: No.

"Question: So as a result of that meeting—

"Answer: We didn't sign the papers that night.

"Question: I understand. Is that because the lawyers hadn't drawn them up?

"Answer: That is right.

1-16/20-69 page 60 } "Question: But you had agreed on the sale?

"Answer: That is right.

"Question: And they took over and ran it pending the drawing of the papers?

"Answer: That is right.

"Question: Isn't that right?

"Answer: Yes.

"Question: So all that remained to be done was merely to sign what you had agreed to and they then took over the running—took over and started running it?

"Answer: That is right."

A. There is one point I left out and that is the fact they haven't said they are going to buy it yet at this particular time.

Q. I thought you said they took it over and ran it?

A. No.

The Court: The Court is interested. When were they put in possession? Prior to signing of the contract?

The Witness: Did it say what time?

Mr. MacMillan: Well, that particular night he had a salesman by the name of Castle and they had an agreement which said that Castle could operate it pending the signing of the papers.

1-16/20-69 page 61 } The Court: Put in possession immediately, really.

Mr. MacMillan: Well, Castle was probably the agent for both of them.

The Court: I see.

Mr. MacMillan: Until the papers could be signed.

The Witness: There was a couple weeks' interval in there to get these other things straightened out before they even took it over. They didn't take it over that night.

By Mr. MacMillan:

Q. All right, sir.

Gordon H. Ware

Mr. Ware, I think you have already said that Mr. Vernon Winquist had been your accountant since '61?

A. That is correct.

Q. And he prepared the balance sheet of December 31, 1963?

A. That is right.

Q. At your request?

A. Yes, sir, that is correct.

Q. And you took that balance sheet with you to the meeting in Mr. Rust's office on February 6, 1964?

A. If that was the date, I did.

1-16/20-69 page 62 } Q. And I think you have previously testified that he prepared the balance sheet and that the sale was by balance sheet, is that correct?

A. He prepared the balance sheet and the sale was—

Q. By the balance sheet?

A. Correct. With a few exceptions.

Q. Well, what are the exceptions? I asked you at the time of that same discovery—

A. Certain debts.

Q. Certain debts?

A. Debts, that is right.

Q. What debts were they?

A. I told you about three times. It's the attorney and the auditor.

Q. Right.

A. And—

Q. That grew out of the negotiations?

A. Yes.

Q. The attorneys' fees and auditor's fees were being incurred as a result of the negotiations?

A. That is correct.

Q. But as far as the assets and the debts of the business, that was what was agreed to on February 6th, wasnt' it?

1-16/20-69 page 63 } A. No. Because after I left that meeting I told Mr. Winquist I didn't know whether these people were going to buy or not. I wasn't sure whether they were going to or not, because I had no way of knowing whether they were going to buy.

Q. Well, you are saying you didn't know but I am saying that the terms had been agreed to?

A. Practically. The major ones had been ironed out.

Q. And at that same discovery I asked you, "As I understand it in that meeting you all had, Mr. Winquist had prepared a balance sheet for December 31, 1963," and you answered, "That is right.

Gordon H. Ware

"And it was on the basis of that balance sheet the sale was effected?"

And your answer, "That is right."

You want to change that or is that—

A. With a few minor exceptions, it's basically right. There were some negotiations going on in between there.

Q. And I think you have also testified that the purchase price was arrived at by taking the assets and deducting the liabilities from them as shown on the balance sheet?

1-16/20-69 page 64

A. I would have no way of knowing how they arrived at it. But I understand that it's logical they would do this. They took over all liabilities.

Q. Well, I think that is what you have testified, Mr. Ware. On Page 30 you answered—I asked you a question: "Now, in the negotiations could you tell us what happened on that night?"

And you answered, "Well, we mainly were discussing the price. And they had taken all the liabilities of the cemetery, brought it down to something like $202,000, and—

"When you say 'they had' you mean Mr. Winquist?

"No, Mr. Cobb, the Cobbs, and the Williams, had deducted to get—to arrive at the final price. All the liabilities were deducted."

Isn't that what you testified at that time?

A. Yes, I guess it is. I was assuming that this is what they did.

Q. Now, at the time that these deductions were being made did you tell them that you had a tax liability?

A. No, taxes—the only thing that was said about taxes that particular night, which I recalled this after I had considered this, they asked me were there any back taxes due now, and I said, "Not to my knowledge."

1-16/20-69 page 65

Q. And there was no other discussion after you said that?

A. No other discussion afterwards. Because going back on the plane with Mr. Winquist I said, "I didn't want to go into the taxes, per se, at this particular time until we get all this other straight and then I want you to take them in and go over the taxes with them."

Q. So you knew that by telling them that there was none due that you hadn't correctly represented the picture?

A. There were none. They asked me if there were any back taxes due now, and there was none due now.

Gordon H. Ware

Q. Did you tell them you had signed a waiver for years prior? Did you tell them that night?

A. Not that night. No, this conversation had gotten mixed up with two or three other conversations that took place. No, we didn't go into anything regarding the taxes other than the fact they asked me if I owed any back taxes due and payable now, and I said, "Not to my knowledge."

Q. You knew—I think you have told us that you knew that you had not put in the statue which had been projected as a cost in your projection for the cemetery?

A. I didn't put it in but I had paid a cash amount on it.

Q. I say, you hadn't paid it?

A. Hadn't what?

1-16/20-69 page 66 } Q. There was a debt. There was an unpaid sum due for the statue as you testified?

A. Which statue?

Q. Well, the one that you told us about at the time of discovery. Let me read it to you.

Starting on Page 130, Line 4.

"Question: Do you have any records at home or any other place indicating what improvements you projected in the 1950's, or '59 that would have been made from '59, '60, '61, '62 and '63, that were not reflected in the records of—

"Answer: The only records I have at home is personal correspondence files that I took out, just personal. Anything that pertained to the business I left for their information.

"Question: I say, do you have in your possession any projections of improvements you were going to make or that were to be made during that period?

"Answer: I don't have any at home, no.

"Question: I mean, do you know of any? That is—

"Answer: I know of some that should be done.

"Question: Could you tell me?

"Answer: One was a statue.

1-16/20-69 page 67 } "Question: You told us that. You had told us that earlier in the deposition.

"Answer: And the roads."

This was your answer, "And the roads."

"Question: Statue, road, what roads would they be?

"Answer: They would be the road back of the singing tower, going around the singing tower.

"Question: Do you remember the sections that would be?

"Answer: No, I never went by sections as far as surveying

is concerned. I would have to have a map. Any time I want to find out what section it was, I would look to the map.

"Question: All right, what other improvements beside that?

"Answer: Oh, gee, I don't know, I—it has been about—

"Question: How about the singing tower, itself?

"Answer: It was already constructed.

"Question: It had already been constructed?

"Right.

"All right, what else?

"I would have to look at the engineer's estimates 1-16/20-69 and all to do that."

page 68 } Q. So you knew that improvements had not been made that had been projected?

A. No, sir, I didn't.

Q. You deny that you told us at that time—

A. No, I was talking about when they took over, this is one of the things they needed to do. But it hadn't been lagging for four or five years.

Q. How long had it been lagging?

A. Oh, I would say six months. It was supposed to—well, it would be hard to say. It's entirely up to weather conditions and when you can get the right price on it and if you can catch in between seasons when the contractor is not busy, and a lot of times you have to wait and bid on it then.

Q. So your engineer had projected certain costs?

A. That is right.

Q. And you knew that those improvements had not been made, according to his projections?

A. I don't know.

Q. You deny that you told us then that—

A. No, I thought you were talking about when they first took over. There were a few things that needed to be done. In fact, there were a lot that needed to be done. And, yes, that is true. Things needed to be done when they 1-16/20-69 took over and they knew this. I told them everything that needed to be done. page 69 }

Q. Who did you tell, Mr. Ware?

A. I told Mr.—all of them.

Q. Well, tell us who.

A. The whole three of them. Cobb, Mr. Cobb, Miss Cobb and Norman Cobb.

Q. Tell us where you told them. Where were you when you told them?

A. In the office.

Gordon H. Ware

Q. And what was the date?
A. I have no idea.
Q. Who was present?
A. The three of us on a meeting.
Q. Anybody else? Any third party present?
A. I don't remember.
Q. You say that would be in Rosewood's office?
A. Yes.
Q. When did they come to Rosewood's office?
A. They came four or five times to Rosewood's office.
Q. Before or after the February 6th meeting?
A. They came before and afterwards.
Q. When did you tell them this, before or after February 6th?

1-16/20-69 page 70 } A. I could have been an individual, Mr. Williams. I know we had dinner with him by himself one day. I don't just remember the exact terms of it. But they knew. In other words, when they looked over the projected things of what they were going to do when they took it over they asked me what I thought and I told him I thought the roads should be paved and the statue be put in.

Q. Mr. Ware, I understand you to say that you were advised when the Government commenced its audit in 1966.

A. Yes, I was advised.

Q. And I think you took the position then as you take now that it wasn't your problem *amd* it wasn't your liability and you did nothing about it.

A. That is correct. I went to the attorney about it. That is as far as I went with it.

Q. I think you also stated that you also were notified of the assessment of the tax deficiency for the years '59, '60, '61 and '62 when they were assessed?

A. That is correct.

Q. And again you took the position that it was not your liability and so you did not do anything about it?

A. That is right.

Q. And you were also notified of the employment of Mr. Bowers as tax attorney and of Mr. Winquist as the accountant to attempt to adjust and settle this with the Government, were you not?

1-16/20-69 page 71 } A. Yes, sir, to the best of my knowledge, I think I was notified through my attorney.

Q. While I think you take the position that those expenses are not yours, you recognize that—I think you have testified

that you recognize that Mr. Bowers' bill of $725 was reasonable but that Mr. Winquist's bill of $2400 was *unreasoinable?*

A. I believe that was the conversation.

Mr. Lam: Let me correct one thing. He said in '66. Are you not talking about '67? When he was notified?

Mr. MacMillan: Well, '66 was in regard to the beginning of the audit. 'Sixty-seven was the conclusion of the audit.

Mr. Lam: I think you advised him, though, isn't that what you are speaking of, wasn't your question directed to him when he was first advised?

Mr. MacMillan: No, I didn't ask him when he was first advised, but I will be glad to ask him.

Mr. Lam: No, didn't you say—I thought your question was, wasn't he advised in 1966.

Mr. MacMillan: Of the commencement of the Government audit.

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Mr. Lam: Well, is there any evidence to that effect that he was? The first evidence I have is '67.

Mr. MacMillan: He testified to that.

Mr. Lam: You are asking him rote things. I wonder if you were going beyond your own letters, or the letters written by attorneys.

By Mr. MacMillan:

Q. Mr. Ware, as I understand it, Mr. Winquist contacted you as soon as he was notified that the Government was commencing an audit?

A. He may have called me. I don't think I got a letter from him. He may have called me on the 'phone, but most of my information came from my attorney, Mr. Lam.

Q. I think you have previously testified that you have no dispute with the settlement amount except that you say that don't owe it.

A. Well, now, that—that is correct.

Q. I think you told us earlier that after the contract was drawn, ready for your signature, that you consulted an attorney, Earl Woodhouse at Virginia Beach, and that he went over the contract with you and you discussed it before you signed it?

A. He read it over and we discussed it.

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Q. And I think the record is clear that Cemetery Consultants has made all of the payment due you, part of them directly and part of them in escrow account with Mr. Lam and Mr. Bowers?

A. The last payment I take exception to. Because it was not paid on time. And also it was put in escrow.
Q. You mean it was paid in escrow on time?
A. No, sir. It was not paid on time.
Q. When was it due?
A. It was due—

Mr. Lam: Your Honor, now I think we are getting into another thing here completely. This is the last payment I think you are talking about, somewhere in the past four or five months, which has—three or four months, I guess, which I don't see where it has any bearing on this at all.
Mr. MacMillan: I think if he takes the position he hasn't been paid, your Honor, we would like to know it.
Mr. Lam: He is not making any claim on it.
Mr. MacMillan: As long as he is not making any claim.
Mr. Lam: At this point he isn't.
Mr. MacMillan: If there is any—

1-16/20-69 page 74 } Mr. Lam: If he is advised by his attorney he is probably going to take some action on it. I say it's not relevant to this issue. He is trying to get him—

By Mr. MacMillan:
Q. Mr. Ware, you have testified—

Mr. Lam: Your Honor, I am going to object to whatever this is. He is going back to something in '61. He is trying to say at this point, I think, with respect to the situation here that this is supposed to contradict Mr. Ware as to what the prior assessment was about. May it please the Court, he has got that one piece of paper which on it says "Preliminary statement."
If I may correlate it to the present one, the preliminary statement in this case started out with some thirty-six thousand. When they got through it was sixteen thousand.
So I don't think Mr. Ware would have any knowledge from a preliminary statement that would change his original statement and I think it would be unfair to hand him a preliminary statement and try to contradict him with that.
The Court: First we have got to hear the question.

1-16/20-69 page 75 } By Mr. MacMillan:
Q. Mr. Ware, I think you have testified that the deficiency assessment prior to 1959 was not in any

way occasioned by failure to make the necessary improvements projected?

A. Well, I said that—that wasn't the basis for most of it now. I don't really know because the attorney handled it. In fact, I had nothing to do with the handling of this and between the auditors and the attorneys they handled every bit of it and all I know is they said this was one of the major factors in the thing.

Q. So it could have—

A. The firm of Kaufman & Spainhour handled it for me. So I didn't really go in too heavy with it but the biggest gripe they had where they really said they stuck us is where we had the excess number of lots.

Now, when they first came in—sometimes in bookkeeping in the cemeteries if your bookkeeper doesn't keep the records straight and charge sections off as you develop them you are going to pay taxes for them. In other words, the bookkeeper and auditor control whether you pay taxes or not and if you have a sorry bookkeeper and she doesn't enter it in the section she should and enters it in something else, you pay taxes on it. So sometimes bookkeeping, bad auditors, can cause a tax loss where you really don't have one.

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Q. Mr. Ware, I show you a letter from the United States Treasury Department dated April 27, 1961, it's checked "Deficiency."

Mr. Lam: Your Honor, this is the thing I am objecting to.

The Court: Let's see what he is going to say. He can ask the question.

By Mr. MacMillan:

Q. Attached to it is a preliminary statement and the explanation of the assessment says, quote, "the principal causes of charges were the adjusted costs of graves sold from estimate basis to actual cost basis and the disallowance of travel and entertainment expenses held to be personal expenses."

Now, do you have anything, any evidence to the contrary with respect to the action of the Government at that time?

A. Like I say, they found these extra lots in there. Naturally it would be a deficiency on the expense of that particular section. It would be a deficiency against the engineer's estimate if he found extra lots in there. In other words, the engineer didn't count the lots properly. The Government comes in and finds 30 or 40 lots you have got to

1-16/20-69 spread the lots over there. And that is what the page 77 } deficiency was for.

And I don't know about disallowance of travel and entertainment expenses—oh, I know what it was, too. I had taken my wife to a convention or two which I paid that personally. I paid that out of my own pocket.

Mr. MacMillan: We would like to introduce that, your Honor.

The Court: Is it a letter addressed to him?

Mr. MacMillan: Addressed to Rosewood Memorial Park, Incorporated which he is the president and general manager.

The Court: Is he familiar with that? Did he get the letter?

Mr. MacMillan: I assume so.

Mr. Lam: That isn't the question you asked.

The Court: He is explaining what it was.

Mr. Lam: Well, I can look at it and explain it, your Honor.

The Witness: If I did get it, your Honor, I don't remember it. It has been so long ago. And some of this goes out. But generally when I get a letter pertaining to taxes I give it to the C.P.A. I don't—I keep a copy in my files or give it to him to keep for me because that is his business 1-16/20-69 and not mine.

page 78 } The Court: All right, I admit it and you note your exception.

Mr. Lam: I don't even know what to except to about it, Judge. I don't know what it means. The only thing, my basis is I don't know what is intended to show by it. Our objection goes to the fact it's a preliminary statement and has nothing to do with what we are involved in.

The Court: Plaintiff's Exhibit Number 1.

(Whereupon, the foregoing document was marked for identification and received in evidence as Plaintiff's Exhibit Number 1.)

Mr. MacMillan: We have no other questions of this witness.

Mr. Lam: Come down, Mr. Ware.

(Whereupon, the witness was excused.)

Mr. MacMillan: We would like to call as an adverse witness Mr. Castle.

The Court: All right.

Mr. Lam: Well, now, your Honor, wait. Let's find out. How do we know he is adverse?

The Court: Well, we will have to see.

Mr. MacMillan: We didn't subpoena him.

1-16/20-69 page 79 } Mr. Lam: How do you know we *supoena'd* him?

Mr. MacMillan: He has been here—

Mr. Spindle: Who subpoenas him has nothing to do with whether a witness is adverse or not. If he has any financial interest—

The Court: If he proves to be adverse, he will be an adverse witness. If it proves otherwise he will be his witness and bound by him.

Mr. MacMillan: Your Honor, if they are saying he is not adverse we will take their representation.

Mr. Lam: All I can say is he works for them, your Honor. If he wants to be bound by their *employe*—

Mr. MacMillan: He worked for Rosewood at the time it was owned by Mr. Ware. He was the *employe* of Rosewood at the time Mr. Ware operated it.

Mr. Lam: Are you going to deny that he is an *employe*—you have already made the statement that you thought he was an agent of both. Now, I can show you his employment contract which was entered prior to the time of the sale. You want to go into the fact that he was not employed by them as general manager?

Mr. MacMillan: You mean subsequent to the sale.

Mr. Lam: No, prior to the sale. If you are not

1-16/20-69 page 80 } familiar with it—

Mr. MacMillan: I am familiar with it and we would disagree on what it means.

Mr. Lam: I see. I understand that. But I think the thing that we are arguing over is whether or not at the time that this contract, dated March 10, 1964, whether or not he was employed by Mr. Ware or your company. Isn't that what we are arguing over?

Mr. MacMillan: I don't believe so.

Mr. Lam: That isn't what we are arguing over?

Mr. MacMillan: We are arguing over whether he is an adverse witness and I am told now he is not adverse to us. So I do not call him now at this time, your Honor.

The Court: Call your next witness.

Mr. MacMillan: Call Mr. Cobb.

Mr. Cobb: Your Honor, may I take my notes to help me with my memory, I have prepared in this

The Court: Well, we will allow you to do that.

Norman Cobb

1-16/20-69 page 81 } NORMAN COBB, called as a witness, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. MacMillan:

Q. Can you tell us your full name, please?

A. Norman Cobb.

Q. Where do you reside?

A. 3504 Chain Bridge Road, Fairfax, Virginia.

Q. What is your occupation?

A. I am retired.

Q. What was your business?

A. Banking.

Q. How long were you in the banking business?

A. Up to the time I retired. Forty-one years, five months and sixteen days.

Q. When did you retire?

A. As of January 1, 1969.

Q. What bank were you associated with during that period?

A. The Vienna Trust Company, Vienna, Virginia.

Q. What positions did you hold with that bank?

A. At that time?

1-16/20-69 page 82 } Q. At any time.

A. From assistant cashier, cashier, executive vice-president, president and Chairman of the Board.

Q. Has your principal activity in your business life been banking?

A. Banking, yes, sir.

Q. Are you familiar with the complainant in this matter, which is Cemetery Consultants, Incorporated?

A. I am a stockholder in it.

Q. Were you one of the interested parties of Cemetery Consultants, Incorporated from the time it purchased certain stock from Gordon Ware?

A. Yes, sir.

Q. What is your age, by the way, Mr. Cobb?

A. I am 64, soon be 65.

Q. Who were the other stockholders of this corporation, Cemetery Consultants, Incorporated at the time it was organized and purchased this stock of Mr. Ware?

A. J. D. Williams and my sister, Mavis Cobb.

Norman Cobb

Q. Who were the officers of that company?

A. J. D. Williams was president. I was vice-president and treasurer, and Mavis C. Cobb was secretary.

Q. Now, can you tell us how the transaction involving this stock was handled? Tell us who purchased what. How was it handled?

1-16/20-69 page 83 } A. The Cemetery Consultants purchased all the stock of Rosewood Memorial Park owned by Mr. Ware.

Q. And the result of that was that Rosewood Memorial Park became a subsidiary of Cemetery Consultants?

A. That is right.

Q. Was all of the stock owned by Cemetery Consultants?

A. Eight shares were escrowed for the benefit of Charlie Castle in the hands of the attorney, John H. Rust. The rest was owned by three individuals.

Q. All the stock of Cemetery Consultants?

A. Yes.

Q. My question was, Cemetery Consultants, after the purchase, owned all of the stock of Rosewood Memorial Park?

A. Yes, sir.

Q. Can you tell us how you first heard of Rosewood Memorial Park?

A. Sometime in early January I got a call—

Q. Of what year?

A. Nineteen sixty-four. Mr. Castle called me at my office in the bank and wanted to know if I would loan him a hundred thousand dollars on the endorsement of a man worth a million dollars. I told him it depends on who the man was and that ended the conversation.

1-16/20-69 page 84 } Shortly afterwards Mr. Castle and a gentleman he introduced as J. D. Williams came into my office and began to talk about Rosewood Memorial Park at Virginia Beach which he was at that time managing, that Mr. Ware wanted to sell it, that it was a good buy, it had been losing money under poor management but he could—under his management he could make it produce a profit. He produced some figures to substantiate the profit that might be made.

And then he asked me what kind of collateral I would require for a loan of ten years. I told him collateral that would be good for ten years,—well, no collateral was forthcoming and none was offered to me to consider and then he began to talk about the three of us buying it, that is, Charlie, Mr. Williams and myself. I told Charlie I would not be interested in it un-

less my sister, Mavis, who is an attorney and was a partner in a joint venture in developing a subdivision commonly known as Cobbdale in Fairfax, which was formerly our family farm, went in with me on the purchase of this cemetery.

I called Mavis and she said she would be interested in it and a few more discussions.

Mr. Williams said, "Well, I guess we better go down to Virginia Beach and look at that cemetery." And we arranged a common time for us to come down and we did come down. We came down once, only once, to look at that cemetery.

1-16/20-69 page 85 } And then we set up a date of February 6th to discuss the terms and conditions of purchase of the cemetery. Mr. Ware, Mr. Castle and Mr. Winquist came up from Norfolk. I had my accountant, Mr. Swart, in the office of John H. Rust. Mr. J. D. Williams, Mavis and I were there. We discussed the terms of it, the purchase price, the interest rate, how it was to be paid, the annual, semi-annual payments, and the assets and liabilities shown by the balance sheet. I asked—

Q. Pause right there a minute, now. Prior to that meeting, had you sought any professional advice about Rosewood or how you should proceed from your accountant, your attorney or anyone else?

Mr. Lam: Your Honor, let him not ask leading questions.

By Mr. MacMillan:

Q. Had you sought any professional advice prior to February 6th?

A. On our first meeting, on our first and only visit to Rosewood, Mr. Ware gave us a balance sheet as of July 31, 1963 and I took that balance sheet back and had Mr. Swart go over it.

Q. Who is Mr. Swart?

A. He is an accountant, my personal accountant. S. Sterling Swart.

1-16/20-69 page 86 } Q. So then you say there came a time on or about February 6, 1964—

A. That is right.

Q.—when Mr. Ware and his accountant, Mr. Winquist, and Mr. Castle met in Mr. John Rust's office?

A. That is right.

Q. Is he an attorney?

A. Yes, sir.

Q. Who else was present

Norman Cobb

A. J. D. Williams, my sister, Mavis, Mr. Swart and I.

Q. Tell us, go ahead now and tell us what happened at that meeting.

A. And the question was asked, I believe I asked the question; are there any taxes due? Mr. Ware says, "All taxes are paid." Then Mr. Swart, being an accountant, says, "Have the returns been audited"?

He said, "Audited up through 1959."

I said, "In that event I want a clause put in that contract protecting us against any and all unforeseen liabilities."

Q. All right, sir, and was there any agreement to do that?

A. Mr. Ware says he had no objection.

Q. To the inclusion of such a clause?

A. That is right. After that time, the meeting broke up.

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Q. Approximately how long did that meeting last?

A. A couple of hours.

Q. As a result of that meeting what thereafter occurred?

A. I went home and made a handwritten memorandum to Mr. Rust what should go in that contract. My sister, Mavis, typed that memorandum up and delivered it, personally carried it to Mr. Rust's office, and part of that memorandum was incorporated into his contract about any accrual of any taxes.

Q. All right, sir. Now, did you thereafter—well, what happened with respect to the cemetery, itself, after the February 6th meeting?

A. We employed Charlie Castle to operate it on an interim basis until we took over officially.

Q. Did there thereafter become a contract? Was a contract subsequently drawn as a result of that accident?

A. A contract was subsequently drawn and I believe signed on March 10th.

Q. Do you know of any change of condition or terms or anything that were renegotiated or negotiated for the first time after February 6th?

A. Well, upon the professional advice of Mr. Winquist, he thought it would be best that instead of buying this stock individually, that we buy it through a corporation, and Mr. Castle owned a corporation in being commonly known as Cemetery Consultants and we purchased all the stock of Cemetery Consultants from Mr. Castle and that corporation bought, subsequently bought, the stock of Rosewood Memorial Park from Mr. Ware.

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Norman Cobb

Q. All right, sir. Now, can you tell us if after the sale anything came up that was unknown and undisclosed with respect to the liability of the company?

A. Well, I believe Mr.—some attorneys' fees to Mr. Woodhouse came up and some accountants' fees came up.

Q. Well, I am talking about the main assets—did any problem arise as to the assets of the company or the liabilities of the company after the date of sale?

A. Well, we were notified that the Government was auditing the returns from the years 1959, 1960, 1961, 1962, 1963 and 1964.

Q. What did you do when you heard they were doing that?

A. We took appropriate actions to protect ourselves.

Q. Such as?

A. By having Mr. Ware put on notice by letter from attorneys, Mr. Rust in Fairfax and Mr. Luther White of Norfolk.

1-16/20-69 page 89 } Q. All right, sir. Now, I show you a letter from John Rust to Gordon H. Ware dated March 1st and ask you if that is one of the letters you referred to?

A. That is.

Mr. MacMillan: We would like to introduce that, your Honor.

Mr. Spindle: Your Honor, please, now may I be heard? We object to the introduction of this letter, and as long as I am on my feet, although the question has not been asked, Mr. MacMillan has a series of letters which deal with the same thing, putting Mr. Ware on notice and also the nature of the tax which subsequently did arise. Now, as the Court observed at the conclusion of opening statements, what we are here today to determine is whether as of the time these gentlemen concluded this contract in March of 1964, whether this term they used, "undisclosed liabilities", was intended to include taxes.

Now, what Mr. MacMillan is getting into now is the particular tax that arose after the sale and this is the issue which is intended to be reserved for another day, should the Court determine this in the affirmative, and I think we are going too far.

1-16/20-69 page 90 } Now we are getting into who is liable for this particular tax.

Mr. MacMillan: Your Honor, we are perfectly willing to offer it on the exception that it doesn't

prejudice my opponent with respect to any particular argument me might want to make what any particular tax was owed.

The Court: What has it got to do with the issue here today? All the Court has to do today is decide whether the term "undisclosed liabilities" covers Federal and State tax.

Mr. Spindle: How the parties were using that term that day in March.

Mr. MacMillan: We are offering this purely to show that the notice was given.

The Court: He has testified to it, hasn't he?

Mr. MacMillan: Yes, sir.

The Court: Why get into it at this time?

By Mr. MacMillan:

Q. Can you tell us whether or not Mr. Ware ever came in and defended the assessment or made any effort to defend the assessment?

A. If he did, I have no knowledge of it.

Q. Did the corporation incur attorneys' fees to
1-16/20-69 Mr. Bowers and accounting bills to Mr. Winquist?
page 91 }

Mr. Lam: Your Honor, excuse me, I am sorry, please.

By Mr. MacMillan:

Q. With respect to the adjustment of this tax,—

Mr. Lam: Before you answer that, please, we are going right into the exact same thing we have just concluded.

The Court: Mr. MacMillan, what does it have to do with whether or not undisclosed liabilities is Federal or State taxes?

Mr. MacMillan: Well, it's part of the total claim, your Honor.

Mr. Lam: We haven't got—

The Court: But the issue today is whether in the contract dated March 10, '64, the term "undisclosed liabilities" when read as a part of the contract covers Federal and State income taxes for a period of years prior to the sale. Now, that is the only thing the Court has got to decide on today.

Mr. MacMillan: We are perfectly willing—as long as we had him on the stand we thought we would make the record and save another day of hearing, bringing him back from northern Virginia.

1-16/20-69 The Court: I agree with you, but they object
page 92 } to it. I will hold you to the issue.

Mr. MacMillan: We have no other questions of this witness at this time.

The Court: Mr. Lam? Mr. Spindle?

CROSS-EXAMINATION

By Mr. Spindle:

Q. Mr. Cobb, in your experience in the banking field, I assume you have been exposed to income taxes problems? Is that correct?

A. How is that again now, sir?

Q. Have you had experience with income taxes in your work as a banker?

A. I am not a tax man, no, sir. I hire an accountant to do that.

Q. I wasn't speaking of your personal taxes.

A. I mean for the bank, also. We hire an accountant.

Q. But in making loans in your experience as a banker, I assume you have been concerned with your customers' tax problems from time to time, have you not?

A. We are concerned when making a loan—we are concerned with the customer's balance sheet.

1-16/20-69 Q. And balance sheets involve tax liabilities, do
page 93 } they not?

A. There is a statement on the balance sheet, any unpaid taxes, and that statement there speaks for itself.

Q. Have you loaned money to land development corporations or persons involved in development of land?

A. On a limited basis. Generally individuals.

Q. Yes, sir, and you are familiar with their tax problems of determining the costs of the lots in a land development, are you not?

A. No, sir, not theirs.

Q. You are aware that they do have those problems, are you not?

A. Yes, sir.

Q. Now, your sister is an attorney who, I believe, you said has developed your family farm?

A. My sister and I developed the family farm.

Q. So you are involved personally in land development, are you not?

A. Yes, sir, to a limited degree.

Q. Is that going on now, sir?

Norman Cobb

A. It's about finished, yes, sir.

Q. Then you are aware of the various alternatives which were available to you in determining the cost of your lots for income tax purposes?

1-16/20-69 page 94 } A. We listen entirely to the accountant. He advised me what to do.

Q. Is that Mr. Swart?

A. Mr. Swart.

Q. What method did he use?

A. He will have to answer that, sir.

Q. You don't know?

A. No, sir. He is here. He can answer that question.

Q. Now, when you came down to inspect this cemetery, the cemetery, itself, was not completed so far as improvements were concerned, was it?

A. I didn't know what improvements were to be made. I just wanted to see that the cemetery was there, that there was such a thing.

Q. Well, did you see all the streets in?

A. I don't know what streets are supposed to go in.

Q. Were you not shown a plat in the office of the cemetery, a map on the wall, which showed the lots and the contemplated improvements?

A. There is a brochure on the wall. But it was not explained to us. It was just there. Anybody could see it.

Q. Mr. Cobb, you understood that considerable work had to be done yet, didn't you?

1-16/20-69 page 95 } A. No, sir.

Q. Are you telling us that it was represented to you that that cemetery was completed as of February of 1964?

A. No representation was made at all. We just bought it as it was there.

Q. What was the result of your own observation as to whether the cemetery was completed or not completed?

A. My own observation is that there is land out back, some 38 acres undeveloped, grown up in weeds, for future development, but what his plans were for future development at that time I had no way of knowing.

Q. The land out back was in weeds?

A. Yes, sir.

Q. You realized that after you bought this enterprise certain monies would have to be expended to complete the development of the cemetery, didn't you?

A. No, sir.

Norman Cobb

Q. You didn't realize that?

A. No, sir. Nothing was said to us about any improvements.

Q. Did you expect to sell that land back there with weeds on it just as such, without any roads or other improvements?

A. How is that?

1-16/20-69 page 96 } Q. Did you expect to sell that land that you saw back there with weeds on it without making any improvements on it?

A. We might have.

Q. Is that what you planned to do?

A. No. I don't—we might sell it. I don't have any future plans for it right now.

Q. Have you made improvements since that time?

A. Yes, sir.

Q. Did the improvements which you have made constitute a change in the plan of development of the cemetery?

A. No, sir.

Q. So you have carried on the business even at this time and carried it right on through the way that Mr. Castle was running it before?

A. Well, I couldn't say that, no, sir, that we carried on just the way Mr. Castle ran it because if it had been I would have been bankrupt.

Q. So as far as the physical improvements on the land and the sale of the lots, the same business even at this time has been carried on even though in a different corporate form, isn't that correct?

1-16/20-69 page 97 } A. I think so. I am in northern Virginia, sir. We have a manager down there who is now Mr. Kirkpatrick and he is here to testify. I think he could answer that question better than I. I am not a professional cemeterian. No, sir, I am a banker.

Q. What was your relationship to Mr. Williams, your business relationship, sir?

A. Prior to this?

Q. Yes, sir.

A. None whatsoever. I didn't know the man.

Q. Have you been involved in cemetery developments yourself?

A. No, sir.

Q. Have you had any bank customers who were?

A. No, sir.

Q. Now, *Mr. Castle,* after he came to you and started these

negotiations, he commenced working for you or your new enterprise, did he not?

A. For awhile, yes, sir.

Q. And for about a month you all contemplated purchasing this individually, did you not?

A. No, just a few days. We contemplated purchasing it individually and then upon the advice of Mr. Winquist we changed it to a corporation.

Q. Well, now, let's see, was it just a few days? Can you recall how long that Mr. Castle was in possession before you closed and took title as a corporation?

1-16/20-69 page 98 } A. No, sir, I cannot recall the exact time.

Q. Would one month sound about right?

A. Approximately.

Q. So Mr. Castle was your agent at that time, was he not?

A. Before we closed he was agent for both of us.

Q. All right, sir. But you acknowledge that he was reporting to you?

A. He was reporting to both.

Q. All right, sir. Well, who stood to gain or lose on the operation of the cemetery during this period of approximately one month that Mr. Castle was in charge? During the one month he was in possession the gain was yours?

A. Right.

Q. And Mr. Castle was your manager on the spot?

A. He was manager for both of us.

Q. All right. And Mr. Castle was fully familiar with the cemetery operation and the projected improvements, was he not, to your knowledge?

A. Not to my knowledge. I don't know what he was familiar with.

Q. Was not representation made to you, Mr. Cobb, that Mr. Castle was fully familiar with this operation?

A. No, sir. He is familiar with operating cemeteries, not this particular one.

1-16/20-69 page 99 } Q. Hadn't Mr. Castle been operating this particular cemetery?

A. He was Mr. Ware's operator for awhile. How long I don't know.

Q. Well, at the time he came to you, he came to you and said, "I have been operating this cemetery for Mr. Ware," didn't he?

A. That is right.

Q. So he was familiar with this operation? That was the representation he made to you, wasn't it?

Norman Cobb

A. He was familiar with it up to that time, but not for future things he was supposed to do. I knew nothing about what he was supposed to do in the future.

Q. My question was, Mr. Castle represented himself as one who was familiar with the operation of this cemetery and projected improvements?

A. Of cemeteries, sir. He has in cemeteries.

Q. My question to you was, as to Rosewood Cemetery.

A. I am answering you, sir. He didn't limit it to Rosewood.

Q. I simply asked you if, as to Rosewood, that he did not represent to you that he was familiar with Rosewood and the projected improvements.

1-16/20-69 page 100 } A. I will have to answer you again, sir, Mr. Castle has been in many cemeteries and he is familiar with the cemetery business.

The Court: What Mr. Spindle is trying to find out, when he came to you you knew he was the operator of Rosewood Cemetery?

The Witness: He told me he was the operator.

By Mr. Spindle:

Q. And he told you about the improvements that were going to be necessary at Rosewood, didn't he?

A. No, sir.

Q. All right. Well, didn't he show you the profits that had been made at Rosewood?

A. No, sir.

Q. Well, didn't he show you the statement showing you that no profit had been made?

A. No, sir.

Q. Didn't he show you some figures as to past operating—

A. Took a scratch pad and sat down and figured out what could be done. Not what had been done.

Q. Wasn't it necessary to deduct the expenses of improvements?

1-16/20-69 page 101 } A. No, sir, he just showed a 30 per cent sales cost. He didn't say anything about any other costs.

Q. After you had entered into these negotiations you say Mr. Winquist advised you that you should take title in the name of a corporation?

A. That is right.

Q. So Mr. Winquist was then advising you as to the auditing, accounting and tax problems, was he not?

Norman Cobb

A. No. He was advising us how best to handle it as a corporation.

Q. But he was working for you?

A. At that time, yes, sir.

Q. This was before you closed?

A. No, sir. After we closed.

Q. I thought you said that Mr. Winquist advised you to take title in a corporation.

A. After we closed. We first closed individually and we resigned that transaction and went in the corporation route.

Q. The closing I was speaking of was the 10th of March. That was the actual date of the agreement?

A. We closed on March 6th, I believe, individually.

Q. Well, before you executed the contract which is in dispute in this litigation, Mr. Winquist was your accountant, wasn't he?

1-16/20-69
page 102 } A. How is that again now?

Q. Before you signed and closed the contract that is here in dispute, dated the 10th of March, 1964, between Ware and Cemetery Consultants, before that date Mr. Winquist was in your employ as your accountant, wasn't he?

A. I would say so.

Q. Mr. Cobb, when did your family development start up there in northern Virginia, Cobbsdale?

A. Some 15 years ago.

Q. And it's about completed now?

A. About completed. Eight lots for sale yet.

Q. Did you just sell lots or did you make the improvements yourself; by way of houses, I mean. Did you build houses?

A. I built a few houses and soon found out there wasn't any building business so just sold lots.

Q. You put streets in?

A. Put streets in.

Q. Curbs and gutters?

A. Streets, sewer and water. No gutters. No curbs and gutters.

Mr. Spindle: That is all we have, your Honor.

REDIRECT EXAMINATION

1-16/20-69
page 103 } By Mr. MacMillan:

Q. Mr. Cobb, as I understand it, you say that

the—there was a contract by which you, your sister and J. D. Williams agreed to purchase this stock from Mr. Ware?

A. That is right.

Q. And that contract was signed?

A. That is right.

Q. And you went to the closing and delivered the $50,000 down payment?

A. That is right.

Q. Is that correct? And received the stock?

A. That is right.

Q. And thereafter, after that closing, you used Mr. Winquist as your accountant for the new business?

A. That is right.

Q. Up to then he had been accountant for Mr. Ware?

A. That is right.

Q. And he then said, he advised you to purchase it in the name of Cemetery Consultants; is that right?

A. In the name of a corporation.

Q. Of a corporation?

A. Right.

Q. Which became Cemetery Consultants?

1-16/20-69 A. Right.

page 104 } Q. And at that point you took the same contract that you had signed individually and changed the individual names to the corporate name and just did it in corporate names?

A. That is the only change that was made.

Q. So that there was no renegotiations or anything, just a change of name?

A. Just a change of names.

Q. Now, did Mr. Ware at any time discuss with you his prior taxes or the improvements that he projected with respect to the cemetery before February 6th when you negotiated this contract?

A. He did not.

Q. Did he at any time discuss with you the method by which he had computed his costs or how costs were computed in the cemetery business?

A. He did not.

Q. And you say that you inquired of him with respect to taxes and he told you they had been paid?

A. All taxes paid.

Q. Right. And you then, you say—you say his accountant asked him whether he had been audited?

A. My accountant.

Norman Cobb

Q. Mr. Swart?

A. Mr. Swart, my auditor, and he said yes, through '59.

1-16/20-69 page 105 } Q. And you said, "Well, we want a clause to protect us against that audit"?

Mr. Spindle: We are just repeating the transcript. Mr. MacMillan just asked him "didn't you say that." We have had all this in the transcript once. It looks to me—

The Court: This is part of the record, anyway.

Mr. Spindle: He is just going over direct examination all over again.

Mr. Lam: As if he is not sure what he said the first time.

The Court: If he has already answered, Mr. MacMillan—

Mr. MacMillan: I just wanted to review what he had said to ask him this question.

Mr. Lam: I think, your Honor, all he is trying to do is impress you again with what he said the first time. But I mean, he said it and I don't think your Honor needs to be refreshed with what he said.

By Mr. MacMillan:

Q. Can you tell us—

1-16/20-69 page 106 } Mr. Lam: Wait a minute. Let's decide the issue before you go barreling along.

The Court: What is the question?

By Mr. MacMillan:

Q. My question is, can you tell us what the word "undisclosed" in the contract meant to you as a result of those negotiations?

Mr. Lam: Your Honor—

The Court: That goes to the issue.

Mr. Lam: That goes to the opinion of what we are here about today, sir.

Mr. Spindle: Of course.

Mr. Lam: Obviously it's not a proper question.

Mr. MacMillan: All right.

The Court: Well, he can say what he understood it to mean, could he not?

Mr. Lam: No, it's obvious—

Mr. Spindle: Isn't he asking the witness for a conclusion which is the issue for the Court to decide?

The Court: Maybe he is. He has already asked him this question that he said to Mr. Ware, "Are there any back taxes"? "No." Well, he says, "Then I want a clause
1-16/20-69 in the contract to that effect so that I might be
page 107 } protected." That is already before the Court. So I don't think any other questions needs to be asked.

I am thinking about lunch.

Mr. MacMillan: We are ready to stop, your Honor, with this witness.

The Court: You through with this witness?

Mr. Spindle: We just wanted to introduce one thing.

The Court: All right, show it to Mr. MacMillan.

Mr. MacMillan: Well, we would object to this, your Honor. There has been no showing of agency to put this contract in. We admitted there is such a contract and have no objection for it to go in as part of the total transaction. We say that the recitation of agency in the contract has not been proved by—

The Court: If you can get it in today and there is no objection to it, why not put it in?

Mr. Spindle: Let me just present the question so you have got something to rule on.

RECROSS EXAMINATION

1-16/20-69 By Mr. Spindle:
page 108 } Q. Mr. Cobb, I show you this document and ask you if you are familiar with it?

A. This is the copy of the interim agreement where he was representing both parties.

Q. All right, sir, and this purports to be signed by Charles F. Castle, agent for G. Norman Cobb, that is you, is it not?

A. That is right. And Mr. Gordon Ware also signed it.

Q. Well, then—

A. But it shows.

Q. You can identify this as the contract that was signed by your agent for you?

A. The interim contract for both parties.

The Court: Defendant's Exhibit Number 1.

Defendant's Exhibit No. 1 introduced.

By Mr. Spindle:

Q. And that—I don't know whether you had a chance to

read it all or whether you are familiar with it, Mr. Cobb, but that refers to the period of possession as being from February 10th to March 15th.

A. I didn't look at the dates.

Q. Sir?

1-16/20-69 A. I didn't look at the dates.

page 109 } Q. Well, it speaks for itself.

A. If it says that I wouldn't dispute the dates.

Q. February 10th was about the time you went into possession, then; is that correct?

A. Something like that, sir.

The Court: The negotiations were February 6th, then, possession about February 10th, contract about March—

Mr. Spindle: March 10th.

By Mr. Spindle:

Q. Mr. Cobb, do you have a copy of the original agreement, the one you referred to as being the same as the one that we have, except the names were changed?

A. My sister has it in her file. I don't have it in my physical possession at this time.

Q. Your sister is here today?

A. My sister will testify. You may ask her that.

Q. Thank you, sir.

The Court: What is the date of this—this agreement doesn't seem to be dated.

Mr. Lam: It's not dated, your Honor, but it

1-16/20-69 states the period in there of operation.

page 110 } The Court: When was this signed, do you know?

The Witness: I don't know.

The Court: All right.

By Mr. Spindle:

Q. Could you approximate it around February 10th, Mr. Cobb?

A. No, I couldn't do it because we could have been down here operating and then we could have drawn it and backdated it to such-and-such a date.

The Court: It had to be on or before February 10th.

Mr. Spindle: About a month before.

Thank you, that is all we have.

Mr. MacMillan: That is all we have, your Honor, of this witness.

The Court: What do you think of adjourning for awhile for lunch?

Mr. MacMillan: Yes, sir, we are for it.

The Court: All right, do you think you can get back here by two?

(Whereupon, luncheon recess was taken, to reconvene at 2:00 o'clock p. m.)

1-16/20-69
page 111 } AFTERNOON SESSION

Mr. MacMillan: I would like to call Mr. Swart.

S. STERLING SWART, JR., called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. MacMillan:

Q. Will you tell his Honor your name, please, and spell it for the Court Reporter?

A. S. Sterling Swart, Junior. S-t-e-r-l-i-n-g, and the last name is spelled S-w-a-r-t.

Q. What is your address, sir?

A. 3504 Burrows Avenue, Fairfax, Virginia.

Q. What is your occupation?

A. C.P.A., Certified Public Accountant.

Q. Were you a C.P.A. in 1964?

A. Yes, sir. I received my certificate in 1946.

Q. Were you, in 1964, associated in any way with Norman Cobb and Mavis Cobb?

1-16/20-69 A. Yes, I have been their personal tax ad-
page 112 } viser for a number of years.

Q. Can you tell us whether or not any time during '64 they consulted you with respect to a potential purchase of Rosewood Memorial Park?

A. Yes, sir. Mr. Cobb gave me a balance sheet and other financial statements of the Rosewood Memorial Park in January and asked me to evaluate it because he was contemplating buying an interest in it.

Q. Do you remember what balance sheet that was for of Rosewood Memorial Park's, what period it was for?

S. Sterling Swart, Jr.

A. The balance sheet was in July, dated July 31, 1963.

Q. When was it that he gave you this? What year?

A. January 9, 1964.

Q. Can you tell us, after you had reviewed the balance sheet, did you thereafter have any conference with Mr. Cobb with respect to the purchase?

A. I discussed some of the questions that I had in connection with it, just prior to the meeting in Mr. Rust's office on February 6th.

Q. Can you tell us what questions you had?

A. Yes. I had a number of questions. Mainly concerning liabilities.

Q. What liabilities?

1-16/20-69 page 113 } A. Especially liabilities not showing on the balance sheet.

Q. Can you give us any idea of what particular concern you were involved with or concerned with?

A. Well, one of the main reasons I was there was for Federal income tax and the Virginia income tax.

Q. Can you tell us whether you were present during the negotiations of the contract on February 6, 1964 in Mr. Rust's office?

A. I was present at that meeting, yes, sir.

Q. Can you tell his Honor what, if anything, occurred with respect to the negotiations of the contract, particular attention to the question of taxes?

A. Well, in connection—there was a general discussion of various items from the balance sheet and Mr. Cobb had previously asked me to bring up the question of taxes since I was the tax expert in the case, which I did. I asked if the tax returns had been filed. I believe Mr. Ware said that they had been filed through 1959, and—well, excuse me—had been filed up to date, but had not been audited except through 1959.

Q. Well, did anything result from this?

A. Then Mr. Cobb said he wanted to be protected for any potential deficiencies. And it was my understanding that this deficiency, or any potential deficiency, would

1-16/20-69 page 114 } be covered by the contract of undisclosed liabilities.

Q. Do you recall how long that conference lasted? I mean, do you know how many hours?

A. I would think somewhere around three hours, maybe more. Maybe three to four hours.

Q. Can you tell us who was present?

S. Sterling Swart, Jr.

A. Mr. Cobb, Mavis Cobb, Mr. Rust, Mr. Ware, Mr. Castle, and I was there, of course. I believe that is all.

Q. Was Mr. Winquist there?

A. Yes, I am sorry, Mr. Winquist was there, yes.

Q. What was he doing there?

A. Well, he was the accountant for the Rosewood Memorial Cemetery.

Q. Had you ever seen him before? Did you know him?

A. Yes, through the Accounting Association. I had met him.

Q. Was Mr. J. D. Williams there?

A. Yes, Mr. Williams was present, also.

Mr. MacMillan: Answer these gentlemen.

CROSS-EXAMINATION

1-16/20-69 By Mr. Spindle:

page 115 } Q. Do you have the balance sheet of December 31, 1963 before you, Mr. Swart?

A. Excuse me, I am sorry? December, 1963?

Q. December 31, 1963.

A. Yes. I think I have it.

Q. That was the balance sheet that was used for purposes of this negotiation, was it not?

A. Yes, sir, I have it.

Q. There is an item there under "Assets" marked "Cost of land and development expenses incurred on unsold lots, $50,00-and-some-odd dollars. Do you recall that item?

A. It is on there, yes.

Q. Did you check the worksheets of Mr. Winquist or of Rosewood in connection with the figures behind that item?

A. No, sir. When I evaluated—pardon me a minute, let me make a correction here. When I evaluated it I did not have it. This was given to me, I believe, on February 6th.

Q. You were evaluating it on a mid-year balance sheet?

A. July 31st, that was the latest at the time I had it.

Q. Didn't the July balance sheet have the same item on it? Perhaps the figure was different.

1-16/20-69 A. Yes. There is a $50,000 item on it.

page 116 } Q. What was the amount of that asset as of July, sir?

A. Cost of land and development expenses incurred on unsold lots, $50,998.39.

Q. So by the end of the year it had dropped about $200, hadn't it?

A. Well, whatever the difference is.

Q. Fifty thousand seven hundred. No appreciable difference, a slight drop, *dight?*

A. Yes. $50,768.19.

Q. Did you look into that item to see if you felt that asset was sound?

A. All I had was this.

Q. What did you do when—when you read that item on the July balance sheet what did you do in relation to that item?

A. I had no comment on that except that I assumed that the accountant had—that this was exactly what it said. That it was the cost on the undeveloped lots.

Q. Mr. Cobb asked you to look at the balance sheet to give him advice on it as a tax expert, didn't he?

A. Yes.

Q. You looked at this item but you mean you didn't investigate to see if the $50,000 item for development ex-
1-16/20-69 penses was sound in your judgment as an ac-
page 117 } countant?

A. Well, that figure could have been any amount. Whatever.

Q. How could it have been any amount?

A. I assumed that the statement here which is prepared by a firm of accountants which I have confidence in, was correct as far as that was concerned, and I didn't go behind that.

Q. But what you are telling us is you didn't investigate that figure?

A. I had no way to investigate it.

Q. Did you investigate any other assets shown?

A. No.

Q. Did you investigate any of the liabilities shown?

A. No, I had no way of investigating.

Q. What investigation did you make before you made a report to Mr. Cobb?

A. I went over the items and I discussed with him, or had written on my papers, the items which I thought he should be careful of, which he should watch out for.

Q. And you didn't mention to him, then, anything about determining the development expenses that had been charged that made up this asset of $50,000? Was that one of the items?

A. Specifically I don't think I brought that
1-16/20-69 up to his attention.
page 118 } Q. Well, wouldn't it make a difference, Mr.

Swart, as to which lots these had been charged against to the extent of this asset?

A. Well, it makes a difference in connection with the cost of the unsold lots.

Q. Yes.

A. That is right. It's a part of the cost of the unsold lots.

Q. The accounting procedure that had been adopted by Mr. Winquist for Rosewood in preparing this $50,000 item would have a great deal to do with the actual value of the corporation, would it not?

A. Well, to the extent of the fifty thousand.

Q. Well, did you discuss with Mr. Winquist the accounting technique that he had used for charging development expenses against certain lots?

A. No, I did not discuss it with him.

Q. Did you look at his work papers?

A. No.

Q. Well, now, as an accountant I assume you are familiar with the various alternatives that are available to a developer of land in reporting costs of lots sold, are you not?

1-16/20-69
page 119

A. Which do you mean now?

Q. I am asking you what alternatives are available to a developer of land under Federal income tax procedures in reporting the costs of lots sold.

A. You have one alternative, as I know of, and that is the actual cost as near as could be determined at the time of the sale.

Q. Well, how do you determine the actual cost at the time of the sale? The actual cost of disbursements made to date? Is that what you are telling us?

A. No. The actual cost. I think some of them can be deferred where you have contemplated making additional costs.

Q. How do you project these additional costs?

A. Well, by the time you have to file tax returns, most cases you have at least three months or longer. If you are uncertain you can have an extension of time and after a period of time you know better as to how much the cost will actually amount to.

Q. Mr. Swart, supposing in the taxable year for which you have filed a return you have sold only one lot but you know that you are going to have to spend some money on streets, sewers, drainage or various and sundry improvements of one type or another, how do you determine the cost of that lot for the purpose of reporting a basis?

S. Sterling Swart, Jr.

1-16/20-69 page 120 } A. Assuming that all the lots are of equal value, I would take the cost to date and add to it any cost that I am sure that I would have to make and divide it by the number of lots.

Q. Now, you would add to it the cost that you are sure you are going to have to make. At this point you don't know what that is going to be, do you?

A. You have to estimate it some.

Q. So then the basis that is put on this lot for tax purposes in the initial stages of development involves an estimate of future expenses, doesn't it?

A. It could.

Q. Well, did it in this case?

A. I don't know. I didn't have anything to do with the books of this company. All I had was this work list, balance sheet and other statements.

Q. When you say "it could", is there—isn't it true that it's going to?

A. I am not speaking specifically of this corporation. I am speaking of what is generally done.

Q. All right, let's speak in general terms then. Isn't it always true that where you have a land development and you are selling lots and when you haven't completed the improvements on the development that you must estimate the costs of future improvements in order to allocate that cost over the lots already sold?

1-16/20-69 page 121 } A. Yes.

Q. Well, then wouldn't that be true in this case?

A. Well, how do you mean it's true?

Q. Well, if that is the method of tax accounting and reporting taxes on lots sold when you are halfway through a development, would it not be true in this case, Rosewood?

A. Well, the figure here is not estimated.

Q. No, the figure I am asking you about is the figure that would have to have been put on the return for the basis of each lot that had been sold up through the time of 1963.

A. In computing the profit there would have to be some estimation in it if the development had not been completed.

Q. That would be true of Rosewood, wouldn't it?

A. Yes.

Q. Well, you realized that at the time you had conferred with Mr. Cobb, didn't you?

A. I am sure I did.

Q. Well, then, didn't you realize that the taxes in future years could be affected by how much was spent

1-16/20-69 for improvements in those future years after Mr.
page 122 } Cobb acquired the property?

A. To me the cost of these lots that had to be —the future costs would be determined very closely. It would not be any estimate.

Q. Well, now—

A. It would vary some but I mean it wouldn't be an arbitrary figure out of the hat. You would have some basis—being in the cemetery business you should have some basis of arriving at your cost to develop this section.

Q. Of course, but it would be an estimate, a knowledgeable estimate, presumably, but an estimate?

A. A knowledgeable estimate, yes.

Q. The difference—I want to make sure we agree with each other—is that however accurately you try to project the cost at best it is not a known figure at the time you close a tax year, it is an estimate of future expenses, isn't it?

A. Well, unless—if you have to make other expenditures on this property, yes.

Q. Well, on this balance sheet you had an asset here of $38,000 for land held for future development, didn't you?

A. That should be the cost of undeveloped land, raw land.

Q. But you knew from this balance sheet that
1-16/20-69 there was land to be developed?
page 123 } A. I knew that there was room for expansion on the project, yes.

Q. Yes, sir, and therefore you knew that there were going to be improvements that had to be made in the future to complete the development, didn't you?

A. Yes. There would be some improvements.

Q. And therefore you knew that there was an estimate of future expenses which affect back taxes, did you not?

A. I wouldn't say that it would affect back taxes.

Q. Why wouldn't it? Explain to me why the expenses which would have to be paid after acquisition in order to complete this development would not affect the back taxes.

A. Well, you are going on an assumption, then, that the estimates were more or less wild and were not very accurate.

Q. Well, I am not going on any assumption.

A. It would only affect lots that had been sold?

Q. I am just going to ask you how you could make the statement that the future expenses could not affect the back taxes. I don't understand your answer.

1-16/20-69 A. Only costs on lots that had been previously
page 124 } sold. Your income tax doesn't have anything to

do with these unsold lots. Your income tax is based only on the lots that have been sold.

Q. Yes, sir, and on the costs that you allocate to those lots which have been sold, isn't that correct?

A. There would be some allocation. Or there would not have to be. It isn't necessary that there would be any allocation.

Q. That is very true. You could elect not to allocate any costs, couldn't you, to the lots which had been sold?

A. I can't imagine anyone doing that.

Q. But you just said you could. Internal Revenue Service would permit you to allocate zero costs to a lot which had been sold?

A. Well, they probably wouldn't object to that.

Q. That is true, and when would you get the tax if you did that, Mr. Swart? If you didn't allocate any costs to it and you charged the taxes then in later years, you would have no profit in later years, and you would have all your profit in the early years, wouldn't you?

A. When would you get the tax? It would be assessed as a deficiency—there wouldn't be any deficiency be-
1-16/20-69 cause you overpaid. There would be a claim for
page 125 } a refund.

Q. But if you elected not to assign or allocate costs to the lots in the first year of sale, Internal Revenue Service would not object. Obviously you are paying a hundred per cent tax on—tax on a hundred per cent profit, aren't you?

A. I can't imagine that situation.

Q. All right.

A. Because I think that you would allocate costs. I haven't seen anybody that would rather do that because they are paying out more money.

Q. I thoroughly agree with you, Mr. Swart, as to what would be good accounting practice. But the point I am making is simply an extreme illustration to show that the Internal Revenue Service will permit you in the early years to allocate the costs.

A. Well, if you did not want to claim any cost for the lots, the Internal Revenue would not object.

Q. Now, if you allocated a hundred per cent of costs to those first lots, wouldn't that be permissible with the Internal Revenue Service?

A. What do you mean, a hundred per cent of the costs? On the lots? The cost of each individual lot?

Q. Well, how do you know the cost of each individual lot except by allocating the total cost across the
1-16/20-69 number of lots? Isn't that the way you determine
page 126 } the cost per lot?

A. Yes.

Q. Are you selling these lots that far in advance that you wouldn't know any costs?

A. No, sir, most of the time these are in process at the time you file your tax return and you will know quite a bit about your costs.

Q. Certainly you know from a projection of future costs, don't you, what costs you are allocating to each lot? Isn't that the way it's normally done?

A. You have to allocate so much cost to each lot.

Q. And that allocation figure involved an estimate of projecting for future or anticipated expenses, doesn't it?

A. It could.

Q. And if anticipated expenses are not exactly as anticipated or vary, then the cost of that lot will vary, the cost of the lot already sold will vary, wouldn't it?

A. Yes. It could.

Q. And if the cost varies the profit varies, doesn't it?

A. Yes.

Q. And if the profit varies you have more or
1-16/20-69 less tax, don't you?
page 127 } A. Yes.

Q. Therefore the actual expenses incurred after acquisition can affect the taxes due for the period before acquisition, doesn't it?

A. Yes.

Q. Well, didn't you alert Mr. Cobb to the—

A. Yes, I did.

Q. —to the tax—oh, you did tell him about this?

A. I told him there was a potential deficiency there, or could be. I didn't go into the cost of this. I was not asked to do that and I did not do that.

Q. But you told him—

A. I told him that any year that hasn't been checked, there is always a potential deficiency.

Q. I think we all know that, but as I understood it you told Mr. Cobb that there was a potential deficiency based upon what expenses would be incurred in the future?

A. No, I think it was just a general statement that there could be a general deficiency. Not based on any item, but any year that was open there could be a potential deficiency.

S. Sterling Swart, Jr.

1-16/20-69 page 128 } Q. But whether you told Mr. Cobb or not, you understood, yourself, that the handling of expenses from that point on would affect the taxes already incurred for past years, didn't you?

A. No, I don't think I discussed that point with him.

Q. I didn't ask you if you discussed it, I asked you if you did not understand it as a tax expert.

A. Well, I would assume from this statement that that would be a minor item.

Q. Minor or major, sir, was not my question. Did you not understand that that could be—that expenses that would be paid out after acquisition could affect the taxes which had accrued prior to acquisition?

A. At the time I discussed it with Mr. Cobb I was not sure of that.

Q. Well, aren't you sure of it now?

A. Not really. Because I have not gone into the books of Rosewood Memorial and I would have to go into that and into their tax returns in order to determine it.

Q. Mr. Swart, as a tax expert aren't you aware of the fact that hypothetically that that would be the result on any acquisition of a land development corporation?

A. Yes. There is always that possibility.

Q. So it had to be a possibility with Rosewood, which was a land development corporation?

1-16/20-69 page 129 } A. Well, if you look at it as a land development.

Q. I understood you to say, Mr. Swart, that you received other financial papers in addition to the balance sheet of July, '63. Would you tell us what they were, please, sir?

A. I have a report here which includes two papers of transmittal letter—well, there is another page of comments, which is considered—which I would consider seven papers of transmittal letter and comments and balance sheet, statement of income and expenses, and statement of cost of lot sale allocated to collections.

Q. And that statement, of cost allocated to lots was delivered to you prior to these negotiations?

A. Yes.

Q. May we have that, sir? May I see that?

Mr. Spindle: We would like to introduce this, your Honor, please.

The Court: Defendant's Exhibit Number 2.

(Whereupon, the foregoing documents were marked for identification and received in evidence as Defendant's Exhibit Number 2.)

By Mr. Spindle:

Q. Mr. Swart, did you represent the Cobb family in the development of Cobbsdale, so far as accounting work is concerned?

1-16/20-69 page 130

A. I have done work on that, yes.

Q. How did they determine cost of lots sold after the end of each year when they reported for tax purposes?

A. Do we want—excuse me, do we want to go into their personal stuff?

Q. I am asking you how they determined the cost of lots sold in Cobbsdale as of the end of each year for tax purposes?

A. Well, the purchase price of the portions that they bought —this was their farm and they bought some of the heirs out. And then they developed streets and water and sewer, and for each section that was developed we took the total cost on the sections that were affected by these improvements and divided by the number of lots.

Q. Fine. At the time that you would sell a particular lot in one of these sections, would I be correct in assuming that all these costs had not been incurred as of that point of time?

A. Well, they started this back about 1946. And I don't recall that we did. It is very possible that we did, but I don't recall off hand whether we did or we didn't. But if I had known of some costs that were going to affect the lot, I would have put it in.

Q. Even though the costs had not been disbursed as of the end of the tax period? If you knew that you had to finish some streets in that section you would project the cost of that street and then allocate that project cost over the lots in that section, would you not?

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A. I think that I would have but I don't recall all the costs on that subdivision now. It has been some years since that was completed.

Q. But that would have been the way you would have handled it?

A. Yes.

Q. And in that particular subdivision, after you completed the actual costs in a particular section, did you not have to

go back and adjust the basis of your individual lots in some instances?

A. We did not.

Q. In every instance did the projected cost equal the exact disbursement after the total costs were in?

A. I would say that it would be impossible to project the actual costs but we were close enough that we did not go back and have to file any additional returns or change the costs of any of the lots.

Q. No adjustment by the Internal Revenue Service?

A. No, no adjustment to the cost by Internal Revenue.

1-16/20-69 page 132 } Mr. Spindle: Your Honor, I think that is all we have to ask this witness at the moment, but this report which has been introduced is a little voluminous. Subject to an opportunity to study it we might like to call this witness as our witness.

The Court: No objection?

Mr. MacMillan: No objection to that.

The Court: You want a little time to study it?

Mr. Spindle: I would just as soon go ahead but if we determine later—

The Court: All right.

Mr. Spindle: —we might like to ask a few more questions.

REDIRECT EXAMINATION

By Mr. MacMillan:

Q. I have a couple of questions.

Can you identify that document for us?

A. This is the contract for purchase of Cemetery Consultants—excuse me, this is a contract between G. H. Ware and Cemetery Consultants, Incorporated.

Q. All right. Is that the balance sheet of February 6th that was brought—of December 31, '63 that was brought to the—

1-16/20-69 page 133 } Mr. Spindle: Is this the contract, Mr. MacMillan, that is the subject matter of dispute?

Mr. MacMillan: That is right.

Mr. Spindle: March 10th.

Mr. MacMillan: March 10th.

Mr. Spindle: March 10th, and the December 31st balance sheet.

The Court: Stipulate it.

Mr. Spindle: They are, I think, attached to the—

Mr. MacMillan: I was just going to introduce it so we would have a copy for the record.

The Witness: Well, careful examination indicated that it is the same.

Mr. MacMillan: Your Honor, we would like to have that marked.

The Court: Plaintiff's *Ehxibit* Number 2 is what I have.

(Whereupon, the foregoing document was marked for identification and received in evidence as Plaintiff's Exhibit Number 2.)

By Mr. MacMillan:

Q. Would you refer to this document and tell us whether or not on the balance sheet there is any reference to any reserve for future tax liability?

1-16/20-69 page 134 } Mr. Spindle: The balance sheet speaks for itself. You have it before you as evidence.

Mr. MacMillan: Your Honor, I think we are entitled to have the assistance of a Certified Public Accountant to help the Court with respect to the balance sheet.

Mr. Spindle: The answer is no. We will stipulate that.

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

By Mr. MacMillan:

Q. Is there anything on the balance sheet, any reserve or figure, that indicates that improvements had not been made, projected improvements had not been made to Rosewood?

A. I don't see any that indicates that it has not been made.

RECROSS EXAMINATION

By Mr. Spindle:

Q. That information, however, is contained on the other document that was delivered to you along with the July balance sheet, wasn't it?

A. Which is that?

1-16/20-69 page 135 } Q. That improvements were projected but had not been completed.

A. You are referring to the last schedule on that?

Q. The report that you previously handed me a few moments ago.

A. May I see it now? This has Schedule B-1 on it which is a statement of cost of lot sales allocated to collections, yes.

Q. Let me, if I may, invite your attention to Page 2 of this report, which has the four sections of the cemetery development listed on the left and then under Columnar totals the actual or estimated total cost, the estimated cost to complete the development, the development incurred to July 31, 1963, accumulated cost allocated to collections on sales and the cost incurred not charged to operations. Isn't that the information that clearly gives you or any other businessman or the purchaser information that there were future projected costs which would have to be paid out to complete this project?

A. That was as far as I was concerned, that was just some statistical information that was put in the report. I did not go into that.

Q. Well, Mr.—

1-16/20-69 page 136 } Mr. MacMillan: Wait a second, Mr. Spindle. I had the witness.

Mr. Spindle: I beg your pardon, I thought you said you were through.

Mr. MacMillan: I beg your pardon. I am sorry, I guess I did.

I had another question for him.

By Mr. Spindle:

Q. Well, we all recognize it's statistical information but is it not statistical information of substantial importance to an accountant or a purchaser trying to figure what the future liabilities of this concern are going to be?

A. No. The liabilities should be stated on the balance sheet.

Q. Doesn't that projection of future costs give you a pretty good idea of what this corporation is going to have to spend after you buy it?

A. This is what somebody else thought it was going to be. Not the new purchasers.

Q. Certainly that would show what Mr. Winquist, Certified Public Accountant for Rosewood, thought the future expenses were going to be, would it not?

A. You would have to ask him.

1-16/20-69 page 137 } Q. What does it appear to you? You read the report, Mr. Swart. Is that not Mr. Winquist's figures?

S. Sterling Swart, Jr.

A. Mr. Winquist, I believe, worked for Edmondson, Ledbetter & Ballard.

Q. Yes, sir.

A. Well, these—I don't know where he got these figures.

Q. Well, I don't know where he got them, either, but if an accountant makes up a report, Mr. Swart, where would you presume that he got those figures?

A. He got them from the—

Q. What is the standard practice?

A. He would get these from the management of the cemetery, of Rosewood Memorial Park.

Q. All right, sir. Now, don't those figures tell anyone looking at that what the costs are going to have to be for this concern after you buy it?

A. I don't think so.

Q. Why not?

A. Any purchaser could change their minds. They could put in other improvements. They wouldn't have to put in the same improvements that were planned.

Q. Precisely. And if you do change those costs you are going to change your back taxes, aren't you?

A. No, not necessarily.

Q. Why not? If you changed those projected
1-16/20-69 costs, tell me why that wouldn't change your back
page 138 } taxes.

A. Well, do these apply to sold lots or unsold lots?

Q. If you will read that you will see the allocation broken down between sold and unsold lots, I believe. How much has been charged to sold lots, how much is projected to be paid charged against unsold lots.

A. Would you show me that, sir, where it breaks it down between unsold and sold?

Q. Estimated cost to complete development.

A. All right, that is future.

Q. That is right.

A. Unsold lots.

Q. A hundred nine thousand.

A. Unsold lots.

Q. Let's analyze this estimated cost to complete development at the point—it was $162,000, wasn't it?

A. All right.

Q. All right. Now, if you purchased this corporation right after this report was made up and you don't spend $162,000, you will change your back taxes, wouldn't you?

A. No.

Q. Why not?

A. This is on unsold lots.

1-16/20-69 page 139 } Q. All right. And let's assume you sell the lots. You sell these lots.

A. Wait a minute. Unsold lots have nothing to do with back taxes or taxes for prior years.

Q. Well, I would like for you to explain to the Court why unsold lots when you sell them wouldn't have something to do with back taxes in a land development.

A. Because each year you take your sales and you deduct from your sales your cost of sales to arrive at your profit. If the lots are unsold you have neither a gain nor a loss.

Q. Yes, sir. But after you acquire this corporation and let's assume if you will for this question, that you sell these lots, now, will it not make some difference whether you spend that $162,000?

A. Well, then, that wouldn't have anything to do with back taxes. It would be future taxes.

Q. My question is whether it doesn't have something to do with back taxes.

A. No, sir.

Q. Excuse me?

A. I see no reason for back taxes.

Q. Let's take this situation. You buy that corporation on that balance sheet and that statement of projected costs, and

1-16/20-69 page 140 } you sell the rest of those lots but you don't spend that $162,000 of projected costs, now, are you telling this Court that wouldn't affect your back taxes?

A. It would only affect any lots that had already been sold. If this were totally on unsold lots, it would have nothing to do with that.

Q. That is exactly what I am trying to get at. It would only affect the taxes on the lots already sold.

Mr. Spindle: That is all we have, sir.

The Court: Mr. MacMillan, I think you had another question.

REDIRECT EXAMINATION

By Mr. MacMillan:

Q. As I understand it, the material you were given was for July 31, 1963; is that correct?

A. That is correct.

Q. There was no accompanying statement with December 31, 1963 which was the basis upon which this sale was made?

A. No, I had nothing else.

Q. Nothing?

A. Just the two sheets of paper.

Mr. MacMillan: We have no other questions.

The Court: You want him to go on out? We are going to excuse him temporarily, aren't we?

1-16/20-69 page 141 } Mr. Spindle: Yes, your Honor, we might recall him. Yes.

(Whereupon, the witness was excused.)

Mr. MacMillan: We would like to call Mr. Williams.

J. D. WILLIAMS, called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. MacMillan:

Q. Would you tell the Court your name?

A. J. D. Williams.

Q. Where do you reside, sir?

A. 3529 Woodburn Road, Annandale, Virginia.

Q. What is your occupation, sir?

A. I am a builder.

Q. What types of things do you build?

A. Residential.

Q. Have you ever had any interest in any cemetery other than Rosewood?

A. Yes, I have an interest in a cemetery in Annandale.

1-16/20-69 page 142 } Q. What is the name of that cemetery?

A. Pleasant Valley Memorial Park.

Q. What interest do you have?

A. Well, let me go back a little bit there. I started off in it with a one-third interest in it and then I purchased—

Q. Talk to his Honor.

A. I beg your pardon.

Then I purchased another one-third interest in it. One of the other parties wanted to get out of it so I purchased his

interest in it. And then about three months ago I purchased the other third interest in it.

Q. All right, sir.

The Court: How much interest did you have in there on March 10, 1964?

The Witness: One-third.

By Mr. MacMillan:

Q. Now, you were one of the parties active in the purchase of Rosedale (*sic*) by Cemetery Consultants—Rosewood?

A. Yes.

Q. Rosewood by Cemetery Consultants?

A. Yes, sir.

1-16/20-69 page 143 } Q. Can you tell his Honor whether or not you were one of the ones who came down in January to look at the cemetery?

A. Yes.

Q. In 1964?

A. Yes, 1964. In January, 1964.

Q. And subsequently there was a meeting on February 6th in Mr. Rust's, John Rust's, office?

A. Yes, sir, that is correct.

Q. Can you tell his Honor who was present?

A. Mr. Norman Cobb and Miss Mavis Cobb, his sister, and Charlie Castle, and Mr. Johnny Rust, and Gordon Ware, and Sterling Swart and myself.

Q. Was Mr. Winquist there?

A. At the first meeting? No, I don't believe Mr. Winquist was at the first meeting.

Q. And can you tell us what happened at that negotiation with respect to the purchase, the price, the taxes, whatever may have been discussed?

The Court: Is this the meeting of February 6th?

Mr. MacMillan: February 6th.

Mr. Lam: Your Honor, I am not so sure that he is correct. He says that it is and he says not at the first meeting. Let's find out from him what meeting it was.

1-16/20-69 page 144 } The Court: Is this the meeting where the negotiations took place and they agreed, the ones that were present?

The Witness: Yes, sir. That is correct.

The Court: February 6th?

The Witness: Yes, sir.

The Court: And possession was delivered three days later?
The Witness: Well, possession wasn't delivered.
The Court: Well, Castle was the agent of both parties?
The Witness: That is correct, sir.

By Mr. MacMillan:
Q. Can you tell us what happened at that conference?
A. Well, briefly what happened at that, we discussed the purchase price on it and come to an agreement on the purchase price. And then Mr. Cobb asked the question there, was there any liabilities, obligations, of the park. And he said none that he knew of.
Q. What type obligations?

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Mr. Lam: Let's not put words in the man's mouth. Let him answer.
Mr. MacMillan: I just asked him what type of obligations. He said obligations.
Mr. Lam: He is explaining.
Mr. MacMillan: That is all that was said, obligations.
The Court: Let's see if he knows.
Mr. Lam: Let's not try to tell him the answers.
The Court: I think the question is proper.
The Witness: And Mr. Cobb asked the question there, said "Is there any taxes due on it".

By Mr. MacMillan:
Q. Who did he ask that of?
A. Mr. Ware. And he said none that he knew of. And Mr. Cobb said, "Well, then, you won't object to putting a clause in it that you will be responsible for any undisclosed liabilities," and he said "None whatsoever." And this was inserted in it.
Q. Now, I understand that subsequent to that meeting there was some interim operation of the cemetery while the papers were being drawn, the contract was being drawn.
A. Yes, sir.

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Q. Then what happened after that? Were they subsequently prepared, the papers?
A. The papers was prepared, yes, sir.

Mr. MacMillan: Answer these gentlemen.

J. D. Williams

CROSS-EXAMINATION

By Mr. Lam:

Q. Mr. Williams, please, the original—well, let me go back a little bit.

You referred to Charlie Castle. Prior to this particular dealing with the Rosewood Cemetery you knew him, did you not, sir?

A. Yes. I had *knew* him for six or eight months before that.

Q. In fact, he worked for you?

A. Yes. He did for awhile. He worked—he didn't work for me personally.

Q. He worked for this cemetery you are speaking of? What was the name of it?

A. Pleasant Valley Memorial Park.

Q. This was in Fairfax County?

A. In Fairfax County, yes.

Q. And it was after, probably, that he left there so far as you know, when he went to Norfolk where he started his employment with Rosewood; is that correct?

1-16/20-69 page 147 A. Well, this is the—I don't know where he went after he left there, but this is where he was whenever he come back to see me.

Q. Now, with respect to the negotiations leading up to the purchase of this, when did they start?

A. I don't quite understand your question.

Q. When was your first—what was the first thing that happened so far as you personally were involved in with regard to this particular acquisition of Rosewood?

A. Mr. Castle come up, I believe it was sometime early in January, and said that he was working at a park in Virginia Beach and it was for sale and he thought it was a very good buy and I asked him what the down payment was on it and I believe that he said the down payment on it was $50,000. And I told him I, at that time, was not able to raise $50,000 on my own, and he was acquainted with Mr. Norman Cobb and he said, "Well, let's go see Norman and see can we raise fifty thousand." And we went up—he called Mr. Cobb and we went up to the bank and sit down and had a discussion with him on the raising of the down payment.

And in the discussion there, Mr. Castle asked Mr. Cobb would he be interested in going in the deal with us. And Mr. Cobb told him that he couldn't give him any answer at that time, that he would talk to his sister, which is Miss Mavis Cobb, and they would discuss it and if they were

1-16/20-69 interested in it they would both go in it together
page 148 } with us. And this was the first discussion.

Q. Did you know Mr. Cobb prior to that time?

A. Not personally. I knew of him.

Q. Now, with respect to—I think you said in answer to opening questions that you are a builder?

A. Yes, sir.

Q. A builder. And so far as accounting and so forth, do you do your own accounting or do you have an accountant?

A. No, I have an accountant.

Q. You have one, you say?

A. Oh, yes.

Q. Of course, your accountant, I assume is not Mr. Swart?

A. No.

Q. Did you bring your own accountant in this particular purchase at any point?

A. No, sir.

Q. Now, with respect to the—I keep forgetting, is it Sunnyvale?

A. Pleasant Valley.

Q. Pleasant Valley. Excuse me, sir. The cemetery you have there, you are familiar, are you not, with the method of accounting, I assume, that is used there?

1-16/20-69 A. My method of accounting on Pleasant Val-
page 149 } ley?

Q. Yes, sir.

A. I have an accountant that takes care of that.

Q. I say, but you are familiar with the method of accounting?

A. Yes. In a general way, yes.

Q. Is that the same, is the set-up on the same type of basis as is the Rosewood Park accounting system?

A. No, it isn't.

Q. It is different from that?

A. Yes.

Q. In respect to that so far as development, was it all developed at one time or is it being developed as sales are being made?

A. No, our little park was all developed at one time. There was no development being made.

Q. That took place over what period of time, say, your development?

A. About eight months.

Q. About eight months?

A. Yes.

J. D. Williams

Q. And all of your costs then in that particular development were expended in the eight months in the development of it?

1-16/20-69 page 150 } A. Roughly, yes.

Q. And are lots still being sold from that particular park?

A. Oh, yes, sure.

Q. And so far as the costs of the lots sold, are they all profit or do you still allocate the costs over to the lots that are now being sold?

A. Well, we allocate part of the costs to the lots that are being sold. This is for accounting purposes only.

Q. Now, Mr. Williams, let me ask you this: As I recall the thing and, of course, when you—I think if I understand it, there was an original agreement where three of you as individuals, you and the two Cobbs, would purchase the stock as individuals, am I correct?

A. This was the first agreement, yes.

Q. And I assume that you paid what, $16,666 each to Mr. Ware?

A. I believe that is correct.

Q. And you subsequently got that back from him, did you not, at the time that the contract was entered between him and Cemetery Consultants?

A. We changed—

Q. Checks, I guess?

1-16/20-69 page 151 } A. No, didn't change checks. We purchased Cemetery Consultants from Charlie Castle, and then we loaned the money to Cemetery Consultants and Cemetery Consultants—

Q. The Cemetery Consultants paid Mr. Ware?

A. Yes.

Q. But what I am speaking of, you did receive a check from Mr. Ware at this time for $16,666 and I guess 66¢?

A. I believe that is correct. Yes.

Q. Now, in this interim period, why did you decide to go into it,—you speak of purchasing this corporation known as Cemetery Consultants which was Mr. Castle's corporation.

A. That is correct.

Q. When you purchased that what did you pay for that?

A. I believe we paid a thousand dollars for it.

Q. A thousand dollars because it actually had no holdings of anything; is that correct? It had no assets?

A. I don't believe it did.

Q. As I understand it, it had been formed but had never gone into any operation, am I correct?

A. I think that is correct.

Q. What was your reason that you decided to purchase in the name of Cemetery Consultants?

A. Well, this was on the advice of our account-
1-16/20-69 ant.
page 152 } Q. Which accountant?

A. Mr. Vernon Winquist.

Q. And you did that for what reason, sir?

A. Well, he thought it would be better to operate it, the Cemetery, as a corporation in place of individually.

Q. Well, actually it was a corporation at the time that you acquired it. All you did was acquire the stock in the corporation, didn't you? Under the original agreement?

A. The stock, yes.

Q. So it was a corporation, at that time?

A. Yes. It was a corporation.

Q. And, of course, as a corporation the usual reasons for forming corporations, that is, ownership is easier to control and the limitation of liability, all that existed when you purchased the stock, just as if you would purchase stock on the open market, would it not?

A. Rephrase that question.

Q. Well, I say, there is no difference when you purchased the stock of Rosewood Memorial Park so far as a liability proposition than if you purchased stock of any other corporation, such as on the open market, is there? You already had a corporation there?

A. Yeah, we purchased the stock.

Q. But for what reason you came and pur-
1-16/20-69 chased it rather than as an individual purchas-
page 153 } ing a stock of Rosewood you came to a corporation purchasing the stock of Rosewood? You say this was on the advice of Mr. Winquist? On what advice? I mean, what was it that you were trying to achieve?

A. Just the advice of Mr. Winquist that he thought it would work better to liquidate the other corporation and—

Q. And take the stepped-up basis?

A. Take it into Cemetery Consultants.

Q. Take the stepped-up basis, is what he is talking about.

A. I can't answer that.

Q. I see. But on his advice you assumed there was some good reason for doing so?

A. I would assume there was, yes.

Q. Then you relied on Mr. Winquist, I assume, to follow this advice, did you not?

A. Yes.

Q. And you had not known him prior to somewhere in this thing, in this purchase, had you?

A. No, I hadn't met the gentleman before.

Q. But after the negotiations for the purchase began that is when you first met Mr. Winquist?

A. Sometime there, yes.

Q. And during this period of operation—or maybe since you were out of the room, there was a period of operation of approximately a month or a little bit better between the time in February and the time in March you entered into this agreement between Cemetery Consultants and Mr. Ware, was it not?

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A. Yes. There was an agreement with Mr. Castle there to operate it for—actually, if we hadn't of went through the deal he would have been operating for Mr. Ware, or after the deal was closed.

Q. I think this agreement was in—this is Defendant's Exhibit Number 1.

A. I will have to do like you do, I have to put my glasses on.

Q. Mr. Williams, if you would just read it briefly, or just read it—

A. That is the agreement.

Q. That is the original agreement? And in this one Mr. Castle was acting for you and Mr. Cobb and Miss Cobb; am I correct? He was acting as your agent when he signed this?

A. Only as far as the operation was concerned.

Q. Well, only as far as the operation, he is still acting as your agent? In other words, it says in here that he will take over the operation, management and will take all profits and absorb all losses. In effect, you all were taking over the operation for this period of time; is that correct?

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A. Only while the contract was being formalized.

Q. And apparently in the event—the last clause says "In the event said sale of Rosewood Memorial Park is refused by Gordon H. Ware, the amount of his liabilities is not to exceed $1900." Apparently by this he had the right if the situation changed to decide not to sell it, is that correct?

A. No, we had a signed agreement—

Q. Well, I say that agreement gave him, however, the right not to sell it if he decided after that period of time—

A. No, I don't believe so.

Q. All right.

Now, were you personally—did you have personal occasion to come down here to visit the site of Rosewood Memorial Park before the purchase?

A. Yes. We came down in the—sometime in the early part of January, yes.

Q. Were you back at any other time?

A. Not as I recall at this time until after the negotiation was concluded.

Q. Until after March? You were not down during the period of time that Mr. Castle was operating?

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A. Oh, yes. Sure.

Q. That was what I was thinking.

A. Certainly.

Q. How many times were you down or how long were you down during that period of time?

A. Well, we usually came down and went back the same day.

Q. Who is "we"?

A. Mr. Cobb and Miss Cobb and myself.

Q. You all were down here on several occasions, then?

A. I don't believe we were down on only one occasion prior to the final settlement then.

Q. Now, you have got me a little confused. I asked you whether you were down during the period of time Mr. Castle was operating it under this agreement, which has been referred to as Defendant's Exhibit 1. That was this month prior to the March 10th agreement?

A. Oh, no, no. No, not to my memory, I wasn't, no. I didn't understand your question there.

Q. Not to your memory?

A. No.

Q. Where then did you meet Mr. Winquist for the first time?

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A. Mr. Winquist, I met him for the first time, I believe this was on March 6th, I believe it was, at Fairfax.

Q. At Fairfax? This was your first meeting with him?

A. The best of my memory, yes.

Q. When did he advise you with regard to buying it as a corporation, as Cemetery Consultants?

A. This was probably sometime the latter part of March. The best of my memory.

Q. Mr. Williams, I am not trying to confuse you but you

are getting a little bit confused. The contract here in the name of Cemetery Consultants was entered on March 10th, which I would put in the first third of the month.

The Court: I assume, Mr. Lam, that he meant to say he met Mr. Winquist the first time on February 6th, instead of March 6th.

The Witness: That is correct. February 6th. That is correct. I beg your pardon.

By Mr. Lam:

Q. Where was that that you met him, as you recall?

A. This was in Mr. Rust's office in Fairfax.

Q. You said you were not down here at any other time. When I say "down here", I mean down to the City of Virginia Beach, Rosewood Memorial Park, during the interim month, am I correct? Until the final agreement was entered?

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A. No, sir, not to my memory, we wasn't.

Q. So then you did not have occasion to see Mr. Winquist at any other time until after the agreement had been entered, am I correct?

A. I talked to him, I believe, on the telephone several times.

Q. On the telephone, about what?

A. Just general discussion.

Q. Can you remember any of it?

A. No, I do not at this time.

Q. Do not remember any of your conversations with him on the 'phone? So you met Mr. Winquist for the first time, roughly, on February 6th at Mr. Rust's office in Fairfax?

A. Yes.

Q. And you did not meet Mr. Winquist at any other time although you did talk to him on the 'phone several times, until after the agreement was entered?

A. I think this is correct, yes.

Q. When was it that he advised you—was it on the telephone—to purchase in the name of Cemetery Consultants?

A. I don't remember any date on that.

Q. Where was the conversation or on what occasion—this seems to me to be a very big thing that he would advise you to move from purchase as an individual to purchase as a corporation. Now, where did this advice come from? Where and when did he give you this?

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A. I don't remember what date it was.

J. D. Williams

Q. All right. I will not tie you down on the date. Where were you when this happened? Where were you with regard to space? Where were you?

A. Well, I was probably at my office in Fairfax whenever I was talking to him on the telephone.

Q. Did he advise you over the telephone to buy as a corporation?

A. It was discussed, yes.

Q. Over the telephone?

A. Yes.

Q. Was this the first discussion you had with him about the purchase—you see, Mr. Williams, this is the problem that bothers me. In the early stages of this Mr. Winquist was the accountant for Mr. Ware. And Mr. Swart has identified himself as being the accountant for Mr. and Miss Cobb. And apparently your own accountant didn't enter into this negotiation at any point, am I correct?

A. That is correct, he did not.

Q. Now, an accountant for a man that you have not met before—you had not met Mr. Ware before, had you?

1-16/20-69 page 160 } A. No.

Q. And you had not met Mr. Winquist prior to this time, prior to this purchase?

A. That is correct.

Q. And yet this man who you had not met before is the man that takes it upon himself to advise you to buy it as a corporation. Now, doesn't that seem strange, without any background or knowledge or anything?

A. No, he was familiar with the operation of the cemetery.

Q. Quite right, he was familiar with it. But you didn't know him, did you?

A. No. Personally I did not, no.

Q. Did you discuss—and he spoke to you only by 'phone of how you should buy it as Cemetery Consultants; is that correct?

A. To the best of my recollection, yes.

Q. And did you discuss that with anyone else? That you should then take it as Cemetery Consultants?

A. Well, this was discussed between Mr. Cobb and Miss Cobb and myself, yes, indeed.

Q. Well, now, in this period of time was Mr. Winquist working for—when I say "you" it would have been for the three of you, was he working here at the cemetery going over the books and so forth for you all?

J. D. Williams

1-16/20-69 page 161 } A. He had prepared—no, he was not working for us at that time. He prepared a balance sheet there as of December 31st which was the result of the final purchase price on it.

Q. That is the only thing he had done for you other than calling you on the 'phone and advising you—

A. Well, he didn't do that for us at that time. He prepared that sheet for Mr. Ware.

Q. So your memory is such if he worked for you during that interim period and if you all paid him for that work, you have no recollection of it?

A. No, I do not.

Q. Now, let me see if I am correct. You do not remember whether he worked for you in that period? You don't recall any specifics that you talked about on the 'phone with him because you didn't meet him personally except on that one occasion? Do you recall any conversation with him at the—did you say it was the February 6th meeting in Mr. Rust's office?

A. Yes, I believe that is correct.

Q. Do you recall any conversation with Mr. Winquist there?

A. No, this was just general discussion on the negotiation of the contract. He was the accountant for Mr. Ware.

Q. All right. How long was this discussion?

1-16/20-69 page 162 } What length of time did it take Mr. Williams? In other words, how long were you all at Mr. Rust's office discussing this matter?

A. I believe possibly two or three hours at that time.

Q. Do you recall any of the other contract features that were discussed? Any other portions of this contract that were discussed at this meeting?

A. Pertaining to what specifically?

Q. I am speaking with regard to the contract. You said the negotiations concerning the purchase were discussed at this meeting that took two to three hours.

A. The general terms of it, yes.

Q. For instance, do you recall how many shares of Rosewood you were buying when you were buying all of the stock?

A. I believe it was 35 shares.

Q. Was that by statement, or how do you know that?

A. This was according to the balance sheet, yes.

Q. Do you recall what the purchase price was?

A. Not at this time I don't, no.

Q. Could it have been $280,000?

A. No, it was in the neighborhood of $200,000.

1-16/20-69 Somewhere around there.
page 163 } Q. All right. Do you recall Mr. Swart—I think you said he was present, did you not?

A. Yes, he was present.

Q. Do you recall any discussion that Mr. Swart had concerning taxes?

A. Well, there was just a general discussion there on the taxes and undisclosed liabilities only.

Q. What other undisclosed liabilities? Do you recall any other thing discussed that might fall in this undisclosed liabilities?

A. Well, undisclosed liabilities is anything that is not shown on the balance sheet.

Q. Yes, I understand that. I say, do you recall—you recalled something about taxes. I say, do you recall any other discussion of any other thing that might have been a potential liability? Any others discussed?

A. Not to my knowledge they weren't.

Q. So if we are getting into undisclosed liabilities, really the only thing you recall is a discussion with regard to taxes, then?

A. Any undisclosed liabilities that was not shown on the balance sheet.

Q. What taxes were discussed?

A. We were talking about any taxes that was
1-16/20-69 due which would have been income taxes or any
page 164 } taxes which was due.

Q. Were any taxes due so far as the discussion was concerned up there?

A. Not according to Mr. Ware's statement, they weren't.

Q. Well, now, there was Mr. Winquist present. Did he say anything about any taxes being due?

A. To my recollection he was not asked the question about taxes being due. The question was asked Mr. Ware.

Q. Well, now, I will go back then. If I should ask you with regard to taxation on your particular cemetery, Pleasant Valley, would you be able to tell me or would you refer to your accountant with regards to that, since you have already stated he handled all your tax affairs on it and all the accounting on it?

Mr. MacMillan: Your Honor, this is purely argumentative about what he would have done or something involving his own cemetery is far afield. We would be here all afternoon.

Mr. Lam: Certainly a propriety in cross-examination to show the scope of the man's knowledge.

The Court: You can examine him to see if he had any knowledge of what happened on Rosewood Memorial. I mean on the bookkeeping end.

1-16/20-69
page 165 } By Mr. Lam:

Q. I am trying to find out as a practical matter that—as I understand you, Mr. Williams, if I should direct any general questions to you with regard to taxation and so forth, were any due and so forth, on your own particular park—

A. Yes, I could answer the question.

Q. You could answer the question? All right. And you wouldn't refer me to your accountant?

A. No, I would not.

Q. But the only thing that you can say when the question was asked in front of Mr. Winquist there was nothing said by him that any were due; is that correct?

A. No, not to the best of my recollection.

The Court: Let me ask a question. I didn't know that Mr. Winquist was at the meeting of February 6th.

Mr. Lam: Yes, he has been identified by every one of the witnesses.

The Court: He did say—

Mr. Lam: Yes, sir, he did, too.

The Court: All right.

1-16/20-69 By Mr. Lam:
page 166 } Q. And did Mr. Swart bring up anything about taxes potentially being due or anything that had not been paid? Do you recall him saying anything?

A. Yes. Mr. Swart brought up the question of any taxes that was undisclosed at that time, too.

Q. What did he say?

A. I don't remember the exact words of what he said on it. But he said there was nothing showing on the balance sheet and he asked the question "Was any taxes unpaid."

Q. Then if I am to understand you correctly, Mr. Williams, with regard to your recollection of what question was asked Mr. Ware and the answer he gave of probably the three-hour conversation which took place in February of '64, you can recall this specific question and this specific answer, am I correct, the question asked of Mr. Ware and his answer? You can recall that?

J. D. Williams

A. Oh, yes, indeed, certainly. Because Mr. Cobb asked the question directly to Mr. Ware.

Q. And there must have been other questions asked directly to Mr. Ware and so forth during that meeting, were there not?

A. I assume there was general questions, yes.

Q. Can you think of any other question that was asked him during that meeting? In other words, you have stated the language of the question you just referred to of what Mr. Cobb asked him and Mr. Ware answered. Now tell me if you will, any other question and answer that was asked of Mr. Ware at that meeting in the three hours.

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A. Other than this general—other than the general terms of the contract.

Q. You cannot? You say you can tell me of no specific questions?

A. No specific question, no.

REDIRECT EXAMINATION

By Mr. MacMillan:

Q. We have one question. Mr. Williams, on his direct examination—Mr. Ware, on his direct examination, stated that after the meeting on February 6th and before the contract was signed in its preliminary form by you all as individuals and then it was redone in the name of Cemetery Consultants, that he recalls having a conversation with either you, Mavis Cobb or Norman Cobb in which he disclosed the entire tax situation as to Rosewood. Do you have any recollection of any meeting with Mr. Ware in which taxes were discussed after February 6th and before this contract was signed or at any other time in which he explained the method by which Rosewood was keeping its books and projected its land costs and taxes, or anything about it?

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A. No, there was no discussion, to the best of my memory.

Mr. MacMillan: No other questions.

The Court: Anything else of this witness, gentlemen? May he stand down?

Mr. Lam: Oh, yes.

(Whereupon, the witness was excused.)

Mr. MacMillan: I would like to call Mr. John Rust.

Mr. Lam: We may have occasion to recall him so I would like to exclude him.

The Court: All right.

MAVIS COBB, called as a witness, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. MacMillan:

Q. Would you talk to his Honor and tell him your name, please?

A. Mavis C. Cobb.

Q. Where do you reside?

A. Fairfax, Virginia.

Q. What is your occupation?

1-16/20-69 A. I am a lawyer.

page 169 } Q. Are you the sister of Norman Cobb?

A. Yes, sir, I am.

Q. Are you one of the persons that purchased stock in Cemetery Consultants, Incorporated?

A. Yes, sir.

Q. Can you tell us whether you were one of the people, one of the investors, along with your brother and Mr. Williams who came to Virginia Beach in January, 1964 and looked at the cemetery, Rosewood Cemetery?

A. Yes, I came with them.

Q. Can you tell us whether you thereafter were at a conference in northern Virginia on or about February 6, 1964?

A. Yes, I was.

Q. Can you tell his Honor where that conference was and who was present?

A. The conference was in Mr. John Rust's office. Mr. Williams, my brother, Norman Cobb, Mr. Sterling Swart, Mr. Vernon Winquist, and, of course, Mr. Rust and I were present.

Q. Was the defendant, Mr. Ware present?

A. Mr. Ware was present, yes, sir.

Q. Did anyone come to that conference with him?

A. Mr. Charles Castle.

1-16/20-69 Q. Did Mr. Winquist come with him, Vernon

page 170 } Winquist?

A. Yes, sir.

Q. All right, can you tell his Honor in your own words what occurred at that conference and how long it lasted? Tell

him the purpose of the conference and what, if anything, was discussed.

A. We discussed—the purpose of the conference was to make plans to buy Rosewood Memorial Park. We needed to agree upon the price, the cash payment, how we would pay the balance that was due, the terms of the agreement in general, whether or not there were any outstanding obligations, whether all the debts were paid. Mr. Swart questioned Mr. Ware about any unpaid income taxes. Mr. Ware stated there were not any unpaid income taxes. My brother, at this time, after some discussion, said, "Then you would not object having a statement in the agreement to this effect that—" Mr. Ware would—Mr. Ware as the seller would be responsible for any and all undisclosed liabilities, including taxes.

Q. Can you tell us whether or not after that conference an agreement was prepared?

A. An agreement was prepared, yes, sir.

Q. Can you tell us whether after that conference there was an interim operation of Rosewood?

A. Yes, there was.

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Q. Tell his Honor what that was.

A. That interim operation was by Mr. Charles Castle pursuant to a very informal agreement that we had that Mr. Castle would operate the cemetery until we were able to finalize the purchase agreement.

Q. Was the agreement subsequently finalized?

A. Yes, sir.

Q. Who prepared it?

A. Mr. John Rust.

Q. Was it prepared in one form and then was the form altered in any way?

A. Yes. It was prepared to be for the—for the purchasers to be Mr. Williams, my brother, Norman Cobb, and myself, and then later on it was prepared for the purchaser to be Cemetery Consultants, a corporation.

Q. Can you tell us whether or not—or can you tell us who Mr. Vernon Winquist was acting for during the period of the negotiation and through the period of the contract?

A. Mr. Vernon Winquist was acting for Mr. Gordon Ware.

Q. Did he at any time act for you during that period?

A. No, sir.

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Q. Can you tell us whether or not at the meeting of February 6th there was any document that was the basis of negotiations?

A. Yes. It was a balance sheet.

Mavis Cobb

Q. And for what period? Who prepared it and who brought it?

A. Mr. Vernon Winquist or Mr. Ware brought it. They were there together and they brought the balance sheet and it was dated December 31, 1963.

Q. Had you seen that balance sheet before that, before February 6th?

A. No, sir.

Q. What, if any, part did the balance sheet play in the sale of the cemetery?

A. We based our purchase on that.

Q. On direct examination Mr. Ware testified that sometime after February 6th and before the signing of the first agreement on or about March 6th, that was with you all individually, that he had a discussion with either you, Mr. Williams or Mr. Norman Cobb, about the tax liabilities of Rosewood and how the—the basis upon which the cost of the lots was projected and how it was done and so forth. Do you have any recollection of any such conference?

A. Never had any such conference.

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Q. Do you recall whether or not you came to Virginia Beach in the interim period from the February 6th meeting in Mr. Rust's office and the meeting in Mr. Rust's office at which the contract was signed?

A. No.

Q. No what?

A. I didn't come to Virginia Beach.

Q. Did you have any discussion with Mr. Ware over the telephone during that period?

A. No, sir.

Q. Did you have any discussion with Mr. Winquist during that period?

A. No, sir.

Q. At what point did Mr. Vernon Winquist become associated with the purchasers?

A. After we had concluded the purchase of the cemetery.

Q. When was that, Miss Cobb?

A. March 6, 1964.

Q. Can you tell us what occurred on March 6th as far as *actully* completing the transaction?

A. We signed the agreements, made our cash payment.

Q. How much was that?

A. Cash payment?

Q. Yes.

A. Fifty thousand dollars.

1-16/20-69 page 174 } Q. The stock that Mr. Ware owned, was that transferred to the three of you?

A. Yes, sir.

Q. Is that the agreement that was subsequently altered to put the name of Cemetery Consultants on?

A. It is, yes.

Q. Now, who prepared that agreement, the actual March 10th agreement, that is in issue here?

A. The March 10th agreement where Cemetery Consultants—

Q. Yes.

A. It was retyped following exactly the agreement that we had with Rosewood Memorial Park—that we had whereby my brother, Mr. Williams and I purchased it.

Q. In other words, Mr. John Rust's draft, the names were altered from individuals to the corporate name?

A. Exactly right, yes, sir.

Mr. MacMillan: Answer these gentlemen.

The Court: Did Rust do that? Made the changes between the buyer and seller?

The Witness: No, sir, I think that was retyped in my office. The only changes, though, were changes from individuals to the corporation.

CROSS-EXAMINATION

1-16/20-69 page 175 } By Mr. Spindle:

Q. Do you have the copy of the contract that was drawn by Mr. Rust originally, naming the individuals as purchasers other than the corporation?

A. I have a photostat of it.

Q. May I have it, please?

A. I have to get my brief case. Will you excuse me, please, sir?

Q. Without perusing it closely can you tell me, Miss Cobb, if this essentially follows the same form as the March 10th agreement except for the names of the purchasers?

A. Yes, it does.

Q. Miss Cobb, I assume in your practice of law you have been exposed to income taxes and income tax problems, have you, from time to time?

A. No, sir, I am not a tax attorney. I avoid them almost with a passion.

Mavis Cobb

Q. But you have been exposed to tax problems in the practice of law, have you not?

A. Again I would answer no, sir. I have my own tax returns prepared by Mr. Swart who has always been my C.P.A. and I know practically nothing about taxes.

Q. What is the nature of your practice?

1-16/20-69 page 176 } A. I do a great deal of domestic relations work and real estate work, examining titles, preparing deeds, Deeds of Trust, closing loans for lending institutions.

Q. In the real estate work I assume you would also be involved in the purchase and sale of real estate?

A. Yes, sir.

Q. And as such, have you represented purchasers in the development of land?

A. No, sir.

Q. Have you represented any land developers?

A. I have represented land developers in the drafting of the original contracts of purchase, but I have not gone any further with it.

Q. You have an interest in Cobbsdale, I believe?

A. Yes, sir.

Q. Are you familiar with the tax treatment that has been given—scratch that—let me start all over again.

Are you familiar, Miss Cobb, in the taxes on Cobbsdale, income taxes, how the cost of the lots has been determined?

A. No, sir.

Q. Is Cobbsdale a corporation?

A. No, sir.

Q. It's individually owned?

1-16/20-69 page 177 } A. It's individually owned by my brother, Norman, and myself.

Q. Well, then, in your personal return which reflects your share of the profits on the sale of lots in Cobbsdale, are you aware of how that profit has been determined?

A. No, sir.

Q. I assume Mr. Swart has done that for you?

A. Yes, sir.

Q. Now, Mr. Winquist advised you all to take this property in a corporate form rather than individual form, did he not?

A. We took the first in individual form and then he advised us to take it in corporate form, yes, sir.

Q. Can you pinpoint the time when he gave you this advice?

A. No, sir, I am sorry, I cannot.

Q. Would it have been at the February 6th meeting?

A. It was not at that meeting.
Q. Would it have been before or after that?
A. I think it would have been after that.
Q. But it would have been, I think obviously, before the March 6th agreement?
A. Yes.
1-16/20-69 page 178 Q. So that somewhere between February 6th and March 6th Mr. Winquist was purporting to advise you and your brother and Mr. Williams as the purchasers, was he not?

Mr. MacMillan: Did you ask her March 10th agreement or March 6th agreement?
The Court: The individual agreement was March 6th.
Mr. Spindle: Yes, sir. If I didn't let me ask it again. I often get mixed up on things like that.

By Mr. Spindle:
Q. What I was trying to say, Miss Cobb, was sometime between February—
A. I am mixed up, excuse me, sir. May I go back a little bit? I am a little bit mixed—on February 6, 1964 we just had the conference and we purchased the property as individuals on March 6, 1964. I am sorry.
Q. Yes. Those are the two dates I have in mind and my question was, sometime in between those two periods Mr. Winquist purported to act on behalf of you and your brother and Mr. Williams advising you as to accounting and tax problems?
A. Between—
Q. Between those two dates.
A. Between the date we had the conference and the date we signed the agreement?
1-16/20-69 page 179 Q. Yes, ma'am.
A. No, sir, he did not.
Q. Well, he did advise you to take it in corporate form?
A. Not at this time.
Q. When did he advise you to do that?
A. After we had signed the agreement to purchase as individuals.
Q. Was the agreement of March 6th signed on that date?
A. Yes, sir.
Q. Then do I understand you are telling me that Mr. Winquist advised you to take it in the corporate form sometime between March 6th and March 10th? Between those four days?

Mavis Cobb

A. It was after March 6th. And the contract dated March 10th was backdated.

Q. What was the date of actually executing the March 10th contract?

A. I am sorry, I don't recall.

Q. Could you give us a feeling for it, Miss Cobb? Would it have been a few days or as many as 90 days?

A. Oh, no. I think it would have been about ten days.

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Q. You all actually went into possession of the property sometime around February 10th, did you not?

A. Through Mr. Castle operating it.

Q. Well, what communications did you have with Mr. Winquist in this period of time?

A. Which period are you talking about, sir? There are several dates, I am sorry.

Q. All right, let's say between February 6th and March 6th.

A. We didn't have any.

Q. You had no communication with him at all?

A. No, sir.

Q. No conferences with him?

A. No.

Q. Well, now, on March 19th you forwarded the stock certificates to Mr. Ware, which were held as collateral for the deferred purchase money and I assume at that time the contract had already been actually signed, had it not?

A. Which contract?

A. The final contract dated March 10th?

A. Yes, sir.

Q. So it would have been signed on March 19th, then, the day on which you forwarded those certificates?

A. I think we delivered those certificates in person.

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Q. I beg your pardon? I was looking at a letter dated 1965, Miss Cobb, I am sorry, I didn't mean to confuse you by that.

Did you not pay Mr. Winquist for his tax advice during this period of time?

Mr. MacMillan: Which period?

The Witness: I don't know, sir.

By Mr. Spindle:

Q. Excuse me. During the period of time prior to March 6, 1964.

A. I am sorry, I do not know.

Q. Who would have that information, Miss Cobb?
A. The checkbook would show it.
Q. Who has possession of the checkbook?

The Court: Checkbook of the corporation or the individuals?

By Mr. Spindle:
Q. Which checkbook are you speaking of, Cemetery Consultants, I assume? The checkbook of Cemetery Consultants?
A. Our own checkbook would show when we closed the transaction as individuals. And then the Cemetery Consultants would show when we closed it with Cemetery Consultants.

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Q. You did pay Mr. Winquist, did you not?
A. I presume we did. I really don't know.

Mr. MacMillan: Paid him for what, Mr. Spindle?
Mr. Spindle: She said she paid him. I am satisfied with the answer.
Mr. MacMillan: Well, she did pay him. She said after March 6th he represented the corporation. That is what we are trying to get straight, what you are asking.
Mr. Spindle: The answer is perfectly clear to me, your Honor.

By Mr. Spindle:
Q. Miss Cobb, I show you a document which, for the record has been marked Defendant's Exhibit 2, and ask you if you had seen that before.
A. I really can't answer, I am sorry.
Q. You do not know whether you have seen it or not?
A. No. I don't know.
Q. In your conferences with your prior accountant, Mr. Swart, did he discuss with you this document?

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A. No. Not that I recall with me personally, no. My brother had some conferences with Mr. Swart which I may not have been present.
Q. You did not come to Virginia Beach and inspect the site?
A. Yes, I did.
Q. You did?
A. Yes, sir.
Q. You were aware this cemetery project was only partially completed, then, at the time you acquired it?

A. No. I didn't know anything in the world about the cemetery business. I knew there were some vacant lands and I knew there were some lots there. That is all I knew.

Q. You knew how many unsold lots there were?

A. No, sir, I had no idea.

Q. What did you think you were getting for the $200,000?

A. Frankly, sir, I depended on my brother and Mr. Swart and Mr. Williams in this. And I did not pay a very great deal of attention to the whole transaction, though I was a partner.

Q. Did you look at the balance sheet yourself?

A. I do not recall that I did.

Q. Well, I am just confused, Miss Cobb.

A. I am, too, sir.

1-16/20-69 page 184 } Q. You and your partners invested $200,000 in a cemetery development project. What did you think you were getting for $200,000 if it didn't have some unsold lots?

A. I told you that I knew it had land and that it had lots that had been sold. But I didn't know anything at all about how many unsold lots there were, how many were sold. Knew absolutely nothing about it.

Q. Do I understand, then, that you are in effect telling me that you were relying on your brother's business judgment?

A. I was relying on my brother, yes, sir.

Q. Were you present or did you hear any discussion involving allocation of costs to lots or how much projection of costs were made for future development?

A. No, sir.

Q. In your presence had you heard the figure of $162,000 mentioned as the amount that was projected as future costs in this development?

A. No, sir.

Q. Did any discussion take place in your presence or that you know about concerning the method of reporting these sales for tax purposes?

A. No, sir.

Mr. Spindle: Thank you, Miss Cobb, we have nothing further.

1-16/20-69 page 185 } By Mr. MacMillan:

Q. Miss Cobb, I wanted to see if I understood you correctly. Did your brother or Mr. Williams engage the services of Mr. Winquist between February 6th and March 6th?

A. No, sir.
Q. Did you pay him anything for any services during that period?
A. No, sir.

Mr. MacMillan: We have no other questions.
The Court: Will you gentlemen concur in a five-minute recess?

(Witness excused.)

(Whereupon, a short recess was taken.)

JOHN H. RUST, called as a witness, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. MacMillan:
Q. Would you talk to his Honor and tell him your name?
A. My name is John H. Rust. I reside in Fairfax, Virginia.
Q. What is your occupation?
1-16/20-69 A. I am an attorney.
page 186 } Q. How long have you been practicing, sir?
A. Since September 1st of 1938.
Q. Are you with a firm?
A. I am with my own firm, Rust & Hurst.
Q. Were you involved in a transaction by which some investors named Norman Cobb and Mavis Cobb and J. D. Williams purchased an interest in Rosewood Memorial Park?
A. I represented Mr. Cobb, Miss Cobb and Mr. Williams in the negotiations leading to the preparation of a contract, and the preparation of the contract and the execution of the same in which instance they were the purchasers of the stock in Rosewood Memorial Park, Incorporated, from Mr. Gordon Ware.
Q. Do you know whether or not the purchasers had tax advice in addition to your own advice as an attorney?
A. The only thing that I can tell you about their tax advice was that they had their own accountants, both parties, at the time they began their negotiations, and so far as I know throughout the negotiations until the contracts were eventually executed.
Q. Can you tell us what you recall about your first in-

volvement in the negotiations or the preparation of the contract?

A. The first thing that I recall about the mat-
1-16/20-69 ter was when Mr. Cobb called me and asked if I
page 187 } would set up an appointment at my office in Fair-
fax for February 6th. This was an evening appointment rather than during the working hours, and we did meet at my office that night at which time Mr. Gordon Ware was present with Mr. Winquist, who was his accountant at that time, and Mr. Cobb, Miss Cobb, Mr. Williams and Mr. Swart were present as purchasers, and Mr. Charlie Castle was also present at that time.

Q. Can you tell his Honor what the general subject matter was that evening and the best you recall about what was said and done?

A. The purpose at that time of meeting was to—first of all was to discuss what was being purchased. The first item as far as my recollection is concerned was determining what assets were owned by the corporation of Rosewood Memorial Park, which had to do with the land, and I think there was some automobiles, and what land was owned by them.

At that time there was a balance sheet that had been prepared by Mr. Winquist which was brought to the meeting on February 6th and which I had a copy. I think each of the others had a copy at that time.

Q. Had you seen it before that meeting?

A. No, I had seen nothing and knew really very little about it. I think prior to that time the only thing I knew was that Mr. Cobb had said he was thinking about buying a cemetery.

This was about the extent of what I knew prior
1-16/20-69 to that night.
page 188 } The balance sheet was then pulled out and was
gone over in a good deal of detail by the various parties and by the accountants there. The copy that I have has circles around it and checks, pluses and minuses, which I would not know what they mean at this time. They were made by me. I was making notes with figures taken from the balance sheet and adding things up, but the net result of that was that we came to a figure which was fifty-six thousand nine hundred-some dollars, which was supposed to be the net worth of the corporation as shown by the balance sheet of December 31, 1963. And it was on this basis that we began to proceed to arrive at a price for the value of the corporation, rather than the price to be paid.

And I think there was one item to be adjusted on that

and that was an automobile that was to be removed from the consideration that would reduce the net worth of the corporation as shown on that balance sheet.

And the next thing that I recall in the meeting would be from my notes, was that Mr. Ware was then to agree to be responsible for any undisclosed liabilities and this covered two items, one was anything that was not disclosed by the balance sheet of December 31, 1963 and the second thing was that the balance sheet was dated December 31, and there had been a period of operation from December 31st to at least February 6th when we were meeting and there would have been some small items that might be reflected as being due by the corporation during that period.

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And after that time we went into some specifics that were to be included in any contract.

One of the things I had in my notes was that it would be —the books would be closed as of January 31, 1964. Then I have March 1st down which I believe was to be the supposed transfer date. And there were little items of that type that took place in my recollection of what happened.

Q. What, if anything, did you do thereafter with respect to the discussions had that night?

A. The next thing that I recall after February 6th—

Q. Did I interrupt you from telling me anything else that you wanted to cover that night?

A. No, this was all that my memory will offer at this particular time, and this was reflected in just some scribbling notes that I took during the course of the conversations that went on in my office that night.

But after that time I received a call from Miss Cobb's secretary to go ahead with the drafting of the contract. My telephone notation on that is February 10th of 1964. Sometime between February 6th and February 10th I received a memorandum as to what was to be included in the terms of the contract and then I proceeded to draft the contract after that time.

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Q. Can you tell us, in drafting the contract, how you proceeded and what you undertook to do?

A. Well, the first thing I did, I made notes to myself as to what I wanted included in the contract taken from my recollection and my notes of the meeting that night, then the notes that Miss Cobb had sent to me in—they were typed up. And started to make an outline of what I wanted to include in the contract. Then I made a draft of the contract, which was

dated the blank day of February, and after this was—had been gone over by the parties we then put it in a final draft form.

I don't know what you want me to relate as to what was included in the contract. This was the method I used.

Q. Can you refer to the contract and tell his Honor what the scheme of the purchase was as to how you would arrive at the net value from assets and liabilities.

A. Well, I think the first thing that we attempted to do was to set up what the terms of sale were. The terms of sale were based on this balance sheet of December 31, 1963 and I believe that is the way it starts. It says "This sale is made in accordance with the balance sheet prepared and submitted after December 31, 1963, which said balance sheet discloses the corporate net worth of fifty-six thousand, et cetera, et cetera—" And I think this was the basis of the transfer of the stock.

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The figure that is on here as the total sales price is $200,076.50. When the discussions started on the night of February 6th the figure was $280,000, as I recall, and it had been reduced by various items that were included on this balance sheet, and not trying to recollect any specific thing, there were several notes of different parties, I don't remember who they were, that I have circles on, that I think were taken out of the balance sheet and this reduced the sum to the $200,000. But there were questionable items that brought the amount down and this was the final agreed figure after that thing.

The first thing we did was to set up the terms of sale and after arriving at this net worth of fifty-six thousand, I then put a clause in there to the effect that the seller would guarantee that the net worth of said corporation is not less than the fifty-six thousand nine fifty-nine, forty-five, less the book value of the automobile which is to be withdrawn as a corporate fixed asset, and this was one of the items that I had in my notes that the seller would guarantee that that net worth was the fifty-six thousand-odd dollars.

As I say, there were—the only thing other than the balance sheet that could have been affected here were any items that came up in the month of January, the operation up to February 6th of 1964.

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Now, at that particular point I did put a clause in that in the event the net worth was determined to be less than the sum of fifty-six thousand, that a credit could be allowed against the first annual payment. It was certainly felt

that there would be ample funds in the hands of Mr. Ware to satisfy anything that might come up other than what was on the balance sheet. I don't know, do you want me to go ahead?

Q. I was interested in the general conditions, why they were in there and the purpose of them.

A. Anyway, we went on from there and I think the contract speaks for itself as to the method of financing and what was happening there. We referred, under Paragraph Number 2, to the fixed assets of the corporation in the nature of real estate which was the land on which Rosewood Memorial Park was located, and that was 91 plus acres, and there was a warranty in the contract that the corporation did own that property and except for the cemetery sites that had been sold and then we set up general conditions and these general conditions had to do with some of the items that I had in my notes, and some that had been agreed upon at the meeting of February 6th.

1-16/20-69 page 193 } The (b) clause which is one of the clauses which I understand is in dispute, is to the effect that Mr. Ware would guarantee and assume responsibility for any undisclosed liabilities of the corporation, and this, as I have said, meant two things; first of all, any undisclosed liabilities as reflected in the balance sheet of *Decemger* 31st on which this contract was based, and then any additional items that might have arisen during the period from December 31st to the date of settlement while Mr. Ware had control of the corporation.

The other general conditions, I think, are fairly—one had to do with the Higgenbotham note, that the purchasers were agreeing to use this for cemetery purposes only; and that then the (d) had to do with the fact that those who were officers and directors of the corporation would resign so that this could be a complete change of management.

And as I understood at that time Mr. Ware was the sole owner of the stock in Rosewood Memorial Park, or so I was advised, and Mr. Cobb and Miss Cobb and Mr. Williams were going to purchase all of the stock within the corporation.

Q. Now, as you drew the contract it was for individuals; is that correct?

A. My first contract was drawn where the stock was being transferred from Mr. Ware to Miss Cobb, Mr. Cobb, Mr. Williams and eight shares would be transferred to me to hold.

1-16/20-69 page 194 } But the three parties were the purchasers of the stock.

Q. And do you know if there was subsequently an actual settlement on that contract?

John H. Rust

A. Yes, that contract was dated March 6th and was closed in my office and my appointment book reflects that took place 11:00 o'clock on the morning of March 6, 1964.

Q. What actually happened at that time, to the best of your recollection?

A. Well, the contract had been put into final form at that time and so far as I recall Mr. Cobb, Miss Cobb, Mr. Williams, Mr. Ware and I know Mr. Castle, was present. Whether anyone else was present at that time I have no recollection of that. But the contract was executed. And at the same time there was an employment contract prepared for Mr. Castle, on the same date.

Q. Do you know if any money changed hands on that day? Was the stock carried out, stock transfer carried out, on that day?

A. I don't know about the stock transfer being carried out on that day, and I would assume that checks passed—this is purely an assumption because I don't have a distinct recollection as to whether the money passed at that time. But if the agreement was executed on that day I would have to assume that the money passed and checks were drawn.

They did not go through my hands, if this is the question.

1-16/20-69 page 195 } The only thing I can tell you about the stock transfer as to when that took place, I received the eight shares of stock in escrow some time later which I put in my safe and then later returned it to the parties under their written request because I understood that this agreement had then been substituted.

Q. The agreement of March 10th?

A. March 10th. With Cemetery Consultants, which embodied all the terms but changed from individuals to a corporate body.

Q. Did you know Mr. Ware prior to this transaction?

A. No, I did not.

Q. Did you have any discussion with him independent of the discussions that occurred on February 6th when everyone was present?

A. No, I don't think I have ever seen Mr. Ware except in the company of the other three parties.

Q. Did you ever talk to him over the 'phone, to the best of your recollection?

A. I have no recollection of ever talking to him on the 'phone.

Q. Have you ever met Mr. Vernon Winquist prior to—

A. No.

John H. Rust

Q. Did you have any dealings with him be-
1-16/20-69 tween February 6th and March 6th when this
page 196 } first contract was signed?
A. Not that I recall.

Mr. MacMillan: Answer these gentlemen.
Mr. Lam: Judge, I think you wanted to ask a question?
The Court: No, you go ahead. You might ask the same question I intended to ask and I wouldn't have to ask it.

CROSS-EXAMINATION

By Mr. Lam:
Q. Mr. Rust, I have found myself in the same position trying to remember things I have done in business before, but I was asking him to read that back because of two things. Now, first of all, it's my understanding that your meeting apparently with the parties was on one occasion?
A. That is correct.
Q. Now,—
A. There were two occasions.
Q. Two occasions?
A. The first was the negotiation night on February 6, 1964 and the second was the time that the papers signed on March 6th of 1964.
1-16/20-69 Q. Where was that?
page 197 } A. Both in my office.
Q. Both in your office. Now, I do not know who drew this, but I was trying to find out for purposes of identification, it's marked as Defendant's Exhibit 1, and I was simply going to ask if you drew it or knew anything about that particular exhibit.
A. I have not seen this before, to my recollection. I did not draw it. The only—you asked me if I knew anything about it and in response to that question it seems to me that at the meeting of February 6th there was some reference to the fact that Mr. Castle would take over and operate the cemetery and I believe possibly effective as of January 31st, if I am not mistaken.
Q. It couldn't be January 31st because you were meeting on February 6th.
A. That is right, but my notes have a date that the books would be closed as far as Mr. Ware was concerned on January 31st. It may have been that the night—or what was happening between January 31st and the time of settlement would be handled by Mr. Castle. This is all I can tell you.

John H. Rust

Q. If I understood your testimony—let me ask you also with respect to Defendant's Exhibit "B"—2. I don't know whether you have ever seen it but I was wondering if you have?

1-16/20-69 page 198 } A. I have no recollection of having seen this document. This is under date of October 22nd of '63.

Q. Yes.

A. The only document that I have any recollection of is the balance sheet that Mr. Winquist dated December 31st of '63, which I believe is attached to this exhibit and is the one which I have in my files. The only one I have seen.

Q. Let me ask you if it came up in the discussion. This particular document you have there which is identified as Defendant's Exhibit 2, has by prior testimony, it was sent to and was in the hands of Mr. Swart. I think you know Mr. Swart?

A. Yes, sir.

Q. He also had in his possession a balance sheet dated, if I recall correctly, July 31st of '63 and I was wondering, these were things he had in his possession and he said he obtained them sometime in January, if I recall—or prior to January, I don't remember which, and whether they were in evidence that night. Do you recall him making any reference to them or asking any questions relating to them?

A. First of all, he was asking questions and referring to a file that he had. I have no idea whether he was referring to this or to what he was referring, nor do I remember exactly what he asked. I have notes in my files of

1-16/20-69 page 199 } just figures. I don't know who asked them or who put them down so I can't answer that question.

Q. John, let me see—excuse me, I hope you don't mind me calling you—

A. No, sir.

Q. I was going to say that in this—in this particular thing, and, I say, I know that you may not personally recall it, maybe you would recall some discussion of it. In this particular thing under several headings, actual or estimated total costs that was, for instance, Project Number One and went on down through the various projects, estimated cost to complete development was a separate column, development costs incurred to July 31st, which we would assume that this was the amount already incurred, spent and so forth, accumulated costs allocated to collections on sales, and the final column, costs incurred not charged to operations. Do

you recall any discussion about the fact that in this type of accounting that was done there, and Mr. Winquist was present as was Mr. Swart at this meeting, that costs on a land development scheme, whether it be a cemetery or regular housing development, the costs were projected and allocated over a period of the cost of development or in accordance with the Federal Revenue period? In other words, they allow in a general proposition a three-year period in which to allocate costs in development. To cemeteries it's five. Do you recall any discussion of this allocation of cost and whether the costs, whether they were up to date on them or behind on them?

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A. I have no recollection of any discussion of that taking place at the particular time.

Q. Now, I simply emphasize, when you say you have no recollection, are you also telling me it didn't take place or you just don't remember?

A. I am not telling you it didn't take place. I would assume that the books of the corporation, what books were available at that time, it may not be nothing more than the balance sheet or this right here, that Mr. Swart had gone over this on behalf of the purchasers. But at that particular time I have no recollection of any such discussion or that type of discussion taking place while we were negotiating the sale.

Q. If you haven't already said—you have already said. You drew the contract initially?

A. Yes.

Q. Now, in reference to your first item in there, and that was the one with reference to the balance sheet, the 56,000, and the guarantee and the first annual payment be deducted from that if there was anything less than that shown on the balance sheet. Explain that a little more fully to me what you have reference to there. In other words, as I understand it, if there were in this period of operation up to probably the first year they had a period of time as I gathered in there, of a year when the first annual payment came due. If that balance sheet turned out any asset or liability shown on there changed to a loss, that is, either by the asset being reduced or liability shown on there going any higher, they had a year in which to deduct that, is that correct?

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A. Well, I don't think that is correct. It certainly was not my intention. When I drew that we felt that maybe within a year we would find out if there was any change in the guaranteed net worth of the corporation. If that were the case, it

could be deducted at the end of the first year, but I don't think there was a limitation placed in there nor did I attempt to place a limitation of one year in which to find whether or not there was some discrepancy in the guaranteed net worth.

I mean, I did not intend to put a limitation of one year if this is what you are asking.

Q. I was asking that question. But this did give them a privilege, I assume, in being able to deduct it rather than making claim for it.

A. I think this is correct.

Q. This would be for the benefit of the buyer?

A. That is correct. Because they would still owe Mr. Ware some money and that would be money with which

1-16/20-69 they could realize any loss that they suffered.

page 202 } Q. And that referred to the assets and the liabilities shown on the balance sheet, didn't it?

A. I think not only that. I tried to say there were two things, not only the assets and liabilities shown on the balance sheet, but since it cut off after December 31, 1963 there was a short period of time where other debts which were not disclosed by this balance sheet could come to light.

Q. And so the 3(b) as I understand you, was to cover any liabilities that had occurred or were unknown between the December 31st date and the date that they took over operations?

A. No, sir. No, it was not limited to that. Under the general conditions, Clause (b) had to do with any undisclosed liabilities. But I think it embodied two things, as I keep saying; one was the condition as reflected in the balance sheet of December 31, '63, and, number two, was anything that took place from December 31st to the date that the purchasers took over the management of the corporation. So it was not limited just for that short period of time, as I understood your question.

Mr. Lam: I have no further questions.

Mr. MacMillan: We have no further questions of this witness.

The Court: One question, Mr. Rust. Did you

1-16/20-69 hear Mr. Cobb or Mr. Swart direct a question

page 203 } during this conference of February 6th to Mr. Ware whether or not any and all Federal and State taxes were due, and the evidence here is that he said there were none due. Do you recall any such statement?

John H. Rust

The Witness: I have no recollection at all about any discussion about taxes and no notes in my file about taxes.

The Court: May he be excused, gentlemen?

Mr. MacMillan: Yes.

The Court: All right, I don't reckon he can go back until he gets his other friend, can he?

Mr. MacMillan: We have one more witness, who is Mr. Winquist, and he will probably be the longest witness we have, from what Mr. Spindle tells me. Both the examination and cross-examination of him.

The Court: Well, now it's 5:00 o'clock, isn't it?

Mr. MacMillan: Yes, sir.

The Court: And he is from up Fairfax?

Mr. Bowers: Right here.

The Court: He is from right here? We have gotten our witness from far away? We have taken care of that?

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Mr. Spindle: There is one other thing we wanted to introduce, this copy of that early contract that Miss Cobb had identified. Can we, without calling her back to the stand—

Mr. MacMillan: Sure.

The Court: By stipulation. You all stipulate.

Mr. MacMillan: You want to put it in?

Mr. Spindle: Yes, I would.

The Court: Defendant's Exhibit Number 3.

(Whereupon, the foregoing contract was marked for identification and received in evidence as Defendant's Exhibit Number 3.)

The Court: All right, when do you all want us to meet again?

Mr. MacMillan: Tomorrow morning, your Honor, if we can.

The Court: Well, now, you have got the Court in a bind.

(Whereupon, a short discussion off the record was held.)

REDIRECT EXAMINATION

By Mr. MacMillan:

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Q. Mr. Rust, the Court asked you whether or not you had any recollection of Mr. Ware being asked whether there were any unpaid taxes? Do you recall that question?

A. Yes, sir.

Q. Is it your testimony that that question was not asked?

A. No, my testimony is that I have no recollection of it. Most of my recollection, my testimony here, had to be refreshed by my notes that I took that night at the meeting. There is nothing about taxes in my notes and so I have no recollection of it.

Q. Can you tell us whether or not there is anything in your notes about undisclosed liabilities?

A. Yes, that is in there. That the responsibility for the undisclosed liabilities would be on the part of Mr. Ware. Also the guaranteed net worth. But there is nothing that is a specific reference to taxes in my notes.

Mr. MacMillan: We have no other questions.

The Court: Any questions, gentlemen?

Mr. Spindle: No, sir.

The Court: All right. Mr. Rust, you can go back and go to work tomorrow.

(Whereupon, the witness was excused and the hearing was adjourned.)

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* * * * *

January 20, 1969

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1-16/20-69
page 208 } Mr. MacMillan: I would like to call Mr. Winquist, Vernon Winquist.

The Court: Gentlemen, it's not necessary to re-swear the witnesses. They were sworn last Thursday.

VERNON WINQUIST, called as a witness, having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. MacMillan:

Q. Would you tell the Court your name?

Vernon Winquist

A. Vernon Winquist.
Q. What is your address, Mr. Winquist?
A. Norfolk, Virginia.
Q. What is your occupation?
A. C.P.A.
Q. How long have you been a C.P.A.?
A. Sixteen years.

Mr. Lam: Excuse me, your Honor, I can't hear him.

1-16/20-69 By Mr. MacMillan:
page 209 } Q. What, if any, connection did you have with Rosewood Cemetery when it was owned—when the stock was owned by Mr. Ware?
A. I was the C.P.A. for Rosewood for about two years.
Q. What two years?
A. From about 1962 until the beginning of 1964.
Q. Do you presently serve as the C.P.A. for Rosewood?
A. No, sir.
Q. Do you have any connection with Cemetery Consultants at the present time?
A. No, sir.
Q. Approximately when did you cease acting as C.P.A. for the complainant or for Rosewood?
A. About 1966, the last part of 1966, approximately.
Q. What interest did Mr. Ware have in Rosewood prior to the sale in 1964?
A. He was the owner of it.
Q. I beg your pardon?
A. Mr. Ware was the owner of it.
Q. Sole owner?
A. Yes.
Q. What position did he hold in the company?
1-16/20-69 A. President and manager of the company.
page 210 } Q. Are you familiar with the contract and the balance sheet dated February 10th?
A. Yes, sir.
Q. All right, sir, and who prepared the balance sheet which is attached to that contract?
A. I did.
Q. Who asked you to prepare it?
A. Mr. Ware.
Q. What, if any, connection did you have with Mr. Ware and with Rosewood at that time?
A. I was the C.P.A. for Rosewood and in that capacity prepared this balance sheet.

Vernon Winquist

Q. Now, at the time that you prepared that did you know Mr. Norman Cobb or Mavis Cobb or Mr. Williams?

A. No, sir.

Q. Had you ever heard of them?

A. No, sir.

Q. Do you recall when you were asked to prepare that balance sheet?

A. Sometime in January of 1964. I don't remember the exact date.

Q. Who asked you to prepare it?

A. Mr. Ware.

Q. Did he tell you why he wanted you to pre-
1-16/20-69 pare it?
page 211 } A. Yes. He said he had a prospective sale.

Q. What are the total liabilities shown on that balance sheet?

A. $77,623.95.

Q. Does that balance sheet disclose any tax liability, Federal or State income tax liability?

A. No, sir.

Q. Did you have any figures in January of 1964 when you prepared that indicating any Federal or State income tax liability?

A. No, sir, I did not.

Q. Did you have any discussion with Norman or Mavis Cobb or J. D. Williams or their accountants or attorneys at any time prior to February 6, 1964?

A. No, sir, I did not.

Q. When did you get this balance sheet prepared—approximately when was it prepared?

A. A day or so, I think, before February 6th. It wouldn't have been much more than a day or two before that.

Q. Do you know whether you furnished it to the purchasers prior to the meeting of February 6, 1964?

A. I did not, no. I don't think they had it until that evening. I believe we carried it up.

Q. Carried it up where?
1-16/20-69 A. Up to Fairfax.
page 212 } Q. Were you present then on February 6, 1964 in the office of Mr. John Rust?

A. Yes, I was.

Q. Why were you there?

A. I was there in connection with negotiations for sale of the stock.

Q. At whose request did you come to that meeting?

A. At Mr. Ware's request.

Q. Can you tell us what you recall of that meeting as to what occurred and what was said or done? What was the purpose of it?

A. The purpose of it was to arrive at the purchase price as they had been negotiating and they began with a basic purchase price of $280,000 for all the assets, exclusive of an automobile, and deducted the liabilities as set forth on the balance sheet, together with an adjustment for a note that was due to Mr.—Mr. Higgenbotham.

Q. Who was the note from Higgenbotham due to?

A. It was due to the corporation, Rosewood Memorial Park, Incorporated.

Q. Did you know Mr. Higgenbotham or anything about him?

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A. I knew him but I didn't know the circumstances surrounding this note.

Q. Did you make any notes with respect to the—that evening as to the accounting figures discussed and arrived at?

A. Yes, I did.

Q. Can you tell us what that is?

A. This is a copy of the notes that I made at the meeting.

Q. Can you tell us what—before you tell us—

Mr. MacMillan: Your Honor, could we have this marked as a complainant's exhibit?

The Court: Plaintiff's Exhibit Number 3. I so mark it, anyway.

(Whereupon, the foregoing document was marked for identification and received in evidence as Plaintiff's Exhibit Number 3.)

By Mr. MacMillan:

Q. Could you indicate to his Honor what your notes show and could you hold it up so he could see it, since there are figures involved?

A. They show gross sales price of $280,000, less liabilities of $77,623.95. And less a note from Mr. Higgenbotham of $7300, for a total deduction of $84,923.95.

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And then the Higgenbotham note was added in at five thousand-some dollars so that the net adjusted price amounted to $2076.05 and the down payment was to be $50,000. This is the negotiated price of the purchase of the stock.

Vernon Winquist

The rest of the information on here has to do with the sales or the payment which was 7.6 per cent of sales with a minimum of $20,000 payable semi-annually. And the net worth was to be the same at twelve, thirty-one sixty-three, except for the automobile.

And I have here "Gordon gets auto. No sale of land for non-cemetery purposes without approval. No personal endorsement, search titles, review contract," and there was at that time supposed to be a statement made as of 3/1/64. That is the contents of this.

Q. Could you take the figure you arrive at as being the purchase price and see if that in any way ties into any figure on the contract as originally signed?

A. It is the exact figure of $200,076.05.

Q. So your notes accurately reflect what the parties discussed that night and the ultimate contract entered into as to the purchase price?

A. Yes. They do.

Q. Why was the Higgenbotham note added back in as shown on your notes there? Can you explain that to his Honor?

A. There was—Mr. Ware requested that efforts to collect the Higgenbotham note be reduced to a minimum and they agreed that if it was not paid within a year, he would personally assume responsibility for it in the amount of $5,000. That was the reason for it.

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Q. In other words, the purchasers were going to undertake to collect it but if they couldn't collect it within a year he would pay that note himself?

A. Well, I don't know that there was going to be any effort made to collect it. If it was not collected within a year he would take care of the note.

Q. Now, was there any other discussion that night as to any other type of liabilities not shown on that balance sheet?

A. Yes. There was an inquiry as to liabilities that may not be shown and I said, "The balance sheet was prepared in very short notice with a limited amount of time, there may be other liabilities that I knew nothing about. I had no time to confirm liabilities from an outside source."

In addition, the issue or the matter of taxes was discussed.

Q. What type of taxes?

A. Income taxes. And at—I believe Mr. Cobb asked the question about prior years' taxes. And Mr. Ware and answered that they had been paid. And there was another question asked about the examination of prior years and I an-

Vernon Winquist

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swered that I thought they had been examined through 1961. I believe 1961 was the date at that time. And insofar as taxes, this is the extent of the discussion.

Q. I beg your pardon. What?

A. Insofar as taxes, inquiry about taxes, this is the extent of it. However, Mr. Swart did say there should be some provision for any undisclosed liabilities or anything not on the balance sheet.

Q. What was that to cover?

Mr. Lam: Your Honor, he has already testified—

Mr. Spindle: That calls for a conclusion on his part.

The Court: He asked him what Mr. Swart inquired, I think. Wasn't that the question?

Mr. MacMillan: That is right, what the discussion was. I am just interested in the factual statement.

Mr. Spindle: He asked him what the term "undisclosed liabilities" was to cover, is my understanding.

Mr. MacMillan: What the clause—

Mr. Spindle: Isn't that what we are here arguing about? Isn't that a conclusion for the Court to make?

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Mr. MacMillan: I am not asking for any more than he would tell us factually what was said. I am not trying to get him to go beyond his interpretation or anything else.

Mr. Lam: I still object on the grounds he has already testified as to precisely what he understood it was, that there was some—other than the balance sheet there were supposedly some liabilities incurred between the date thereafter and that he didn't know what they were.

The Court: He can testify as to anything said by any of the parties at that meeting, because they were all present in the presence of each other and I will permit it.

Mr. Lam: Mr. Swart was not a party to the—

The Court: But he was present.

Mr. MacMillan: He was present, Mr. Lam.

Mr. Lam: Note my exception for the record, please.

The Court: And apparently as C.P.A. for—

Mr. Bowers: The purchasers.

The Court: For the sellers.

Mr. Lam: Purchasers.

The Court: Purchasers. All right.

Vernon Winquist

1-16/20-69 By Mr. MacMillan:
page 218 } Q. Mr. Winquist, could you tell us, please, the discussion, if any, that occurred with respect to a clause to be included. Just tell us the factual—what factually happened.

A. At the conclusion of the discussion in regard to liabilities and taxes, Mr. Swart suggested that a clause be included to cover any undisclosed liabilities. This was the extent of it.

Q. Undisclosed where?

A. As far as the balance sheet is concerned, as I understood it.

Q. Was it a sale by balance sheet?

Mr. Lam: Now, that calls again for a conclusion on the part of the witness, your *Hononr*. The contract speaks for itself.

By Mr. MacMillan:

Q. I will ask it this way: Was anything else discussed, Mr. Winquist, other than the figures you had before you and had brought with you on the balance sheet?

A. The possibility of any other liabilities that were not listed on here was discussed, yes.

Q. I understand, and the discussion was around—

Mr. Lam: Your Honor, he cannot tell the man when he is trying to direct questions to him, and he is the
1-16/20-69 witness, what he wants him to say.
page 219 } The Court: He can ask him what discussion took place.

Mr. Lam: He has asked him that, your Honor, and he is now saying that the discussion included this and I say that is an improper question. It's leading.

The Court: He can ask him if there is any discussion concerning taxes.

Mr. Lam: He has answered that question several times. I don't know how many times he has got to come back to it. I object to it on the grounds it's repetitious.

The Court: Let's find what the question is.

By Mr. MacMillan:

Q. The question is, Mr. Winquist, when the discussion with respect to taxes arose, did Mr. Ware say anything about taxes?

A. Mr. Ware said that prior years' taxes had been paid.

Vernon Winquist

Q. Was there any discussion with respect to a clause to be included as to liabilities and taxes?

A. There was a discussion or statement by Mr. Swart that he wanted a clause in there to cover any undis-
1-16/20-69 closed liabilities, yes.
page 220 } Q. All right, sir. Now, Mr. Ware testified here last Thursday as follows, and I would like to read it to you. I was asking him about what occurred at that meeting and he said that there had been a discussion of purchase price and then certain deductions were made for the purchase price for liabilities, as you have just explained, on this Exhibit 3. And I asked him this question:

"Now, at the time these deductions were being made, did you tell them that you had a tax liability?"

Mr. Ware answered:

"No, taxes—the only thing that was said about taxes that particular night, which I recalled this after I considered this, they asked me were there any back taxes due now and I said 'Not to my knowledge.'

"Question: And there was no other discussion after you said that?

"Answer: No other discussion afterwards because going back on the plane with Mr. Winquist, I said I didn't want to go into taxes, per se, at this particular time until we get all the other straight and then I want you to take them in and go over the taxes with them."

And my question is, do you recall any discussion with Mr. Ware on the plane going back in which he said that to you?

A. No, sir. I don't remember any discussion
1-16/20-69 about taxes on the plane going back.
page 221 } Q. Did he direct you to take any information to the purchasers respecting taxes?

A. No, sir.

Q. Did you, in fact, have any discussions with the purchasers with respect to taxes between February 6th, the night of this discussion, and March 6th when the contract was settled in Mr. Rust's office?

A. No, sir.

Q. Did you have any telephone conversations with them?

A. No, sir.

Vernon Winquist

Q. With the purchasers? Did you have any correspondence with the purchasers?

A. No, sir.

Q. Did you have any contact with them in any way in any manner about taxes or otherwise?

A. None to my knowledge.

Q. Did you attend the closing on March 6th in Mr. Rust's office?

A. No, sir.

Q. Did you have any further—when did you next have any discussion with the Cobbs and Mr. Williams other than having seen them there that night? When did you next have any discussion with them?

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A. Approximately March 10th.

Q. Can you tell his Honor what happened at that time?

A. They came into my office and requested that I continue as C.P.A. for the cemetery at that time, for Rosewood Memorial Park.

Q. Had they ever suggested that prior to that night?

A. No, sir.

Q. Did you have any discussion with them, then, at that time?

A. Yes, I did. We sat down. I reviewed the sales agreement, said that I thought it would be a preferred way to handle it if they purchased it through a corporation rather than as individuals. And after some discussion they agreed to do this, and suggested that they change the agreement to corporate buy-out and that Miss Cobb could execute a new agreement in the manner as in the old agreement except for the change of parties and this was done subsequent to that date.

Q. Did you have any discussion with Mr. Ware about this?

A. Yes, I did.

Q. What occurred?

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A. I called him and talked to him over the 'phone and explained the reasons for it. And he said it would be all right with him.

Q. Do you know whether or not Mr. Ware had already received the $50,000 down payment at that time?

A. Yes, he had.

Q. Was it still in check form or had it been deposited, do you know?

A. I am not confident, but I am—I believe it had been deposited, yes.

Q. To his own account?

A. Yes.

Q. Can you tell us whether the agreement as reached on February 6th was the same agreement that is carried forth in this contract dated March 10th?

A. Yes, it is. It's the same except for the parties, of course.

Q. I understand that. I am talking about the terms.

A. Yes, sir.

Q. The same down payment?

A. Yes, sir.

Q. Same installment payment and so forth?

A. Yes, sir.

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Q. At the time you were C.P.A. for Rosewood, which you have described, I think you said '62 to '64, were you also C.P.A. for any other company in which Mr. Ware had any interest?

A. No, sir.

Q. Did you have any occasion to prepare Mr. Ware's personal tax return?

A. Yes. That was, however, for the year 1965 in 1966.

Q. In other words, you did not prepare his personal returns prior to '65?

A. No, sir.

Mr. MacMillan: We have no other questions, your Honor.

The Court: Mr. Lam?

CROSS-EXAMINATION

By Mr. Spindle:

Q. Mr. Winquist, why did you advise your new clients, the Cobbs and Williams, to take this stock in the form of corporate ownership rather than individual ownership? What were the reasons expressed to them at the time?

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Mr. MacMillan: Your Honor, you remember when I tried to get into this whole matter with my first witness, I was told we were here on the narrow issue of what was the intention of the parties with respect to the contract, having particular relationship to what occurred at the time of the negotiation of the contract. Mr. Spindle's question now is going to the whole matter of taxes that resulted after the contract was signed. He is asking him what happened after the date of closing and after the date of the contract, and I submit it's not within

the Court's rule and I assume the Court will defer whatever questions he has of Mr. Winquist with respect to that for future time.

Mr. Spindle: Your Honor, we have been into every other aspect of this negotiation. Your Honor has heard every conversation involved between February 6th and the date of final closing. And now Mr. Winquist, who is the man that was most familiar with the tax situation, is representing the purchasers, and I would like to know what was said there.

The Court: Anything that was said at the time of the settlement it seems to me—does this go to that?

Mr. Spindle: This is prior to settlement.

Mr. MacMillan: I beg your pardon. I don't object to anything prior to settlement. But he is asking him
1-16/20-69 what he did after settlement.
page 226 } Mr. Spindle: Let me make my question clear. I want to know what reasons Mr. Winquist expressed to Mr. Cobb, Miss Cobb and Mr. Williams prior to the final settlement. Your Honor understands there was a moment when they took it filed individually and on Mr. Winquist's advice they changed that and had a new settlement in which they took it in the name of a corporation, Cemetery Consultants. Now, that is the contract that is in litigation, a March 10th contract between Cemetery Consultants, so this is prior to the formal execution of that.

The Court: And will have a bearing on whether or not this balance sheet—

Mr. Spindle: Yes, sir, I want to see what was in their minds.

Mr. MacMillan: I don't object if his question now, your Honor, is what was the explanation of that contract. But he is going to use this as an opportunity to have discovery for the next hearing when we come back on taxes. I am going to strenuously object to it because you have held me strictly that I couldn't go into any matter that is going to come up in the next hearing. That is the only point I want
1-16/20-69 to make.
page 227 } Mr. Lam: Your Honor, he is precluding there is going to be another hearing.

Mr. Spindle: Let's take one thing at a time, I suggest. My question at the moment is what he said prior to the time of settlement.

The Court: All right.

The Witness: I advised the three parties that there would

be tax advantages to purchasing the stock through a corporate purchase rather than individually as they had. It would be easier for them to repay the purchase price and because they did not have personal liability insofar as the purchase price is concerned, that benefit would enure to Mr. Ware as well and I thought it was beneficial to both parties. The easier it was for them to repay, the better it would be for both parties.

By Mr. Spindle:

Q. What were these tax advantages?

A. A step-up in the basis of assets acquired and a direct liability to Mr. Ware through a new corporation.

Q. I didn't understand that last thing you said "and a direct liability to Mr. Ware."

1-16/20-69 page 228 } A. The purchaser, Cemetery Consultants, the second purchaser, would be directly obligated to Mr. Ware. Subsequent to liquidation it could use the assets to pay Mr. Ware without paying tax on two levels and this is an important factor that makes it easier to liquidate the indebtedness.

Q. You say "subsequent to liquidation." Then at that moment you and the purchasers contemplated a liquidation of Rosewood Memorial Park into the new parent, Cemetery Consultants, didn't you?

A. Yes, sir.

Q. And this was the tax advantage that was inherent?

A. Yes, sir.

Q. Through a liquidation. All right, sir.

Then also inherent in a liquidation of the old corporation, Rosewood Memorial Park, whose stock was being transferred at this time, also inherent in this liquidation was determination of costs on the project, was it not?

A. I don't know that, Mr. Spindle.

Q. Well, the expense of putting in a street after liquidation would be an expense of Cemetery Consultants, which is a new and different taxpayer from Rosewood Memorial Park, wouldn't it?

A. Yes, it would be.

Q. So that Rosewood Memorial Park as a separate entity, as a separate tax paying entity, would cease to exist on liquidation into the parent, wouldn't it?

1-16/20-69 page 229 } A. Yes, sir.

Q. And therefore any monies spent after that

time would not be credited as costs for the development of these lots by Rosewood Memorial Park, would they?

A. No, sir.

Q. And Mr. Cobb and Miss Cobb and Mr. Williams understood the tax situation at that time, didn't they, so far as they expressed it to you?

A. I don't know whether they did or not, Mr. Spindle, because it's not an easy—I know that they relied on the fact that I said there would be tax advantages and did realize that there would be a stepped-up basis and that they would recover a greater amount of costs and it would be easier for them to pay because of the fact they would not be taxed at two levels, but when you go beyond that, it gets to be technical and I don't *koww* whether they understood the remaining part of it or not.

Mr. Spindle: Well, your Honor, may I have the Defendant's Exhibit 2, which is the accounting statement for the midyear '63.

The Court: Here it is.

By Mr. Spindle:

Q. Mr. Winquist, I ask you to glance over that.

1-16/20-69 page 230 } You prepared it and I assume you are familiar with it.

A. It looks like a reproduction of a copy of a report.

Q. I think within your accounting firm you actually prepared that?

A. Yes.

Q. Or prepared under your supervision, wasn't it?

Well, now, this was delivered to Mr. Swart. Did you deliver it yourself and discuss it with him?

A. No, sir.

Q. Did you discuss the contents of this report with Mr. Cobb, Miss Cobb or Mr. Williams?

A. No.

Q. And I will include John Rust in that, any of the purchaser or their representatives?

A. No, sir.

Q. You knew it had been delivered to Mr. Swart, I believe, didn't you?

A. I don't know whether I was—I believe I had knowledge of it before, Dick, but I can't remember now.

Q. In that February 6th meeting up in John Rust's office,

you and Mr. Swart didn't discuss the contents of this report or allude to it?

A. Not to my knowledge.

1-16/20-69 page 231 } Q. Let me direct your attention to the projection of costs which appears on Page 2 of your report, and ask you to explain, if you will, how the taxes were paid on Rosewood Memorial Park up through the date of that report. How is it you determine the taxes on—

Mr. MacMillan: Your Honor, we are going to object now. We are not talking at all about what the intention of the agreement was. We are having a fullblown hearing on the question of taxes which we understood was coming up at a subsequent hearing. We strongly object. He has not asked him a single thing about any conversation he had with Mr. Cobb or with Mr. Swart or what was said or what was discussed. He is now getting into the whole question of taxes and trying to have a discovery at this hearing.

The Court: Well, rephrase your question.

By Mr. Spindle:

Q. What I am trying to do is to determine first what were the tax obligations—what was the tax situation. This is what we are talking about here. What was the tax situation of Rosewood Memorial Park as of this time and then I am going to get into how much of it was disclosed to the purchasers.

1-16/20-69 page 232 } How were the taxes paid on the sale of these lots, Mr. Winquist? How were they computed, I mean?

A. An estimate of the cost was prepared by—an estimate of a cost of a section of the cemetery was prepared by the engineers and a per-lot cost based on that estimate was used to report the cost of sales or to calculate the cost of sales and determine the taxes that were due. Until such time as the sections were developed or within a reasonable period they were closed out and the costs were finally determined.

Q. So that for 1963, say, the profit that was computed on the sale of a given lot involved a projection of the expense of completing all of the lots in that section; is that correct?

A. That is correct.

Q. So that the figures you have used to prepare the returns for Rosewood for '63, '62, '61, necessarily involved an engineer's projection of future costs?

A. Yes, it did.

Vernon Winquist

Q. So that at the time of the sale these costs that were projected to be spent for the completion of the project are shown in that report, aren't they?

A. Yes, they are.

Q. In fact, I realize the report is as of some months prior to the date of sale, but as of the date of the report it was projected that there would be $162,000 of costs incurred to complete Sections Three and Four, which were the two open sections?

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A. That is correct.

Q. All right, sir. Well, to your knowledge from your discussion with them, the purchasers, the principals, not the corporation, the principals understood the method of accounting that was used in computing profits on the sale of cemetery lots, didn't they?

A. I don't know that, Mr. Spindle. And it's not necessarily —it's not indicated here as such, because Project Three, for instance, has an estimated cost to complete development of a hundred nine thousand. But that includes a sizable acreage that is not developed today and may not be developed for ten years. The gardens—it's divided into gardens and it's difficult to determine without calculating all the exact divisions of the land and the land allocation of Project Three that is in a garden that is under development.

Q. Well, the engineers had given you these figures, had provided them to management, I suppose, and you used them in preparing the tax returns?

A. Yes, sir.

Q. So that as of 1963 it was projected that $162,000 would have to be spent in the future?

A. Yes, sir.

Q. And is it reasonable to assume that those figures were in the same area as of the time of settlement?

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A. Approximately, I would think, yes, sir.

Q. Obviously some costs would have been expended up through March, but—

A. Yes.

Q. —but essentially we are in the same area as of March of '64.

Well, now, if that $162,000 was not in fact spent then the figure you used for preparing the tax returns in '61, '62, and '63 would be erroneous, wouldn't it?

A. It may or may not be. That is why I say the Project Three, the figures that are used cover the total of Project

Three, which is approximately a quarter of the entire cemetery. The developed portion, the costs incurred up through 1963 and 1964 and until liquidation, were assigned to the developed gardens and not to the entire amount as set forth in this original projection. So they may not be overstated or they could be. It's difficult to say without calculating.

Q. But the monies that the purchasers would spend after March would affect the taxes for '61, '62 and '63, wouldn't it?

A. It depends on in what area again. It would affect the taxes if they were—if they were expended in the gardens that were under development. There is no question about that.

1-16/20-69 page 235 } Because the lots had been sold from that. But if development costs were incurred in an area where no lots had been sold it would have no bearing whatever.

Q. You would be starting a new project?

A. You would start a new garden but not a new project.

Q. But in that portion of Project Three which was already developed into a garden, which I believe is the terminology for a cemetery area, for that portion that was already under development, the amount of money that the purchasers would spend would affect the accuracy of the taxes already incurred and reported?

A. Yes, sir.

Q. And is that not fully set forth in that report, the method of reporting taxes?

A. I can't remember. It's not set forth here and except possibly—I think there is some mention made of it.

Q. The third paragraph on the first page, Mr. Winquist, is a statement of the method of tax accounting?

A. It's a statement of accounting but not necessarily tax accounting. It says the corporation reports income on a modified cash basis of accounting which includes determining gross income from lot sales on the basis of percentage of

1-16/20-69 page 236 } collections. That is specifically put in there because it's not—it varies from standard accounting reporting but not necessarily from tax reporting. And, of course, it's an obligation to disclose it as it varies from standards or general accepted accounting reporting and that is the reason for that statement.

Q. While it varies from general accounting reporting it's entirely permissible with the Internal Revenue Service, isn't it?

A. Yes, sir.

Vernon Winquist

Q. And it is permissible because it's subject to review or audit upon the completion of the expenses in a project, isn't it?

A. Yes, sir.

Q. Now, I would like to also invite your attention to Page 3, Mr. Winquist, the second, if you will, paragraph on Page 3, and ask you to read that to the Court, if you would, just so the record will be complete.

A. Deposits? Is this—

Q. Prior to completion of a development of a section—

A. Oh, "Prior to completion of development of a section, costs charged to operations as a result of lot sales may, in this section, have been determined by use of engineer's estimates of total expected development costs for such section."

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Q. And on Page Two appears the statistics showing the dollars of estimated costs to complete the development, doesn't it?

A. Yes, sir.

Q. So don't you feel that you have made a fair disclosure as an accountant of the method of paying taxes in this corporation and the fact that it involved estimates of future expenses?

A. Mr. Spindle, I have to look at this. My intent was to make a disclosure of accounting, the difference between the accounting methods employed by the corporation and insofar as what would generally be accepted on an accrual basis.

Now, insofar as tax liabilities or tax method of reporting, this would be secondary because at this time I don't think there was any tax liability. I think there was a loss sustained in this year and there were no taxes incurred.

Q. But as of the date of sale there were no tax liabilities then existing, were there?

A. There were no taxes for which—that had been assessed, that is correct.

Q. But there was the potential of a tax which might occur from the expenditure of these projected costs or the failure to expend the money for these projected costs?

1-16/20-69 page 238 }

A. Yes.

Q. That potential was *ther* at the time, wasn't it?

A. Yes, sir, it was.

Q. Did Mr. Swart discuss this report with you, Mr. Winquist?

A. Not to—not to my memory, Mr. Spindle.

Q. Did he ask you any questions about it? Was there any allusion to it in your contacts with Mr. Swart?

A. Not that I remember. The only contact I had with Mr. Swart was that evening of February 6th which was a very brief period. And I don't remember right now.

Q. Well, this discussion you had with the principals relative to changing to a corporate acquisition rather than an individual acquisition, that discussion took place before the final contract was signed, didn't it?

A. Yes, it did. It took place on March 10th.

Q. And as I understand it, perhaps you will recall, actually the contract was dated March 10th but the signatures and the formal execution of the contract was more like the end of the month, wasn't it?

A. That is correct.

Q. And during that period of time you were representing the purchasers as their accountant?

A. Yes, sir.

1-16/20-69 page 239 } Q. Did you have any further discussions with any of those principals or their accountant or lawyer concerning income taxes?

Mr. MacMillan: From when to when, Mr. Spindle?

By Mr. Spindle:

Q. Excuse me. From the first time you have just told us about, which you have identified as around March 10th, up until the actual closing around the end of the month?

A. No, sir. No discussion of taxes.

Q. Can you tell us what tax benefit was in dollars from this liquidation and step-up of basis? Or can you project it based on a sale of remaining lots?

A. No, sir. It would be entirely too involved. I would have to make an accounting essentially to know this. This is a technical, difficult thing to do.

Mr. Spindle, I may—in a definition of the period of time, I obviously discussed taxes with the tax benefits with the principals on March 10th insofar as their purchase. I don't mean to say that I did not discuss it with them on that date insofar as the tax items. I did not discuss anything that occurred prior to the date of sale.

Q. But at this conference in which you made this recommendation, you explored the tax picture with them?

1-16/20-69 page 240 } A. I explored the benefits that would be to—that would enure to them insofar as the cor-

porate purchase in lieu of individual purchase, yes.

Q. In addition to discussing the benefits, Mr. Winquist, I assume that you painted the entire picture and showed the additional liabilities that would be incurred as a result of the liquidation, didn't you?

A. Could you define what you mean by "additional liabilities"?

Q. The tax conditions.

I will rephrase that. The tax conditions to Rosewood as the termination, the termination of its life, business life, and its liquidation, on its tax liabilities. What conditions flowed to Rosewood taxwise from its liquidation, before completing these projected expenses, of course?

A. Again, this is a difficult thing to answer because you do not know—I did not project those liabilities, because there is no way I could define them, no way I could know, that there would be any. And I don't think there was any as a result of the liquidation and a subsequent tax settlement.

Q. You don't think there were any liabilities as a result of the liquidation?

A. No, sir.

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Q. Well, would you explain to me, then, why there were no liabilities if these—the liquidation cut off the expenditure of funds by Rosewood, didn't it?

A. It did. But this would be done shortly in any event, whether it was a liquidation or not.

Through a recovery of costs from another section that had been previously settled, there was an additional approximately $13,000 worth of charges that enured to the benefit directly as a result of the liquidation that would have been lost irretrievably if the thing hadn't been brought to a head at that point. So I don't believe there were any additional liabilities that resulted from the liquidation.

Q. What gave rise to the assessment which is the tax we have in issue here today?

A. Basically an overestimation of the costs.

Q. If the costs had been spent in line with the engineer's projection as reported on your statement there, there would not have been any more taxes, would there?

A. This is true. But there is no reason to spend costs that would be unnecessary, of course. Which is what happened in Project One and Two as well.

Q. Well, in Project Three and Four, which were the ones

that were still under work, still working on them at the time of the sale, One and Two had been completed, I understand, but in Three and Four, are you saying that these
1-16/20-69 estimates were not correct? You didn't have to
page 242 } spend this money.

A. I am saying that in Project Three, for example, the estimates included an estimate of a sizable section of the cemetery to which no expense of development had been incurred. The development costs through '63, Four and Five, were all allocated to a developed garden which was substantially complete. And because of that and because of an additional adjustment insofar as the tax case settlement was concerned, I don't think there would have been any reduction in future cost of lost had the corporation continued.

Q. I am not sure I understood you, Mr. Winquist, I am trying to follow you. You say you don't think there would have been a reduction in cost if the corporation had continued. But don't you think that $162,000 would have been expended?

A. No, sir.

Q. You don't think so?

A. Not in the sections that were settled in the case. We are talking about an area of land approximately 47 per cent of which—and I didn't come prepared to discuss this, so I am doing this from memory of the tax case—

Mr. MacMillan: Let the record show, your Honor, we have excepted all the way through that this was to be the matter of a subsequent hearing. But I can't stop the Court.

1-16/20-69 The Witness: Approximately 47 per cent of
page 243 } the land contemplated in the estimates of the engineer to be developed was platted off in gardens. The cost incurred in that section to the date of liquidation was all allocated to that garden and none to the other 52 per cent. So obviously you could spend more than $162,000 after you developed the other fifty-two per cent, but that may be years in the future.

By Mr. Spindle:

Q. I understand that.

A. And this is where you have to understand, you can't relate a hundred sixty-two thousand to Project Three, only that portion that was settled in the tax case. This is all I am trying to say. And it's difficult to tell you in such a way that it's understandable unless you are prepared—better prepared to discuss it.

Vernon Winquist

Q. Well, the—

A. Let me interrupt and give you one example, Mr. Spindle.

In Project Three there was initially a projection of 13,600 graves, according to the engineer's estimate. The area that we settled something less than 6,000, I can't re-
1-16/20-69 member the exact figure. It was maybe not even
page 244 } five. I am not certain.

Now, all the cost that was incurred to date was allocated over those 5,000, or whatever number of graves they were. Now, obviously if you develop another 7,000 grave sites for sale you are going to have another sizable amount of additional costs incurred. But that was not done. But it is included in the $162,000 to be expended. But that is not the way the case was settled with the Internal Revenue Service on this basis. It was settled—

Q. You settled it on a narrow section of one or two gardens?

A. A much narrower section, right.

Q. Well, was the return that you filed in '63, '2 and '1, did you consider it a proper determination of costs at that time by using the hundred sixty-two or whatever would have been projected expenses, do you feel?

A. It would have been a proper estimate presumably, and I am not an engineer, provided all the other acreage was developed.

Q. But you are entitled at that time to project the costs on the entire acreage, were you not? Not just the section that you are immediately working on?

A. Yes. I am sure that would be entirely all right.

Q. And so that if these other sections had been
1-16/20-69 developed by the purchasers, this projection
page 245 } would have been borne out, wouldn't it?

A. I don't know that. Because there are so many things that could affect it that would affect the total amount of costs. It may affect Section Three absolutely none because there was a sizable adjustment and it would be my opinion that it would not affect Three in any amount, because of the fact there was a sizable adjustment in a compromise with the agent that would not have been available if it had not been settled.

Q. When you filed these returns for '61, '62 and '63, Mr. Winquist, you had full access to all of the costs and projected costs in the project, did you not?

A. Yes, sir.

Q. And did you not feel at that time that the return was a

fair estimate, contained a fair estimate, of the costs of each lot which you were reporting as sold?

A. Mr. Spindle, I filed the return for the year ending July 31, '62 and July 31, '63. Now, I used the cost projections that had been in effect for several years, as far as that project is concerned. I made no determination in my own mind whether fair or unfair. There is no way I could determine at that point without a sizable amount of interest as to what the costs per lots incurred, how it would compare with what had been estimated. I used the previous estimates and, of course, the previous methods without making any determination as far as amount.

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Q. You felt, I assume, in preparing the return and filing it as the accountant for the corporation that this method of reporting was a fair method of reporting the taxes incurred by this taxpayer?

A. Yes, sir.

Q. So that in preparing your year-end balance sheet, you set up no reserve for income taxes. You didn't feel any was required under good accounting and tax practice, did you?

A. That was no—I did not set up a reserve, that is correct.

Q. Am I correct in assuming that it's your professional opinion that none was required?

A. At that date, yes. There would be none that could be determined that was required.

Q. And your report that accompanied the balance sheet disclosed the potential tax liability, did it not?

A. I have not read this in several years. I don't know whether it does or does not.

I don't see anything in here, Mr. Spindle, about a potential tax liability.

Q. You don't consider that the statistical summary of projected cost read together with your statement that it's based on engineer's projections and your modified cash reporting method, you don't feel that this is a full and fair disclosure of the tax accounting that was used?

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A. No, sir, I don't. I don't think that anyone other than a fellow professional or someone who was thoroughly familiar with the results of the methods used would know what was the result of it because this, as I stated in my letter, that it presented the facts on a modified cash basis of accounting. And you have to understand what that means to know whether or not this constitutes any tax liability.

Q. I am sure it wasn't your purpose to hide anything, Mr. Winquist.

A. No, sir.

Q. I am not suggesting that. You would feel that it's the function of an accountant to make a full and fair disclosure to the notes of a balance sheet if the balance sheet does not tell the whole story?

A. Yes, sir.

Q. And I suppose the tax or the material attached to the balance sheet would disclose to whoever would read that report the entire financial situation of this corporation. Wouldn't any other C.P.A. by reading that report understand the tax situation?

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A. I don't know whether he would or not. He would understand the method of reporting or he should be alerted to the method of reporting and accumulating costs, yes.

Q. It says so right there, how you reported the costs, doesn't it?

A. Right.

Mr. Spindle: That is all we have, your Honor.

REDIRECT EXAMINATION

By Mr. MacMillan:

Q. Mr. Winquist, did you prepare the statement of July 31, 1963 to be a document for these purchasers?

A. No, sir.

Q. Never heard of them at the time that was prepared?

A. No, sir.

Q. The only thing you prepared for these purchasers was the document of December 31, 1964; is that correct?

A. Nineteen sixty-three.

Q. 'Sixty-three?

A. Yes, sir.

Q. Now, you have discussed with the Court the advantages of this change from an individual purchase to a corporate purchase. Did the advantage to the purchasers contemplate in your mind any detriment to the seller?

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A. No, sir.

Q. Did you intend or know that there would be a detriment to the seller because of the advantage to the purchaser from doing it in a corporate name?

Vernon Winquist

A. No, sir. I had no idea of any—and still know of no detriment to the seller and would not have advised a change without a complete discussion about it with the seller.

Q. If you had known it was going to be of any detriment to him?

A. Correct.

Q. Are there two ways that a transaction can occur in order to establish the same basis for the purchaser when a corporation is involved when you have the sale of a corporation?

A. Yes, sir. If you either liquidate the corporation, the buyer could liquidate the corporation and sell the assets, which would establish it—

Q. You mean the seller sells the assets?

A. Or the buyer can purchase the stock through a corporation and create the same basis for the assets through liquidation.

Q. All right, let's go over that now for the Court.

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If the purchasers here had said to Mr. Ware, "We want to buy Rosewood, the assets of Rosewood," what would have been their basis if they had said, "We don't want to buy the stock, we want to buy the assets." What would have been their basis?

A. Their basis would have been the same within a few dollars of what it was when they liquidated.

Q. So what you were in effect saying to them was that rather than buy the stock in their personal names, they should buy it in the corporate name so that when dissolution occurred under the regulations they would get the same basis they would have gotten if they had bought the assets?

A. That is correct.

Q. So there was no trick or no deviousness on your part. You were merely telling them alternate methods?

A. That is correct.

Q. And, as I understand it, you did not intend, foresee or suspect, and don't now suspect that there has been any disadvantage to the seller as a result of the method?

A. That is correct. If I had had any idea that there would be, I would have never recommended it or never—or without a full and adequate disclosure to both parties.

Q. Now, is it not true that Mr. Swart saw a potential tax liability after you told him that they had been audited only through '59 or '61, whatever you said?

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A. Yes, I think it is.

Vernon Winquist

Q. And that is why he said that, "We want a clause to protect the purchasers"?
A. Yes, sir.

Mr. Spindle: I object to the question and ask that it be stricken.
The Court: All right. I think it calls for a conclusion.
Mr. MacMillan: I asked him factually. He is a factual witness. He was sitting there, your Honor, and is testifying as to what occurred.
The Court: I know you asked him, that is why Mr. Swart—
Mr. Spindle: Asked him why Mr. Swart said something. This involves a mental process of Mr. Swart.
Mr. MacMillan: I was merely asking the sequence in which the events occurred, your Honor.
The Court: Well, he wouldn't know why Mr. Swart wanted something done, would he? Mr. Swart would have to testify to that.
Mr. MacMillan: I think he has testified to it and I think that Mr. Winquist was sitting there. And the evidence is that Mr. Swart, with the knowledge of the things
1-16/20-69 we have been discussing, said that he wanted a
page 252 } clause to protect the liability not shown on the balance sheet?
The Court: He can testify to that, but not why he wanted the clause.
All right. Are you all through with this witness?
Mr. MacMillan: We are through.
Mr. Spindle: No, sir, let me ask him one other thing.

RECROSS EXAMINATION

By Mr. Spindle:
Q. Mr. Winquist, I am sure you would agree with me that a $34,000 tax assessment is a detriment to the seller. I frankly don't understand why you say that this liquidation did not result in a detriment to the seller. It ended the business and tax life of Rosewood, did it not?
A. Yes, sir, it did.
Q. So that any monies spent on the project would be spent by Cemetery Consultants and not Rosewood from liquidation on, wouldn't it?
A. That is correct.
Q. So it was impossible to complete any further

1-16/20-69 costs, to expend any further cost for Rosewood
page 253 } and live out this projected expense, once you liquidated, wouldn't it?

A. It would be impossible to incur any further costs, but the reason—by Rosewood, but the reason I say that it did not enure to the detriment of the seller is because the area that was involved in the tax case was restricted to an area that was substantially developed. When you consider that fact, together with a compromise adjustment to settle the case, I can't see how it could be to the detriment of the seller. I don't think there would have been any more expended in those areas.

Q. Are you telling us that the same tax result would have occurred if the property had never been sold and Mr. Ware had gone on with his completed development? Is that your testimony?

A. Insofar as the areas or the gardens that were developed, this is substantially true.

Q. How about the rest of the areas? Why do you restrict it to this one little garden?

A. Well, because—

Q. It's just one asset?

A. Because the area—again I have to—I didn't come prepared to discuss this part. But you have to visualize how the cemetery is set apart in gardens. Section
1-16/20-69 Three is a quadrant of the entire property that
page 254 } is divided into probably, I believe, three or four different gardens. I don't remember the exact number. The cost incurred to the date of liquidation was all lopped into the two gardens or the area that was substantially developed.

And in addition to that, in a compromise, we were able to recoup approximately $13,000 worth of costs that had been lost in a previous settlement, and I think that that would constitute the maximum that would be expended in those area and this is why I feel that way.

Q. Why was the settlement of the tax case confined to costs in one section?

A. Because the other portion of that section development has not begun in it, may not be completed for years in the future, and you can't indefinitely prolong a settlement of a section. All of this involves the technical aspects of the tax case which you have to have knowledge of to understand.

Q. I can appreciate that and also I realize *withouth* the documents it's difficult to follow this through.

Vernon Winquist

Mr. Winquist, in making your audits in prior years, did Mr. Ware make a full disclosure to you of all the financial circumstances of his corporation?

A. I think he answered anything that I asked him, yes.

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Q. How about the books and records? Were they properly kept?

A. As nearly as I can remember, yes.

Q. Did you set up the accounting books for them, Mr. Winquist, your firm?

A. No, sir.

Q. Did you feel that they were reasonably well kept to reflect the financial transactions of this corporation?

A. That I can't answer yes or no, because insofar as accounting is concerned, they probably do not reflect it or did not reflect it in accordance with generally accepted accounting procedures. They were designed for tax—they were kept primarily for tax reporting and needed some adjustment to currently or to properly reflect accounting and financial position.

Q. But in order to carry forward this system of tax accounting which involved projected costs, you approved of the books they kept?

A. Oh, yes. Yes, I did.

Q. And there was never any attempt by Mr. Ware to hide anything in this business, was there?

A. No, sir.

Q. After you took over this account, did you suggest any switch to any different method of accounting?

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A. At one of the examinations with one of the agents, I think that issue was discussed for one of the prior years. I don't remember the exact date of that. I believe that was—however, I believe that was prior to the sale of the stock. I think that was discussed with the agent. The extent of the discussion that followed, I don't remember, but that dates back to about 1963 or somewhere in that time.

Q. Well, you approved of his tax accounting techniques?

A. Yes. Yes, I did.

Q. And the way the returns were filed? It was all done and in your judgment was proper?

A. Yes, it was.

Q. Did you make any changes in the books after you came in?

A. They would be normal, if I did. I can't remember that exactly. But not basically.

Vernon Winquist

Q. After Cemetery Consultants came in did you change the basic system of accounting?

A. No, sir. That remained—that continued until it was liquidated.

Q. I mean after liquidation, the same method of reporting was used for Cemetery Consultants as had been used for Rosewood, was it not?

A. Yes, sir.

Q. Since you worked for Ware for three years
1-16/20-69 and the purchasers since that time, you saw no
page 257 } reason to change the method of accounting?

A. No, sir.

Q. Mr. Winquist, Mr. MacMillan asked you about a statement that Mr. Ware made earlier in this proceeding which in reference to anything being said about taxes, Mr. Ware said that he had not made any—well, let me read it back to you so I won't be misquoting, but the question is this:

"Now, at the time these deductions were being made, did you tell them that you had a tax liability?"

This is Mr. Ware I am quoting.

"No, taxes—the only thing that was said about taxes that particular night, which I recalled this after I had considered this, they asked me were there any back taxes due now and I said 'Not to my knowledge.' "

Do you consider that a correct statement?

A. If you are speaking of taxes assessed, I think it was. There were no taxes that had been assessed, reduced to a liability, to my knowledge, at that time, either.

Q. Mr. Winquist, you were present when this conversation took place between the purchaser and the seller and you were the man who was most familiar with the tax situation of the seller. If you had felt that there was anything wrong with that statement, would you have not made some further statement about it yourself?

1-16/20-69 A. Not without a direct question, I don't be-
page 258 } lieve.

Q. I believe you were aware that they had this report that we have been discussing, even though you might not have discussed the details, you knew it had been delivered to their people, did you not?

A. Mr. Spindle, I am not certain whether I knew about it or not, because the basic statement that I was concerned with was the one I had just prepared when we flew up there that night. I am not certain that I knew they had a copy of it prior to that.

Vernon Winquist

Q. The one that you prepared didn't have this full explanation? I mean, the year-end balance sheet that was attached to the contract did not carry what you might consider as footnotes?

A. Correct.

Q. Or explanatory material. But with this explanatory material the tax situation was fully disclosed, was it not?

A. With the—which explanatory material, now, are you—

Q. The matter we have been over earlier.

Mr. MacMillan: Your Honor, we are just exploring back over. This isn't redirect. We are going back over what he asked him a half hour ago. He has answered

1-16/20-69 every one of these questions.

page 259 } Mr. Spindle: I am tying it in with the conversation of February 6th with the explanation of the taxes in that report and the conversation that there was a complete disclosure.

The Court: He didn't answer that it was a complete disclosure, though. He doesn't agree with you, apparently.

Mr. Lam: I don't think he has answered the question.

Mr. Spindle: He testified that another accountant reading this would completely understand the tax situation.

The Court: It isn't a question about another accountant. It's a question between the parties, isn't it?

Mr. Spindle: No, sir. The accountant, Mr. Swart, is their agent and whatever his knowledge is about the situation of the corporation his clients were purchasing is chargeable to those principals.

The Court: Isn't the question here what was the intention of the parties at the time they did this and what did they contemplate?

Mr. Spindle: Yes, sir. But—

Mr. Lam: And what was their knowledge.

1-16/20-69 Mr. Spindle: Intent also involves knowledge

page 260 } and our point is that Mr. Swart had full knowledge of this potential tax situation and that knowledge is chargeable to the purchasers.

The Court: I know, but then he said, too, do you mind—said to your man, well, following that, "Do you mind if we put a saving clause in the contract so that we might be protected."

He said, "Not at all." So the intention, it seems to me, I will listen to you, was to cover the very thing that we are talking about. I mean, that is the way I see it up to this time.

But I mean, I will give you plenty of time.

Mr. Spindle: All I want to do is ask Mr. Winquist if taken together, this conversation and the report, which Mr. Swart had, if he didn't feel that this fully covered the tax situation.

The Court: I will let him answer it if he thinks it did or not.

The Witness: Mr. Spindle, I don't know that because I don't know the extent of his—of this review of the report. When we were discussing it that evening, my principal comments were related to this balance sheet together with the fact that I wasn't confident that every liability had been put
1-16/20-69 in there. Which is what I tried to convey that
page 261 } that evening.

Mr. Spindle: All right, sir.

I would just like to say to the Court that yes, Mr. Swart did ask that a clause be put in, but the clause you will keep in mind is against undisclosed liabilities and we think that this situation was fully disclosed.

The Court: Why didn't they put in there, including all State and Federal taxes and we wouldn't be here so long.

Mr. Lam: Yes, sir.

The Court: Any other questions?

Mr. MacMillan: We have no *furhter* questions.

The Court: Mr. Spindle, do you have any more of this witness?

Mr. Spindle: Just indulge me one more second.

By Mr. Spindle:

Q. Do you know the date that the final contract was executed?

A. I do not know the exact date but I believe it to be the last few days in March.

Q. Would December 31st sound about right to
1-16/20-69 you—I mean, March 31st sound about right to
page 262 } you?

A. That would be very close, I would think.

Q. Were you aware of the mechanics of handling the settlement? Were you present when the checks were exchanged?

A. At the final settlement?

Q. Yes, sir.

A. Yes, sir.

Q. Do you recall that the original checks were returned to the purchasers and new checks issued?

A. Yes, sir.

Q. I show you three checks from Gordon Ware to Mr.

Williams, Miss Cobb and Mr. Cobb each for $16,666.00 and ask you if those were the checks that were used in the final settlement to return the $50,000 initial down payment?

A. I am sure they were.

Mr. Spindle: We would like them—

The Court: Stipulate them, yes. No question about it?

Mr. MacMillan: We don't dispute it.

Mr. Spindle: We just want to establish the date, your Honor. These are all dated March 31st.

The Court: Shall I clip them together and mark them Defendant's Exhibit Number 4?

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page 263 } The Court: Is that all of this witness?

By Mr. Spindle:

Q. Mr. Winquist, were you working for them up to March 31st? From March 10th to March 31st, you were serving as an accountant for the purchasers, I believe?

A. Yes, sir. Yes, sir.

Mr. Spindle: That is all we have.

The Court: Anything else, Mr. MacMillan?

Mr. MacMillan: Your Honor, we would like to rest at this point. We would like the record to show that we tendered certain letters of notice that the audit had been made, and we were told that this would come at a later point in the proceeding and we don't want to have it said that we didn't tender them. We have tendered them and we understand we are not permitted to put them in at this point.

The Court: All right.

(Whereupon, the witness was excused.)

Mr. Lam: Judge, are you going to recess now for lunch?

The Court: How long, how many witnesses do you have, Mr. Lam?

Suppose we recess for lunch until 1:30.

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page 264 } (Whereupon, luncheon recess was taken.)

(Whereupon, the hearing reconvened at 1:30 o'clock p. m.)

AFTERNOON SESSION

The Court: Mr. Spindle off for the afternoon?

Mr. Lam: Judge, Mr. Spindle had to go back to town and I mentioned this to Mr. MacMillan while ago. What I think we would do, we would proceed with the conclusion of our evidence at this stage of the thing, anyway, and I have indicated to the Court before, I certainly don't want to argue the thing today because I don't feel like it and I think probably it should be written up for argument, anyway, so that we have the benefit of the testimony before us in arguing it, and at the conclusion of my evidence I would just like to move at that time, because Mr. Spindle had to go and he was, of course, essential to it, too, could we put off that phase of it to some other time?

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Mr. MacMillan: Your Honor, we strongly oppose that. This case was filed last April. We tried all summer. Our property is under a Federal lien and it's going to be sold if this is not paid. We have posted a bond, all expenses of which has gone to us.

We came for a hearing in October. A motion for continuance was made on January 10th and was denied. We came on the other day with the understanding that we would proceed to conclusion here. There is going to have to be another hearing, as I understand it, at a subsequent time on some other phase of it than the determination today.

My client has come from northern Virginia, this is the third trip, to hear this matter and I don't know of any rule of Court that says that an attorney can leave the Courtroom merely because he has another matter. I have got five matters on my docket this afternoon including a Board meeting, but this is my duty to come here and hear this case to a conclusion and we strongly, respectfully submit that the issues are pretty clear.

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The matter is finally in the Judge's mind at this time and it would be highly improper in view of the fact that this property is under restriction of the Federal lien to defer the decision from moving onto another stage.

Mr. Lam: Your Honor, may I simply suggest this, that at some prior time I had moved for a continuance which was not granted. This has been months ago. It wasn't granted. We went to Court without anything on our part. The Court, on its own motion, at that time concluded the hearing and continued it to a later time. When we came in the other day it certainly was not our mixup that the Court docket had gotten such that the other Judge, which is Judge Wahab, was involved in another case and it was transferred to your Honor, and that was on Thursday.

As you recall again, the Court, of its own motion, so forth, could not continue to hear the case on Friday, when we were

ready to proceed with it, at that time because of the fact that the Court, itself, had other functions.

1-16/20-69 page 267 } But today is a little bit different. We have come back. Mr. Spindle thought his docket was clear and apparently it wasn't, for this afternoon, because he thought we would be finished. But I think —it's not been on any accord of ours that the thing has delayed along. And I say to your Honor, I think it would be under the circumstances he did have to leave and with me— and I think I submitted and the Court would know I would be fair about the thing, I don't feel up to arguing the case this afternoon, that this would be an appropriate thing and it certainly can be continued for a week or two weeks for argument on that particular motion, and I think it would be essential to us to get the evidence transcribed so that we would have that when we are talking with the Court about the ruling the Court should make.

Anyway, I don't think there has been anything unfair or any delay on our part.

The Court: I will hear that motion at the conclusion of the evidence. Right now I am not inclined to grant it, but I will listen to you.

Mr. Lam: I want to call Mr. Castle.

The Court: Mr. Castle, have you been sworn?

Mr. Castle: Yes, sir.

The Court: All right.

1-16/20-69 page 268 } CHARLES F. CASTLE, SR., called as a witness, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Lam:

Q. Would you state your name and your address, please, Mr. Castle?

A. My name is Charles F. Castle, Senior. My address is Route 2, Box 80 B-1, Richmond, Virginia.

Q. You are, I guess, currently employed in the sales of cemetery lots; am I correct?

A. Yes. I am with Greenwood Memorial Park and also the president of Silent Aid Corporation.

Q. Are these cemeteries?

A. No, Silent Aid Corporation is an alarm system.

Charles F. Castle, Sr.

Q. But the other is—
A. Is a cemetery.
Q. And your position there is what?
A. General manager.
Q. Mr. Castle, going back in a period of time and particularly back to the latter part of 1963, you
1-16/20-69 came to Norfolk, or Virginia Beach, rather, and
page 269 } became employed at Rosewood Park by Mr. Ware?
A. That is correct.
Q. Prior to that, where had you been employed?
A. I was with Mr. J. D. Williams, Pleasant Valley Memorial Park in Fairfax.
Q. When you left employment there did you come to Rosewood?
A. Yes.
Q. Do you recall when or what time of the year that was?
A. I recall exactly. It was the first of November. I was employed by Gordon about the first week of November.
Q. This would be of '63?
A. Yes.
Q. All right, sir. Now, while so employed with him did you come to learn that he was interested in selling Rosewood Park?
A. Yes. We discussed it and let's say I made him a little interested in selling it.
Q. Could you tell me this: That is a result of this interest, and let's relate it to the particular parties, the Cobbs and Cemetery Consultants, what transpired after that with regard to negotiations of the sale?
1-16/20-69 A. Well, let's see, I worked there with Gordon
page 270 } and took on a separate contract for mausoleums and crypts, an agreement, I wouldn't say a contract. We didn't go into a formal contract. And then we discussed—I discussed with Gordon the possibility of him selling the cemetery and he gave me an understanding of what he would do and I went to Mr. Norman Cobb there to borrow some money for a down payment on the cemetery.
Q. Let me stop you there. Of course, Mr. Norman Cobb is in Fairfax?
A. Yes, sir.
Q. Or Vienna?
A. Vienna Trust Company.
Q. And you are down here at the Beach. Had you known Norman Cobb before?

Charles F. Castle, Sr.

A. Yes, sir, we knew each other for quite a few years before.

Q. Do you recall anything specific with regards to your knowledge of Mr. Cobb when you first met him or—

A. Well, let's see, I first met Mr. Cobb when I moved into Cobbdale.

Q. Which has been explained was a subdivision of his?

A. Right. And we became quite good friends. And we belong to the same Club. We used to have dinner
1-16/20-69 together, stuff like that, go to the Club meetings.
page 271 } Norman and I had previously tried to start a cemetery back on a piece of land he had back in Vienna, but we ran into trouble of one of the adjoining property owners, some colored Major, something like that, in the Army, was against it so we couldn't get clearance to open it up.

Q. When was this in period of time?

A. Oh, this was a couple of years, I guess—at least a year before 1963.

Q. So when you say that you went to Mr. Cobb about financing, it was with this background knowledge and personal knowledge you had of him?

A. Yes.

Q. I see. All right. Go ahead then from there.

A. Well, when I approached him on it he took a financial statement which we worked up. I didn't have much in the way of finances, and in the discussion he thought he would be interested in this if the place was everything that I said it was. And consequently I think he checked with J. D. Williams and talked to him about me and the prospect and I think that is where J. D. came into the picture.

And so Norman and Mavis and I believe J. D. all three of them, made a trip down to the park to look at it to see what it looked like and if it looked like a worthwhile project. And they were satisfied after they saw it that it was
1-16/20-69 worthwhile project and then we started negotia-
page 272 } tions with Gordon for the purchase of the cemetery.

Q. Now, at this stage when you say they made the trip down, whom were you employed by at that time?

A. Gordon Ware.

Q. And did you subsequently become employed with Cemetery Consultants or were—let me go back, first of all, before we get to the Cemetery Consultants part of the thing.

The Corporation known as Cemetery Consultants, what was that? Who established it and so forth?

Charles F. Castle, Sr.

A. It was established originally by myself, Mr. Stewart, Mr. Goff, and—

Q. Well, none of these principals?

A. No, none of these principals involved here. Mr. Britton was the other partner that first started. And then I eventually bought the whole thing out.

Q. This was a Virginia corporation?

A. Yes.

Q. And did it have any holdings or anything at the time that the discussions of this purchase were being undertaken?

A. I was using it—I was acting as a cemetery consultant. I have for a number of years done side work of consulting work and I was using this corporation for that after leaving Carver Memorial Park.

1-16/20-69 page 273 } Q. But it had no ownership or any property or anything of that nature?

A. Had no value particularly, no.

Q. Now, when and where did the Cemetery Consultants get into the picture in this purchase?

A. Well, we decided that instead of forming a brand-new corporation, since I already had this corporation set up that they would reimburse me for a portion of my expenses for Cemetery Consultants and use that instead of forming a new corporation.

Q. When you say "we decided", whom are you speaking of, Mr. Castle?

A. Norman Cobb, Mavis Cobb and J. D. Williams.

Q. In other words, not Mr. Ware?

A. No, Mr. *ware* was not a part of that. That was our group.

Q. And did you have occasion or were you employed or anything by—of course, you owned it, but you in effect transferred it to them; is that correct?

A. Well, we—let's say they reimbursed me for a portion of it because at that point I was still becoming a part owner of Cemetery Consultants. Part of the stock was to be assigned to me.

Q. And in—I have here an exhibit which has been entered and it's designated as Defendant's Exhibit Number

1-16/20-69 page 274 } Look at this and tell me if you are familiar with it and what that represents.

A. For an interim period, the period mentioned here, I took over the operation of Rosewood Memorial Park and Mr. Ware turned the checkbook and the amount of monies in the check-

book over to me to operate the park up until the settlement of the cemetery on the date of settlement, which I think was around the first part of March.

Q. Let me say, this shows that you signed as the agent for G. Norman Cobb, Mavis C. Cobb and J. D. Williams; is that correct?

A. That is correct.

Q. And although this is not dated, it says that the effective life of this agreement will be from February 10, 1964 to March 15, '64, so was this entered at approximately February 10th of '64?

A. Approximately. I actually was running the cemetery maybe a week before that.

Q. Right. And when it was entered as their agent this was done with their full knowledge and so forth?

A. Oh, yes.

Q. When I say "full knowledge," consent and so forth.

The terms in there, if there were profits they
1-16/20-69 were to go to all of you, not just—
page 275

Mr. MacMillan: Your Honor, I object to leading the witness into what he wants.

The Court: The contract speaks for itself.

Mr. MacMillan: The contract speaks for itself and he is leading.

By Mr. Lam:

Q. Now, I have here a photostat of an employment contract dated March 6, 1964, and ask you if you have ever seen this before.

A. Yes, sir.

Q. That is a copy. But it's a copy of what, Mr. Castle?

A. Of an employment agreement, contract, between myself and the parties mentioned here.

Q. Who are the parties mentioned there, for the record?

A. Norman Cobb, Mavis Cobb and J. D. Williams, and myself.

Q. And it purports to show initials on the second page. When I say "purports" photostats of initials, and also photostats of signatures on the back page. Is this the way the original was?

A. Yes, sir.

1-16/20-69 Q. These are the signatures of the Cobbs and
page 276 of yourself; is that correct?

A. That is my signature. I am pretty sure it's the Cobbs.

Q. I mean reflected on there?

A. Right.

Mr. Lam: Your Honor, I would like to have this contract designated employment contract and dated March 6, '64, introduced as Defendant's Exhibit 5, I believe it is, sir.

The Court: Defendant's Exhibit Number

(Whereupon, the foregoing document marked for identification and received in evidence as Defendant's Exhibit Number 5.)

By Mr. Lam:

Q. Now, Mr. Castle, tell me, if you can, as accurately as you can,—well, first of all, I think you mentioned that the Cobbs, and I refer to the Cobbs as being Mavis and Norman Cobb, and Mr. Williams, came here to the park; is that correct?

A. Yes.

Q. Did you see them at any other time prior to the execution of this Cemetery Consultants agreement for the purchase?

A. Oh, yes. Several occasions.

1-16/20-69 page 277 } Q. Can you recall when and where you saw them?

A. Well, let's see, on one occasion I can recall I was at Norman's home. Norman Cobb's home. This was in, I would say, the early part of January, as well as I recall. I made two trips up there. J. D. Williams was down at the park on two to three occasions that I can recall. Mavis was down a couple of times. Let's see, one time I know Mavis and J. D. were down together and one time—two times Mr. Williams was down by himself. I don't recall that Norman—the three of them were together up until, you know, down—down at the park. But Mavis was down at least once. J. D. was down at least twice and I was up there at least twice.

And I believe me and Mr. Winquist and Gordon made a trip up to Fairfax. We had dinner at the Fairfax Country Club that day, as well as I recall. Those are—the best of my recollection.

Q. You mentioned Mr. Winquist so I know who he is.

A. Yes.

Q. In this interim period, and that is the period between

probably while this Defendant's Exhibit 4 was in effect, and that was in the period that—you have identified it previously. During that period of time did you have any occasion to see Mr. Winquist?

A. Yes. I saw Mr. Winquist a couple of times. He was at the office a couple of times during this interim.

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Q. Stay there any period of time?

A. Not any great length of time. One time was about maybe a couple hours or three hours during the middle of the day. I was at his office one time. I went down to the office, I can recall that. Whether it was right at this exact period here, I am not too clear because it was all right about the same period of time. A lot of things were happening.

Q. Was this during the period negotiations for purchase were going on?

A. Yes. Oh, yes.

Q. Do you recall any discussions dealing with the development of the cemetery, costs, et cetera?

A. Yes. We went into a great deal of discussion on costs.

Q. Can you recall any of the discussions that were had and with whom?

A. Well, one particular discussion we had related to building of crypts and a mausoleum. Mr. Ware had a deadline that was already in effect. In fact, I was selling under that deadline while I was there, of May 1st to begin construction of crypts and mausoleums, and according to the agreement, the written agreement, with the people, that construction had to begin by May 1, 1964. And Mr. Williams and his brother and myself and the Cobbs wanted to honor that agreement and make sure we got started and we did. We started—I think we started on the 30th day of April or somewhere in that vicinity. But we were in motion and building before May 1st.

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Q. Now, with respect to other development of the portion of the Cemetery that was opened to view, I understand there are some undeveloped lands and probably some now, too, is that correct?

A. Yes, there was some undeveloped portions and roads that had to be paved and we paved those also.

Q. Were these all discussed at this time and were they open for anybody to see?

A. All this was discussed during this period, yes.

Q. Now, let me ask you, within the office of the Rosewood Park, I guess it's a sales office or whatever kind of office you would call it—

Mr. MacMillan: Your Honor, let me say this, and I don't want to interrupt his direct examination, we made the objection at the beginning of this hearing that this contract did not contain any undertaking to make improvements, any undertaking to take any action as to the future and we said we wanted to preserve all through this hearing our objection.

1-16/20-69 page 280 & 281 } They are now trying to show that there were clauses in it agreed to. I just want the Court to understand we continue that objection. I am not going to object to every single question.

The Court: Mr. Lam, don't you think we ought to confine it to the issue?

Mr. Lam: Well, now, your Honor, I don't know how—

The Court: What does this have to do with the issue? The issue, as you know, and you all drew it, the issue is whether or not the contract of March 10, '64—

Mr. Lam: Undisclosed liabilities.

The Court: Undisclosed liabilities covered Federal and State taxes. Now, if this has something to do with this issue I will permit it, but I fail to see where it has anything to do with the issue. Maybe you can help me.

Mr. Lam: First of all, you have got a determination of the word "undisclosed", have you not?

All right, now, if then costs that have to be done, expenses have been done, are wellknown, obvious, open and so forth, at the time that they undertake this contract, then it is not an undisclosed proposition. It may result in—

1-16/20-69 page 282 } The Court: Because when you get through the development and so forth you all get back down to the question that we are ultimately getting to and that is the question of whether there had been any tax liability. But this happened after the contract, see.

Mr. Lam: But it was discussed. The proposition, though, as I understand it, and what I would seek from this witness, may it please the Court, that this was all discussed and known to them at the time they entered it. Therefore it was not an undisclosed proposition so far as we are concerned. They contended it was, but we contend it isn't, because they had knowledge of it. This is what I am trying to show.

The Court: If it has something to do with that, all right.

Mr. Lam: That is right. This has to do with the cost and so forth that they knew they were going to have to spend in order to meet—but these were projects that they had to make, your Honor. In other words, we have shown you—it's been introduced there, a thing that was sent by—

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The Court: Hundred sixty-two thousand.

Mr. Lam: —by the other man to them that
1-16/20-69 showed the full thing about cost and all this and
page 283 } I am taking it not from a tax angle so far as Mr.
Castle is concerned, but from a personal standpoint. They say they knew nothing about it.

The Court: If it has to do with undisclosed liability, such as corroboration after entry of the contract. But you must have something before that.

Mr. Lam: These were discussed prior to the time, as I understand it.

The Court: Let's ask him, and with whom did he discuss them.

By Mr. Lam:

Q. Mr. Castle, when you were making mention there of the facts that crypts had to be built and so forth, because of contracts that had been made with people buying them, I assume—

A. That is right.

Q. During the period of time that Rosewood was under Mr. Ware's control?

A. Ware, right.

Q. Was this discussion concerning these expenditures and so forth for the starting of the constructions? Was this done prior to the time the purchase was made by Cemetery?

A. Yes.

1-16/20-69 The discussion as far as building the crypts
page 284 } and stuff like that was discussed as early as, I
would say, the first part of February. Mr. Williams was down one time, I know, during the middle of February where we discussed plans of where it would be built, went over some records as to where these crypts would be located, which was later changed. I remember that one pretty well because at the same time we had to buy some tents and lowering devices and things like that because the equipment that Mr. Ware had was in pretty foul shape there and we had to make an agreement whereby we would go ahead and purchase it and then when the transaction, and if the transaction were completed, that we would take on the responsibility and Mr. Ware agreed to let us go ahead and purchase this equipment.

The Court: Is this prior to February 6th, you say?

The Witness: Prior to when?

The Court: February 6, '64.
Mr. MacMillan: He said the middle of February.
The Witness: This is the middle of February.
Mr. MacMillan: After the date?
The Witness: This was pretty well in the middle of February.

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page 285 } By Mr. Lam:
Q. Before the final contract, as you had understood, was executed?
A. Oh, yes, it was before the March 6th or 7th or 8th, or whatever it is that the contract was signed there. It was prior to that.

The Court: As I understand it, Mr. Lam, everything was agreed on on February 6th when all these people were present, Mr. Castle, the Cobbs, and I can't think of all of them now, Mr. Winquist, Mr. Swart. I would like to find out what took place on February 6th.

By Mr. Lam:
Q. All right, what took place on February 6th? Do you remember anything on that date?
A. To give an absolute *spcific* date would be extremely difficult.
Q. Do you recall any meeting in Mr. Rust's office?
A. Yes.
Q. Was it day or night?
A. It was in the evening.
Q. Do you recall who was there?

1-16/20-69
page 286 } A. Yes. There was myself, Gordon Ware, Vernon Winquist, Mr. Rust, Mavis Cobb and Norman Cobb.
Q. All right. Now, at the time—
A. And Sterling Swart was there.
Q. Do you remember any of the discussions that were held or had on that occasion?
A. Lord, we discussed just about everything, I think.
Q. In those discussions was there any discussion—

Mr. MacMillan: I object. I object to him asking him—

By Mr. Lam:
Q. Let me ask my question first.

Mr. MacMillan: I object to anything except him asking what was discussed, not leading the witness at this important part of the—

Mr. Lam: He *want* right along and asked specifically of the specific things that were discussed of his witness. Your Honor, this is what you wanted to get down to.

The Court: I want to know if they discussed taxes.

1-16/20-69 By Mr. Lam:
page 287 } Q. Was there ever taxes, costs and improvements and things of that nature discussed, Mr. Castle?

A. Well, now, on taxes, one of the main points on taxes discussed—I, myself, asked, I believe Norman and J. D., I don't know whether Mavis was present at the time, I believe she was, but one of the main things was to make sure that there was a clause in the contract that would cover any tax liability, to see that this was made prominent for the one simple reason, that the man that was sort of gearing me on the side who has done a lot of buying and dealing in cemeteries, told me to be sure that this was watched out for and this is one of the main points that I made to them.

And in the discussion that evening as well as I can recall it, this subject was brought up and Gordon Ware was asked about taxes. And he said, "Well, my taxes are up to date. The last tax, fiscal tax audit, that I had—" There was some large sum of money that was due and then after a lot of argument he said he got it down to a very low sum, I can't remember the sums. But for an example, maybe twelve or thirteen thousand and he settled for twenty-five hundred or something like that. And that he thought that he had had a tax loss the year before and that this might play a part on helping them with their tax.

In fact, as well as I recall it, his statement was
1-16/20-69 that he didn't think there would be any problem
page 288 } with the taxes on the next tax audit and this also was substantiated by Vernon Winquist, from what he knew and could see himself, there would be no great amount of taxes to pay, if any.

Q. All right. Now, were the discussions with regard to the cost, et cetera, what do you recall with regard to the expenditures as far as costs, *improvment* and et cetera, in the cemetery?

A. Well, to recall as far as whether at this particular meeting costs of development were discussed or not I really

couldn't say that there was. But there were discussions, and I don't recall which meeting or when it was, but it was between at least four—at least four of us present, that it would take somewhere in the neighborhood of 35, 40 thousand or maybe even more to do the building which was necessary for the mausoleums, the crypts, and things that we were to install.

Q. These things that you are talking about now, were they already projected on the plan of the architect—not the architect, well, I guess the architect or surveyor's plan of the park? In other words—

A. Gordon had some—had a projection of his own. But we didn't want to follow the projection that he had.

Q. I see.

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A. We changed it to another location—in fact, we changed it over from a corner into the circle and decided to build in a circle rather than there. The decision, the final decision, on that took place sometime in March.

Q. Now, within the building—and I referred to it earlier as probably the office building of Rosewood Park—is there anything on the wall, chart of the cemetery, with the lots and so forth laid out?

A. Well, as you come in the office there is a big mural. I don't know if it's there now or not. But there was a big mural of the park showing it as it would be when it was completed. In other words, an outlay of the gardens with drawings of what would go into each section.

Q. And from a sales standpoint, how do your salesmen—how did they record what had been sold and so forth?

A. We had plats that we—when we make sales we had a plat layout of the plans and we would red them out on the plat. That is the undeveloped part.

On the developed parts there were plats of the section that we would red out as they were sold.

Q. Where were these plats displayed?

A. The main part of the control was in the front office where the receptionist was kept. The others were back in what was Gordon Ware's office.

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Q. When the Cobbs and Mr. Williams and so forth, when they were down the first time, of course, you were fully familiar with all of these particular things, were you not?

A. Yes.

Q. When they came down the first time were they shown all through the park?

A. Yes, sir.

Q. And the office and these plats and plans and everything?

A. Yes. We went over the entire park and looked over everything.

Q. Now, on these plats and plans, would it show the sidewalks, streets and so forth like that?

A. Yes.

Q. Would it show on the developed ones or the proposed ones, or—

A. No, there was—it showed the developed and the projected plans for a portion of the undeveloped properties.

Q. Could you, from the charts, could you find out by looking at it—in other words, I am speaking of your working charts that you were referring to, would you know from that whether a sidewalk or street had been developed or was still in the projected or undeveloped stage?

A. No, you couldn't tell by looking at that, at the plat, whether it had been or not.

1-16/20-69 page 291 } Q. How would you tell?

A. Going out and looking on the grounds.

Q. In other words, if you just made use of these charts and looked around outside you could tell the state of development?

A. Yes.

Q. You mentioned a whole mausoleum that hadn't been built; is that correct?

A. That is correct. Well, we were selling the mausoleums. We had not yet developed it.

Q. Yet sales on that were being made prior to the purchase?

A. Oh, as much as a year before.

Q. All right. And I think, if I am correct, just to make sure that the Court understands it, whatever your relationship was between you and Cemetery Consultants, that came to an end; is that correct?

A. That is correct.

Q. There is pending a suit between you and them now over some differences between them on that; is that correct?

A. That is correct.

Q. Do you recall a meeting, the best I can recall, Mr. Castle, a luncheon meeting, maybe at the Pine Tree Inn. Do you recall any such meeting with Mr. Winquist and any other parties?

1-16/20-69 page 292 } A. Yes. Mr. Williams, Mr. Winquist and Gor-

don and I had lunch at either the Pine Tree Inn or Charlie's, or somewhere.

Q. Do you recall when in period of time this took place?

A. I would say sometime in the latter part of January or the early part of February. Somewhere in there.

Q. Do you recall any discussion at that time concerning taxes or anything?

A. Yes, we discussed pretty generally a lot of the points in question and taxes was one of them.

Q. Can you remember anything that was said or done by any of them there?

A. To give an exact statement would be pretty rough, but it was in general the same type of statements covering the tax—what tax liabilities there were and what taxes were due on the cemetery. Just this sort of thing.

Q. Well, let me ask you this, Mr. Castle: Now, apparently the question—when you say "taxes", let's use it in its broad general terms. This was discussed on numerous occasions, apparently?

A. At least three that I know of.

Q. And this dealt with the general tax situation relating to cemeteries?

1-16/20-69 page 293 A. Right. If I may, I had a worry of the fact that we might later be stuck with a high tax. This has happened in the sale of cemeteries because of the way cemeteries are handled. This was a period of time when Internal Revenue and all was just beginning to dig into cemeteries and find out what they were all taxwise, and there were several decisions on cemeteries concerning taxes that varied greatly because cemeteries take on personalities like people, and some people handle their tax structures one way and some another, and so forth. And because of this there are a lot of times a cemetery will owe taxes and yet not even the management themselves would know that they owe taxes until the actual audit by the Internal Revenue.

Q. And then the question of development would come into this?

A. Oh, yes. Your development and all is part of your taxes. In other words, the stages of it.

Q. Do you ever recall any conversation that Mr. Ware had with any of the other principals with regard to costs, development, and so forth, as relating to taxes?

A. Well, I think one of the statements I made awhile ago, one of the things that Gordon said was that if certain things were done, that the taxes would be less. Because of the loss

he had the year before, that this would relate into this according with construction and things going on. It would all be interrelated. In a general discussion.

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Mr. Lam: You may inquire.

CROSS-EXAMINATION

By Mr. MacMillan:

Q. Mr. Castle, you have had quite a broad experience in cemetery work, have you not?

A. Almost 20 years.

Q. How many different cemeteries have you been connected with?

A. I was with National Memorial Park for about 14 years. And then on an overlapping extent I was with J. D. Williams and the Goffs for about two years. I have done consultant work.

Actually, if you say "cemeteries employed", you see, at one time I had—I was associated with two corporations that *controled* all together about 14 or 15 cemeteries. But this was under a contractual basis. We were working as the United Sales Corporation and the American Sales Corporation and Blue Hills Sales Corporation all related in one group up in Boston, Massachusetts, and while I was with National Memorial Park Norman and I took on outside sales contracts over and above.

Q. You don't mean Norman Cobb?

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A. No.

Q. Norman?

A. Marlowe, I am sorry. Mr. Marlowe. There is a difference.

We had some outside interests along with the running of the National Memorial Park and Park Lawn Cemetery.

Over the past couple or years, or three years, however long it's been since I left Rosewood, I have been associated with more cemeteries than before because I have moved around quite a bit since then. But for the last year and two months I have been with Greenwood Memorial Park.

Q. What I was getting at is, is it not customary for persons such as yourself to be somewhat of a sales manager under the owner and then to actually sell for the owner? The employment contract is one in which you have a—has been put in—a sort of sales agreement for the owners?

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A. It can operate anyway you want it to. Some people operated under sales agreements. Some operate directly with the cemetery. It just all depends on what you are doing at the time.

My situation was a unique one, to say the least, because I did do a lot of outside contracting along with my employment through other cemeteries without contracts.

I was never under a contract, for instance, for 14 years with National Memorial Park. But at the same time we did take contracts from other cemeteries.

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Q. Well, take when you went to work for Mr. Ware. He was still the owner and general manager, wasn't he, in November, 1963?

A. Yes.

Q. And in that situation you were a salesman under him?

A. Salesman and then I had a verbal agreement with him as a separate contract because of an arrangement we had with a fellow on the sale of lots and bronze. I took on the crypts and mausoleum end of this as a separate arrangement.

Q. Now, there has been introduced an earlier sales agreement with individuals. I think it was dated March 6th, and subsequently the agreement was something with Cemetery Consultants?

A. Yes.

Q. When the corporation did the purchasing?

A. Right.

Mr. MacMillan: We would like to introduce that just so the record will be clear on that.

The Court: That is Plaintiff's Exhibit Number—

Mr. Lam: It's already been introduced, Judge. If you look at it—

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Mr. MacMillan: That is a prior agreement, Mr. Lam.

Mr. Lam: I just gave it to him.

The Court: This is dated April 1, '64.

Mr. Hudgins: Yes, sir, we have never seen that, Judge, excuse me. April 1, '64. This contract is after the date of the contract we are here in question about.

The Court: Mr. MacMillan, this is April 1, '64 between this witness and Rosewood, which resulted after the individuals changed to a corporate purchase.

Mr. Lam: Has nothing to do with this. Executed between him and the other people.

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The Court: That is before Rosewood was dissolved, apparently.

Mr. MacMillan: Yes, sir.

Mr. Lam: Before it was dissolved but after Mr. Ware was out of it.

Mr. MacMillan: It was simultaneously part of the transaction in which the March 10th agreement was executed.

Mr. Lam: Your Honor, how can it be simultaneous? How can it have anything to do with—

The Court: Because the one on March 10th
1-16/20-69 was dated back.
page 298 } Mr. Lam: March 10th was dated back.

The Court: It happened in the latter part of March.

Mr. Lam: But how can a contract, apparently that was entered after the sale, and this is dated the 1st day of April, '64, and there has been no testimony going into that between —how can a contract between Mr. Castle and the purchaser, Cemetery Consultants, have anything to do with the litigation between Rosewood and/or Mr. Ware and the Cemetery Consultants?

The Court: Have anything to do with showing the intention of the parties when they entered into the contract as regards to taxes.

Mr. MacMillan: Your Honor, they have introduced an employment agreement through this witness.

Mr. Lam: Which was made prior to the sale, too.

Mr. MacMillan: Let me finish. Which was a part of the March 6th agreement and that agreement was at a time when the individuals were purchasing it. When the change was made from a personal purchase by Mr. Cobb, his sister and

J. D. Williams, to a corporate purchase by Ceme-
1-16/20-69 tery Consultants, at the same time that employ-
page 299 } ment agreement that has been introduced was altered and this is the agreement that took its place.

The Witness: Could I see that, please?

Mr. MacMillan: As part of that transaction.

Mr. Lam: Your Honor, I am simply saying it would have nothing to do with Mr. Ware. I don't know if it was entered after or anything else?

The Court: I will admit it for whatever probative value it might have. You except to it.

Mr. Lam: Note my objection and exception for whatever value it has, Judge, not knowing what it is or anything else.

Mr. MacMillan: Could we get it marked, your Honor?

The Court: The contract of employment which I have marked Plaintiff's Exhibit Number 4.

Mr. Lam: It's not Defendant's, your Honor.

The Court: It says Defendant's.

Mr. MacMillan: Complainant's.

Mr. Lam: It's a complainant's exhibit.

Mr. MacMillan: We are offering it.

The Court: Should be 4.

1-16/20-69 page 300 } Now, I have Plaintiff's Exhibit 1, Plaintiff's Exhibit 2, Plaintiff's Exhibit 3 and what you have just handed me is Plaintiff's Exhibit 4.

The Witness: Your Honor, could I see that, please?

By Mr. MacMillan:

Q. Mr. Castle, you have described your experience of some 20 years in the cemetery business and I think you indicated also that you are the person who first contacted Mr. Williams to see if he was interested in purchasing this cemetery from Mr. Ware, and then—

A. No, sir, you have got that just a little bit wrong. I contacted Mr. Cobb about borrowing some money to buy the cemetery myself.

Q. Did you go with Mr. Williams to see Mr. Cobb that day?

A. No, sir.

Q. The first day?

A. No, sir. I went to Mr. Cobb all by myself.

Q. All right, sir.

A. Because I was interested in getting the cemetery for myself. At that particular moment Mr. Williams and I was a little bit on the outs. But then through—I don't know how Norman and them got hold of J. D., but evidently to check on some work I had done for them, they got together and then the next thing I know Mr. Williams is wanting to get involved in this project and then is where we got together on it.

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Q. I see. Now, you say that during that period you had a friend who was already in the cemetery business, is that correct, who was advising you on this deal?

A. Mr. Norman Marlowe.

Q. He also had had experience in the cemetery business?

A. Quite a bit. Spent his whole life in it, in fact.

Q. He is the man who cautioned you about being careful about Federal taxes, Federal and State income taxes?

A. I don't know about Federal and State income tax, but tax liabilities as such.

Q. And he said to be sure and get a clause in the contract, I think you have testified—

A. To see that we were well protected against such eventualities, yes.

Q. That is why you came to the meeting on February 6th?

A. That wasn't why I came to the meeting, but let's say it was discussed.

1-16/20-69 page 302 } Q. I haven't finished the question. That is why you came to the meeting on February 6, 1964, being very conscious that in negotiating this contract that there be a clause protecting the purchasers against any outstanding liability?

A. I wouldn't say that that was the purpose of the meeting at all, but I would say—

Q. I didn't ask you what the purpose was. I said, you came to the meeting being conscious of the need for a clause protecting you against the—the purchasers against tax liabilities because Norman had cautioned you about it?

A. Well, let's say I was aware of that from the very outset and the meeting, of course, didn't have too much to do with it, but I was aware of it through the entire proceedings.

Q. Was there any mention that night of having a clause in the agreement against taxes?

A. There was a discussion on taxes. So to say whether there was a clause to be put in or not, that was up to the attorneys.

Q. All right, sir. You wanted to be protected against taxes.

Mr. Lam: He is putting words in his mouth.

Mr. MacMillan: The witness is on cross-examination.

1-16/20-69 page 303 } Mr. Lam: I am making an objection. I hope you don't mind if I do it. He has repeatedly asked him wasn't he conscious of it and so forth and then asked him the question and that was the reason the clause was put in it and he answered he didn't know if there was any clause put in there with respect to that. Now he is coming back with—

The Court: I think we have covered it. Said he was aware of it when the meeting was—

By Mr. MacMillan:

Q. Now, I think, Mr. Castle, you have testified that at some point there was some improvement to these crypts. There was some improvement to the crypts after—

A. No.

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Q. —after the date of purchase?

A. I said there were no such things as crypts until after the date of purchase. The entire thing was brand new and had to be built by May 1st. Had to be started according to the contract. No crypts of any kind existed in the park until after May 1, 1964.

Q. Do you recall how long it took to build them?

A. Approximately six weeks, I would say.

1-16/20-69 page 304 } Q. And then I assume you had to borrow the money to pay for them or get the money to pay for them after you had them built?

A. No, sir. Mr. J. D. Williams, who happens to be a builder, and his brother, who is foreman on his job, built the crypts with an arrangement with Cemetery Consultants that they would pay for them after they were completed, and Mr. Williams, I know, charged some interest on his money while he had it being developed. But this arrangement was between Cemetery Consultants, Mr. Williams and his brother, I would imagine.

Q. So Mr. Williams built these crypts and then when they were completed he presented a bill and the bill was paid?

A. That is correct.

Q. Were you the manager during that period?

A. Yes, I was.

Q. Do you know where the money came from to pay him for the crypts?

A. Yes, sir.

Q. Where did it come from?

A. Out of—let's see, I believe—some of it came out of sales. I would say all of it came out of sales.

1-16/20-69 page 305 } Q. What did it cost to build them, do you remember?

A. I think the total, the total thing, came to somewhere in the neighborhood of twenty-three or twenty-four thousand dollars.

Q. And you think that the money came from sales? Any part of it come from a bank loan?

A. It could have. Mr. Cobb there and Mr. Williams took care of those matters. Mavis and them took care of the banking matters themselves.

Q. So that if the bank loan had been acquired to pay that on February 9, 1965, it would not have been at the time of sale that these improvements were put in?

A. Would you say that again now?

Q. If a bank loan was made in February, 1965, to pay for

these crypts, it would have been in 1965 that the crypts were put in and not in '64, as you recall it?

A. The crypts were put in in 1964.

Q. And so they didn't borrow the money for a year later?

A. If they borrowed money for the crypts, I don't know why they would have done it because by that time there was plenty of money to cover it. There was an escrow amount that the Bank of Virginia Beach—that more than covered that and I believe Mr. Cobb, himself, went down and had them release some monies related to this. As far as I

1-16/20-69 can remember on it.

page 306 } Q. And that was done in '65, was it not?

A. As far as I am concerned, it was done in the year 1964 when the crypts were built.

Q. All right, sir.

A. Let's put it this way: Mr. Williams presented the bills for it during that period of time and the bills were paid, including interest.

Q. Your recollection was that it was '64?

A. Yes.

Q. Instead of when the money was borrowed?

A. Right. As related—not borrowed, this was pretty well —well, if sales is borrowing money, then let's say it was borrowed money. But the sales were there to cover the expenses. And it was paid for out of sales.

Q. Now, as I recall, at the same time that the sales transaction was going on between these parties, Cemetery Consultants and Mr. Ware, you and Mr. Ware were also having transactions between you with respect to the sale, were you not, which were not disclosed to the purchasers?

A. Gordon and I had an arrangement between ourselves, yes.

Q. Tell us what that arrangement was.

A. I had an arrangement with Mr. Ware whereby he would loan me $5,000 to help see that the cemetery had

1-16/20-69 money enough to get running, and another ar-

page 307 } rangement with him related for a difference of—

I believe it was somewhere in the neighborhood of $7,000, and I assumed that obligation myself with Gordon on the understanding that if I continued with the cemetery I would repay him. If not, that was it.

Q. And Mr. Ware has testified previously that you asked him to keep this quiet from the other purchasers, from Mr. Cobb and Mr.—

A. I made no such statement.

Mr. Lam: Hold on before you answer that. I recall nothing in any testimony from Mr. Ware that he has said anything about keeping anything quiet, nor.

Mr. MacMillan: Let us get that. We might as well stop right now and get it.

Mr. Lam: Your Honor, if he is going back to the depositions, that is one thing. When he says "testimony", I was making reference to what has been testified here today. But, anyway, he can look for that, too, if he wants to. I distinquish testimony from depositions, may it please the Court.

Mr. MacMillan: Do you want me to look it up or do you recall that he said that?

Mr. Lam: I do not recall it, no. I would rather you look it up because I don't remember what he said.

1-16/20-69 page 308 } Mr. MacMillan: Your Honor, I would like to read Pages 84, 85 of the transcript to the Court on this issue.

The Court: This is an examination of Mr. Ware?

Mr. MacMillan: Examination of Mr. Ware.

The Court: On what date?

Mr. MacMillan: "I assume, Mr. Ware, that you wanted him, that is, Mr. Castle, to pay this eight thousands dollars additional purchase money, which, in your mind, was the Higgenbotham note because you didn't know whether Higgenbotham was going to pay the note or not; is that the problem?

"No, I wasn't worried about it, just worried about when—" he was going to pay 'when' he says.

Yes, worried about when he was going to do it.

"Answer: Yes.

"Question: So actually you could have collected twice? You could have collected from Mr. Higgenbotham and you could have—you could have, also, a claim against Castle for this $8,000, couldn't you?

"No, I couldn't collect it but once from Higgenbotham. I don't think he would be foolish enough to pay it twice.

1-16/20-69 page 309 } "Question: No, I mean, you could have collected from Higgenbotham, still Castle would have owed you the eight thousand on the purchase price.

"Answer: There was a potential of this, yes, because this is one of the incentives he offered me to buy—sell, rather.

"Question: I understand.

"Answer: Okay.

"Question: The total price of $200,076.05 would not have induced you to sell?

"Answer: The note was the difference.

"The note was an additional inducement to you to sell?

"Answer: Right. Although I did sell at the same price because I hadn't collected my difference from Charlie on the note and I loaned him five, so I would have wound up with the same price.

"Question: Have you collected the eight-thousand-dollar note?

"Answer: No.

"All right. So Castle, in effect, said, 'I will give you this note to induce you to sell, but just don't tell the purchasers that I am giving this note.'

1-16/20-69 page 310 } "Answer: He didn't want them to know right then. Said wait a week or two or three.

"Question: And I think—again I am not tricking you—our records would indicate that you called Mavis about a year later when he stopped paying this $50.00 a month—

"He wrote her—I wrote her a letter way before then.

"Question: You had written her a letter before then?

"Answer: Way before then, and I told her it was between the two of us."

By Mr. MacMillan:

Q. So Mr. Ware did testify, Mr. Castle, that you asked him not to disclose to the purchasers that you were giving this $8,000 note which in Mr. Ware's mind was the Higgenbotham, which was shown on the balance sheet. Do you deny that?

A. I deny the fact that it had anything to do with the Higgenbotham note. I simply told Gordon, "Just make out a note for the amount of money that was the difference and I would pay it.

Q. Difference in what he wanted to sell for?

1-16/20-69 page 311 } A. Right. In other words, if it's going to make a difference of holding up the sale I would pay the $7,000 myself and it didn't make any difference whose it was. And it wasn't related to any particular note. It was related to a difference between a sales price and a sales figure that Gordon had coming to him according to our discussion in setting up this sale.

Q. I show you a note dated March 6, 1964 which you signed. Will you identify that for us? Is that the note?

A. That is it.

Charles F. Castle, Sr.

Mr. MacMillan: We would like to mark that, your Honor.

By Mr. MacMillan:
Q. Is this the $5,000 note which also was between you and Mr. Ware?
A. Looks like it. As far as I can see, it is.

Mr. Lam: Do you mind letting us see them?
Mr. MacMillan: Got them from you. Mr. Ware gave them to you.
Mr. Lam: I am sure I gave you everything, but I just want to see what they are.
Mr. MacMillan: Your Honor, I would like to have it introduced and marked, a note dated March 6, 1964 in the sum of $8,000, Charles F. Castle, payable to Gordon H. Ware.
The Court: Plaintiff's Exhibit Number 5.

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page 312 } (Whereupon, the foregoing note was marked for identification and received in evidence as Plaintiff's Exhibit No. 5.)

Mr. MacMillan: I would also like to introduce a note dated March 6, '54, from Gordon—*paybble* to *Grodon* H. Ware in the sum of $5,000, signed by Charles F. Castle.
Mr. Bowers: 'Sixty-four.
Mr. MacMillan: 'Sixty-four. Excuse me, your Honor.
The Court: Plaintiff's Exhibit Number 6.

(Whereupon, the foregoing note was marked for identification and received in evidence as Plaintiff's Exhibit No. 6.)

By Mr. MacMillan:
Q. Are those notes still outstanding?
A. A portion of them. One of them is. One is now null and void because of my discontinued employment by Rosewood. The other one—
Q. Which one are you referring to there?
A. The $8,000, not the $5,000 note I still owe Gordon money on. I have paid him a portion of it. I don't know exactly how much. But I have paid him, oh, I know for a year or two there. How much more I owe I don't even

1-16/20-69
page 313 } know myself. But I do owe him a portion of that $5,000.
Q. Does he recognize that the $8,000 note is paid and released?

Charles F. Castle, Sr.

A. Yes. I would think so.
Q. Has he given you any writing to that effect?
A. No. I think the note, itself, is self-explanatory.
Q. In other words, you rely on whatever the note says?
A. Yes, sir.

Mr. MacMillan: We have no other questions, your Honor.

REDIRECT EXAMINATION

By Mr. Lam:
Q. Mr. Castle, one question. You mentioned the crypts, I think costing somewhere in the neighborhood of twenty-three or twenty-four thousand dollars.
A. That was the crypts and mausoleum.
Q. Was this according to this cost factor, was this according to the plans that were originally had?
A. Of the original plans.
Q. With respect to what was originally intended for these—
A. No, I think Gordon's original plans would have cost quite a bit more.
1-16/20-69 page 314
Q. What happened to reduce it?
A. Mr. Williams came up with a different idea of installing the below-ground crypts which were much less expensive than the type of crypt that normally was thought of at that time. He developed a crypt based on a concrete block and slab arrangement which was quite adequate and serves very well. Took the place of this.
Q. Didn't have any trouble with them afterwards?
A. I ain't been around there long enough to know.
Q. Do you recall anything about any falling-in or anything like that?
A. No, sir, not that I know of.
Q. Not while you were there?
A. As far as I know, they have been very—
Q. All you know this was considerably less than had been projected by Mr. Ware as the cost of them?
A. Yes. Considerably. It was less than would have been projected by myself, even. I would have projected at least double the amount.

Mr. Lam: All right, come down, sir.

(Whereupon, the witness was excused.)

Joe L. Godwin

Mr. Hudgins: Call Mr. Godwin, please.

1-16/20-69 page 315 } JOE L. GODWIN, called as a witness, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Hudgins:
Q. State your name to the Court, please.
A. Joe L. Godwin.
Q. Mr. Godwin, you are a resident of the City of Virginia Beach?
A. Yes.
Q. How are you employed?
A. I am a Certified Public Accountant.
Q. How long have you been a C.P.A.?
A. Fourteen years.
Q. Fourteen years? Mr. Godwin, I show you Defendant's Exhibit Number 2.

Mr. MacMillan: Your Honor, we want to object to this witness on the grounds that unless there is some showing that he knows something factually about the issue in dispute here today, we would oppose his testimony today. To my knowledge I haven't heard his name mentioned until this minute in this extended hearing as having been employed or
1-16/20-69 page 316 } being present in 1964 or '64 or any other time pertinent to these matters and I would like to formally object to his testimony today on the issue that was made for today.

The Court: Does he know anything about the issue today?

Mr. Hudgins: Your Honor, he is here, we have him here for the purpose of examining and explaining an audit report by a C.P.A. and interpreting the same and to say what he thinks it means and the questions it may raise, and I think we have had testimony previously that Mr. Swart had this report in his hands. We have had testimony as to Mr. Winquist, by him, as to what it means and I think we are entitled to have Mr. Godwin testify as an independent witness as to what he thinks it may mean. We stipulate he had nothing to do with the deal.

Mr. MacMillan: Mr. Swart and Mr. Winquist were both present when they were negotiating. Mr. Godwin was not

present. He is being put on the witness stand to say how he would have interpreted a report which Mr. Winquist has already prepared and been examined on.

The Court: That is going to be a matter of another hearing, should the Court in this instance hold it's
1-16/20-69 covered.
page 317 } Mr. Hudgins: Judge, I think it goes to the question of whether or not it's disclosed or undisclosed if a reading of this particular report by the appropriate witness would reveal that the question of taxes is disclosed, and it certainly has something to do with the question before the Court today.

Mr. Lam: Let me suggest this thing to you: Both Mr. Winquist was in a prejudiced position being involved in the thing. Mr. Swart was in a prejudiced position being involved. If they both made mistakes they both would seek to correct them here. We have a right to call an expert witness on a matter of this nature and this is interpretation of a financial statement. He comes here only as an expert with regards to background without having any factual knowledge. Otherwise he wouldn't be able to testify as to opinion. Only if he is in an expert position.

This is our purpose of bringing him here today, to interpret a financial report as an expert. And this certainly the Court should know because the only two witnesses that have testified to it so far have been, by being involved in it, somewhat prejudiced in their positions.

1-16/20-69 The Court: Well, how long are you going to
page 318 } take with him?

Mr. Hudgins: Judge, I have very few questions of him.

The Court: Well, I don't know if it's going to have any bearing on the issue that is before me because the issue is not what the—the issue here is whether or not the contract of March 10, '64 covers Federal and State taxes. That is the sole issue. I am trying to determine it by what they contemplated, what were the intentions of the parties at the time they entered into this contract.

Mr. Lam: Yes, sir. Don't forget the word "undisclosed", your Honor.

Mr. Hudgins: I think their knowledge at the time is important also, your Honor,

Mr. Lam: I think the Court keeps going around this thing because he doesn't see taxes spelled out.

The Court: Well, go on.

Joe L. Godwin

Mr. MacMillan: I except, your Honor, and I point out we were cut off from examining these other witnesses because your Honor said you were going to hold us right to this.

The Court: It's not going to be binding on me,
1-16/20-69 I will tell you that right now.
page 319 } Mr. Lam: The reason he was cut off, his memory gets cut short, because this tax proposition was something that came after the contract date. We are now dealing with a document dealing with the time prior to the contract being made.

We would like it for the record, your Honor.

The Court: If you insist on putting it in the record, go ahead.

Mr. Lam: We do want it for the record.

By Mr. Hudgins:

Q. Mr. Godwin, have you had occasion to examine a copy of this particular report?

A. Yes, sir.

Q. Was this at my request?

A. Yes, sir.

Q. Mr. Godwin, in reading this report as a Certified Public Accountant—

The Court: What report are you referring to?

Mr. Hudgins: This is Defendant's Exhibit Number 2, your Honor.

The Court: The one that was attached to the contract?

Mr. Hudgins: No, sir, the one that was sent
1-16/20-69 to Mr. Swart previously. The audit report dated
page 320 } October 22, 1963.

The Court: All right.

By Mr. Hudgins:

Q. In examining this report as a Certified Public Accountant are there any items or statements in this report that would raise the question in your mind concerning taxes and, if so, would you point these out to the Court?

A. In reading it, on Page 3, the accountant, and I will read, informs everyone that, "Cost allocated to collections on sales and charged to operations for crypts sales and for Project Four has exceeded development cost incurred through July 31, 1963 by $2440.34, and $3,857.58 respectively. This results from sales having been made from these sections at a rate greater than the rate at which they are being developed.

This condition normally exists in the years immediately after the date at which the first sales from a section are made."

Then he goes on and says, "Prior to completion of development of a section costs charged to operations, as a result of lot sales made in this section, have been determined by use of engineers' estimates of total expected costs, development costs, for such section." Which means when they sell a lot, they use an estimated cost.

Now, my next concern would be, and this is
1-16/20-69 reflected in the statement, in looking at it, the
page 321 } next thing I would go to, go to the tax return to see if the tax return was made on this basis because so many times a report will be on one basis and a tax return will be on another.

And this I did, and the July 31, '63 return was done on this estimated cost basis.

Mr. MacMillan: Your Honor, I object. He is now telling that after reading that report he carried on an investigation of a document that was not available to Mr. Swart and now going to testify what that document was.

Mr. Hudgins: Judge, he just testified that would be a question in his mind. As far as I—

The Court: Not going into that?

Mr. Hudgins: Not going into that at all.

The Court: All right.

By Mr. Hudgins:

Q. Mr. Godwin, is there anything else in this audit report or balance sheet or attached exhibits that would raise the question of taxes? And if so, which ones?

A. When we get into the income statement we see that the cost of sales is given to us in Schedule B-1, which is strictly based on a percentage. And we know that somewhere along the line if we use estimated costs, that it's got
1-16/20-69 to be adjusted to actual sometime.
page 322 } Q. Let me ask you this question, Mr. Godwin: Would this report as is, not going outside of it to any other documents, in light of your general knowledge as an accountant, reveal to you the possibility of an adjustment in taxes due to the fact of estimated costs being used?

A. Yes, sir, definitely.

Mr. Hudgins: You may cross-examine.

Joe L. Godwin

CROSS-EXAMINATION

By Mr. MacMillan:

Q. Mr. Godwin, as I understand it, you were not personally present or knew nothing of this transaction until this suit arose?

A. That is correct.

Mr. MacMillan: We have no other questions, your Honor.

The Court: Stand down.

(Witness excused.)

The Court: Call your next witness, Mr. Lam.

Mr. Lam: That is all we have, your Honor.

The Court: Gentlemen, care to argue the matter?

Mr. MacMillan: Yes, sir.

1-16/20-69 page 323 } Mr. Lam: Just a second. Before I got in here, your Honor, I had asked that we conclude our evidence—one of our attorneys who is important to this thing has had to leave because of another commitment. And I told you that I felt under the circumstances I wasn't equipped physically and mentally to continue the argument. We have, one, concluded the evidence. I will be glad to do it this Friday or next Friday.

The Court: How about tomorrow morning at 9:00 o'clock?

Mr. Lam: Judge, I don't feel well today and I made a special effort to get here. Now, I had two cases pending this morning and I would have canceled the one if it hadn't been for the other because of the way I felt. Now, I don't know if I am going to feel any better tomorrow. I feel like I ought to have some recovery. Other people have been out with the flu. I don't know whether I have it. I haven't lost a day yet. But, I mean, it's not easy to think and what-not.

1-16/20-69 page 324 } The Court: You don't look like you are too sick. You feel bad?

Mr. Lam: Not real bad. I just feel sort of weak and so forth and I have spent all day in bed yesterday trying to be in shape for this and I just think—I am not even concerned about his tax liability or anything else any more. I think I ought to have a reasonable opportunity if I come to Court and say I don't feel like I am in condition to argue a thing, the Court ought to give some consideration to that. We have put on the—

The Court: What day this week would you suggest?

Mr. Lam: I would say Friday, your Honor. I am scheduled, as far as I know, every day this week in Court.

Mr. MacMillan: Your Honor, I will be out of the City on a matter from Wednesday on, this week.

Mr. Lam: We will do it the following week.

Mr. MacMillan: This is the second trip this gentleman has made now and he was here and could have stayed over one night and heard it the next morning, and I am not fussing with anybody except to say that there has been a studied effort to keep us from having a hearing and a decision in this matter when the matter is before the Court. There is no justification. They have got three lawyers, any one of whom could argue the relative simple matter. I don't
1-16/20-69 even need five minutes to argue it, ten at the
page 325 } most, and I submit parties have a right and you can't just jerk them around and the lawyer leave the Courtroom and go to—

Mr. Lam: Show me the studied effort. Now, you are making a personal attack on me. What studied effort? Name one example.

Mr. MacMillan: I will name one. January 10th, the record will show your Honor that a hearing was held to continue this entire matter. I am not talking about the one we had the day Judge Wahab was unable to handle it. I am talking about the Friday before that. No desire to proceed with this case.

The Court: You say you are going out of town Wednesday?

Mr. MacMillan: Yes, sir.

The Court: What time Wednesday?

Mr. MacMillan: All day. Be gone all the way from Wednesday to the end of the week on a matter in New York.

The Court: Of course, I don't want Mr. Lam to argue it tomorrow if he doesn't feel like arguing it, if he has been sick. I am going to make him move it along. I am not going to let him—

Mr. MacMillan: Do I understand that Mr.
1-16/20-69 Cobb can recover his expenses, your Honor?
page 326 } Mr. Lam: He doesn't need to be here. He didn't testify today and he certainly "ain't" going to testify in an argument on the case. He certainly hasn't got to be here for an argument.

You don't have Mavis here. You don't have—who was the other principal? J. D. Williams here. I mean to argue a case —I don't recall many arguments which are legal arguments on the facts of a case where the principals have to be present. I can't think of any.

The Court: Gentlemen, I will give him a few days but that is all I want to give him now. He is going to be out of town.

Mr. Lam: I am not going to be out of town, your Honor.

The Court: But tomorrow is the only day. He says he can't take it tomorrow. Now, you can't take it through Friday. Now, let's start with the first day next week and see what we can do.

Mr. MacMillan: All right, sir. Is that the 28th? What date is that?

The Court: All right, Wednesday, January 29th at 9:30.

1-16/20-69 page 327 } NORMAN COBB, called as a witness on rebuttal, having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION (Rebuttal)

By Mr. MacMillan:

Q. Mr. Cobb, you heard Mr. Castle testify that the crypts were built before April 1, '64. Do you have a recollection when that work was done?

A. Yes, sir.

Mr. Lam: Your Honor, that wasn't the testimony.

The Court: He said it was built in '64.

Mr. Lam: Right, he said in the question that they were built after April 1, '64.

Mr. MacMillan: All right, May 1, '64.

Mr. Lam: Mr. Castle didn't say that.

The Court: He said they had to start by May 1, '64 and they got under the wire.

Mr. MacMillan: In April.

By Mr. MacMillan:

Q. Did you hear that testimony?

1-16/20-69 page 328 } A. Yes, sir.

Q. Do you recall when that work was done?

A. Yes, sir.

Q. When was it done?

A. Sometime in the first part of '65 because we borrowed the money from the Bank of Virginia Beach on February 9, 1965 in the amount of $50,275 to pay for these crypts.

By the Court:

Q. Did you pay for them in advance?

A. No, sir. After they were finished.

Q. It was completed then in February of '65?

A. Yes, sir. We paid for them and borrowed the money on February 9th.

Q. Of course, they could have been built in '64 and settled in '65?

A. But Mr. Castle testified it took six weeks to build them and that is about right.

Q. They were built six weeks before February 9, 1965?

Mr. Lam: We aren't going to accept your statement.

The Court: That is his testimony.

Mr. MacMillan: We have no other questions.

1-16/20-69 page 329 } Mr. Lam: Take the stand, Mr. Cobb, sir. I would like to inquire, Mr. Cobb. Take the stand. Take the stand, please, sir.

CROSS-EXAMINATION

By Mr. Lam:

Q. You have testified previously that you only came down here once during the course of all the proceedings with regards to the negotiations of this purchase; is that correct?

A. We came down here—

Q. When, or do you know?

A. Mavis, J. D. Williams, myself and Charlie Castle. I rode down with Charlie Castle. I paid the toll. The Yorktown Toll Bridge of seventy-five cents. Charlie Castle asked for and kept the receipt, but I paid the toll.

Mavis rode down with J. D. Williams. First part of February—I mean, January, 1964, to see the cemetery. That is the only time we were down *her* until after February 6th when it was—when the contract was closed.

Q. How many times have you been down since then?

A. I couldn't reply to that because that has been any number of times.

1-16/20-69 page 330 } Q. How come your attorney was raising such a fuss about your coming down here just two days this time, if you have been down so many times? This is nothing unusual.

A. I own it now. At that time I didn't own it.

Q. But it's no real problem for you to come to Virginia Beach?

A. No problem, but it's expensive for you to come down.

Q. You have been coming down?

A. Yes, as an owner of the cemetery. Any prudent businessman is going to do that.

Norman Cobb

Q. Were you there when the crypts were started?
A. I was part owner of the cemetery at that time.
Q. I didn't ask you that. I said, were you there when they were started?
A. When the first spadeful of dirt was turned?
Q. When the first spadeful of dirt was turned.
A. No, sir.
Q. Were you there when the last spadeful of dirt was turned?
A. No, sir. That was under the auspices of J. D. Williams.
Q. Were you there at any time the crypts were under construction?
A. I may have been.
Q. I didn't ask you if you may have.
1-16/20-69 A. I have to answer I may have been. I can't
page 331 } say yes.
Q. You mean your memory is not that good?
A. I am not relying on my memory. I am telling you the truth, sir. I may have. I couldn't say whether I was there while it was under construction or not.
Q. But you just got through here and said they didn't start until 1965, didn't you?
A. Mr. Castle testified about six weeks during the process of construction for six weeks, so we borrowed the money on February 9, 1965. So six weeks prior to that would be the first part of January.
Q. So when the Judge asked you whether you knew when they were started you said you based it on that; is that correct?
A. That is right.
Q. So you really weren't here and you didn't see it started?
A. I didn't see a spade of dirt turned, no, sir.
Q. And you didn't it during the period of construction?
A. I didn't say that. I say I may have.
Q. But you have no memory of it—
A. I said I may have been here. I don't deny it. I don't admit I was.
1-16/20-69 Q. Let's get down to it. Did you ever see it in
page 332 } construction? The crypts?
A. I may have.
Q. Can you remember ever seeing it?
A. I could have, but I don't remember definitely.
Q. You can remember one little piece of a conversation that took place on February 6, 1964. You can do that, can't you?

Norman Cobb

A. Yes, I signed my name.
Q. On that date?
A. February 6, 1964, yes, sir.
Q. A contract was drawn up and signed that night?
A. No. We didn't sign it that night. We signed it March 6, '64, not February.
Q. Well, then, your memory is sort of faulty, isn't it, Mr. Cobb?
A. No, sir, not on that.
Q. But it is faulty when you come to the crypts because you can't remember whether you ever saw them under construction?
A. I don't know if I saw them while they were under construction. That is Mr. Williams' project, he is the builder, not me. I am a banker.
Q. The $150,000 borrowed, who was it paid to?
A. To First & Merchants. I mean, Bank of
1-16/20-69 Virginia Beach. That is the note payable to
page 333 } them.
Q. I know where you borrowed the money. Who did you pay it to?
A. Put it into Cemetery Consultants and they paid J. D. Williams.
Q. You are sure of that?
A. Yes, sir, because they borrowed the money.
Q. How close to the date of that?
A. The date it was borrowed?
Q. How close to that date did you pay J. D. Williams?
A. Now, when the check was drawn to J. D. Williams, I don't know.
Q. So it could have been drawn at the latter part of 1965, couldn't it?
A. Could have but it wasn't, I am sure. Could have.
Q. You sure of that now?
A. No, sir.
Q. You think it would be right in the same period of time, then?
A. It was within—it was paid to Williams within a reasonable time shortly after February 9th.
Q. Or a reasonable time afterwards?
A. Yes.
1-16/20-69 Q. So you could have borrowed the money a
page 334 } reasonable time after the crypts were finished?
A. Mr. Lam, I am not in the habit of borrowing money, paying interest on it, and letting it lie idle in the bank.

Norman Cobb

Q. I see. So it's because of that habit is your only memory of when these crypts may have been done; is that right? Suppose there had been no need. Mr. Castle testified that the cost of the crypts was at least twenty-three or twenty-four thousand dollars but you only borrowed fifteen.

A. That may be true, too. An automobile I buy might cost $7500 but I might borrow $500 to pay for it.

Q. Did you pay Mr. Williams in full?

A. Yes, sir, as far as I know.

Q. And his bill came out to an even fifteen thousand?

A. Fifteen thousand, seven hundred twenty-five dollars. What his bill came to I don't know. I don't have his bill.

Q. How much did you actually borrow?

A. Fifteen thousand two hundred seventy-five dollars.

Q. Let me see what you are reading from. Where did you get the information for these notes?

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A. From the First & Merchant National Bank, Virginia Beach branch.

Q. When you went out a little while ago?

A. When I went out and made the telephone call. The note is signed "Cemetery Consultants." And the money is loaned strictly on my endorsement, Mavis Cobb and J. D. Williams.

Q. You were down here, then, on February 9, '65?

A. Could have been.

Q. Could have been? Borrow any money from anybody else around that time?

A. For this purpose?

Q. For any purpose.

A. Personal?

Q. No, in dealing with Cemetery Consultants did you borrow any other money while you have owned Cemetery Consultants?

A. While I have owned Cemetery Consultants?

The Court: Even if he did—

Mr. Lam: Well, he has picked one date out of the year '65.

The Court: I don't see what, Mr. Lam, it would have to do with whether or not taxes are covered under that contract.

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Mr. MacMillan: Your Honor, I will be quiet because he is on cross-examination. I think counsel is entitled to latitude, but I don't know—

Mr. Lam: *The* put him on, Judge, with respect to this. *The* put him on, Judge.

The Court: I don't think it has any probative value at all

on this issue, but if you want to get it in the record, I will be patient.

Mr. Lam: *I* won't take me but a little bit longer.

By Mr. Lam:

Q. Have you all made other borrowings?

A. Yes, sir.

Q. Can you remember any of the dates of them, anything specific?

A. No, sir.

Q. I see. When you called the bank a little while ago, how did you identify that particular date?

A. They gave me the date.

Q. Well, I mean, what did you do, just call and ask what date you borrowed money?

A. I am well known at the bank. Reg Church is a personal friend of mine. He was at lunch. I called the note teller, told him who I was. Told him the note that was given about three years ago. I wanted to know the date of it and the amount of it.

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Q. A note or any note?

A. This particular note.

Q. I see. And you didn't remember the date and you didn't remember the amount when you asked for it; is that correct?

A. I did not remember the amount. The date the bank gave it to me.

Q. Do you remember any other notes you may have drawn in '64?

A. 'Sixty-four?

Q. Yes.

A. No, sir. We didn't borrow money in '64.

Q. Just in '65?

A. Yes, sir.

Q. The income was high enough in '64 you didn't have to borrow?

A. Sir?

Q. The income was sufficient in '64 you didn't have to?

A. We didn't make any purchases in '64 that I know of. Didn't have to borrow any.

Mr. Lam: All right, Mr. Cobb, that is all.

The Court: All right, see you all on the 29th at 9:30.

(Whereupon, the hearing was adjourned.)

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March 20, 1969

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page PT-1 } Mr. MacMillan: Judge, we had a couple of questions of Mr. Ware and I understand he hasn't arrived. The other matter we had was on a question of subpoena for records that was issued without any notice to us and we have filed a motion to quash those subpoenas and Mr. Bowers was going to cover that for the Court.

Mr. Bowers: Your Honor, please, Mr. Winquist was served with a subpoena earlier this week, *duces tecum,* to bring certain records with him to the hearing today and in addition, Cemetery Consultants was served a subpoena.

Mr. Winquist, of course—we have filed a motion to quash each one of those subpoenas, the day after we have notice of the service of the subpoena. In respect to Mr. Winquist there was an order attached to the notice, to the subpoena, and directing the production of certain records; however, in connection with the production of that order, the Statute, Section 8301, does not appear to have been followed. We were—did not receive notice. We were the adverse party. And that statute was amended to require notice to the adverse party, so we move to strike it and quash it on that ground, as well as the fact that the records, the books and records, writings, *et cetera,* are not material to the issue before the Court; and I want to cover that a little more fully in connection with the subpoena against Cemetery Consultants.

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But, for those two reasons we move to strike or quash that subpoena, in connection with a subpoena served on Cemetery Consultants, a party.

The Court: What was the first one that was served?

Mr. Bowers: Mr. Winquist.

The Court: And the next one was Cemetery Consultants?

Mr. Bowers: That is right, sir. And we move to quash that subpoena on the grounds—several grounds—but the ground that the books and records and so forth were not material or relevant to the issue in this case, and we feel, of course, that

on February 20th, when your Honor so ruled—if you will recall, briefly—the defendant filed a motion for production of these very identical documents. I could read them to you, but they are identical. And after extensive hearing, which I might say was—it was about the fifth or sixth hearing on the motion for production of the very same documents—your Honor ruled that they were not relevant or material to the issue, the issue in this case, and therefore held that the motion should be denied and on March 10th you entered an order supporting your ruling on February 20th. So we say that that really is *res adjudicata.* It's binding and if they weren't relevant at that point—

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The Court: The Court can't change its mind—

Mr. Bowers: —we say if they weren't relevant at that point they can't be all of a sudden relevant at this point.

The Court: I think the Court can change its mind any time during the hearing, but go ahead. I will listen to you.

Mr. Bowers: We feel that is conclusive of the materiality and relevancy of it.

Now, secondly, the motion for production at that time, supplemental motion, spelled out a couple grounds for their request for these particular records. One of the grounds was the manipulation of taxes by Cemetery Consultants, Inc. And I might say, just to give you a little background again on this point, there are two corporations, as you recall, Rosewood Memorial Park—

The Court: Cemetery Consultants is the one that bought the stock of Rosewood?

Mr. Bowers: Bought the stock of Rosewood from Mr. Ware.

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From the very beginning of this action we said the Rosewood records, to the extent we have them, are available. They have always been available.

In the deposition taken of Mr. Ware, in September, some question came up and it stated in there on the record that those records were always available. The tax liability that is involved only involves Rosewood Memorial Park, Inc. They were the only records that were examined by the Internal Revenue Service. Cemetery Consultants' records were never examined. These records of Rosewood have always been available. They are the only ones that could possibly be relevant to this case, and we stand ready to present those records at any time. We have never opposed that.

The Court: I know, but Cemetery Consultants bought the stock of Rosewood and they bought it on a contract—but go ahead.

Mr. Bowers: That is perfectly correct.

I might say that in connection with this motion for production these two grounds were set forth, manipulation of taxes and mitigation of damages, and I would like to just reflect on two points in connection with the clause that we are in here to construe and has been basically construed by the Court; there is 3(b) of the contract: "The seller"—who was Gordon Ware—"hereby assumes responsibility for any and all undisclosed liabilities of the corporation,"—that is of Rosewood, not of Cemetery—"and agrees to save the buyer harmless should any such liability be discovered."

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That is the simple clause and the issue revolves around that particular clause.

Now, in the answer filed by Mr. Ware, in Paragraph 16, Mr. Ware sets forth, other than denying most of the allegations of the complainant, sets forth his defenses, and those defenses are—might I just read to you 16—"your respondent denies that the complainant is entitled to the relief prayed for, or any relief, and by way of affirmative defense states that any tax liability which may have been assessed was disclosed, and further states that any tax liability which may have been assessed was not the result of actions for which your respondent was or is responsible.

And your respondent further avers that the complainant will suffer no damage as a result under the facts."

Now, in connection with the deposition of Mr. Ware taken in September, which was submitted to the Court, if you will recall, in connection with the issue out of chancery it is clear that the disclosure issue—we know what that issue is, we have disclosed that and we had a two-day trial in connection with that—the only other defense really that they raised was that any tax liability which may have been assessed—of course, against Rosewood,—was disclosed, and further states that any tax liability which may have been assessed was not the result of actions which your respondent was or is responsible for. That is the only defense they have raised.

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Now, in connection with that, Mr. Ware was asked, and we have put in the petition for relief, for further relief which we filed last time on February 20th with your Honor, and which we renew today, exactly quotes from his deposition as to how he answered that question, what those defenses consisted of, and he said—and I am going to read you two little points because his attorney agreed with him—that the only defenses that he had was that improvements which were not agreed to but were allegedly stated to be made by the

buyer, were not put in. But he admits, as we have quoted in the petition, that there was no agreement to make these improvements. That is one defense. He says had

3/20/69 page PT-7 } these improvements been put in there would be no tax or these taxes would not be incurred; and, two, that there was some alleged $6900 credited that he had advised the buyers about. And they are the only defenses that were raised to this date.

What I wanted to read, and I have got a couple of things here I want to read to you to orient you properly on this case, because I think it's gotten out of proper proportion and we are arguing on a lot of collateral issues which now tend to really put the State Court in the position of trying a Federal tax case. That is what we are getting down to.

On Page 123 of the deposition, September 20, 1968—September 30th, I am sorry—it says here, September 30th, 1968, Mr. MacMillan states: "It is my understanding that the defendant in this case is telling us on discovery deposition that he knows of no facts which caused this tax liability for which he says he is not responsible, other than the fact that this complainant failed to make improvements, projected improvements, which he says should have been made after purchase. That is the only fact he knows anything about.

"Mr. Lam: Which he says that they said would be made after purchase. He has no control over what

3/20/69 page PT-8 } they do. He has stated that. This was in the discussions, that if they did it it would wipe out a deficiency, if it existed, plus he did state, the $6900. If you were looking at it, you would have two things there."

That is Mr. Lam. And I submit that you can read the testimony beginning some earlier pages, I think about 118, in connection with this specific defense, and it was either by the attorney for Mr. Ware, or by Mr. Ware. There was no basis of any, no defense set up here in this answer, showing or alleging any manipulation of taxes or the failure to mitigate damages alleged, and we have set forth several excerpts in the petition which your Honor has in the file there.

The Court: Let me ask you a question.

Had Cemetery Consultants made certain improvements that you say that they understood, would the tax have been what you claim now?

Mr. Bowers: Let me explain it this way, your Honor: The evidence will show that the projects that we are talking about, Projects Three and Four, covered a substantial amount of the cemetery, maybe a quarter of the total projected part for development, and each section was approxi-

3/20/69 page PT-9 } mately a quarter. The projects or sections were divided into gardens. And Mr. Ware had only sought to develop—for instance, I am taking one example to give you a specific answer—had only attempted to develop two gardens in Section Three. I believe they were Singing Tower and Pythian Gardens. He had projected costs for the total improvements over the whole project but he had sought to develop two gardens within that section. And at the time of the sale, for all intents and purposes, those improvements were made. You can only improve a garden so much. You can't put but so much in it. And I happened to handle the tax settlement and shortly or about the time of the sale, almost all the improvements that could be put in there were put in there. And had Rosewood continued for a period of time—this is the reason it's confusing—had it been continued and not been liquidated there wouldn't have been any substantial difference in those taxes because no more improvements could be put in. The real difference, the real cause of the tax deficiency was merely the fact that Mr. Ware had over-estimated his costs substantially and had not put in those costs, himself.

In other words, you may—you may go on and put a road in and you may have an engineer project it and he is going to put seven inches of crushed stone under that road and he is going to do various other things, and it runs the projects up, the estimated costs way up. But when you come to do it you may or may not do that for the road. You may put in a cheaper road and this is what happened. But the improvements were there.

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So, if it had gone on for years there wouldn't have been any substantial difference in the tax. The only thing that was affected was that through the tax settlement the alleged or the proposed tax liability of Rosewood for those years, and that was the only issue in those years, the over-estimated costs, the only issue for the years we are seeking to recover, the only issue, and what happened was we effected a substantial reduction in those taxes for Mr. Ware through our services. Not increased them, but a substantial reduction in those taxes.

Let me just read further from this deposition—

The Court: That is Mr. Ware's deposition?

Mr. Bowers: Yes, sir, Mr. Ware's deposition.

On Page 108,—well, this is Mr. MacMillan:

"Do I understand you to mean that you had put in all the improvements in the period 1959, '60, '61, '62; '63 and '64"—which are the years prior to sale, '64, except the sale was made during that year.

3/20/69 "Answer: No, there were some—
page PT-11 } "Question: That you had projected back in '59?

"Answer: No, there were some missing.

"Question: Some improvements missing?

"Answer: Yes.

"Question: What was missing?

"Answer: Well, one of them was a statue that I knew of.

"Question: What else? You mean a statue, meaning a figure?

"Answer: Yes. Oh, I don't know what else. I would have to get the books and find out. I had a real good bookkeeper and I left that mostly up to the auditor and bookkeeper to handle it."

Then on Page 119, which is a part we have quoted in our petition:

"Mr. MacMillan: In other words, you don't contend that they—" meaning Cemetery Consultants—"made any agreement to make any expenditures, any specific expenditures after they purchased it?

"Answer: No, it was just a verbal—

"Question: Well, tell us about it.

"Answer: They just said they were going to spend between forty and fifty thousand in the next four
3/20/69 months.
page PT-12 } "Question: They made no agreement to do that in this contract?

"Answer: No, they just stated they were going to do it.

"Question: But they made no agreement with respect to it?

"Answer: No. There wasn't anything written and at the time I could care less because it had no effect on me."

That is Mr. Ware. So he admits, he makes an allegation there with some vague statement to make some improvement, where, when is not known. But he admits flatly and categorically there was no agreement to do it. And I might say again that the real confusion of the Court since the beginning of this thing has been because we have had a complicated tax matter, involved with a rather simple issue here, and the confusion of the Court with that simple issue, because projected costs have been shown which have no bearing whatsoever on the actual gardens that were in place and in development. The projected costs cover the whole section.

The Court: Have anything to do with income taxes?

Mr. Bowers: No. The projects have noth-
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page PT-13 } The only projects that would be applicable

to the developed garden would have nothing to do with the income tax.

You follow what I am saying? In other words, here is Section Three. It's a larger area undeveloped. They develop it in gardens, in various little sections of that particular Project Three. Only two gardens, for instance, in Project Three were developed, leaving a lot of vacant land still undeveloped in Section Three. These are the two we are talking about. So, you can't take the projected costs when the cemetery begins for the whole section and say that he should have put those in these particular gardens because you would have to allocate those garden costs to the particular part that is being improved; therefore the projected costs had they been allocated, the total projected costs for the section had they been allocated to the gardens, would have been substantially less and those projected costs—let's assume that the total for the whole section was $130,000 when they started the cemetery. Let's assume that the two gardens in that section constituted roughly 50 per cent—make it $120,000, for the total project, and say the two gardens constituted 50 per cent of that section that they proposed to develop,

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50 per cent, roughly, of those costs or sixty thousand would be what they planned to put in those two gardens,—you follow me?

Now, if they put sixty thousand in, if that was a correct estimate and they put sixty thousand dollars in, there could be no additional tax because they would have used that and allocated it to the cost of the land and that would have been their basis when they sold the sites. And it would be no additional tax. If they had actually put in what they projected to that improvement. But what happened was, instead of putting in what they projected—they put improvements in but the improvements were substantially less in cost than they projected.

In other words, instead of putting in sixty thousand they put in forty, say, but the forty improved the property. You had just as many hedges around it; you had the roads, but they didn't cost as much.

That is the simple thing and that is the reason we had the deficiency. Because the improvements that were put in were not the improvements projected and it was done by Ware, not by us, before we got there.

You can't—if a garden is fully improved you can't go in after the five-year period and dump a lot of money in because there is no place to improve it further. You

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can't dig the road up and put another road in there. The improvements were there. So I say

had Rosewood gone on and not been liquidated there would have been hardly any additional tax involved there. It's possible anytime to put in a few additional improvements which may, if it's within the five-year period of the Revenue Service rule, that might add to the cost basis, but that would have been negligible. And there was no agreement to do that, either, by Cemetery.

Now, furthermore, the effect of the settlement was to greatly overcome any possible disadvantage there because there was a substantial tax saving over what the Government projected as the tax on those years.

The Court: Answer me this: Suppose you hadn't dissolved Rosewood Park and you had continued on the projected improvements, would that have affected the taxes?

Mr. Bowers: Be minimal. Be minimal, because if your Honor please, if you improve a garden and—in other words, there are only so many things you can do. You can put sidewalks in; you can put statues in; you can put roads around it; and these add to your cost basis. Now, you can put those in in a different manner. You can put them in as a very expensive road or you can put it in as a less

3/20/69 page PT-16 } expensive road. But all of those improvements for all intents and purposes were put in at the time of the sale; all of them were in; there were no substantial improvements left to be made. Maybe a few of the shrubberies that had been originally projected could have been put in. Maybe a few minor improvements could have been put in. But you can't over-improve a garden. I mean, you can only put so much in it.

The Court: Why wasn't that raised at the time of settlement? You are the experts on tax matters.

Mr. Bowers: Well, I say—

The Court: Go ahead. I don't want to interrupt you.

Mr. Bowers: —I say that it had no effect on it—the liquidation had no basic effect on this at all. Had the corporation been continued there would have been no substantial difference in the cost basis.

As a matter of fact, if it had been continued and the Government had come in two years later and audited for this very issue and then Ware had not contested it and sought to settle it in some way, he probably would have ended up paying a greater tax than he would as a result of the tax settlement, because we went in there and made a tax saving for him.

3/20/69 page PT-17 } The Court: You hadn't handled it in such a manner to create some of these taxes?

Mr. Bowers: Not created but saved some.

The Court: What I am trying to find out is if these plaintiffs have done anything to increase the tax that was contemplated between the parties. Now, if they have done something that created or made additional tax I want to know what it is. I suppose I will find it out from Mr. Spindle.

Mr. Bowers: What we are saying, your Honor, is this: That we haven't, and, secondly, we are saying that they have not pleaded as any defense such as you are saying now.

Mr. MacMillan: There is no issue made.

Mr. Bowers: There is no issue made to that. You really can't hear it as a matter of law because they have to raise the defense.

The Court: But aren't we in equity? And aren't we trying to do what is right between the parties? Isn't that what we are trying to do?

Mr. Bowers: Well, I would say it is the old—

Mr. MacMillan: Equity must follow the law. You must at least plead. Equity can't change a contract.

The Court: No, can't change a contract.

3/20/69 page PT-18 } Mr. Bowers: I just feel that we have the one issue. There is no evidence of any manipulation by Cemetery, by the buyer at all here. Now, we get new counsel here who comes with all this additional thing that has never been—pleads manipulation, and all we are going to do is get into all kinds of collateral things. We submit it's costly, it's time-consuming, and has nothing to do with it. They are totally irrelevant to the issue involved here, and I would just remind your Honor that we went through and we typed up and read to you in detail—and I am sure you are familiar with it thoroughly—the transcript of October 17th, and I read it completely and I knew it was in there. And we went through the same long harassment or statement of allegations and Judge Wahab filtered it out and he said the only issue is whether or not these taxes were covered in that contract. That is the only issue in the case. That has always been the only issue, I think, your Honor.

We submit there is no reason for the Court to go into this long harangue on a collateral issue, and it will only come out ultimately to show the same thing. We just feel it's not proper. It's not before the Court.

3/20/69 page PT-19 } Secondly, Mr. Ware, in his deposition admitted—I could read it to you, Pages 100 to 101, 103—that he was notified completely of this proposed assessment; he doesn't back off from it at all. He agreed that the amount of the settlement, the liability, was correct. The propriety of the amount was correct. And now after being given notice to come in and

defend—as a matter of fact, he was sent the complete Revenue Agent's report, some, maybe 40 or 50 pages, and these years only had one issue in it, the over-applied cost issue for the years he was operating and he refused to come in. He had an indemnity clause in the contract to pay—to hold the buyer harmless and to assume and pay all undisclosed liabilities. And the law is—and I submit that I can give you several cases—that where the indemnitee gives notice to the indemnitor to come in because he is being pursued by a third party in connection with some action or claim, and the indemnitor does not come in, chooses to stay out, then he is—

The Court: Estoppal, or whatever.

Mr. Bowers: He has waived his right and short of fraud or bad faith or something like that which is not pleaded here —he is bound by that settlement, and there is good authority on that and I might give you a couple of cases. I will just quote—you would read them yourself—but there is one, *Jennings versus U. S.* in the Fourth Circuit Court, 374 Federal 2nd 983. I am just going to quote from what it said. It said, "The concept, that notice plus an opportunity to defend renders binding on an indemnitor the judgment in a case in which he did not participate, springs from notions of *res adjudicata.* The reasoning is that where an indemnitor is *notifed* and can take part in—indeed may control the litigation; he is precluded from contesting the indemnitee's liability in the subsequent indemnity action. The indemnitor's knowing failure to participate is deemed a consent to the representation by the indemnitee." That is what they have done here. They have relied on counsel who was hired by the buyer after giving full notice to represent them in handling this with the Government. The Government brought this up, and we didn't bring it up, and assumed to impose this on Rosewood. He was given full opportunity to come in. And he didn't come in. He waived his right. He is bound. He now can't go back and upset it, and say it should have been something else, you caused it.

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Another case in the Sixth Circuit, *Hessler versus Hillwood Manufacturing Company,*—the other case in the Fourth Circuit was 1967—this is 1962, 302 F. 2nd 61. Retailer of nails "vouched in" manufacturer in a buyer's action against a retailer due to defective nails manufactured by Hillwood. And it was held that Hillwood was bound by the facts determined in the New York buyer's action. Manufacturer cannot question the retailer's defense of the suit, absent showing of fraud, collusion or bad faith. Hillwood had an opportunity

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to defend. And the cases go right on down. There is another case holding substantially the same thing, in 1963, where they came in and there was a contest and it was settled. And that case is *Trustees of New York, New Haven and Hartford Railroad Company versus Tileston and Hollingsworth Company,* 189 NE2nd, 522.

Any number of cases. I didn't find any particular Virginia case in point on an indemnity agreement, but there are any number of cases on it.

So we submit that to now allow, without any pleading, a party to come in and raise an entire different issue which has never been pleaded, and to allow the defendant here, who is the seller, to come in after he has had full opportunity to contest this thing on a collateral basis, is just not proper. And we submit that the Court has sufficient evidence and facts before it right now to make a proper determination here as to the issue before it, and doesn't need to hear all this other evidence. I mean, this is not necessary.

3/20/69 page PT-22 } I might say this, too, before I get to this one last point, I want to read this, on Page 116.

"Mr. MacMillan: Do you want me to read you the question again? (Reading)

'And further states that any tax liability which may have been assessed was not the result of actions for which your respondent was or is responsible.'

"What is the factual basis for that? What is it that you claim that was not your action, that resulted in the tax liability?

"Mr. Lam: Again I have to keep interjecting. Part of the defense, I would say at this point, is unknown to Mr. Ware, the legal defense, which, as you know, I have a full right to set forth. So I think to his knowledge is the only way that he can answer that question. I am sure he isn't fully cognizant of some of the things that I hope and intend to do.

"Mr. MacMillan: If I understand the rules, we can proceed by a motion for more definite statements, or we can discover the party; and the party is bound. If he says he has nothing and we come to trial and are not given an opportunity to prepare then he has nothing. I don't mind your talking to him. All we want to know is what we are

3/20/69 page PT-23 } going to be met with and not play cat and mouse between now and the day of trial.

"Mr. Lam: I wasn't playing cat and mouse. I say I think a lawyer has a right to take his client's case and develop from the facts, as he knows them, any legitimate defense. I think you agree, for instance, a man may have—"

Then there was some discussion off the record.

The next question, after the discussion, back on the record:

"Mr. MacMillan: As I understand it, Mr. Ware, your attorney indicates that what you know about that affirmative defense which reads, 'And further states that any tax liability which may have been assessed was not the result of actions for which your respondent was or is responsible,' end quote, "refers to the fact that if this corporation had made improvements there would have been no tax liability?

"Answer: That is correct, and charged it to the proper sections."

Now, the whole purpose of discovery was to get the whole purpose of his defense and we are relying on that. That is all his defense was and is up to this point. Now, we have new counsel come in and at this late date seeks to bring in different issues to support an affirmative defense that has not been pleaded.

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I might say this, that there was talk about an offer of proof and subpoenaing records. In connection with offer of proof it says here, in this extensive ALR Annotation, "an offer of proof must be in proper form; the offer must fully and clearly state the fact which counsel desires to prove, and the manner and evidence by which he proposes to prove it,—" and it goes on.

In a case very similar the refusal to allow counsel to continue and complete offer of proof to establish an affirmative defense and counterclaim which the Court had held demurrable, was erroneous, where the pleadings were insufficient. And I will *stat* the case, *Exchange Lumber & Manufacturing Company versus Thomas,* and it's an Idaho case. It's 233 Pacific 2nd 406.

So again the statements that I heard February 20th about subpoenaing records which the Court had already held were irrelevant and immaterial to the issue for the purpose of making some kind of offer of proof, is for the support of some defense that is not even pled, and it's clearly not proper. And many cases in here hold that the offer must be straight-forward and say exactly what they intend to prove and if it's not relevant, if it's not pleaded and so forth, then the refusal to accept the offer of proof is justified. And that ALR Article is found in 89, ALR 2nd, Page 279.

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This is the point that I recall and we had Mr. Fentner—it wasn't transcribed, but on February 20th I was there and he asked after he was overruled on the motion for production,

he asked to have these records, as I recall, purely for the purpose of appeal, and I say that when you haven't put in a defense, I mean haven't pleaded the defense, it's irrelevant entirely and the offer of proof should be dismissed and there is no error whatsoever to it.

I also made a note at the last hearing in connection with some statements Mr. Spindle made and I am sure they are competent, they are in the notes taken down by Mr. Fentner, in which he flatly admitted that the Rosewood Corporation owned—that the people of the buyers here owned the stock of Rosewood entirely, there were no restrictions and they could sell, dissolve, do anything they want. He admitted that.

He further admitted that the corporation was free not to carry out the projects. They are in the record, admissions by Mr. Spindle. And I submit that if those are in the record as admissions, the only defense they have pled, they don't have any defense, and the defense of manipulation, *et cetera,* has never been pled, and frankly, I never saw how that tied into the issue. It was baffling and confusing to me, how that tied into the issue that we have in this case.

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So, we submit that for all of those reasons that the motion to quash should be granted and that the records are not—the records of Cemetery—are not relevant to the issue here in any way; and that—and of course, there is no question about the notice, Mr. Winquist. We haven't received notice so that obviously is defective there. He is not a party to the suit and in 66—

The Court: 8301. If you are not a party you have to give notice. Weren't you all—didn't you have actual notice?

Mr. Spindle: Yes, sir, they did.

The Court: That is what I thought.

Mr. MacMillan: We had no actual notice at all. We asked for actual notice and—

Mr. Spindle: You got it.

Mr. MacMillan: I beg your pardon?

Mr. Spindle: You got it.

Mr. MacMillan: We had no notice, your Honor.

The Court: Let me see if I can help you. When you were in Chambers he was going to ask for the *subpoena duces tecum.*

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Mr. Spindle: The next morning. I told you.

Mr. MacMillan: Your Honor, he did not tell me that. He did not tell me when. He said he was going to move for it and he wanted to have it entered right there while I was sitting there, and I said we wanted to oppose it and we want to meet you with the authority and we want a hearing on it. We

never had any notice whatsoever, your Honor, that it was going to present—

The Court: I thought I said I was going to issue the *subpoena duces tecum* in due course.

Mr. Spindle: You did, and I said to you when you said that, "I will present it tomorrow morning," I said that directly to Mr. MacMillan in your presence in your Chambers.

Mr. MacMillan: I was never told anything. I was utterly surprised that the Court had entered a notice without any notice to me. I have been doing business with Mr. Spindle ever since I have been practicing law and he has never failed to give me notice of what is going to happen, and when it's going to happen, and it's a notice which has to be given in writing under the order. I was completely taken by surprise that the Court would have a hearing on a matter that we had been down on five times and I told the Court we would be there with the law and be heard on it.

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The Court: Well, maybe I misunderstood you. But my impression was that in my office I said, "Well, if he produces an affidavit and an order, we will issue—"

Mr. MacMillan: You are right, your Honor. If he produces an order and affidavit that meets the rules you would issue, and I said, "I will be here to show it doesn't meet the rules."

Mr. Spindle: I said I would present it tomorrow morning and I did present it the next morning.

The Court: Well, I will hear from Mr. Spindle. Let him finish first.

Mr. Bowers: I just want to conclude briefly, that, of course, we would show that there was no manipulation and there was no tax advantage loss or no tax deficiency caused by acts of the buyer. But that would be a long—it would be a long and drawn-out matter. We hope maybe it won't be as long as we anticipate. But, in any event, there is sufficient law, there is sufficient evidence before the Court that the pleadings are there and the deposition is there and there is no basis, I submit, to get into this strenuous and collateral issue and that the Court has ample grounds to deny access to these records of Cemetery as being irrelevant, immaterial, and also—

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The Court: I agree with you. But I don't want to cut off Mr. Spindle on anything. Yes, I could. I could right here this morning, but he says that—

Mr. Bowers: Your Honor, all I can say in answer to that is the rules or the law is really meaningless if we are just going to brush them aside and not abide by them. There is

no guideline at all. I mean, that is the reason these cases are decided and say either it was in error or not in error. And there is not here on this record any reason to get into this issue. No reason whatsoever. And even if it were appealed, the Court would find no reversible error in it.

All right, sir.

The Court: Let me hear from Mr. Spindle.

The first thing he mentions is that you didn't give any notice under 8301, this man is not a party to the controversy. I will hear you on that.

Mr. Spindle: Well, the Court has already stated its recollection, which is mine. We were in your Chambers on the day before this subpoena was issued. On an argument as to whether we were entitled to get these same records by way of discovery. And we argued at considerable length. In fact, it was the second time we had argued it, as you will recall, because we had been down once before and then Mr. MacMillan and Mr. Bowers and I couldn't agree on the form of the order. So we came down and we re-argued the matter and you adhered to your formal ruling that we were not entitled to get by discovery under the rules, these documents of Cemetery Consultants and Rosewood.

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At that time I said that I would present to the Court, I wanted to get a *subpoena duces tecum,* in fact, the Court said, in your Chambers, that you would grant a *subpoena duces tecum.*

Mr. MacMillan objected to that and we discussed that at some length and then you concluded that by saying, according to my recollection, your Honor, that "I will grant the respondents a *subpoena duces tecum,*" and I said, "I will present the order tomorrow morning."

Now, that certainly constitutes sufficient notice. We went over to Mr. Lam's office, drew the order, and that order was presented to you at 10:00 o'clock the next morning when you arrived in Court, and was granted properly.

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Now, let me get to the meat of this thing, your Honor. We are here today to finally get to the nitty-gritty—as the teenagers say—of this case.

The Court: Want to see how much the defendant owes the plaintiff.

Mr. Spindle: That is what we are here for today. We have had a lot of skirmishes up to now, but they raise some technical question that it's not properly pleaded.

Paragraph 16 of Mr. Lam's answer spells out precisely the respondent denies that the complainant is entitled to relief

prayed for, or any relief, and by way of affirmative states that any tax liabilities which may have been assessed was disclosed. That is our first defense.

And further, states that any tax liability which may have been assessed was not the result of the actions for which the respondent was responsible. We are saying it's their responsibility. That is our manipulation defense.

And your respondent further avers that your complainant will suffer no damage as a result of the tax liability. That is our third defense. That they are not going to have any damage because they are going to get this same dollar-for-dollar back from the Internal Revenue Service.

3/20/69 page PT-32 } Mr. Lam lays out in Paragraph 16 of his ground of defense, or his answer, one, two, three—we have three issues here today.

Now, it has been well pled.

Now, your Honor, on the relevancy—we are going to be put in the strange position of having to argue a case based on statements of counsel as to what their records show. Our defense of manipulation, I will just label it that way for brevity, and our defense that they have suffered no damages, or expressed another way, mitigation of damages, all depends upon the proof which must come from their records.

Now, I have no question that Mr. Bowers and Mr. MacMillan are properly going to state to the Court what they think their evidence will show, but that is not the way we try cases. My client is entitled to see these records and to present to you outside of the case—I cannot at this point tell you precisely what those records are going to show.

Now, Mr. Bowers has argued for an hour as to how this tax arose. He says Project Three has been spent out. He made the statement to the Court that if they had not liquidated and if they had continued these expenses it wouldn't have affected the taxes.

3/20/69 page PT-33 } Is the Court going to accept counsel's statement of that without giving the other party to the case the opportunity to look at those records and determine the truth of that fact? My client is entitled to look at those facts. Now, on the relevancy, Cemetery Consultants' records are relevant for two simple reasons. The first is, "Yes, we think we can show manipulation." Your Honor put your finger right on the pertinent question. You touched them on the Achilles heel. If they had not liquidated and if they had spent this money we think there would have been no tax. We have to have those records to prove that to the Court. You can't accept my word or Mr. Bowers' word to the contrary. We need to get those records

out on the table and put them before the Court so the Court can determine for its own evidence, rather than statement of counsel, whether or not there was manipulation.

And I say to the Court on that question, yes, I acknowledge that they owned the stock, they were free to liquidate, they were free to cease expenditures, the purchasers were. There was no obligation to do so, but if they come to us and say, "You use this money for these taxes which resulted from what we did," then their actions became pertinent to the liability that was within the contemplation of the parties at the time they signed the contract and therefore we are entitled to see those records to prove to the Court this manipulation which created the tax which they now seek to recover from us.

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The second reason that it's relevant is because it will go to disprove their damages. They haven't put on proof of damages yet and, frankly, I think this whole argument about relevancy is a little premature. It ought to come on when the evidence is offered. But since the motion is made to quash the subpoena when we can't get to the witness stand, I say to you that it will be relevant when it is offered because when they put on their proof of damages and try to show you that they have $15,000 of taxes for which we are liable, we are then confident that we can show to you that they have already recovered this $15,000 back from the Internal Revenue Service. They have in fact not suffered any damages and, in fact, the attempt to recover from Mr. Ware would constitute a double recovery.

There are two grounds why we must have those records. I think the time for the Court to rule on the relevancy is when the documents are offered in evidence before the Court. We are certainly entitled to see them, rather than argue this case on the basis of counsel's representation.

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Mr. MacMillan: Your Honor, he did not answer the problem in this case. And the problem in this case is, are attorneys going to come to the Court on the day of trial able to rely upon what the plaintiff, defendant says his defenses are? Now, we took, we spent plenty of money taking this deposition. We sat down one whole afternoon. We didn't ask this man to be bound by what he said. We asked him to talk to his lawyer and tell us what his case was and he swore under oath what his case was and now you are being told that isn't his case. I say they can't do it and I say the Court open now and hear a case that was not pled and to merely read a bill—of course that bill is wide enough to cover the

moon. Why do you think we took his discovery deposition; because we wanted to know what the contentions were. We didn't want to come down here today. Right this minute, right now, we don't know yet what their contention is. We have had this man before. When they gave us one of these wild answers with the defense, of every defense under the moon, we put him under oath and said, "Tell him what it is."

3/20/69 page PT-36 } His lawyer interrupted and said, "He can't tell you because he is not a lawyer." He came back on the record and said, "The only thing we have in this case is that you didn't make the improvements."

Then we said, "What are we supposed to do—" now, you didn't contract to and you said you might do it. And I relied on that. In fact, he said—now, if we have to come to Court on a case in which we have done everything that we can to find out what the case is, and be met at the last minute with a babbly reading of the complaint as if it were the first day of the case, I say you can't practice law anywhere on that basis and defend your client.

That is our position in the case.

The Court: I think he is entitled to see the books. See if it was any manipulation going on. Mr. Bowers says there was not. If there wasn't that will end it. If there was, then I think the Court should hear it and find out if there is any mitigation of this alleged amount paid out.

So I will overrule the motion to quash. And to which action of the Court you except?

Mr. MacMillan: We except, your Honor.

The Court: All right.

3/20/69 page PT-37 } Mr. MacMillan: We would like to call Mr. Ware. I might say, just—

The Court: Do you want a minute to look at the records or maybe take 30 minutes, or might take an hour—or do you want to go on and call the witnesses and then cross-examine them from the record? You haven't seen the record, have you?

Mr. Spindle: I have not seen the records, but I think we can move the thing along. Let's go ahead and I think we can do it from the witness stand.

I might ask you to indulge me for a half-hour or so, to take a recess.

The Court: I figured you might want a little time.

Mr. MacMillan: Your Honor, let us make it clear that we are here today without waiving our exception that this Court has ruled previously and has entered an order, there is only one issue in this case, and that is the question of whether

there was a disclosure. They have indicated—notwithstanding the admission of the defendant—they have called upon us to defend it to put on our proof. We don't waive our position that we have taken throughout this matter that this was all gone into, decided, and the Court told us to come to a hearing on the issue that was decided, I think it was in January.

The Court: That was on taxes.

3/20/69 page PT-38 } Mr. MacMillan: Solely on the question of the interpretation of the clause, your Honor. There are basically elements of damage which we have here. The first is, we will show that for the years '59, '60, '61 and '62, there were penalties and interest of sixteen thousand seven hundred.

The Court: Nineteen fifty-nine through what?

Mr. MacMillan: Nineteen sixty, '61 and '62. That the total tax penalties and interest was $16,753.42. That in addition to that there was an attorney fee paid George Bowers of $725 on March 11, 1968; and there was a accountant's bill paid Mr. Winquist of $2400, on April 2, 1968; that when the Government was in the process of levying on the Cemetery Consultants they had to—they not only levied on the escrow account, they required Cemetery Consultants to post a bond with surety, the bond premium being $167.

The Court: Is that a one-shot premium, so to speak?

Mr. MacMillan: One-shot premium, yeah. And also required them to post $16,900 of their own securities to *aby* the payment as a result under the forthcoming provision of the bond; that, in addition to that, we are en-

3/20/69 page PT-39 } titled to the attorney's fees that were incurred in this proceeding including staving off this levy of the lien and that would otherwise have fallen on it, plus the attorney's fees for this proceeding before the Court, the amount of which, of course, is going to have to be fixed by the Court at the conclusion of this matter, and then the Court costs, witness fees and expenses that were a direct flow from the defendant's failure to perform his contractual obligations. That would be—

The Court: Do you have a total not counting the attorney's fees for this proceeding?

Mr. MacMillan: Well, your Honor, not except as I have given them to you.

The Court: All right.

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page 1 }

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March 20, 1969

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GORDON H. WARE, the Defendant, called as an adverse witness, having been previously duly sworn, was examined and testified further as follows:

ADVERSE EXAMINATION

By Mr. MacMillan:

Q. Would you state your full name?

A. Gordon Ware.

Q. I think you have previously testified in this matter?

A. I have.

Q. I think you sold your stock of Rosewood Memorial Park to Cemetery Consultants in March, 1964?

A. I sold it to the individuals originally and then I transferred it over to their corporation at their request.

Q. It went to Cemetery Consultants Corporation?

A. Yes, sir.

Q. And I think that sometime in 1966 the Inter-
3-20/21-69 nal Revenue Service commenced an audit of the
page 4 } affairs of Rosewood for tax years from 1959 to '65, and are you aware of that?

A. I was aware of it.

Q. You were notified that was beginning?

A. That is right.

Q. And I think you have also testified that you were notified that the audit disclosed a deficiency for the years you owned the stock of the corporation, 1959 to 1962?

A. I am not sure about that question. Would you state it again, please?

Q. Yes. I say, you have previously testified that you were

notified of the agent's report. You were given a copy of the agent's report?

A. That is right.

Q. Which report showed that there had been a tax *deficienty* for the years during which you owned all the stock?

A. I couldn't state that for a sure fact. I did get the report that the Government was assessing them.

Q. For those years?

A. Right.

Q. That was for the years 1959, '60, '61 and '62?

A. I don't recall the exact time. But that sounds
3-20/21-69 about right.
page 5 } Q. All right, sir. I think you have previously testified that you were called upon to come in and defend and that you concluded not to; is that correct?

A. Upon advice of my attorney. I decided not to go in because I did not feel it was my liability.

Q. And I think you were also notified that Cemetery Consultants was engaging Vernon Winquist and George Bowers to work with the Government on this deficiency assessment and try to work out a compromise?

A. I don't know the exact names. But I remember there was a compromise being worked out. We got information on that.

Q. I think you have previously admitted that the amount of the settlement was fair but that you deny that you owe it?

A. I couldn't say it was fair because I knew nothing of how they settled it. But I still say I don't owe it.

Q. Still say you don't owe it? You deny that you have previously testified that the amount was—the amount was correct but that you denied that you owed it?

A. I didn't know whether the amount was correct or not for what the Government assessed because I didn't go into that too much other than a casual look at the
3-20/21-69 audit that came in.
page 6 } Q. I say, do you deny that you previously testified—

Mr. Lam: Let him read the statement to him.

The Witness: What did I testify and I will tell you whether I did or not.

By Mr. MacMillan:

Q. The rules say I first must ask you whether you deny it and read it to you.

Gordon H. Ware

A. No, I wouldn't deny anything I testified to.
Q. Page 104 of the transcript,—

"Question: And it is my understanding, Mr. Ware, that there is no dispute in this case as to the propriety of the amount of the settlement but that all other matters as to whether you owe it or whether Cemetery Consultants caused the assessment because of what they did or didn't do after they purchased it, are still very much a part of your defense in this case?
"Answer: Right."

Do you recall that?
A. If I said it, I don't recall it, I guess.
Q. You couldn't now deny that you said that?
A. Oh, no, sir.
3-20/21-69 Q. I think you have previously admitted that
page 7 } the bill of Mr. George Bowers was correct, have you not?
A. Yes, sir. We said it was reasonable.
Q. Seven hundred twenty-five dollars?
A. That is right.
Q. I think you have previously testified that the bill of Mr. Vernon Winquist was not correct, was not proper.
A. Yes, that is true.

Mr. Lam: I would ask again that he read that part where he stated that, because that isn't his exact answer, with regard to either one of them.
Mr. MacMillan: Well, he has already said it's true. I will be glad to read it to you.
Mr. Lam: I believe you are asking him hasn't he said something. He ought to be advised of what you are saying because—

By Mr. MacMillan:
Q. Mr. Ware, at Page 105 of your discovery deposition I asked you: "Mr. Ware, I understand that the amount of the accountant's bill of $2400 for services in conjunction with this service in working with the Government on this claim on the tax claim is disputed?

3-20/21-69 "Yes, it is."

page 8 } A. That is correct.

Q. Is that right?
A. That is right.
Q. Now, could you tell the Court what is wrong with Mr. Winquist's bill, please?

Mr. Lam: Your Honor, I am going to raise an objection at this time. This is not up to him to do it. This is why he employs counsel.
The Court: If he knows. He probably doesn't even know.
Mr. Spindle: He can only be required to testify to facts. He can't be required to express the defense of his accountant and lawyers from the witness stand.
The Court: If he knows. He can just say where he got his information from.
The Witness: I would like to see Mr. Winquist's bill for the year and exactly what it entailed.

By Mr. MacMillan:
Q. It was sent to your lawyer.
A. It wasn't broke down. Just the amount was sent there.
3-20/21-69 page 9 } Mr. Winquist did a lot of other work for Rosewood other than this case.
And in prior years of settlement with the Internal Revenue we spent nothing like this and we had disputed claims the same way the last time they came in. And it cost nothing like that.
Q. All right. Let me show you the bill, Mr. Ware.
A. All right, sir.

Mr. Lam: Your Honor, he is still going to ask him to look at the bill, if it's a breakdown, and ask whether it's right or wrong. He is not in a position to know the answer to that at all. But I guess, as you say, he can say he doesn't understand it or doesn't know whether it is or not.
The Court: If he knows he can answer it.
The Witness: I would like to ask Mr. Winquist a question. How many audits did he make and is this his total bill for Cemetery Consultants, because I know he made other audits for Cemetery Consultants other than this work and I am wondering if all of it was lumped together.

By Mr. MacMillan:
Q. I am sure you can call Mr. Winquist as a witness. I was
3-20/21-69 just asking you what is the basis of your own personal objection to the bill.

Gordon H. Ware

page 10 } A. Well, prior to this we have spent anywhere from, say, eight to nine hundred dollars when we have a claim against the Internal Revenue Service—when they have a claim against us, and we have to settle it, which did transpire once before. I didn't even have a lawyer—yeah, I did. The lawyer was $350 and the C.P.A.'s bill was around seven or eight hundred and I can't understand.

We went before them the same way that you had to do, and they had to do, and I just can't understand why it would cost $2400 when prior to that it cost for both of them less than $1100.

Q. I say, you know yourself of anything wrong with this bill other than your general feeling that it may not be proper?

A. No. I don't. Other than the fact that I would like to see it broken down to all of the work he has done this year for Cemetery Consultants during this time. Because I know that he did other audits for them other than this and I want to know if he submitted another bill. Did he?

Q. He certainly did. Are you talking about did he submit a bill to Cemetery Consultants other than this for this year he submitted a bill to them for the services that they did for the period 1964, '65? If that is what—

3-20/21-69 page 11 } Mr. Spindle: Your Honor, please, the fact that the witness must ask a question, which obviously is proper, indicates to me he doesn't have the information with which to answer Mr. MacMillan's question. I object to Mr. MacMillan carrying on a colloquy with the witness and making his own statements.

Mr. MacMillan: I am attempting—he is an adverse witness. I am attempting to find the basis of his objection.

The Court: His basis is that in the past he employed the same auditor to handle similar business and it wasn't this high.

By Mr. MacMillan:

Q. Did you employ the same auditor?

A. No, he didn't handle this one.

Q. He never handled any of these previous ones you are telling us about?

A. No.

Q. I thought it was the same one.

Mr. MacMillan: Answer these gentlemen.

Mr. Lam: Come down.

Mr. Spindle: We have no questions.

Norman Cobb

(Whereupon, the witness was excused.)

Mr. Bowers: Mr. Cobb.

3-20/21-69
page 12 } NORMAN COBB, called as a witness, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Bowers:

Q. Mr. Cobb, are you a stockholder of Cemetery Consultants, Inc.?

A. I am.

Q. And an officer?

A. I am.

Q. Will you tell us what office you hold?

A. Secretary-Treasurer.

Q. How was the transaction with Mr. Ware, in connection with the sale of this stock, handled?

A. Cemetery Consultants bought all the stock of Rosewood Memorial Park at that time owned by Mr. Ware.

Q. And do you recall anything about the dissolution of Rosewood Memorial Park, when that may have taken place?

A. I believe it was in 1965.

Mr. Bowers: Your Honor, please, you want to mark this for identification?

The Court: We will mark it as an exhibit, if Mr.
3-20/21-69 Spindle has no objection to it.
page 13 } Mr. Spindle: We have no objection.

The Court: You want to call it "1" again?

Mr. Bowers: Let's start at "1", it will be easier for me.

By Mr. Bowers:

Q. Mr. Cobb, I show you what purports to be a certificate of dissolution for Rosewood Memorial Park and ask you if you're familiar with that?

A. Yes, sir. This is from the State Corporation Commission in Richmond, Virginia, dated September 16, 1965, cited "Certificate of Dissolution, Articles of dissolution of Rosewood Memorial Park, Incorporated," signed by Jesse W. Dillon, Chairman of the Commission.

Q. What was the date of the dissolution?

A. This order is dated September 16, 1965.

Norman Cobb

Mr. Bowers: We offer that.
The Court: All right, be marked Plaintiff's Exhibit 1.

(Whereupon, the foregoing document was marked for identification as Plaintiff's Exhibit Number 1.)

By Mr. Bowers:
Q. Mr. Cobb, when did Cemetery Consultants
3-20/21-69 learn of the audit, proposed audit, by the Internal
page 14 } Revenue Service?
A. In 1966.
Q. That was in connection with what corporation?
A. Rosewood Memorial Park.
Q. Mr. Cobb, I am going to show you what purports to be an agent's report attached to the District Director's letter and ask you if you are familiar with it?
A. Yes, sir. This purports to be the worksheets of the agent's which he used to set up the deficiency.
Q. What is the date of the letter?
A. January 26, 1967.
Q. Who received that report?
A. This is directed to Rosewood Memorial Park, Incorporated, Post Office Box 5365, Bayside Station, Virginia Beach, Virginia, 23456.

Mr. Bowers: Offer this in evidence, your Honor.

(Whereupon, the foregoing document was marked for identification as Plaintiff's Exhibit Number 2.)

By Mr. Bowers:
Q. Mr. Cobb, what did Cemetery Consultants do to keep
Mr. Ware advised in connection with the audit
3-20/21-69 commenced by the Revenue Service?
page 15 } A. We had our accountant notify him that the
audit was pending.
Q. Do you recall when that was?
A. In 1966.
Q. And what else did you do?
A. And we gave him an opportunity to come in and assist in the audit. He refused. Said he wasn't concerned, it wasn't his liability.
We then hired professional services in the nature of accounting services and attorney services to try to effect a compromise of this audit, of this tax liability.

And we notified him of that. And still he did not participate.

Q. Mr. Cobb, I show you a letter dated March 1st from John Rust to Mr. Gordon Ware and ask you if you are familiar with that?

A. Yes, sir. This is a letter dated March 1, 1967 addressed to Mr. Gordon H. Ware, 110 Windward Shore Drive, Virginia Beach, Virginia, signed by John H. Rust notifying Mr. Ware that—

Mr. Lam: Your Honor, the letter will speak for itself.

3-20/21-69 By Mr. Bowers:
page 16 } Q. Do you recognize the letter?
A. Yes, sir.

The Court: He identified it.

By Mr. Bowers:

Q. Who was Mr. John Rust?

A. He was the attorney for us in Fairfax, Virginia. Personal attorney.

Mr. Bowers: I offer that letter in evidence.

The Court: Plaintiff's Exhibit 3.

(Whereupon, the foregoing letter was marked for identification as Plaintiff's Exhibit Number 3.)

By Mr. Bowers:

Q. Mr. Cobb, I show you a letter dated March 2nd from Mr. Luther White to Mr. Gordon Ware.

A. This is a letter from Mr. White dated March 2, 1967, registered and return receipt requested to Mr. Ware, also notifying him of this tax deficiency and his liability.

Q. Who sent that letter?

A. Mr. Luther White.

Q. Who was Mr. White?

A. Our attorney in Norfolk.

The Court: Plaintiff's Exhibit 4.

(Whereupon, the foregoing letter was marked for identification as Plantiff's Exhibit Number 4.)

Norman Cobb

3-20/21-69
page 17 } By Mr. Bowers:

Q. Mr. Cobb, what, if any, notice did you give or contact did you have or did Cemetery Consultants have in connection with Mr. Ware as to the compromise of the audit of this Rosewood Memorial Park?

A. We notified him the audit was being made and gave him an opportunity to assist in the compromise.

Q. And what action, if any, did Mr. Ware take?

A. None.

Q. Has the Federal Government made any deficiency assessments against Rosewood or in connection with Rosewood Memorial Park for the years prior to the purchase by Cemetery Consultants and subsequent to those years?

A. They have.

Q. Would you tell us what years, if you recall?

A. Nineteen fifty-nine, 1960, 1961 and 1962, prior to the purchase, and 1964 and 1965 subsequent to the *puchase*.

Q. Mr. Cobb, I show you what purports to be copies of assessment notices received by Cemetery Consultants and ask you what they are.

The Court: Received by Cemetery?

Mr. Bowers: Received at Cemetery Consultants' office for Rosewood Memorial Park, Inc.

3-20/21-69 Mr. Spindle: We would be willing to stipulate
page 18 } they were received, if Mr. Bowers—

By Mr. Bowers:

Q. You might just read the caption on the first notice.

A. "Cemetery Consultants, Incorporated, successor to Rosewood Memorial Park, Incorporated, Post Office Box 5365, Bayside Station, Virginia Beach, Virginia, 23456."

Q. What years did those purport to cover?

A. The years 6/31/59, 7/31/60, 7/31/61, 7/31/62.

The Court: That will be Plaintiff's Exhibit Number 5.

(Whereupon, the foregoing document was marked for identification as Plaintiff's Exhibit Number 5.)

By Mr. Bowers:

Q. I show you another notice of assessment in connection with Rosewood Memorial Park, Inc., for 1964. See if you can identify that.

A. Yes, sir. This is a notice of assessment to Cemetery Consultants, Incorporated, successor to Rosewood Memorial Park, Incorporated, dissolved. Date of assessment, 1/26/68.

The Court: Plaintiff's Exhibit Number 6.

(Whereupon, the foregoing document was marked for identification as Plaintiff's Exhibit Number 6.)

3-20/21-69
page 19 } By Mr. Bowers:

Q. Mr. Cobb, let me refer to one thing: There is some notation on that. Can you tell us what that is?

A. Yes, sir. We paid $2953.17 on June 20, 1968.

Q. So this particular assessment for the year '64 was paid by Cemetery Consultants; is that correct?

A. That is right.

Q. How about with respect to the assessments made against Rosewood Memorial Park for the prior years?

A. No, sir, they have not been paid.

Q. Why not?

A. We don't feel we owe them. We think it's Mr. Ware's responsibility under our contract agreement.

Mr. Bowers: Your Honor, that was Numbers 5 and 6.

The Court: This is 5 and 6.

By Mr. Bowers:

Q. Now, Mr. Cobb, has Cemetery Consultants paid accountants' and attorneys' legal fees in connection with the services rendered in connection with the adjustment of the Internal Revenue Service's claim?

A. Yes, sir, we have paid two sets of bills.

3-20/21-69 Q. Can you tell us who the attorney was and
page 20 } who the accountant was?

A. Mr. Vernon Winquist was the accountant. Mr. George Bowers was the attorney.

Q. What bills did you pay?

A. We paid Mr. Winquist $2400 for his services prior to 1964. And we paid Mr. Bowers $725 for his services prior to 1964. And we paid Mr. Ware (*sic*) some $3600 for his services subsequent to '64 and Mr. Bowers $2920 for services subsequent to '64.

Q. Do I understand that you have paid for the services of these accountants and attorney for the years after the sale and you are not seeking to be reimbursed for that payment; is that correct?

Norman Cobb

A. That is right. We feel that Mr. Ware owes us both attorneys' fees and accountants' fees for work he did prior to —on the tax returns and the returns and the books prior to 1964, prior to our purchase.

Q. Now, Mr. Cobb, can you state or tell us what other expenses that you, Cemetery Consultants, contend that Mr. Ware is liable for?

A. We feel in addition to those expenses we are entitled to recover all of our attorneys' fees in this case to its final conclusion, the Court costs, the premium on the bond—

3-20/21-69 page 21 } Mr. Lam: Your Honor, may it please the Court, I think these are legal matters.

The Court: Ask him what the premium on the bond costs.

By Mr. Bowers:

Q. How much was the premium on the bond?

A. A hundred sixty-seven dollars. And that bond, by the way, is good until August 1, 1969. And we had to get that bond, we had to put up—the bond is in the amount of $16,700 and we had to put up securities in the amount of $16,900.

The Court: How much was the taxes that you paid for '59, '60 and '61 and '62, pursuant to these assessments?

Mr. Bowers: How much taxes?

The Court: How much taxes did he pay for '59, '60, '61 and '62?

Mr. Bowers: The assessment for the years prior to 1964 have not been paid.

The Court: But it's been settled for a sum of money?

Mr. Bowers: That is the sum. That is the assessment, right.

3-20/21-69 page 22 } The Court: This says thirty-some thousand dollars.

Mr. Spindle: Plaintiff's Exhibit 5.

Mr. Bowers: I think the original total proposed assessment was around $39,000.

These are the settled amounts.

The Court: Do I have it correct, Mr. MacMillan's statement is $16,753.42? That is what it adds up to?

Mr. Bowers: I am going to ask Mr. Cobb right now.

By Mr. Bowers:

Q. Mr. Cobb, have you had a chance to total the tax as-

sessments for the years prior to sale that you claim Mr. Ware is liable for, including interest? Have you got that?

A. Yes, sir. Mr. Vernon Winquist, the accountant, has furnished me with those figures.

Q. Would you give me the figures, please?

A. The tax deficiencies total $11,557.57. Accrued interest, unpaid, amounts to $5,095.85, or a total of $16,753.42.

Q. As of what date?

A. As of March 20, 1969. As of today.

3-20/21-69 page 23 } Q. Mr. Cobb, has the Internal Revenue Service taken any action against Cemetery Consultants or attempted to take any action since the tax liabilities were assessed which are still unpaid?

A. Yes, sir. They have levied on the money we have paid in escrow held by a Mutual Savings & Loan of Virginia Beach. They also gave us notice of a lien to be made against all the assets of Cemetery Consultants, Incorporated.

Q. They have not yet made that levy or lien against the assets at this point?

A. We bonded that off.

Q. You bonded it off? What effect would the filing of a lien have on the business of Cemetery Consultants?

A. If they had put a lien against that it would have been most disastrous. In the first place we couldn't have sold any more lots and gave good title to it. Because as you know, a tax lien has a cloud on the title.

And, furthermore, the adverse publicity we would have gotten would have just precluded making any more sales there. Nobody would have bought and I wouldn't have blamed them.

The Court: The figure you just gave me, Mr. Cobb, was for 1959, 1960, 1961 and 1962?

The Witness: Yes, sir.

3-20/21-69 By Mr. Bowers:

page 24 } Q. Mr. Cobb. let me ask you one question while they are looking at this exhibit.

How are the payments that you make as purchaser of the stock made under the contract? Are they made on an annual, semi-annual—

A. The first payment—we made a down payment of $50,000. Then we made another annual payment and there have been semi-annual payments since.

Q. Have you made all those payments to date?

Norman Cobb

A. Yes, sir.

Q. Let me show you a schedule of payments and see if you are familiar with that.

A. Yes, sir. This is a statement of payments to Mr. Ware or to Mutual Federal Savings & Loan Association in escrow for the benefit—

Q. These are the semi-annual payments that are due on the contract to purchase; is that correct?

A. Yes, sir.

Q. And the last payment was made at what time?

A. 10/4/68.

Mr. Bowers: We offer this.

The Court: Plaintiff's Exhibit Number 7.

(Whereupon, the foregoing document was marked for identification as Plaintiff's Exhibit Number 7.)

3-20/21-69 By Mr. Bowers:
page 25 } Q. Mr. Cobb, to your knowledge has Mr.—has Cemetery Consultants made any demands on Mr. Ware for the payment of these taxes and/or including attorneys' and accountants' fees?

A. Yes, sir.

Q. Mr. Cobb—

Mr. Lam: Your Honor, probably he can't identify them anyway, since they are from counsel and somebody else, to me. But I can identify them.

The Court: No objection to them?

Mr. Spindle: We will stipulate they have been received.

The Court: Stipulate they have been received. Give me the names of the persons.

Mr. Bowers: First one is letter of April 2, 1968, from Mr. Bowers to Mr. Lam.

The Court: That will be Plaintiff's Exhibit Number 8.

(Whereupon, the foregoing letter was marked for identification as Plaintiff's Exhibit Number 8.)

Mr. Bowers: And the next is a letter from Mr.—from Cemetery Consultants, Inc., dated April 2, 1968 to Mr. Lam with attachments, those attachments being state-
3-20/21-69 ment for services rendered by Edmondson, Led-

page 26 } better & Ballard, Accountants, and Mr. George Bowers, Attorney.

The Court: Plaintiff's Number 9.

(Whereupon, the foregoing letter was marked for identification as Plaintiff's Exhibit Number 9.)

By Mr. Bowers:

Q. Mr. Cobb, I show you Exhibit 9 and ask if you are familiar with that.

A. Yes, sir. This is the letter sent by Mr. Kirkpatrick, President of Cemetery Consultants to Mr. Lam, Attorney, with attachments about the tax matter.

Q. What are the attachments to the letter?

A. One is a copy of Mr. Winquist's bill for $2400. Another, a copy of Mr. Bowers' bill for $725.

Q. Can you tell me from looking at those exhibits when those amounts were paid by Cemetery Consultants, Inc.?

A. 3/11/68.

Q. Which one was paid 3/11/68?

A. Mr. Bowers' bill.

Q. All right, what is the date of the other one?

A. April 2, 1968.

Q. That was Mr. Winquist's bill?

3-20/21-69 A. That is right.

page 27 } Q. Paid April 2, '68 by Cemetery Consultants, right?

A. Yes, sir.

Q. These are the two bills that Cemetery Consultants seeks reimbursement from Mr. Ware plus interest from the date paid?

A. That is right.

The Court: The letter of April 2nd and the bill of March 31, '68 and the letter of February 29, '68, are stapled together. I will put them together. Plaintiff's Exhibit 9.

Mr. Bowers: That is all we have. You may answer these gentlemen, please, sir.

(Whereupon, a short recess was taken.)

Mr. Bowers: Your Honor, please, I have got just one more short question I would like to ask Mr. Cobb.

Norman Cobb

DIRECT EXAMINATION (Cont'd.)

By Mr. Bowers:

Q. Mr. Cobb, with respect to the exhibit put in the record there on the attorneys' and accountants' fees, with reference to the accountants' fee of Mr. Winquist, $2400, have you had a chance to, or did you review that bill and do you find it reasonable?

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page 28

A. Yes.

Q. All right, sir. And did you pay it?

A. Yes.

CROSS-EXAMINATION

By Mr. Lam:

Q. Mr. Cobb, I want to first ask you to, if you would, look at the two letters, one dated March 1, '67, second dated March 2, '67, one identified as Plaintiff's Exhibit 3 and Plaintiff's Exhibit 4. Would you look at those?

Now, Mr. Cobb, I think that—and I believe you were just going by memory—I think you said that the first notification that Mr. Ware had of this assessment was in 1966. Am I correct?

A. I testified that we notified Mr. Ware the tax—they said they were going to make an audit of the books in 1966.

Q. How was that done? Orally or how did you do that?

A. Mr. Winquist notified—as our accountant notified him by telephone.

Q. So far as you are advised?

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page 29

A. So far as I am advised.

Q. Now, those particular letters there, you have identified them, the one of March 1st is from whom to whom?

A. It was Mr. John H. Rust to Mr. Gordon Ware.

Q. And that was Mr. Rust, who has previously testified, is the attorney in Falls Church?

A. No, sir, he is in Fairfax. He is our personal attorney in Fairfax.

Q. From the Tenth District, then?

A. I don't know whether Fairfax is in the Tenth District or the Ninth District. I think it's the Tenth District. They change so often up there.

Anyway, Joe Broyhill is my Congressman.

Q. That is the Tenth District. We are talking about the same John H. Rust?

Norman Cobb

A. Yes, sir.

Q. He is your attorney *ant* he wrote March 1st to Mr. Ware and he said that an audit was going to be made; is that correct?

A. No, sir. No, sir.

Q. What does he say in the letter? What is he advising him of?

A. Advising him that the audit had been made, $16,331.02 tax deficiency.

3-20/21-69 page 30 } Q. He states for what years, doesn't he?

A. 'Fifty-nine, '60, '61 and '62.

Q. Now, I ask you again, he says in that letter as of March 1st that an audit had been made; is that correct?

A. Yes, sir.

Q. And that the final total according to the amount he is claiming due is sixteen thousand-and-some-odd dollars, is that correct?

A. That is right. That is right.

Q. Now, look at the other letter which is dated March 2nd, and that is the letter to Mr. Ware from Mr. White, is it not?

A. Yes.

Q. In that letter what does Mr. White say with respect to an audit being made? Or is going to be made?

A. Mr. White said that the taxes amounted to $39,230.03.

Q. So when you say thirty-nine thousand in that letter—and that's the claim he makes, is that correct?

A. Yes, sir.

Q. Then Mr. Ware has a right to be somewhat confused since letters dated from both your attorneys and dated respectively one day apart are over $16,000 difference in the amount of the claim, are they not?

3-20/21-69 page 31 } A. No, sir. Mr. Ware would not be confused because one is the gross amount, the other is the net amount after, after adjustments or after—let's see the word I am seeking for—

The Court: Negotiations, compromise?

The Witness: That is right.

By Mr. Lam:

Q. All right, after negotiation and adjustments, am I correct?

Now, when was the audit completed? Those letters are written on March 1st—incidentally, those letters take place how many years after Cemetery Consultants purchased this corporation?

Norman Cobb

A. Approximately three years.
Q. Approximately four, isn't it? You bought it in '64?
A. 'Sixty-four, and this is '67.
Q. 'Sixty-seven, excuse me, you are correct.
And when was the audit completed?
A. I don't know, sir. I don't have that date.
Q. Well, now, I show you this here, which is a notice of a levy—

Mr. Lam: Is that in here somewhere?
Mr. Bowers: We have got the agent's report right there.
The Court: Plaintiff's Exhibit Number 2 is the agent's report, dated January 26, '67.

3-20/21-69 page 32 } Mr. Lam: That is a preliminary statement. That is the preliminary statement, is it not, Mr. Bowers?
Mr. Bowers: That is the result of the examination by the agent.
Your Honor, please, I would like to make this one statement.
Mr. Lam: Mr. Bowers is not testifying.
Mr. Bowers: I want to make a statement here and I object to this because, really, the letters speak for themselves and he just had knowledge of the letter.
Mr. Lam: I am testing his knowledge.
Mr. Bowers: This is what was said when we put them in, if you recall.
Mr. Lam: He has testified to them, has he not, your Honor, and placed them in as an exhibit.

By Mr. Lam:
Q. Now, I show you this, Mr. Cobb. Do you know what that is?

The Court: Have you shown it to counsel?
Mr. Lam: Excuse me. You are familiar with it?

3-20/21-69 page 33 } The Witness: This is a form from the United States Treasury Department, Internal Revenue Service Form Number 668-A, headed "Notice of Levy."

By Mr. Lam:
Q. All right. Now, it shows on that in the information contained therein—

Mr. Lam: Let's introduce this, please, your Honor.
The Court: All right. Defendant's Exhibit Number 1.

(Whereupon, the foregoing document was marked for identification as Defendant's Exhibit Number 1.)

By Mr. Lam:
Q. Now, Mr. Cobb, the date of the assessment according to that is what?
A. 9/11/68. This doesn't—wait a minute. This doesn't say "date of assessment." It says "notice of a levy."
Q. Read in the second column here.
What date is the date of assessment?
A. 1/26/68.
Q. January what?
A. 26th.

3-20/21-69 page 34 } Mr. Bowers: Your Honor, I again object to this. The document speaks for itself. This is a Government document. It speaks for itself and he doesn't know anything about it.

By Mr. Lam:
Q. The nature of that date of assessment, then, means that the conclusion of all this took place in January of '68; is that correct?
A. I don't know that I can answer that.
Q. Well, you either can or you can't.
A. I would have to beg off, sir.
Q. All right. Now, the amount shown on that is how much?
A. Sixteen thousand six eight nine—

Mr. Bowers: Again we object, your Honor. The same thing. The document speaks for itself.
The Court: I think so. Be sustained.

By Mr. Lam: Referring back to the letter that you have there, which is the first letter that Mr. Rust wrote to Mr. Ware on March 1st of 1967, he says the amount due is sixteen thousand what?
3-20/21-69 page 35 } A. Three three one oh two.
Q. And so at that time he comes up with almost the precise exact figure except for some additional penalties as the assessment after it all took place, after it was settled; is that correct?

Norman Cobb

A. How was that again?

Q. I say in March of 1967, he is accurate enough at that point—and there has been much to-do about all the settlement that took place and all the negotiations—but he comes up with the figure that, with the exception of additional penalties, is the same as the final assessment, doesn't he?

A. He comes up with the figure that was furnished by the Internal Revenue Service. Mr. Rust didn't furnish it.

Q. I see. I understand that, but I say it takes place a year before the final arbitration of it, doesn't it, almost?

A. This letter takes place before the final arbitration?

Q. Yes.

A. I don't know.

Q. It's advice to him that what, that it had been made?

A. Yes, sir.

3-20/21-69 page 36 } Q. Had been made and I understand after that there was a great deal of negotiations to reduce it?

A. No, this is a reduced figure as far as I am concerned.

Q. Well, then, when you get down to the fact that you gave Mr. Ware an opportunity to come in, he has had no opportunity, if that is a reduced figure, at that point?

A. He had the opportunity before this figure was reduced.

Q. Not by any letters or notice you have shown him?

A. By telephone conversations direct, by a man who at one time was his accountant.

Q. Who was your accountant?

A. After the purchase but not simultaneous.

Q. From March 10th on?

A. He was our accountant from March 10th on *bur* he was Mr. Ware's accountant prior to that.

Q. You didn't enter the final contract and pay for it until what, March 30th?

A. Enter the final contract and pay for that?

Q. Pay the $50,000 when you purchased in the name of Cemetery Consultants took place at the end of March, didn't it?

A. Yes. Changing from individuals to the corporate.

3-20/21-69 page 37 } Q. So he was your accountant according to his own statement and your knowledge of it at least 20 days before you completed the purchase?

A. Well, I guess he was accountant for both of us at that time.

Q. That is what I kind of thought he was.

Norman Cobb

Now, there is in these proceedings—

Mr. Lam: Excuse me, your Honor, I don't find it. Are these all the exhibits in this file here other than what has been introduced here today?

The Court: We have Plaintiff's Exhibits 1 through 9. We have Defendant's Exhibit 1.

Mr. Lam: I am speaking of those entered at the previous hearing.

The Court: I don't know about those, ask the Clerk.

Mr. Lam: Judge, we are going to have—I just as well state it at this time. We will have some confusion of exhibits because we are not renumbering these similar to the same numbers we used in the prior hearing. Because I have here—

The Court: I have dated them. Exhibit Number 1 dated such-and-such a date.

Mr. Lam: That is correct. True. All right.

3-20/21-69 This is my copy I made of it, but I don't find it
page 38 } in the file.

The Court: Show it to counsel.

Mr. Lam: They are familiar with it, I am sure.

Mr. Spindle: It has been introduced.

The Court: All right.

By Mr. Lam:

Q. In the hearing on January 16, 1969 an exhibit was introduced as Defendant's Exhibit Number 2. I ask you to look at that.

A. All right, sir.

Q. Are you familiar with it?

A. No, sir.

Q. You are not familiar with it?

A. No, sir.

Q. Have you ever seen it before?

A. I don't recall, sir. I do not believe I did, but I don't recall. I think I saw the balance sheet as of December 31, 1963.

Q. All right. Did you, of your knowledge—and you have referred to letters that you knew were written by attorneys and so forth—of your knowledge did you know that that particular exhibit, the report of Ledbetter and—

3-20/21-69 A. Ballard.
page 39 } Q. Edmondson, Ledbetter & Ballard, dated October 22, 1963, did you know that that had been sent *o* and was in the hands of your accountant?

A. I don't believe my accountant had this.

Norman Cobb

Q. He stated on the stand that he did.

A. I thought he testified he had the December 31st statement. If it was delivered to my accountant I delivered it to him, but I don't recall doing it.

Q. Well, then, his testimony as to whether he did or did not have it would be better than yours, then, so far as your memory is concerned?

A. Yes, sir.

Q. All right. But so far as your knowledge, you don't recall seeing it previously?

A. No, I don't. I don't recall it.

Q. And if he did have it, then are you saying that—what was the name of your accountant?

A. Mr. Swart.

Q. Are you saying that he brought nine of the details of that to your attention?

A. No, he did not bring any details.

Q. Now, just for clarification so there is no question of joint accountancies in here, Mr. Swart was never the accountant of Mr. Ware; is that correct?

3-20/21-69 A. That is correct.

page 40 } Q. He was employed by you, I think you stated, for a number of years?

A. Yes, sir.

Q. And you still employ him?

A. Yes, sir.

Q. Now, at the prior hearing, if you will recall—you know Mr. Castle, do you not?

A. Yes, sir.

Q. He was employed by you all to operate this Cemetery, was he not, as manager and so forth?

A. What do you mean "you all"?

Q. Well, that is a proper question. He was employed by Cemetery Consultants and/or Mavis Cobb, J. D. Williams and Norman Cobb, to manage this Cemetery at the time you acquired it, was he not?

A. Not by Cemetery Consultants.

Q. Not by Cemetery Consultants? All right.

If you state he was not employed by Cemetery Consultants, was he employed by Rosewood Memorial Park while under your ownership?

A. Prior to our purchase?

Q. After your purchase and assumption of the ownership of Rosewood Memorial Park, was he so employed?

A. Yes, sir.

Norman Cobb

3-20/21-69 page 41 } Q. And he continued in your employ until some later date after the final negotiations and the purchase of the property in the name of Cemetery Consultants, did he not?

A. He was still employed by Rosewood Memorial Park.

Q. Which you owned?

A. Cemetery Consultants owned.

Q. And at the time you employed him, though, you were dealing as individuals owning Rosewood Memorial Park then, weren't you? I mean, wasn't the employment contract I showed you signed as principals of Rosewood Memorial Park?

A. As officers of Rosewood Memorial Park, yes.

Q. All right. Now, you recall he stated that there was certain work done putting in crypts and so forth which were put in by Mr. J. D. Williams.

A. A mausoleum was built by Mr. Williams.

Q. Mausoleums and crypts?

A. No, sir, mausoleum.

Q. Well, then, there were crypts built, were there not? Aren't crypts the things that go underground?

A. I am not a cemetery man.

Q. Not a cemetery man?

A. I say I am not a cemetery man, no, sir.

Q. If I asked you whether there were any crypts in Rosewood Memorial Park at this time would you be able to say there were or there weren't?

3-20/21-69 page 42 } A. There are now. We have sold some and put them in.

Q. So if there are now—you know what a crypt is, don't you?

A. Yes.

Q. What is it?

A. Similar to a vault.

Q. It's what?

A. Similar to a vault. It's a concrete box affair that you put a vault in.

Q. And it's not a mausoleum, is it?

A. No, sir.

Q. And a crypt does go underground, doesn't it?

A. I don't know. They can go underground or over the ground.

Q. Where do they go in Rosewood Memorial Park?

A. Under the ground.

Norman Cobb

Q. That is what I said, isn't it, Mr. Cobb? You have more knowledge than you seem to want to reflect in this thing.

When were they put in?

A. You mean the crypts?

3-20/21-69 Q. Crypts.

page 43 } A. I really don't know, sir. I guess, I presume they were put in when they were needed.

Q. You think they were put in when they were needed, yet beginning in May of 1964, you left the room, went and called the bank to find out, to check some loan you had borrowed from them, is that right, to pay for them?

A. Not for the crypts.

Q. Not for the crypts?

A. No, sir, and I might clear up now, I was under the wrong impression.

Q. I kind of thought you were.

A. That loan was made to put an extension on the office, not to build the mausoleum.

Q. That is what I wanted to know. I knew that, Mr. Cobb.

A. Yes, sir.

Q. But I didn't think you did

A. Being human, sir, I am subject to error.

Q. Right, and I was going to correct your error.

So when you came back your other testimony with regards to that being borrowed for the payment of the crypts to J .D Williams that was in error, not false, but I mean

3-20/21-69 just in error, according to your memory?

page 44 } A. Again Mr. Williams built no crypts. Mr. Williams built the mausoleum.

Q. Well, suppose your previous testimony is the fact that Mr. Williams did build the crypts and that this payment you went out and looked up was to pay him for the crypts, you would be confused again?

A. No, sir, Mr. Williams did not build the crypts. Mr. Williams built the mausoleum.

Q. So then may we take it that when you previously testified that Mr. Williams had put in the crypts and that the payment was for that, it is evidence of your lack of knowledge and confusion with regards to the state of affairs?

A. Mr. Williams did not build the crypts. Mr. Williams built the mausoleum.

Q. So if you previously testified that he did, then you would be in error; am I correct?

A. Testified to what?

Norman Cobb

Q. If you previously testified that he did build the crypts, you would have been in error when you testified to that?

A. I never testified Mr. Williams built the crypts. He didn't build the crypts. I am telling you again he built the mausoleum.

Mr. Lam: All right, excuse me, your Honor.

3-20/21-69 page 45 } We haven't written that last one up. Do you happen to have your notes from the previous hearing?

The Reporter: No, sir.

By Mr. Lam:

Q. Well, you corrected one thing I was going to ask you about.

Now, one final question: I think you made the statement a little while ago that you were not a cemetery man and knew very little about it and so forth?

A. That is right.

Q. I would like to ask you whether prior to the purchase of this cemetery in 1964 you ever addressed a convention of cemetery people in New Orleans in 1961 and that the theme of the talk made there was "A Banker Takes a Look at Cemeteries." Did you ever do so?

A. Yes, sir.

Mr. Lam: All right, thank you.

Mr. Bowers: Is that all?

Mr. Lam: That is all I want.

Mr. Bowers: Let me have a few questions with him.

REDIRECT EXAMINATION

3-20/21-69 page 46 } Mr. Lam: Now, your Honor, excuse me. With regards to that, that is my copy of an exhibit which I don't find. I would rather keep it.

The Court: All right.

Mr. Lam: If it ends up missing we will supply it.

The Court: Supply it.

The Witness: Could I confer with counsel for a minute?

The Court: Mr. Spindle, he wants to confer with counsel for a minute.

Mr. MacMillan: I don't think there is any occasion for that, your Honor, we just have a couple of simple questions.

Norman Cobb

By Mr. Bowers:

Q. Mr. Cobb, Mr. Lam asked you a number of questions about Plaintiff's Exhibits 3 and 4. I am going to read from Plaintiff's Exhibit 3, a letter from John Rust dated March 1, 1967, first paragraph:

"It has come to the attention of Cemetery Consultants, Inc. that Rosewood Memorial Park has an income tax liability for the period ending July 31, 1959, 1960, 1961 and 1962, in the amount of $16,331.02." The years men-

3-20/21-69 tioned are '59 through '62, are they not?

page 47 } A. Yes, sir.

Q. Look at that.

A. Correct.

Q. Now, in that connection I direct your attention to Plaintiff's Exhibit Number 2 and ask you to look, to tell the Court, what that is, to the best of your knowledge, sir.

A. This Internal Revenue report of an examination.

Q. Is that the agent's report? Is that the agent's report?

A. Yes.

Q. What is the date of it?

The Court: You already testified to it on direct examination. 1/26/67.

By Mr. Bowers:

Q. All right, sir. Now, look at the deficiency assessments for the years '59 through '62, if you will.

A. Yes, sir.

Q. Can you take a little piece of paper and total those just quickly?

A. They are already totaled.

Q. Now the whole thing is totaled but not those

3-20/21-69 years that I am talking about.

page 48 } A. They are totaled here.

Q. That includes '64 and '65 and so forth. I am asking you for the years '59 through '62.

A. According to my figures, $16,169.34.

Q. Does that figure approximate the figure that Mr. Rust used in his letter for the same years?

A. Yes, sir.

Q. So that Mr. Rust's letter was merely pointing out the tax deficiency for the years '59 through '62; was it not?

A. That is right.

Q. As determined in an agent's report which was the initial proposal; is that correct?

A. Yes, sir.

Q. Now, I hand you Plaintiff's Exhibit 4 which is a letter from Mr. Luther White to Mr. Ware and direct your attention to that letter, and look at the last paragraph on that letter. Will you read it to the Court, please?

A. "We urge you to contact this office immediately regarding this matter so that we may reach an understanding about these matters."

Q. No, sir. The last paragraph on the first page.

A. Oh. "This is to notify you that this—that

3-20/21-69 page 49 } it is our position that any deficiencies in Federal Income Tax, including penalties and interest, for the years covered—or on the years covered by the report, are, insofar as they involve the years of and prior to the purchase, are your responsibility in accordance with the terms of your agreement with Cemetery Consultants under date of March 10, 1964."

Q. And did Mr. White send a copy of that agent's report, which is Plaintiff's Exhibit 2, to Mr. Ware? Look at Paragraph 2, sir.

A. "Our clients have received under date of January 26, 1967, a 30-day letter from District Director of Internal Revenue, addressed to Rosewood Memorial Park, Incorporated, enclosing a report on which the Government proposed a net deficiency in the Federal income tax against Rosewood Memorial Park, Incorporated, in the amount of $39,230.03. Enclosed to you is a copy of the District Director's letter, the report, and supporting documents attached to it."

Q. So Mr. White's letter had reference to the report which covered the years '59 through '65, did it not?

A. That is right.

Q. And Mr. Rust's letter had only reference to the years '59 through '62; is that correct?

A. That is right.

Q. Is that the difference in the two?

3-20/21-69 page 50 } A. That is the difference.

Q. Is it not apparent to you what the difference is?

A. Yes, sir.

Q. Mr. Cobb, if you will carry on with this and just take your little pencil just a second again because Mr. Lam had some difficulty here, if you will just take the deficiency assessment without the interest up here for each one of these years, which is the figure here, each first figure there—(indicating)—

Norman Cobb

A. All right, sir.

Q. —which is what was assessed for those years?

A. Eleven thousand five sixty-nine eighty-five.

Q. So the tax that was actually assessed against Cemetery as a result of Rosewood's tax liability for the years '59 through '62 was $11,569.85; is that correct?

A. Yes, sir.

Q. Now, what is the difference between that and what was proposed?

A. Interest and penalty.

Q. No, what is the difference between that and the figure you had before? What is the figure you had before here?

A. $16,169.34.

3-20/21-69 page 51 } Q. That was the tax that was proposed against them? What is the difference between those two figures?

A. $4599.49.

Q. All right, sir, now the larger was the proposed tax *deficienty* only, no interest, penalties and so forth, and the other was the settled or assessed final figure, is that correct?

A. That is right.

Q. So how much savings was—

A. $4,599.49.

Q. Plus any interest at six per cent for years going back to '59 on all the larger assessments. That interest was saved; is that correct?

A. That is right.

Q. So it would be something in excess of $4500 was saved?

A. Yes, sir.

Q. On Mr. Ware's taxes, is that right?

A. That is right.

Mr. Bowers: That is all I have, sir.

The Court: Anything else, Mr. Lam?

Mr. Lam: Judge, no, I don't think I have any more.

The Court: Stand down, Mr. Cobb.

(Whereupon, the witness was excused.)

3-20/21-69 page 52 } The Court: Gentlemen, it's about nine minutes to 1:00. I think we ought to eat something.

Mr. Spindle: Anything that suits the convenience of the Court.

Mr. Bowers: I may have just a brief statement. I believe that with the evidence of Mr. Cobb that we have proved,

really, all of the necessities of our case, all the figures and all the facts, and with the exception, of course, of attorneys' fees, *et cetera,* in this proceeding which has not been concluded and we can't give a figure at this point, but we would be glad to let the Court hear that at a later time.

The Court: Do I understand that the amount of the claim is $16,753.42 for '59 through '62?

Mr. Bowers: That plus attorneys' fees and accountants' fees which were incurred in that litigation which are another $2400 plus interest on those.

The Court: Well, now, the Exhibit Number 6 is a paid receipt for $2953.17. What is that?

Mr. Spindle: That is the '64.

Mr. MacMillan: Taxes assessed after the sale against Rosewood which these parties bore. Also, your Honor, there was $2900 in attorneys' fees after the years of sale. There were also accountants' fees of $3600 after the year of sale. They have paid the taxes, the attorneys' fees and accountants' fees for the years after sale. They make no contention for those things in this proceeding.

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The Court: I understand. Well, what I have here is $16,753.42. I have the $725 attorneys' fees. I have accountant fees of $2400. Premium on the bond of $167. I have no Court costs or costs of witnesses plus attorneys' fees, if any, to be allowed in this case.

Mr. Bowers: Yes, sir.

The Court: So you rest?

Mr. Bowers: We rest, yes, sir.

The Court: Suppose we adjourn for lunch and come back about—can we be back by 2:00?

Mr. MacMillan: We will be glad to cooperate with counsel in view of the Court's ruling. I know he wants to eat. Don't want to deprive him of eating. He is liable to—

The Court: He might not eat as long as I do if he wants to—

Mr. MacMillan: Our position is that you have ordered us to produce them and we have produced them. All we want is the people with the records to stay with the records. He wants to watch over our records.

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The Court: I expect any time with Mr. Spindle will be all right.

Mr. Spindle: We can work that out.

The Court: Suppose we come back at 2:00 o'clock. In the meantime you all, with reference to the records, you can work it out.

(Whereupon, the hearing was adjourned for luncheon recess.)

AFTERNOON SESSION

Mr. Bowers: Judge, just let me make the final statement to be sure the record is clear that we have rested on the original complaint and the petition which we filed with your Honor for further relief pursuant to Section 8-581 on both of those petitions.

Thank you, sir.

3-20/21-69 page 55 } Mr. Spindle: Your Honor, counsel for the complainant very kindly made these records available to us for what time was available after we had a chance to get something to eat. But you can see we have got one whole file cabinet and these piles here. We found, in fact, we couldn't dent the surface in this little time, through no fault of theirs, it's just the volume of documents, but we think that with perhaps some explanation from the witnesses who have brought these records here, that we would hope that we can turn to the pertinent parts of them and uncover the evidence that we think is going to be relevant to your decision.

But I wanted to say to the Court at this time that we really haven't had a chance, or we have had some minutes, I don't mean an opportunity, but not a sufficient opportunity to go into them. So that we would like to go ahead but it may be that we will need some more time to look into these, or some adequate time to look into these and we—

Mr. Bowers: I just would make an observation there that the records he is pointing out presumably contain all the records, Rosewood and Cemetery. Now, your Honor, the Rosewood records have been available for a year for them.

The Court: I know. I understand.

3-20/21-69 page 56 } Mr. Bowers: I don't want a few minutes argument, talk about a few minutes. He has had a year or at least counsel has had a year to look at them and it's on the record it has been available.

The Court: We can proceed and see from the witnesses. It might develop if you look in such-and-such a place you will find what you are looking for and it might be that he has got to do some searching in there. I don't know.

Mr. Spindle: I don't want to leave Mr. Bowers' statement that we have had a year and have not chosen to avail ourselves of the opportunity to look at Rosewood's records go unanswered. It's our position that Rosewood's records, without the continuing records of Cemetery which continued to

operate this cemetery, would be meaningless. We would be looking at half of the pie and not seeing the other half. That is why we moved for permission to look at both records and our motions to inspect both records were denied.

We would like to go ahead at this time and call Mr. Winquist, please.

Mr. Bowers: If your Honor please, we want to note for the record that counsel for the defendant are calling Mr. Winquist as their own witness.

3-20/21-69 The Court: That is right.

page 57 } Mr. Bowers: All right, sir.

Mr. Spindle: It's my understanding that Mr. Winquist is not an officer of the plaintiff corporation or claimant corporation and therefore under the rules we are not entitled to call him as an adverse witness. It is my understanding that he is the accountant for the claimant corporation and the person most familiar with these books.

VERNON WINQUIST, having been previously duly sworn, was called as a witness and was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Spindle:

Q. Mr. Winquist, you have testified here *bofore,* but so that the record would be more exact for this particular hearing, would you state for the record your occupation, sir, and—

A. C.P.A., Vernon Winquist, my name.

Q. How long have you been practicing as a Certified Public Accountant, Mr. Winquist?

3-20/21-69 A. Approximately 18 years.

page 58 } Q. Your firm is Edmondson, Ledbetter & Ballard?

A. Yes, sir.

Q. In Norfolk?

A. Yes, sir.

Q. I understood that you had been the accountant for Rosewood Memorial Park and after its acquisition by Cemetery Consultants you were employed by the new owners to continue that representation; is that correct?

A. Yes, sir.

Q. After the liquidation in approximately April of 1964 you have continued as accountant for Cemetery Consultants, Inc., is that correct?

A. No, sir, in no capacity except in this tax matter. And I think that ended sometime in the end of 1967 or '8.

Q. Did you not continue to serve Cemetery Consultants as an accountant after the liquidation?

A. The liquidation took place in '65 and I did serve until the end of '66. But at that time they engaged other accountants and I have not served in that capacity.

The Court: Until the end of 1966?

The Witness: That is correct.

3-20/21-69 By Mr. Spindle:

page 59 } Q. You said '65. Did you mean '64, Mr. Winquist? October 1st of '64?

A. That was the beginning of the final year of the liquidation, yes. The liquidation or dissolution was consummated in '65. It began in '64.

Q. Well, for tax purposes it was treated as being dissolved as of the first of October, 1964, wasn't it?

A. No, sir. I was—it actually had a fiscal or had—the year July 31, '65 was its final return.

The Court: July what?

The Witness: 31, 1965.

By Mr. Spindle:

Q. Well, I am frankly confused because in the Revenue Agent's report attached to the 30-day letter which is part of the exhibit here, the last taxable period for Rosewood is shown as 1/8/65. Could you explain?

A. The Revenue Agent was in error, Dick. He did that for the purpose of trying to assess a penalty for late filing but he was proved wrong. That return was filed as of July 31st and that was the final date approved in the Appellate Division. That is incorrect. It is the alleged ending by the Revenue Agent, but it is not correct.

Q. All right, sir. Now, directing your attention to the method of bookkeeping of Rosewood in relation to

3-20/21-69 the determining of costs, can you tell us either

page 60 } from your working papers or from the books of Rosewood here the actual cost for the improvements of these lots as finally determined when the corporation was closed out by Project Three and Project Four?

A. I would have to get my papers to do so.

Q. Can I hand them to you? I don't know what to hand you.

A. Now, what was the question?

Q. Well, let's look at Project Three first. Is my understanding correct that this tax arose out of the costs expended or which had been charged against Three and Four? Weren't they the two projects involved?

A. Yes, sir.

Q. Maybe it would be a little more orderly if we took Project Three and examined the facts concerning that one, and what I would like to know, Mr. Winquist, is the amount of costs which had been deducted in your estimated cost through these years involved and the actual amount of expenditures for these improvements to the lots.

A. The cost that had been deducted, of course, is based on an estimate of the percentage, percentage of cost, applied to collections. And that amount was $45,921.68 through all years involved.

3-20/21-69 page 61 } Now, I do not have—I have a total by all years involved and broken down by the four years involved insofar as prior years are concerned. Most of that was expended in the earlier years. Or was charged off in the earlier years, I should say.

Q. Now, the figure you used was $45,921?

A. That is correct.

The Court: He said for all years involved.

The Witness: For all years; now, this is all years through 1965. Through the final year.

By Mr. Spindle:

Q. That is all years, and is this the actual expenditure or is this the amount that had been charged?

A. The amount that has been charged. I believe that is what you asked.

Q. That was the estimated figure. And what was the figure which was ultimately determined to have been actually expended for costs in Project Three?

A. The figure, the actual figures, that was ultimately allowed as a cost of Project Three was $69,817.99. And from that we deducted fifty-three per cent of the land, which was the incomplete portion of it, for a net figure of $62,550.51.

Q. There was a portion of Project Three that was incomplete, is that—I didn't understand it.

3-20/21-69 page 62 } A. These costs are the costs incurred as nearly or—or costs that we settled on insofar as the

total costs of the developed gardens of Project Three.

Now, half of Project Three, or fifty-three per cent, according to the determination, I think that is reasonably correct, this was another issue with the Revenue Agent, half of the land has not been developed and will be at some future date, but that may be years in the future. We eliminated that portion of the land cost.

The Court: Five three per cent is undeveloped land?

The Witness: That is correct.

Mr. MacMillan: Your Honor, could the record show that our objection which we have made throughout that this is not material, we are not going to mention it again. Just want to say we except to all of this testimony.

The Court: And your objection continues throughout this line of testimony?

Mr. MacMillan: Yes, sir.

By Mr. Spindle:

Q. Now, we are talking about just Project Three now, aren't we, Mr. Winquist?

A. That is right.

3-20/21-69 page 63 } Q. And five three per cent of Number Three was not developed, is that correct? I didn't—

A. Five three per cent—from the sixty-nine thousand we removed five three per cent of the cost of the land in this particular project. That figure amounted to seven thousand two six seven, forty-eight, and the remaining $62,550.51 is what was allowed as cost of Project Three?

Q. Well, did I understand it that forty-five thousand—I will just deal in round figures for the moment—forty-five thousand was the amount which had been deducted but sixty-two thousand-odd was the actual cost allowed?

A. Well, you see, it gets involved and you have to have an explanation, because they don't sound reasonable and without it they are not reasonable.

The cost, total cost, in the projects is broken down in various categories and then it's allocated to the particular garden it was in the settlement and this is the way it has been done.

It included an amount of $8800, a recovery of cost, that was attributable to Project Two, which had been previously settled. It also was reduced by the cost that applied to the lot inventory at the end of the period.

Vernon Winquist

So you have to have all those factors to deal with the numbers that we are talking about.

3-20/21-69 page 64 Q. Well, could you give me the categories which —subtotals which add up to this sixty-two thousand or could you direct me to where that is in the records?

A. It includes labor of $11,759. It includes various items of other development costs, features and so forth, thirty-five thousand six hundred thirty-nine ninety-one. Land of thirteen thousand five-four-O eighty. And then this transfer of $8877.63 from Project Two. That totals sixty-nine thousand eight hundred seventeen ninety-nine.

And you deduct—the portion of the land or five three point six seven one per cent of the land that was not developed and that total amounted to seven thousand two sixty-seven, forty-eight, and the rest due is sixty-two thousand five five-O five one.

Q. All right, sir. And the five three per cent was applied only to cost of land. Wasn't applied to labor or these other development costs?

A. That is correct.

Q. Mr. Winquist, could you explain to me, then, how the deficiency assessment arose? You started a moment ago to say it requires an explanation.

A. Well, first—

Q. It would appear that the costs exceeded what you have deducted and I am sure there is an explanation for that.

3-20/21-69 page 65 A. Well, this is the cost—the figures I have given you, represent the cost for the gardens in Project Three that were developed. The cost of developing those gardens did not represent such or totaled as great an amount as originally estimated. And basically that is the reason for the adjustment.

The cost, once you have determined it, needs to be divided, of course, in—divided by the lots, so you get the lot cost and determine the cost that is deducted in the returns. That total cost did not aggregate a figure that would compare or that would be equal to the original estimate.

Q. Well, I must have then confused your figure of forty-five thousand nine twenty-one which I thought was the original estimate.

A. Well, this was—I believe you asked me what amount was deducted as cost of the sales in the returns.

Q. I did.

A. And that was that figure.

Vernon Winquist

Q. I did, and I was thinking that would be the same as the original estimate over the five-year period. Am I wrong?

A. It would be based on the original estimate but would not be the same.

Q. Well, what was the total estimate of costs for Project Three that gave rise to the percentage which you applied?

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page 66 }

A. The total cost including land was a hundred sixty thousand seven hundred seventy-four dollars and eighty cents. It contemplated the production of twelve thousand six hundred sites, grave sites. The actual gardens developed produced six thousand a hundred thirty-two sites.

Q. How many sites were contemplated?

A. Twelve thousand six hundred.

Q. Twelve thousand six hundred and the actual sites developed six one three two?

A. Yes, sir. Now, the part of cost incurred exclusive of that portion of the land, all costs incurred were spread over the area that was developed which represented six thousand one hundred thirty-two sites. And this is the basis upon which it was settled. But in spite of that the costs were less than they were estimated.

Q. Well, the aggregate deduction of forty-five thousand nine twenty-one which includes all years from '59 through '64—

The Court: 'Sixty-five.
Mr. Bowers: 'Sixty-five.
Mr. Spindle: All right, '65.

By Mr. Spindle:

Q. Is substantially less than—obviously substan-

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tially less than the $160,000 which was contemplated and is less *that* the amount of the actual costs and if the amount deducted was less than the actual cost, I don't understand what gave rise to the deficiency.

A. Well, the actual cost of course is the cost to *develope* 6,132 lots. The lots sold that gave rise to the forty-five thousand nine hundred deduction represent the sale of 3,324 lots. Now, that means that two thousand approximately eight hundred lots remained in inventory, or sites remained in inventory and the lots that remained in inventory had to, of course, bear a prorata share of the cost.

Vernon Winquist

Q. Do your records indicate when these 2,708 remaining lots remaining in inventory were sold?

A. No, sir. They probably—a sizable percentage of them are in inventory today, I believe.

Q. You have records indicating how much has been expended for the cost to develop the remainder of the lots that were contemplated?

A. No, sir.

Q. Do you have any records with you, Mr. Winquist, or worksheets, information, as to the amount that Cemetery Consultants has expended for the further development of these Project Three lots?

A. Project—I think there is only one item would be involved. In the year following it there was some
3-20/21-69 surface on the roads that bordered near Project
page 68 } Three, I don't know whether it—the total amount was in there, but the portion of the road surfacing that was allocated to Project Three was $2,180. And there was another small amount of $27.80. That would be basically the only thing that would remain as near as I can determine, that would involve any development cost. And that probably is a repair rather than a development.

Q. You mentioned that 12,600 sites were contemplated and only 6,132 were actually developed. Were the remaining contemplated sites abandoned as separate sites or would that be in this unfinished land?

A. They are in sort of limbo. I don't know if they have been abandoned or planned or what, but so far as the gardens that were developed during this period of years and in this subdivision of Project Three all costs or—or there was no further development essentially to be made on those.

Now, when you get beyond Project Three in the last half of the cemetery, or in the area, the land area of the cemetery beyond Project Three, there is a lot of vacant land to be developed. But nothing in development costs were allocated toward that portion of it. It was all allocated to the plots that were sold during this period. That is why I would say it was essentially completely developed.

3-20/21-69 The only portion of it that remained were some
page 69 } minor things and I am not even certain about the road surfacing. The roads were in there. They had to be in there to be able to circle the garden.

Q. All right, sir. Could you give us the same information on Number Four? Could we switch to Number Four and run

through the same thing? I would like to know the contemplated costs and actual costs, total deductions, and how the deficiency arose.

A. In Project Four the total contemplated lots or sites, these are four-site lots or total number of graves that would be available, under the original plan of the planned project was 5,600. The number of lots in the garden that was developed was 3,728.

Now, in order to deal with this area you have got to deal with the 3,728 and also bear in mind the cost originally planned contemplated 5,600 being available for sale.

Q. Do you know the total contemplated cost of improvements?

A. In Section Four?

Q. In Section Four.

A. Seventy-two thousand a hundred thirty-four, sixty-three.

The Court: Would that be cost determined to be expended?

The Witness: Ultimately when all 5600—

3-20/21-69 The Court: In Section Three 69,817?

page 70 } The Witness: No, sir.

Mr. Bowers: No, sir. One hundred sixty-thousand seven seven four, eighty.

By Mr. Spindle:

Q. Could we go on and get the actual costs that were expended up to point of dissolution?

A. The cost of labor amounted to $3,683.85. Various items of other development costs was $12,751.95. The land cost amounted to $14,089.63. And then again cost that was negotiated as a recovery of Project Two amounted to $4,247.54, for a total of $34,692.97.

And deducting land that was apportioned to the incomplete part, which represented 52.564 per cent of the total land costs—

Q. Let me get that percentage again.

A. 52.564. That deduction amounted to seven thousand four-0-six, 0-seven, for a cost, a net cost, of $27,286.90.

Now, if you are to remove fifty-two per cent of the estimated cost of 72,000 you would have to take out over half of it or something in excess of 83,000. You would have about

$34,000 remaining cost, or thirty-three, so you see,

3-20/21-69 insofar as this garden is concerned, it was not

page 71 } fully developed but it was substantially—the sub-

stantial portion of the cost was already in there, and that includes such things as grading, seeding, you have to grade the roads, engineering costs and so on. And they are the substantial parts of them.

Q. But as of liquidation or dissolution, Project Four had not been completed, had it?

A. No, sir. Not a hundred per cent complete, no, sir.

Q. In fact, a considerable amount of development remained in Project Four, did it not? Is that a fair categorization, a considerable amount? How would you describe it?

A. I would say it looks like from the figures that approximately—approximately 80 per cent of the cost was incurred and approximately 20 per cent remained to be incurred, or maybe a little less than that.

Q. Now, what were the deductions which had been taken by Rosewood on account of these costs?

A. Thirty-one thousand nine sixty, forty-four. This is again the total for all years.

Q. What was the amount of the deficiency assessed against Rosewood on account of Project Four over these years? Is that a figure you can readily arrive at or would you rather do it by years?

3-20/21-69 page 72 } A. No, sir, Mr. Spindle, I can't. You see, they are merged with—Three and Four are merged and they would have to be—

Q. All right, sir.

A. I would have to figure that out.

Q. Well, I am not asking you to do a lot of arithmetic on the witness stand.

Let's take Three and Four together, then. And, of course, I am interested in the ultimate figure, not the Revenue Agent's report, but the figure on which you settled the case.

A. These are the figures—I have been quoting figures from the final settlement.

Q. Now, what were the over-applied costs per year for both Three and Four in the final settlement?

A. For the year 1959, the adjustment to over-applied cost amounted to $3,082.27; for the year 1960—these are all years that end on July 31st in each respective year—for the year July 31, '60, the cost, over-applied cost, amounted to $3,720.06; in 1961, $5,848.13; '62, $6,204.31. Well, there are some others that go on, if you—

Q. Well, '63 there is no change here, isn't that right?

A. That is correct. There were some minor—some changes in there but it resulted in no change in the tax.

3-20/21-69 page 73 } Q. No change in the tax? That's both Three and Four we are talking about?

A. That is right.

The Court: What is it, for '63 and '64?

By Mr. Spindle:

Q. Well, I understood there was no change in '63?

A. There is no change in the tax, but there was some change in the cost application.

Q. Maybe we better put that down. Have you that figure?

A. Two thousand five nine five, twenty-six for the year '63. And the year '64, $914.29. And for the short period of the year '65, $317.36.

Q. How is it that there is such a small adjustment in over-applied costs in 1964? Isn't that a year in which they were operating at full speed?

A. Well, in cemetery development when you began selling out of any garden or any area that is to be developed, as soon as you engineer the garden, grade it and seed it and so forth, do the bulk of the—or a sizable percentage of the development cost, you immediately start to sell sites from it. Really, all you have to have is an engineered section and platted so that you can show people where the sites will be.

3-20/21-69 page 74 } Now, those sites were sold consistently in those early years. Far more graves were sold in those sites in the earlier years than in recent years and this is the reason for the change.

Q. From your records there, how many lots were sold in 1964?

A. From Project Four in 1964, 43 lots were sold.

Q. Forty-two?

A. Forty-three.

Q. This is from Number Four?

A. That is correct.

Q. How about Number Three?

A. Number Three, thirty-eight.

Q. Well, how would that compare, for instance, with 1962, just to pick a year?

A. In 1962 from Project Four there were 1149 lots sold. And from Project Three there were 69 lots sold.

There is a decided drop-off in lots after the first two or three years of the beginning of each project.

Q. Well, now, you have the Revenue Agent's report before

you and it's in evidence and the final settlement for over-applied costs for Three and Four is substantially—is different, in any event, from the proposed over-applied costs for each of these years. What gave rise to the difference between the assessment by Mr. Rothman, the Revenue Agent, or the proposed deficiency by Mr. Rothman, and your final adjustment with the appellate conferee. What factual difference, is what I am driving at, Mr. Winquist.

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A. The facts were not necessarily too different. It was just difficult for Mr. Rothman to accept the facts. He insisted that something like 67 per cent of the land should be removed and it took days to get down to the basic facts to agree, for he and I to agree on the basic facts in the case. We never did. And this is why it went to appellate. He insisted that an arbitrary figure of $2500, for instance, should be removed from the cost of Project Three and Four as cost that would benefit the area behind it. And we didn't agree on this.

He had a good number of other issues. He refused to allow any cost insofar as cost of Project Two that was—the cemetery thought it was entitled and eventually recovered. He refused to allow any of that. And for these reasons we couldn't reach an agreement. All of which were resolved in the appellate conference in Richmond.

Q. The facts of the actual amount expended by Rosewood was not in dispute, was it?

A. No, the dollar amount was not. No, sir, but the proportion that we wanted to allocate to the developed part was in dispute.

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Q. Is that the principal reason for the difference between Rothman's proposed figures and the final settlement figures as to over-applied costs?

A. Those three or four items that is correct.

Q. That you just mentioned?

A. Yes.

Q. Not a question of the dollar amount spent?

A. No, sir.

Q. Well, now, directing your attention again to Project Number Four, Mr. Winquist, which you say had some substantial work remaining to be done, had Rosewood not been dissolved at the time that it was, would these over-applied costs be assessed for these prior years?

A. In all—this is a question that there is no way I can give you an answer, because they, in fact, were not dissolved

or did not continue and was liquidated. In my opinion the cost would have been no greater had they continued and I say that because I don't think the recovery of costs from Project Two would equal—or I mean, the recovery of costs from Project Two would be considerably in excess of the total cost that would be expended to complete development of both of these projects, in my opinion.

But now I can't tell you that it would or would not for certain, because I don't know. There is no question about what they would have been examined because both years were under extension and the Government wasn't going to let that expire.

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Q. I assume, of course, that it would be audited. I am not speaking of what anybody might have gotten away with by lack of an audit. I am assuming we are talking about the correct tax figures.

But my question is directed to a continuation of Project Four as distinguished from the termination of Project Four as of October 1st of '64 or whenever the actual date of dissolution was, and I am inquiring as to whether if it had been continued, these assessments of back taxes on account of Project Four, if it is not correct that they would not have been assessed.

A. Continued how far?

Q. Within the five-year period from the commencement of Project Four.

A. Well, you see, you had reached that point essentially in the year of liquidation. This is one factor that you have to contend with.

Q. What was the initial year for Project Four?

A. I think it was in the year '60. I believe that is the first sale—no, '61. It began in the year that commenced in July, or August 1, 1960, and ended July 31, 1961.

Q. So the five-year period permitted under the Revenue procedures would not have expired until '65, would it?

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A. That is correct. It would have been—this is what I say, it was a very short period that remained. It essentially included—or, in fact, the five-year period would have expired the year, the final year of the corporation, because that year extended through July 31, 1965.

Q. Well, if it had not been dissolved and if the project had been completed within that five-year period, this would not have given any rise to any back taxes, would it?

Vernon Winquist

A. Well, if the project costs equal exactly the estimate, it would not. But the figures indicate that they would not equal what was projected so there would be some adjustment in any event. Past history would indicate that is true. And this is a normal procedure because if you did it any other way you would be paying out more taxes in the earlier period than you would have to and you would have to file a claim for a refund. It would be a normal thing to have adjustment where some tax would be due.

Q. At the conclusion of the development period?

A. That is correct.

Q. You said based on the expenses which had actually been incurred you would predict they would still not meet the contemplated expenses even at the conclusion of five years?

A. That is correct.

3-20/21-69 page 79 } Q. Could you explain that to me a little? Have you got figures there on which you base that statement?

A. In Project Four subsequent or after the land and development costs were transferred to Cemetery Consultants in liquidation, so far as this project is concerned, there again was surfacing of the road of $2180 that was allocated toward Project Four. That same figure was allocated toward Three.

And there was nineteen hundred-and-some dollars expended for features for that project, and two hundred-odd dollars for marble benches.

Now, when the features are in and the road was surfaced this essentially represented the great majority of all costs insofar as the categories of costs in Project Four. And this is why I—I mean, I am talking in dollars and cents amount. You might have put a few trees out but there wouldn't be any substantial cost involved. This is why I say that those amounts do not add up to as much as was adjusted or negotiated in settlement, and I think if it continued on this may not have happened and, it seems to me that there would have been costs involved or an adjustment of the cost, anyway in my opinion.

3-20/21-69 page 80 } Q. But the figures you are using, Mr. Winquist, are actual expenditures by these purchasers after the date of purchase, aren't you? You mention that road, $2180, and a few odds and ends, probably less than $2400, as I got the picture. But this is all that the purchasers spent, then, from the time they bought this project until they wrapped up this corporation.

Vernon Winquist

A. This was expended—well, now, they expended no more than this so far as these projects are concerned; that is correct.

Q. And up until that time you had $62,000 spent on Three and some $27,000 spent on Project Four by Mr. Ware when he owned the project, if I understood your figures correctly?

A. Well, that is not quite correct. That includes a portion, a majority of that was expended by Mr. Ware, that is correct, but there were some items in this, in that category, that were expended also by—

Q. And less than $2500 spent by the purchasers after they acquired it?

A. Well, it was twenty-one hundred, twenty-two hundred, or so, in one project. In Project Three. There was a little over $4,000 in Project Four.

Q. In Project Four there was over $4,000, you say?

A. Yes.

Q. Are you using that same $2180 for the road?

A. This applied to each project.

Q. You mean there was $2100 worth of grading 3-20/21-69 when it ran through Number Three and when it page 81 } got over to Four there was another $2100?

A. Of surfacing, that is correct.

Q. Do these expenses that you have, figures you have used, Mr. Winquist, include expenditures on the crypts or in connection with the crypts?

A. No, sir. Nothing of this has anything to do with the crypts of the figures I have been quoting you.

Q. Were the expenditures in connection with the crypts a part of the cost deducted by Rosewood which gave rise to this deficiency assessment?

A. No, sir. There were no adjustments to the cost, the crypt costs. The figures I have given you are from Project Three and Four. And they were the only ones that entered into this period.

Q. Were the crypts handled as a separate project?

A. They were handled entirely separate; that is correct.

Q. There was no adjustment made?

A. There was no adjustment made to those.

Q. When did the crypt sales start, Mr. Winquist?

A. I don't know exactly, Mr. Spindle, but—

Q. Prior to acquisition?

A. Yes. There were, I think, a few sales, I think, 3-20-21-69 made prior to acquisition. A few sales of crypts

page 82 } and/or mausoleum type sales. I think all those were subsequently canceled. I am not certain.

Q. Was there a reason for the cancellation connected with the sale?

A. Well, most of the time it was because buyers didn't have the ability to pay.

Q. The cancellation had no relationship to the new owners?

A. No, sir.

Q. Well, when were these crypts paid for in relation to the date of acquisition?

A. Explain this again.

Q. When were the expenses in connection with the crypts incurred? When were the corporate expenses for the crypts incurred?

A. I am not certain, but I think prior to the date—a sizable portion of them were incurred prior to the date of liquidation. Approximately 21 or 22 thousand dollars was expended prior to the final liquidation of the corporation for the construction of either crypts or mausoleum-type crypts.

Q. But was that spent after acquisition, after March, 1964 and prior to liquidation?

A. Yes, sir.

Q. None of that was spent before March of '64?

3-20/21-69 A. Not to my recollection.

page 83 } Q. Is this an accrual item, Mr. Winquist? Is this a question of when you accrue these expenses?

A. Is what now?

Q. This $22,000, is any part of that an item about which the timing of the deduction might be open to question?

A. No, sir. These were amounts actually disbursed. Not accrued. They were paid for.

Q. Was Rosewood on a cash or an accrual basis?

A. It was on a modified cash basis.

Q. But this $22,000 was deducted as of the time it was actually expended by Rosewood?

A. It was actually paid out, disbursed by Rosewood, prior to liquidation. That is correct.

Q. And the deduction was taken for the period in which it was actually disbursed?

A. Well, that part of the deduction that would apply to those crypts that had been sold was taken, that is correct.

Q. But none of this money had been expended prior to March of '64?

A. No, sir. None to my recollection. I couldn't say that there had been a hundred dollars of it.

Q. No substantial portion of it?

3-20/21-69 A. No, sir, no substantial portion of it.

page 84 } Q. In the contemplated expenses for Section Three or in the contemplated expenses in Section Four were any expenses for crypts included?

A. No, sir. Not in the initial plan of it.

Q. Well, your qualification would indicate that at some point after initial planning they were included?

A. Well, in Section Three, the hundred sixty-odd thousand that I set forth earlier represents the development cost that was estimated to develop Section Three entirely into sites, grave sites, that would be available as sites for sale. Now, within the land area of Section Three a small section, a small portion, I should say, that may represent the equivalent of a hundred grave sites was set aside as a crypt garden.

Q. As a what?

A. As a location for crypts.

Q. Oh, thank you.

A. And, of course, the land cost of that was carved out, which may be only a couple hundred dollars. But that was carved out and set up in the crypt costs as well as the cost of building and installing those crypts.

Now, to that extent the crypt gardens were physically located within Project Three of the entire cemetery. But a nominal area or a nominal physical amount of land

3-20/21-69 was set aside for that part of it.

page 85 } Q. But only the portion of the land cost was included in the contemplated costs on Three, or did you say that contemplated costs of building the crypts were included?

A. No cost was included in the contemplated costs of Project Three of the land cost. The fifty-three per cent of the land that was removed from the total cost as being incomplete or undeveloped, that represented seven thousand some-odd hundred dollars. A portion of that land was assigned to a crypt garden. That amount would be nominal, I would say less than five hundred dollars. I don't know the exact figures. But that cost, that cost went into the crypt project as well as the cost of construction.

Q. Now, you handled the conferences with Rothman, who was the local agent, and with the Appellate Division, taking both the '64 assessments together with those for prior years, did you not?

A. Yes, sir.

Vernon Winquist

Q. And the '64 assessment included a disallowance of deductions for the perpetual care fund, did it not?

A. Yes, sir.

Q. And a $34,000 addition to income. Was that adjusted between the Revenue Agent's proposed deficiency and the final settlement?

A. No, sir. That was not—there was no change
3-20/21-69 made in that—well, except there may have been a
page 86 } couple of thousand dollars change, I believe, where
he hadn't given credit for some amount, but there was no basic change made in that at the time of final settlement.

Q. And in your '64 or '65 year there was also an assessment dealing with bank reserves, was there not?

A. Yes, sir.

Q. Was that adjusted?

A. The assessment was changed completely. It was eliminated. There was no assessment for that item in the final settlement.

Q. That was a $45,000 proposed addition to income?

A. Yes, sir.

Q. For the '65 year, and that was completely eliminated in the Appellate Division?

A. Yes, sir.

Q. What was the reason for the elimination of that item? Could you explain the substance of that to us?

A. Well, it has to do with the distinction between a cash and accrual basis tax payer as it relates to the dealer reserve account, which is a part of the Internal Revenue code that was codified about six or seven years ago. You no longer can defer dealer reserve or amounts set aside in dealer reserve if
you are on an accrual basis. But this was another
3-20/21-69 issue that Rothman felt like applied to a cash
page 87 } basis tax payer and I didn't, and neither did the
Appellate Division.

Q. Now, when you were negotiating a settlement of these cases, the proposed assessment which was going to be claimed against Mr. Ware of some sixteen thousand, and ultimately was settled at eleven-five or a difference of $4700, on the other hand the settlement made on behalf of Cemetery, which was not contemplated to be charged over against Mr. Ware, was initially at twenty-two thousand and ended up at twenty-four hundred or a saving of $20,000. Other than the hold-back reserve adjustment, is there any other—was there any

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other item involved which was switched from one year to another in your settlement?

A. Well, there were no switches from one year to another on any items. There were some eliminations, one of which was the hold-back reserve, and there was another item of commission of about $4,000 that was eliminated. And a few small items, travel and some other expenses which we eliminated first but which was allowed to stand. Basically they are the items.

Q. Were any of these adjustments—and you and I both know, Mr. Winquist, often in settling these cases certain adjustments can be moved from one year to another and I am simply asking because I don't know whether any of these items involved in issue at the Appellate Division level were switched from one time period to another.

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A. No, sir.

Q. In settlement?

A. No, sir. There was nothing switched from one period to another. As a matter of fact, it was some concern to me because I think the Internal Revenue Service could have legitimately switched some of the items in prior years and collected the greater amount of taxes had they so desired. But they did not do that and there was no attempt to change it.

Q. In arriving at your settlement of these figures were any issues traded off for other issues by way of settlement in view of hazards of litigation or uncertainties?

A. No, sir. Major issues, the one that consumed the great majority of the time, had to do with the cost factor and there was no way to trade that off. You convince the man you have the proper cost and convince the man that some cost should be allocated from the Project Three and that was about all you could do.

As a Matter of fact, we were permitted to deduct that cost in the most favorable years and we put most of it back in 1959 and '60 in Project Three where it would really do the most good. There were no other issues to be traded insofar as any particular year was concerned.

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The reserve, the bank reserve or hold-back reserve was eliminated. It was originally put in that year and it was eliminated.

The other items that were included in the years involved were either settled or eliminated completely. There was no switch at all.

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Q. Now, Mr. Winquist, can I invite your attention, please, to the balance sheet which you had prepared for December 31, '63? Do you happen to have a copy of that in your papers?

A. Yes, sir.

Q. I believe that was the balance sheet that was used in connection with the sale of this property, was it not?

A. Yes, sir.

Q. The sale of stock.

Now, shown as a current liability is a debt of $30,780 under the account "Perpetual Care Allocation, collected and not remitted." I would like to ask you what has happened to that liability.

Mr. Bowers: I am going to object at this point because unless Mr. Spindle can show how that is related here, I don't see the purpose of that question.

Mr. Spindle: I will lay some groundwork and the questions will show how it is related.

3-20/21-69 Mr. Bowers: All right, sir, I would like you to
page 90 } do that.

By Mr. Spindle:

Q. First let me ask if in connection with the acquisition of the stock the purchasers did not assume these liabilities.

That is not well phrased, but the corporate liability continued after acquisition of the stock by the new purchasers, did they not?

A. Oh, yes. It would remain unchanged. This would—they did not assume it, I don't think.

Q. I don't mean personally assume it. I don't mean the stockholders personally assumed it, but they bought the corporation *wih* this liability on the books?

A. Yes, sir.

Q. Now, in determining this $30,000 that the corporation owed to the perpetual care fund was not the cost which was deducted each year against lots which gave rise to this deficiency assessment, was not that based on the gross amount including the amount which had to be put into the perpetual quired that ten per cent be set aside and put into this perpetual care?

A. Please restate that, Mr. Spindle.

Q. Let's go back.

3-20/21-69 In the years when Rosewood was operating
page 91 } prior to the sale to the new interest here of Ceme-

tery, it sold a lot for $5,000. You applied against that collection an estimate for cost, and that was a percentage which the engineers had worked out, and that was deducted as the cost of that lot. Well, now, the state law required that ten per cent beset aside and put into this perpetual care fund, did it not?

A. Not prior to this time, it did not.

Q. It did not require it prior to '64?

A. There was a change in the law. I don't know exactly when that is in effect. But it was not in effect, I know, at the time of—or during 1963 and prior.

Now, this has been enacted since that date. I don't know the exact date.

Q. But going back to '61 wasn't ten per cent of each sale pulled out for perpetual care?

A. Yes, sir.

Q. All right. Now, my question is this, then: I wasn't aware of the change in law and I wasn't directing my question at any change in the law—in all of these periods we took out ten per cent for perpetual care?

A. That is correct.

Q. Then when you applied this cost factor of eleven or twelve per cent, or whatever it may have been, in each of these years, in order to make your deduction for
3-20/21-69 cost you applied it to the perpetual care reserve,
page 92 } did you not?

A. No, sir.

Q. Well, if you sold a lot for $5,000 and you had to put ten per cent aside, you would put $500 into the perpetual care fund, wouldn't you?

A. That is correct. That is what is in this account.

Q. All right, sir, but then you applied that same twelve per cent to that five hundred dollars in order to make that deduction, didn't you?

A. No, sir. Twelve per cent? What twelve per cent now are you speaking of?

Q. Twelve per cent I am using as an example of the percentage which was used in determining the deductions for cost of each lot in each year.

A. To use specifics, if you have a $500 lot and you use 12 per cent as its cost, it would cost $60.00; correct?

Q. All right.

A. If you had a $500 lot you were obligated or you did set aside—and this was done in prior years, you set aside $50.00 in this perpetual care account that one day should be paid

into the trust fund, perpetual care fund. You figured cost at 12 per cent of $500 which was $60.00. It had no bearing on the portion that you set aside in the perpetual
3-20/21-69 care fund.
page 93 } Q. But the amount that you were going to set aside in the perpetual care fund and that you owed in the perpetual care fund was related to the $60.00 which you had deducted on a $500 lot?

A. No, sir. None whatsoever.

Q. You took 12 per cent of the gross, the $500 gross?

A. Yes, sir.

Q. And yet $50.00 of that had to go into the perpetual care fund?

A. No, sir, no, sir, no, sir. Fifty dollars was independent of that. The 12 per cent factor or the $60.00 represented the estimated cost that had nothing to do with the perpetual care fund. The perpetual care was another fifty entirely independent of the $60.00.

Q. Well, let's see if it didn't have something to do with it, Mr. Winquist. You sold the lot for $500 and you had to set aside $50.00 to go into the perpetual care fund?

A. That is right.

Q. So your net sales price on the lot was for $500, is that right? Do you follow my example?

A. Well, that is not the way it was handled. Continue and I will see what I—

3-20/21-69 Q. You sold the lot for $500. You have to put
page 94 } aside fifty for perpetual care. That netted $450 to Rosewood, did it not?

A. That is right.

Q. Shouldn't the 12 per cent which is your estimate of cost apply on the collections which were net to Rosewood?

A. The 12 per cent was applied to all collections. The last $50.00 collected on this lot that we are using as an example, after the 12 per cent had been applied, was set aside in this $30,000 account to be paid over to the trust fund. Now, that would have no bearing whatsoever on the cost factor in the way it was handled here.

Q. Well, what was the ultimate disposition of that liability?

A. It was not paid prior to liquidation.

Q. Has it been paid since liquidation?

A. I don't know.

Mr. Bowers: Let my objection stay to that question, be-

cause I see no relevancy to the issue, anyway, whether it's paid or not.

The Court: I think he is trying to get at the improvements ran up the tax and all that sort.

Mr. Bowers: Whether perpetual care is paid in later years has no bearing at all.

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By Mr. Spindle:

Q. Mr. Winquist, again coming back to this perpetual care fund, in the '64 year the Revenue Agent added to income some $34,000. As I understand it, and I am asking you if this is correct, that was the result of Rosewood's failure or refusal to pay that $30,000 liability on the balance sheet when they bought it, into the perpetual care fund, isn't that correct?

A. It was the result of the continuous build-up in the reserve or in this amount for a number of years without paying the amount over to the perpetual care fund.

This item gave me considerable concern for a number of years. And I think the agent would have had every right to put it in the year 1962. And when he shows the year '64 for reasons I don't know, this is where we settled on.

Q. This resulted in a considerable benefit to Rosewood in that this liability which they had assumed was now converted over to the income side of the ledger, was it not, by virtue of this adjustment?

A. Well, it resulted in—

Q. In a benefit?

A. What benefit?

Q. Rosewood didn't pay this money to the per-

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petual care fund. There was a $30,000 liability which they owed into the State perpetual care fund. They didn't pay it. And as a result you picked up—you converted that liability into income, paid taxes on it or made it taxable but it happened to fall in a year when you had a $25,000 loss so you paid no substantial tax on it, and then instead of a liability you carried it as an asset on the income side, didn't you?

A. First this wasn't converted to income. It was taxed by Internal Revenue Service because of failure to pay it in as it accrued or as it was collected and due.

Now, the tax assessment really had no bearing on conversion to income. They failed or they said, "You cannot retain this deduction from income because you haven't paid it in. And it's accumulated over seven, eight, years and we are not

going to permit you to continue this." This is essentially the position they took.

Q. But they treated it as income?

A. Yes.

Q. Thirty-four thousand dollars of income in this final year?

A. Not in the final year. This was the year prior to the final—

Q. 7/31/64, excuse me.

A. Yes, sir. Now, there was some adjustment. There was a two or three thousand dollar adjustment in one

3-20/21-69 of those years because of an item of this fund that

page 97 } they failed to consider.

Q. And that was a year in which you started off before the agent proposed this adjustment with a $25,000 tax loss, didn't you?

A. That is correct.

Q. So it didn't hurt you to pick up this income in 1964? Didn't hurt taxwise to pick up this income in '64?

A. It was certainly—well, it hurt to the extent that it created some taxes but it would be far more favorable in '64 than in '62.

Q. Or in a subsequent year?

A. Or in any other year, that is correct.

Q. Well, that is why I asked the question, if by failing or refusing to pay and allowing this to be converted to income if it didn't really benefit Rosewood.

A. Well, it caused—in what respect?

Q. In the respect that what was carried on the balance sheet as a liability of $30,000 is converted into income and after payment of a nominal tax is then an asset instead of a liability. Isn't that correct?

A. There is no way that it could be an asset. The fact that it was taxed by Internal Revenue Service wouldn't convert it to income. It would cause an additional taxable item to occur in a year that ended July 31, '64. But it

3-20/21-69 got in taxable income by virtue of disallowing the

page 98 } accumulation of it over a period of years.

Now, I don't see how it could be an asset. It caused a $2400 tax liability, essentially.

Q. All right. You paid the $2400 tax liability. Wouldn't this be an adjustment to net worth? Wouldn't you pick it up on net worth instead of a liability after you paid the tax? The remainder that is left over is no longer a liability. It's been converted, it's been treated as income. Wouldn't that be

an addition to net worth on your right-hand side of your balance sheet and an addition to cash receivables on the other side? Certainly would be an asset, wouldn't it?

A. I don't see how it could be an asset, or how it could be converted to an asset, Mr. Spindle.

Q. Well, would it be an adjustment to net worth?

A. Well, the fact that it was treated—the fact that it was treated—disallowed as a deduction from income over the years wouldn't necessarily affect it in any other respect.

Q. Well, did you continue to carry it as a $30,000 liability when you had to pay income tax on it? That wouldn't be a proper accounting treatment, would it? Wouldn't it go into net worth? Wouldn't it drop down below the line and go into the net worth of the corporation? It wouldn't con-

3-20/21-69 tinue to be a liability, would it?

page 99 } A. It very well may. Now, I don't know how it could create an asset. This is my—

Q. Maybe I phrased it badly. Maybe it's just simply an adjustment to the liability side of the balance sheet. But it seems to me that if you treat this as income and you pay tax on it, then you would make an adjustment to net worth below the line, take it off as a liability. Would that be correct?

A. If you did this, this would be correct.

Q. Well, now, let me ask you, let me direct your attention to a new subject, Mr. Winquist, one of the effects of the liquidation of this subsidiary into the parent was to obtain a new basis in the hands of the parent, which was the purchase price which the parent had paid for the stock spread over the assets upon liquidation, wasn't it?

A. Yes, sir. The difference of the net amount.

Q. And this liquidation was made to take advantage of the provisions of Section 334 (b) 2 of the Internal Revenue Code, with which I am sure you were and are very familiar?

A. Yes, sir.

Q. Now, in the process of liquidating, the parent, Cemetery Consultants, not only acquired the assets of Rosewood but it also assumed the liabilities of Rosewood, did it

3-20/21-69 not?

page 100 } A. Yes, sir.

Q. And, in fact, to effect that liquidation of the subsidiary into the parent, a document was executed by which the parent, Cemetery, formally assumed all of the liabilities of its subsidiary, Rosewood; isn't that correct?

A. To the best of my knowledge, that would be correct.

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Q. Weren't you aware of it? Did you prepare that document?

A. No, sir, I didn't prepare it. Miss Cobb or whoever would have handled the legal effects or legal aspects of it would have.

Q. Such a document did exist, was executed, wasn't it?

A. I am quite confident it was.

Q. That would be customary in this form of liquidation, wouldn't it?

A. Yes, sir.

Q. Now, a part of the liabilities which Cemetery assumed when it took over Rosewood as of October 1, 1964, or whatever period of time this liquidation, in fact, occurred, part of the liabilities the parent assumed were the tax liabilities of the subsidiary, weren't they?

3-20/21-69 A. Yes, sir.

page 101 } Q. And under the regulations, under 334(b)2 the tax liability of the subsidiary must be added to the basis of the assets in the hands of the parent, must they not?

A. Yes, sir.

Q. So that the 15—let me get the correct figure—the $16,753.42 tax liability, which is the liability of Rosewood, was added to the basis of the assets in the hands of Cemetery, was it not?

A. No, sir.

Q. Why not?

A. The amount was not determined at that point, nor was it responsible for payment presumed to be Rosewood's, and accordingly it was not added.

Q. Well, whether the exact amount had been *determine* as of the moment of liquidation would not mean that the parent, Cemetery, was not entitled to that step-up in basis when the final tax was determined. When the final tax was determined the parent would be entitled to that step-up in basis, would it not?

A. If the parent would assume or would pay or would be obligated for any liability subsequent to liquidation, it would add to the basis, to the base of all assets.

Q. It also acquired all of the assets of Rosewood and one of those assets, at *lease* according to the contem-

3-20/21-69 plation of the parties, was a claim of right

page 102 } against Gordon Ware, was it not?

A. Yes, sir.

Q. But one of the liabilities as between Rosewood and the

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Internal Revenue Service, the United States Government, there wasn't any doubt at that point or when it was determined that there was a liability of Rosewood to the United States Government?

A. That is correct.

Q. And the parent had to assume that liability? It did, in fact, assume the liability?

A. Yes.

Q. And under the regulation that liability of $16,000 had to be added to the basis of the parent, did it not?

The Court: Sixteen seven fifty-three.

Mr. Spindle: The figure I jotted down this morning when they were citing damages, your Honor, on my pad was sixteen seven fifty-three, forty-two, which included interest up through today.

The Court: That is right.

By Mr. Spindle:

Q. Now, what I am asking, Mr. Winquist, and I realize the figure might be adjusted from time to time according to interest, but whatever the liability of Rosewood was for taxes to the United States Government as of the moment of liquidation, that had to be without discretion added to the basis of the assets in the hands of Cemetery. I am asking if that isn't correct.

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A. I don't know the exact provision but from a practical point this would be an impossibility until such time it were determined, if it were in fact determined, to be Rosewood's liability.

I can't quote the Code in regard to that aspect. But there would be no practical way of accomplishing this until such time as you determine the amount.

Q. I realize that the entry might not be made as of the date of liquidation, I realize the mechanical problems, but that doesn't mean that the parent is not entitled to, or that when it was determined an entry should be made adjusting the basis and amended returns, if necessary, filed?

A. Oh, correct.

Q. Isn't that correct?

A. This is correct. Yes.

Q. This happens all the time?

A. Yes, sir.

Q. And once you settle a liquidated claim or you deter-

mined—it might be an undiscovered liability so there was a liability assumed that was not known, and later popped up, wouldn't you have to adjust the basis upwards for that assumption of liability?

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A. Yes, sir.

Q. Well, then, regardless of the fact that the entry of $16,753.42 could not have been made on the date of liquidation in '64, as soon as that liability was determined and settled with the Internal Revenue Service, isn't that an addition to basis in the hands of Cemetery?

A. As soon as it is determined to be Rosewood's liability. I don't see how it could be an addition prior to that determination.

Mr. Bowers: Do you have any authority on that, Dick? I mean, has it been determined?

Mr. Spindle: I believe I am examining the witness, your Honor, please. I would appreciate not being interrupted by counsel unless he has an objection to the form of the question.

The Court: You interrupted each other at an excellent time. It's 4:00 o'clock. You all want to try tomorrow morning? You want to try it next Tuesday? I am not—

Mr. Bowers: Tomorrow morning, your Honor.

Mr. MacMillan: We have got our witnesses all here.

The Court: Want them recognized?

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How about tomorrow morning at—you want to start a little earlier?

Mr. MacMillan: Yes, sir, as soon as you can start.

The Court: I think 9:30 would be time enough.

Now, do you want the witnesses recognized for tomorrow morning? Or they will be here, anyway.

Mr. MacMillan: You tell them to be here, I am sure they will be here whether you recognize them or not.

Mr. Spindle: I hate to ask Mr. Winquist to come back. I was just going to *as* him one or two more questions.

The Court: You say it's two, I know it's two. Ask him the two.

They are going to have to re-examine him.

Mr. Bowers: We may have some questions after that.

The Court: Suppose we adjourn to tomorrow morning at 9:30.

(Whereupon, the hearing was adjourned to reconvene the following morning, March 21, 1969 at 9:30 o'clock a. m.)

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* * * * *

March 21, 1969

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page 108 } The Court: You all ready to proceed this morning? Mr. Winquist?

VERNON WINQUIST, the witness on the stand at the time of adjournment, having been previously duly sworn, resumed the stand and was examined and testified further as follows:

DIRECT EXAMINATION (Cont'd)

By Mr. Spindle:

Q. Mr. Winquist, we ended up last night talking about the step-up in basis on assumption of liabilities. I didn't mean to try to take you by surprise, I am sure you are thoroughly familiar with that section, and I wasn't asking to test your memory without looking at the Code, but let me come back a minute.

Just to lay the groundwork for this discussion I will show you the document which purports to be the assumption of liabilities by Cemetery of Rosewood upon dissolution and ask you if you can identify that as such.

A. Yes, sir, I am sure—

Q. You recall that?

A. Yes.

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Q. You have seen that.

Mr. Spindle: I don't believe this has been introduced in evidence, your Honor. I would like to introduce it.

The Court: The notice of levy is Defendant's Exhibit 1, and I believe this will be Defendant's Exhibit Number 2.

(Whereupon, the foregoing document' was marked for identification as Defendant's Exhibit Number 2.)

By Mr. Spindle:

Q. Now, in relation to our discussion of late yesterday afternoon, this provides that Cemetery Consultants hereby assumes—and I am reading only the pertinent parts—hereby assumes any and all taxes, whether accrued or contingent, that may be payable or properly assessable against Rosewood.

Now, based on that assumption of liability my question to you is why, if you say it is not proper, why the tax which the Government assessed against Rosewood in the amount of some sixteen thousand dollars now with interest, why that $16,000 would not be added to the basis of the assets in the hands of Cemetery?

A. The first—first it's a question of determination of the amount as well as whether it is their liability or not. It's a matter of practical application.

3-20/21-69 page 110 } Now, if you tax—taxes, I mean the application of tax rules, so far as accounting procedures, should work to a reasonable result. If you can't get that, I don't think it should be adjusted until you know the answer.

Q. Well, as I understand what you are saying is until you know the amount of the tax when a tax is in dispute you could not make the entry on the books which would step up the basis, but there isn't any question, is there, Mr. Winquist, that ultimately Rosewood was held to owe the United States Government some taxes?

A. It was—correct.

Q. That was agreed upon—

A. It was held to owe the tax. But if in fact does not eventually pay those taxes, it is not a liability, isn't that correct?

Q. I don't think so.

A. If you treat it any other way you would get a completely unreasonable accounting result and I don't think that is intended in the Code. It hasn't been in most applications of it.

Q. Well, let me direct your attention to Section 334(b)2 regulations. I have underlined the portion there that deals with the assumption of liability for your ready reference. I know you are generally familiar with it. But the provisions of the Treasury regulations which require additions to basis there don't speak in terms of payment of the tax. They speak in terms of assumption of liabilities, don't they?

3-20/21-69 page 111 }

A. This is correct.

Q. And furthermore, the regulations do not leave this to the discretion of the tax payer. The regulations say that the assumption of liability shall be added to the basis of the assets. It's a mandatory provision, is it not?

A. That is correct.

Q. All right, sir. Then realizing that you might not know the amount of the liability and maybe the liability is in dispute, but if the parent company, Cemetery, assumes the tax liability of the subsidiary, as this one clearly did, then why doesn't that liability for taxes to the United States Government have to be added to basis?

A. The parent company can't, obviously, assume any greater liability than it eventually will pay. It's not possible to get a benefit of a liability that it's never going to have to pay. If you were to make an adjustment, and here again is where your direct conflict with the application of this provision insofar as sound accounting principles is concerned, or accounting as it related to income taxation, if you were to make an adjustment on the dissolution or transfer of this to assets, at best it would be an incorrect one. You

3-20/21-69 would know you would have to change it.

page 112 } The practical application of this is to do nothing until that liability is determined and then adjust it.

Q. Well, let me proceed—

A. And I don't think there is an agent or a conferee that would argue with that position. In my opinion.

Q. Well, doesn't that run directly contrary to the language of the regulations, Mr. Winquist?

A. I don't think it runs contrary to the interpretation of them.

Q. Well, would you read this regulation into the record, then, that we are—

Mr. MacMillan: Your Honor, let the record show, and I don't mean to interrupt, that Mr. Winquist has been called as their own witness and if we are bordering on impeachment, and I don't say we are, but if we are bordering on impeachment it can't be done. The witness has given his professional opinion. He said that this liability was never put on the books and has not been taken as an advantage for the continuing corporation. There has been no manipulation here and the argument is being made that he should have taken it as a manipulation and put it on the books and claim it as a cost.

Vernon Winquist

And I just want the record to show that he has
3-20/21-69 never said they did it, he has testified that it
page 113 } would not be proper to do it that way, to assume,
to put on their records a liability which was Mr. Ware's so that they could get the tax advantage of it and leave it on the records, even though Mr. Ware was paying. I just want the record to be crystal clear.

Mr. Spindle: Are you making an objection, Mr. MacMillan?

Mr. MacMillan: I am making an objection to your attempting to impeach the witness whom you have called.

Mr. Spindle: This witness I am calling only as a factual witness, your Honor, as the accountant who made the entries on these books. And all I am asking him is the factual situation of what entries were made on the books of Cemetery and Rosewood.

Now, I am trying to find out from him why he did not make the entry which would step up the basis. And I am simply—

The Court: You just asked him to read the regulations into the record.

Mr. Spindle: That is all. At the moment our discussion
relates to a provision of the Treasury regula-
3-20/21-69 tions and I think the record would be clearer if
page 114 } we simply had that in the record, itself. I asked
him to read that, it's a one-sentence regulation.

The Court: The Court will permit it. Put the regulation in.

Mr. MacMillan: We don't oppose that, your Honor. That is not my point.

The Court: I know, you think he is bordering on an attempt to impeach.

Mr. MacMillan: He doesn't like his answers.

The Court: Well, it's his interpretation of it. Mr. Spindle disagrees with him. That is the reason he wants the regulation put in the record.

The Witness: It says here "the adjusted basis," and I won't read all of this, "of the subsidiary stock held by the parent with respect to the deductions and liquidations are made of this"—are made, period—dash, I guess—"shall be increased" —and it is not discretionary, I agree with this—"by, Number One, the amount of any unsecured liabilities assumed by the parent."

But my point is in a definition of unsecured liabilities assumed, now it does not tell you how to define that item and
this is where I think we are at conflict and I
3-20/21-69 don't think that this would be included in that.
page 115 }

Vernon Winquist

By Mr. Spindle:

Q. All right, sir, let me ask you this: Whether or not the tax payer, in this case Cemetery, elected to add this $16,000 to the basis of its assets would not make any difference as to whether it was entitled to or should have, if the law required the addition to basis, the discretionary act of the tax payer would not change the effect of the law, would it?

A. You will have to—you lost me there for a minute.

Q. It was a little cumbersome.

My question is simply this, Mr. Winquist: If your interpretation of liabilities is incorrect—

A. Liabilities assumed.

Q. Liabilities assumed—the fact that the regulations require that would be the governing factor and not the discretionary act of the tax payer in electing to put it on the books or not?

A. Any liabilities that they assumed, there is no discretion with it. They would need to insofar as this application of this is concerned.

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Q. All right, sir, and the reason you say Cemetery did not, under your direction as accountant, add this to basis was because you felt that these liabilities assumed were indeterminate at this point?

A. They were not assumed insofar as these prior years were concerned and also indeterminate insofar as amount is concerned.

Q. Two reasons. One, it was not assumed; the other it was indeterminate?

A. Correct.

Q. In view of the language of the assumption document, could you explain to me why you say that Cemetery did not assume this liability?

A. Because it was provided for in the purchase agreement between Cemetery Consultants and the seller.

Q. I don't want to be in a position of arguing with you as a witness—

A. At least in my opinion. That is the only answer I can give.

Q. The contract of purchase under your interpretation and the interpretation of your client, provided an indemnity from Mr. Ware for these taxes?

A. Right.

Q. But there couldn't be any doubt in your mind, could it,

that the obligation to the United States Government was from Rosewood?

3-20/21-69 A. Correct.

page 117 } Q. And that was a tax of Rosewood and under the language of this document wasn't that assumed?

A. It was assumed—yes, it was. Any liability would be assumed, or any liability that was Rosewood's would be assumed.

Now, we get back to the intangible position of adjusting a record in one manner and then if the result is different, reversing that insofar as bookkeeping entries are concerned. And I don't think that that is what is intended under this section of the Code.

And I again say that I don't think there is an agent or a conferee that would cause this to come about.

Q. Well, let me move on to the next step.

If this $16,000 of liability must be added to basis, if you will take that premise, must be added to basis—

Mr. MacMillan: Your Honor, could the record show now that he was a factual witness and now he is saying if you take the hypothesis that it should have been added what would have been done, and so forth. I am just making it clear, your Honor, that all the questioning is not merely calling this witness as to what was done in these books, he is now going into his professional opinion, which we don't make any objection to that, except to let the record show that he is not a factual witness.

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page 118 } Mr. Spindle: He wants me to be bound by the testimony, but this gentleman was the accountant who was to direct the entries here on Cemetery Consultants' books, your Honor, and I am still exploring with him the effect—

The Court: He is an expert. Wouldn't he be allowed to?

Mr. Spindle: I am not calling him as my expert, your Honor. I am calling him as purely the accountant for the adverse party. And he said that he did not make this entry. He has given his reason and I am exploring with him if he had made the entry in accordance with the regulations, at least according to my interpretation, what would be the result of it.

The Court: All right.

Mr. Spindle: And I think the Court ought to see that.

Vernon Winquist

By Mr. Spindle:

Q. Mr. Winquist, assuming that it was added to basis, this would mean that Cemetery Consultants—I want to make sure this is sort of put in layman's language for the record—this would mean that Cemetery Consultants would have a higher cost basis for these lots, would it not?

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A. Yes, sir.

Q. To the extent of the amount of the tax paid? And would not that mean that upon the sale of these lots in subsequent years they would receive $16,000 tax free as a return of the capital?

A. No, sir.

Q. Why not?

A. It would have to be allocated as the regulations here specify in proportion to the fair market value of all assets.

Q. Yes, sir.

A. Now, the lot sales would probably represent ten per cent or fifteen per cent of the value of all assets so that it would need to be spread over undeveloped land, vacant land, building and all other assets, and when they were ultimately sold and/or depreciated, if they are depreciable, this would be a recovery.

Q. I realize that they must be allocated over all the assets. But the assets of Cemetery Consultants when they liquidated Rosewood was essentially land. They might have had a truck or two or some tools, but basically it was land, either lots or undeveloped land, was it not?

A. I think that probably represented about 50 to 60 per cent of the total assets, yes.

Q. Then the rest would be depreciable assets, wouldn't it?

3-20/21-69 page 120

A. For the most part they would be depreciable.

Q. When you allocated in accordance with the regulations this tax money over all the assets, whether it be land to be sold, an inventory item or depreciable assets, then you have increased your basis to the extent of that $16,000 and you would either get it back tax free by depreciation or by the sale of lots with tax free money, would you not?

A. You would have an additional deduction against income, yes.

Q. On the depreciable assets, yes, you would have an additional deduction against income and that income would go into Cemetery tax free?

A. This is correct.

Q. On the sale of lots you would get back to the extent—the amount of this tax money that was allocated to lots you would get back that allocation tax free, wouldn't you?

A. Yes, sir.

Mr. Spindle: That is all, all I have at the moment.

CROSS-EXAMINATION

3-20/21-69 page 121 } Mr. Bowers: Let me ask a couple of questions.

By Mr. Bowers:

Q. Just on that last question, Vernon, since it's fresh in your mind, you clearly stated that Cemetery has not taken advantage of any possible tax liability as an assumption and then added it to its basis; is that correct?

A. That is correct.

Q. But even if it had taken this benefit, as Mr. Spindle says the law requires, makes mandatory, and if it had done this, what would have happened if this Court determined that this liability under the contract belonged to Mr. Ware and Cemetery had to pay the liability—I mean, and Mr. Ware had to pay the liability, becoming his liability?

A. You would have to reverse any entries. You would have to adjust any asset for any amount, of course, that was not subsequently—

Q. So that if this imposes the liability where we claim it should be, on Mr. Ware, under this contract, there is no possible benefit that Cemetery could obtain from this assumption under any circumstances; is that correct?

A. No, sir.

3-20/21-69 page 122 } Q. Mr. Winquist, with respect to the tax examination of Rosewood, the only issue proposed for adjustment by the Internal Revenue Service for the years 1959 through 1962 was, as I understand, the over-applied cost issue; is that correct?

A. That is right.

Q. And that issue involved improvements in two gardens, I believe, in Section Three and one garden in Section Four; is that correct?

A. That is correct.

Q. Now, can you tell me when the sales of the first lots in Section—in those gardens in Section Three occurred?

A. In Section Four they were made in the year that began August 1, 1960 and ended July 31, 1961.

Vernon Winquist

Q. All right, sir.

A. In Section Three—in Section Three they began in the year that—or they were made first in the year that began in August 1, 1958 and ended July 31, 1959.

Q. All right, sir, and you previously testified that the two gardens in Section Three had been substantially completed at the time the Cemetery purchased the stock of Rosewood, had they not?

A. That is correct.

Q. In Section Three?

3-20/21-69 page 123 } A. In Section Three there was little, if anything, to be done.

Q. And with respect to Section Four, I believe your testimony was approximately 80 per cent complete, the garden in that section, is that correct?

A. This is correct. Approximately correct.

Q. Now, with respect to the tax settlement effected on that issue, were additional benefits secured for Rosewood with respect to the years 1959 through 1962 which reduced the tax proposed by the agent for those years?

A. Yes, there were. There was approximately $13,200 that was added to the cost of lots in those two sections—

Q. How did that come about?

A. —that was not in fact expended in those two sections.

Q. All right, sir, how did that come about?

A. It resulted from a transfer of costs from Project Two that was settled without giving consideration to the entire project in a previous agent's examination. There was costs that should have been deducted from that source as well as costs that should have been charged out over the years that resulted from transfer of sales to that area.

Q. That previous examination was many years ago, about 1960 or '61, is that correct?

3-20/21-69 page 124 } A. Approximately, correct.

Q. So that as a result of the negotiations and ultimate settlement with the Revenue Service, what was the tax savings effected for those years?

A. It would be approximately $6,000, somewhere between five and six thousand dollars, together with interest that would average about 50 per cent of that figure for the years involved.

Q. I take it that the total tax savings including interest, because the tax deficiency was substantially reduced for those years, taking the interest saved, that it would amount to approximately $9,000; is that correct?

Vernon Winquist

A. Something less than that. Somewhere around $8,000.

Q. About $8,000 which was the savings effected over what the agent proposed for those years, is that correct?

A. That is correct.

Q. Mr. Winquist, in your judgment was the tax benefit on that issue for those years more favorable to Rosewood than if the gardens in both sections that were being improved or completed had both been totally completed and the cost allowed as proper deductions?

A. I don't think there would be any additional tax benefits to be received if they had continued on for a good number of years for this reason: They were essentially com-
3-20/21-69 plete in development. There was a recovery of a
page 125 } sizable sum of costs that was not expended in those areas in the first place. And furthermore, the costs were over-stated and for each year that this was prolonged there was an addition of six or seven hundred dollars in interest on delinquent taxes. Any tax that would be saved from any cost reduction in the future would, I don't think, offset the increased cost of carrying the liability.

Q. Any additional benefit would have been offset by the additional interest which was accruing?

A. Additional interest on the ultimate liability.

Q. As I understand, costs from other sections that were given effect in this settlement more than offset any possible additional improvements in these lots; is that correct?

A. More than offset any normal or probable additional improvements. Obviously you could spend a hundred thousand dollars, but no prudent businessman would do so.

I don't even know if you could spend that much. If you have fully developed it that ends the project. And it was essentially developed when it was settled.

Mr. Bowers: That is all I have, your Honor.

The Court: Anything else, Mr. Spindle?

Mr. Spindle: Would you indulge us just one minute?

3-20/21-69
page 126 } REDIRECT EXAMINATION

By Mr. Spindle:

Q. Mr. Winquist, again let me—I don't want to ask you things in relation to this without giving you an opportunity to look at these regulations. I want to ask you something in relation to a step-up in basis from the earnings of Rosewood

after acquisition and prior to dissolution; according to the figures in the Revenue Agent's Report there was approximately $9,000 of income to Rosewood in this final period ending 7/31/64, that might not have been the final period, but in the period following acquisition ending 7/31/64, my question is, did you add to the basis of these assets in the hands of Cemetery the possible acquisition earnings of Rosewood?

A. This section, the interpretation of this section of the Code insofar as I understand it, directs that the earnings of the subsidiary shall be converted to the accrual basis from the date of acquisition of the stock to the date of liquidation. You carve out that portion of the period and convert the operations to an accrual basis and you add this amount to the assets of the corporation and that was done.

Q. That is what I wanted.

A. But it would not have any bearing on the cash basis.

3-20/21-69 page 127

Q. But that portion of the earnings from acquisition to date of dissolution was added to the basis of the assets in the hands of Cemetery?

A. This is correct.

Q. But the other section about assumption of liabilities was not followed in putting the assumed liabilities on?

A. It was not followed insofar as this liability but in my opinion it was followed insofar as the assumed liabilities.

Q. Were there other liabilities which were put on?

A. All other liabilities other than the tax matter.

Q. That is what I meant. Other liabilities of Rosewood at point of dissolution?

A. That is correct.

Q. Which were assumed by Cemetery were added to the basis of Cemetery?

A. Yes, sir.

Q. What about the $30,000 liability to the perpetual care fund? Was that added to basis?

A. This is a—a portion of that is added—was in the basis, and a portion of it was added to a reserve for liabilities that would be paid in the future or satisfied in the future.

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Q. But that liability in fact was not paid, was it?

A. It was not paid prior to liquidation, that is correct.

Q. Prior to liquidation, you say? At the time you added it to basis was it your understanding that it would be paid into the perpetual care fund?

A. Yes.
Q. So you treated it as a liability?
A. Yes, I did.
Q. Let me ask you one other thing. Going back to your reference, I think to the 1960 or 1961 audit by the Internal Revenue Service, was the Revenue Agent's report or the final report on this '61 or thereabouts audit, made available to you?
A. Yes, sir.
Q. Was that kept in the papers of Rosewood?
A. Yes, sir.
Q. To your knowledge is it still among the Rosewood papers?
A. Yes, sir, I think so.

The Court: We are going to be most of the day in this matter, are we not?
3-20/21-69 page 129 } Mr. Spindle: I hope not, sir. I am through with Mr. Winquist subject to the advice of my senior counsel here.

By Mr. Spindle:
Q. Mr. Winquist, you earlier testified that you had ceased representing Cemetery at some point of time. I assume your testimony about the entries on the books about step-up in basis would apply only through the years or point of time in which you were representing Cemetery?
A. This is correct insofar as—of course, I have no knowledge of what went on since that time. Insofar as the step-up in basis, I don't think there would be any unless it results from some additional liability.
Q. You don't know what entries have been made on the books since you have ceased representing them?
A. No, sir.
Q. Mr. Winquist, I want to ask you about your $2400 bill and I want to make it clear I am not questioning the value of your services as an accountant, but in view of the fact that at the time you performed these services you were also negotiating a settlement for the year 1964 which involved a substantial amount of money, and at least in the position of your client these bills were to be charged to different people, I want to ask you how you arrived at
3-20/21-69 page 130 } your bill from the standpoint of allocating your time or the value of your services between these

two clients. Could you explain to me how that bill was arrived at with a view to the allocation problem?

A. It was done on the basis of time, Mr. Spindle, time essentially devoted to the issues involved, and this is the amount as near as I could tell. You can't cut a half-hour in two here and there, but as best I could tell insofar as the time was concerned, this is the way it was handled.

Q. Did you keep time records as to how much time was spent on the issues involved for the separate clients?

A. Oh, yes. You mean for separate clients—other clients or are you talking about—or separate issues?

Q. I am talking about on this particular case. Obviously when you went to Richmond to talk to the Appellate conferee I assume you must have been talking about the issues that were involved in 1964 and the issues that were involved from 1959 through 1962?

A. Yes, sir.

Q. In one conference? And now your client takes the position that certain of it, of your time allocated to certain issues, are chargeable to Mr. Ware and certain are chargeable to Cemetery or Rosewood. I am simply asking you, within the framework of this one case, whether you kept separate time records.

3-20/21-69 page 131 } A. I did, like I say, within limitations. I can't and don't intend to imply that I could tell you to the minute the time that we switched discussing one issue over the other, but to the best of my ability I kept it in that manner, because I wanted to be particularly careful about that phase of it.

Q. You were aware of the claim?

A. I was aware of the fact that there would be some claim.

Q. Did the results accomplished, in the sense of tax saving, enter into the amount of your bill?

A. Very minor but it did to some extent, yes.

Q. The tax savings for the years 1964 accruing to the benefit of Cemetery Consultants were $20,000 according to my notes from your testimony, as against four thousand or forty-seven hundred dollars for the years '59 through '62. I am wondering if that ratio of tax savings was reflected in your bill.

A. It was not reflected in the same ratio, obviously. I mean, you have to have some background on the negotiations to understand the difficulties in dealing with this particular Revenue Agent because he refused to accept a position that I thought was clearly obvious just on the grounds that "I am

not going to decide it and I will let somebody else do it, but I believe you have the better half of the argument."

3-20/21-69 page 132 } Well, if you leave an issue like that and you get to Appellate and it's resolved in a matter of ten minutes because he wasn't—they realized we had the better argument, obviously you save a sizable sum of tax, but the effort involved is not as extensive as it is in arguing another issue where you have to really convince people that your figures are correct and you are on a sound basis.

Now, all that entered into my thinking in making up that bill, because I was requested to break it down.

Mr. MacMillan: Your Honor, we would make a point that the record is clear that the savings to the tax payer was around eight or nine thousand dollars and not forty-five as was stated.

The Court: For all the years except '64?

Mr. MacMillan: No, I am talking about Mr. Ware—the part that is in dispute here. Mr. Winquist has testified that Mr. Ware saved about $8,000 in taxes and interest as a result of his efforts. Something was said about forty-five hundred.

The Court: Forty-seven hundred, I think Mr. Spindle said.

Mr. Spindle: Well, let's go back into that, because my notes from his initial testimony yesterday show a saving of $4738.25.

3-20/21-69 page 133 } The Court: Did Cemetery Consultants pay you for '64?

The Witness: Yes, sir.

The Court: Do you recall what the amount was?

The Witness: The amount was $3600 for the work that I did for them.

Mr. MacMillan: The bill is in the record, your Honor.

Mr. Bowers: Let me just correct Mr. Spindle. I think he is mistaken. This testimony did not come from Mr. Winquist, it came from Mr. Cobb. So you are just wrong on that, Dick.

Mr. Spindle: Thank you. I stand corrected.

By Mr. Spindle:

Q. Maybe you can explain it. I am confused as to these savings. I heard your testimony in answer to Mr. Bowers' questions and I didn't understand it. Mr. Cobb had given us these figures before and they seem to be in conflict.

The total amount initially assessed by the agent was $16,293 and the final agent's report is $11,557, I am leaving the pennies off, and according to my arithmetic the difference

if $4738. Now, those figures, I believe include
3-20/21-69 interest.
page 134 }

Mr. Bowers: No, they do not.

The Witness: No, sir.

By Mr. Spindle:

Q. Is that the principal only?

A. That would only be principal.

Q. Is that the reason for the difference between these figures that we are talking about?

A. This is correct. Now, I may have had—did not refer to my—to the papers and I may have been off some, but it was my thought that the interest and principal would approximate $8,000.

If the figure is forty-seven hundred, it would not be eight thousand. It would be something less than that. But the interest factor is approximately half the tax as an average over this period.

Q. Well, let's see, Mr. Winquist, we are dealing with the years '59, '60, '61 and '62 and at the time of your negotiations it was '66. The final report is dated 10/30/67, maybe it ran into '67. So taking an average between '59 and '62, you were dealing with about six years average, five or six years average interest. It would seem to me that the interest factor would be nearer 30 per cent. Can you show me where I am wrong?

3-20/21-69 A. Well, interest factor from the date of the
page 135 } tax. The interest is still accruing. Interest on tax that was due October, 1959 is something like about 57 or 58 per cent right now. Now, the—

Q. "Right now," you mean 1969?

A. This is correct. It produces six per cent per year and this is where I arrive at the approximate 50 per cent figure.

Q. Yes, but at the time you made this settlement, you said you had saved this client some eight thousand dollars. Now, at the time that you performed this work and made this alleged savings, it was 1966, was it not?

A. It was settled, I think, the very first part of 1968.

Now, I did not mean to imply at any specific time because I don't believe that was asked me about the tax savings, and I answered including interest to date. I did not specify that but my answer did include interest to date.

Now, if it goes back to another specific time, of course it has to be recalculated.

Q. Well, this was in relation to services performed. The first year involved was '59, 7/31/59, and that tax would be due four months later, so you are talking about interest running from almost the end of 1959.

A. October 15, '59.

3-20/21-69 page 136 } Q. October 15th, '59, and the last year involved is '62 so the interest there would run from October 15, 1962?

A. That is right.

Q. So the average interest would run from somewhere in the early part of—middle part of 1961, wouldn't it, if you want to take one figure?

A. That is correct.

Q. Average it out. So you are really talking about interest running from the middle of '61 until 1966? Nineteen sixty-seven you said you settled it.

A. The interest factor would be from about '61 until the end of—or first part of '68. It wasn't finalized until January of '68.

Q. That is about 36 or maybe 39 per cent?

A. This is correct.

Mr. Bowers: I might point out one thing. You can't take just an average.

Mr. Spindle: Just a minute. I have him on cross-examination and I would like to proceed with my examination, if it please the Court—or I have him on redirect.

Thank you very much, Mr. Winquist.

That is all we have, your Honor. Of this witness.

RECROSS EXAMINATION

3-20/21-69 page 137 } By Mr. Bowers:

Q. I just wanted to point out one thing, Vernon, Mr. Winquist, you can't take a pure average because the amounts, the principal amounts, differ and therefore if a greater principal amount were in an earlier year you would have more interest, would you not?

A. This is correct.

Q. You just can't take an average, you would have to figure it out, and we haven't done that. It would fall in the figures in the record.

The Court: Mr. Winquist, I believe they are going to let you go.

Mr. Bowers: Let me ask one more question.

By Mr. Bowers:

Q. In connection with your services, Mr. Spindle has referred to your bill of $2400, and you referred to the time element. Could you, or would you, state that in connection with the issue for which you prepared this bill dealing with the earlier years, 1959 to '62, why your time, why so much time was spent with respect to that issue?

A. Well, it's a difficult issue to attempt to explain to anyone. It was difficult for me to understand insofar as exactly how the Cemetery was divided in the sections, the cost
3-20/21-69 factors, the estimates, and this was the first at-
page 138 } tempt that this particular agent had in investigating or examining any cemetery and it took a long time.

Q. Did you not have to spend a large amount of your time out at the office of Cemetery and so forth in connection with digging out the facts?

A. I don't know whether it was spent—not too much at that office. More of it was spent in my office. Most of the records were brought down there.

Mr. Bowers: All right. Thank you. Thank you, that is all.

The Court: Not going to need him any more today, are we?

Mr. Bowers: We may.

The Court: You are not going to let him go? All right.

(Whereupon, the witness was excused.)

The Court: Call your next witness.

Mr. Spindle: Your Honor, Mr. Godwin hasn't been sworn.

JOE GODWIN, called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

3-20/21-69 By Mr. Spindle:
page 139 } Q. Would you state your name, age and professional address, please?

A. Joe Godwin; Certified Public Accountant; 51—correction—50; 117

Q. How long have you been practicing accounting, Mr. Godwin?

Joe Godwin

A. Eighteen years.

Q. How long have you been certified as a public accountant?

A. Fourteen years.

Q. Mr. Godwin, I show you a report of Edmondson, Ledbetter & Ballard dated October 22, 1963, which was introduced at a previous hearing held here on January 11, 1969, and marked Defendant's—well, I can't read the exact number on here, but this is otherwise identified, and ask you if you had an opportunity to examine that report?

A. Yes, sir.

Q. Now, would that report delivered to an accountant indicate to such examining accountant the method of accounting used for reporting taxes on the sale of lots by Rosewood Memorial Park?

A. In my opinion, it would, Mr. Spindle. And if I may read a few sentences in the report—the report
3-20/21-69 is very good. It's clear.
page 140 } First it says the corporation reports income on a modified cash basis of accounting which includes determining gross income from lot sales on the basis of a percentage of collections. Now, to me this is a little unusual method and an accountant looking at this, I would say, "Well, we will look into it a little bit further."

So we get over to Page Three and we notice that "Costs allocated to collections on sales and charged to operations for crypt sales and for Project Four has exceeded development costs incurred through July 31, 1963, by $2,440.34, and $3,858.58 respectively. This results from sales having been made from these sections at a rate greater than the rate at which they are being developed. Prior to completion of development of a section costs charged to operations as a result of lot sales made in this section have been used—have been determined by use of engineer's estimates of total expected development costs for such section."

Now, this, I think, would put me on guard of course that estimates are used and this is a balance sheet and P & L Statement and many times tax returns are prepared on a basis a little bit different than a financial statement. So I would immediately go to the tax return and see if this was on the same basis and, of course, it is.

And we know when estimates are used that
3-20/21-69 somewhere there has to be an accounting to ac-
page 141 } tual cost. So I am sure that any accountant looking at this would surely have enough information to get in and see how this operation is conducted.

Joe Godwin

Q. Mr. Godwin, based on that report would an accountant be alerted to the fact that there was a potential tax deficiency between the engineer's estimate which is referred to therein and the actual cost expended?

A. If he were to—I believe so, if he were to analyze Page Two, the costs incurred, which has been set out here, and he tells us plainly that the cost exceeds the development costs in Section Three and Four for these amounts of money.

So we know right here that there is a possible correction of spending more in the future in here or there is going to be some sort of a tax adjustment.

Q. You have an alternative, you have either got to spend of spending more in the future in here or there is going to have a tax deficiency?

A. He points this out.

Q. That is made clear in that report?

A. Right.

Q. All right, sir, now let me direct your attention to the Revenue Agent's report in this case—

Mr. Spindle: Is this an exhibit, your Honor?

3-20/21-69
page 142 } By Mr. Spindle:

Q. I show you the Plaintiff's Exhibit Number 2, which is the 30-day letter of January 26, 1967, to which is attached the Revenue Agent's report, and ask you if you have previously had an opportunity to study that document?

A. Yes, sir.

Q. And I also show you the Plaintiff's Exhibit Number 5, dated 3/20/69, which is a Xerox copy of the Form 17-A, making the actual assessment against Rosewood Memorial Park for the years '59, '60, '61 and '62, and ask you if you are familiar with the tax assessed by the Revenue Service against Rosewood?

A. I think this is the first time I have seen the 17-A, Mr. Spindle. But this is setting forth—but I am familiar with the report.

Q. You are familiar with the report? Now, I would like to further show you the Defendant's Exhibit Number 2, dated today, which is the document by which Cemetery assumed the liabilities of Rosewood, and ask you to look at that a moment.

A. All right.

Q. I would like to ask you this, sir: In your opinion, is there any question that as of the dissolution of Rosewood and its liquidation into the parent, Cemetery,

3-20/21-69 that Rosewood had an obligation or a liability to
page 143 } the Internal Revenue Service?

Mr. MacMillan: Your Honor, before he answers that could I put an objection in the record? It's been our position throughout that Mr. Ware was called upon to come in and participate in these proceedings. It's been our position that what was done was perfectly *bona fide,* open and above board, no manipulation, a strict following of law.

Now, in this proceeding, having not participated at the time, an effort is being made through an accountant now to attack what was done after there has been a stipulation and admission on the witness stand that the amount was correct, but we don't owe it.

We just want to preserve our objection to this line of testimony. It's inadmissible and not relevant.

Mr. Spindle: Mr. MacMillan misconceives the thrust of this testimony entirely. We did not come in and defend because we have never thought that Mr. Ware had any liability and today we are convinced he has no liability for this tax. But we are not fussing with what Mr. Bowers and Mr. Winquist did in settling the tax. What we are showing
3-20/21-69 here, your Honor, is not how they settled the
page 144 } tax case but that they are going to get this tax money back and are not in fact damaged. Now, that is the thrust of this testimony.

By Mr. Spindle:

Q. Now, Mr. Godwin—

Mr. MacMillan: Your Honor, if that is the thrust then we would object to it on the grounds that the evidence by his own witness, which he called factually, shows that they never contended—never put on the books this charge which they say they could have put on and could have had the tax advantage by, and that he is now saying that under this regulation Mr. Winquist could have put it on the books, and if he had put it on the books he would have gotten the advantage of it as a liability, and if Mr. Ware had to pay the tax, he would get the advantage of Mr. Ware paying the tax, but him getting advantage of the liability.

So he is attempting by this witness to show what Mr. Winquist could have done, which Mr. Winquist said they didn't do. And we say if it's offered on that grounds it's inadmissible.

Joe Godwin

The Court: I overrule the objection. Go
3-20/21-69 ahead.
page 145 } Mr. Spindle: Your Honor, this is to show that they are not damaged, that they have not suffered a penny's damage.

By Mr. Spindle:

Q. Now, Mr. Godwin, I lost track of where I was a little bit in that colloquy, but looking at that assumption document, I ask you whether or not there is any question that Rosewood at the moment of liquidation had a liability to the United States Government for taxes?

A. That is correct. No question.

Q. Is there any question that the parent corporation, Cemetery, assumed that tax liability as of the moment of liquidation?

A. No question.

Q. Now, under the Internal Revenue Code what is the effect of the assumption of that tax liability to Cemetery Consultants?

A. Well, I do not mean to dispute anything that Mr. Winquist has said, and I am stating my opinion, but to me the regulation is clear. And I quote, "The adjusted basis of the subsidiary stock held by the parent with respect to which the distributions and liquidations are made of this paragraph, subparagraph, shall be increased by the amount of any unsecured liability assumed by the parent."
3-20/21-69 And it's clearly assumed.
page 146 } And, Number Two, "By the portion of the subsidiary earnings and profit of the period beginning on the date of purchase and ending upon the date of the last distribution and liquidation attributable to the stock of the subsidiary held by the parent."

So to me it's crystal clear they have no choice but to put this liability on there. They have assumed it, this should be done.

Q. Is this discretionary with the tax payer or required by law?

A. In my opinion it's not discretionary, it's required by the regulations, by law.

Q. Now, would the action of the tax payer in electing to put it on or not to put it on have any effect on the law?

A. Not in my opinion.

Q. And did the tax payer in your opinion here have an opportunity to add this to basis?

A. Definitely.

Q. And under the law as set forth in that regulation, with this $16,000 added to basis would that tax payer, Cemetery, recover that $16,000 tax free ultimately in the operation of Cemetery?

3-20/21-69 page 147 } A. Dollar for dollar. And I think Mr. Winquist verified this.

Mr. Spindle: Your witness, Mr. Bowers.

CROSS-EXAMINATION

By Mr. Bowers:

Q. Mr. Godwin, assuming that your testimony is correct or your opinion is correct, and this is a liability the day of liquidation, suppose that these proceedings brought at the conclusion of this tax settlement ultimately determined that Mr. Ware was responsible for this liability, now, what would happen in that case? Now that you have put the liability there as an addition to basis?

A. Well, in my opinion I think this would be income to Cemetery Consultants.

Q. It would be income?

A. Right.

Q. To Cemetery Consultants?

A. Right. I may be in error, but this is my first thought.

Q. That when Mr. Ware paid off, this would be income to Cemetery Consultants?

A. Right.

Q. In a year—

A. Subsequent.

3-20/21-69 page 148 } Q. Subsequent to sale?

A. Right.

Q. Would there be any adjustment in the basis of the assets of Cemetery?

A. I do not believe so.

Q. So your opinion is that they would add it to the basis and then have to pay income in later years; is that correct?

A. Right.

Q. Let's assume that Mr. Ware, after liquidation had come in or had come into the tax proceedings on notice by Cemetery Consultants and had participated through you and his own attorney in the settlement of this tax matter with Uncle Sam, and had arrived at, say, the same settlement and immediately after liquidation Mr. Ware said, "That is my lia-

bility and I am going to pay it," what would have happened at that point to the assumption of liabilities?

A. I think perhaps—I think under the regulations we would still have the same results. I really do.

Q. So you say that it would still be the same even though he came in and participated and there was no question of settlement and he would assume the liability, that nevertheless Cemetery would have to assume it?

A. If we follow these regulations, it says it must be added to the basis.

3-20/21-69 page 149 } Q. That is your opinion; is that right?

A. That is right.

Q. Do you have any authority for saying that had Cemetery—had Mr. Ware paid off this liability in a subsequent year because of the determination of the Court today it would be income to Cemetery?

A. I think that perhaps the perpetual care that was taken as income in 1964 which was a result of over many years of accumulating and the agent took it in the income in 1964—

Q. Why did he take it in '64?

A. This I do not know.

Q. Do you have anything to base that on?

A. Maybe it wasn't practical to carry it back to the previous year.

Q. Why wouldn't it have been income in the years Mr. Ware got the money in hand in the prior years and didn't put it in the perpetual care trust fund, but kept it, or the corporation, Rosewood—

A. I don't believe I follow you, Mr. Bowers.

Q. In the perpetual care—are you familiar with that?

A. Yes, sir, I think so.

Q. The last ten per cent on the collection of sale of a lot—

A. Right.

3-20/21-69 page 150 } Q. —is collected by Rosewood—

A. Right.

Q. —and was to go into a perpetual care trust fund?

A. Right.

Q. But Rosewood in the years which Mr. Ware had the cemetery, there were many prior years, received the money from the customer and excluded, say, that ten per cent from Rosewood's income in those years?

A. Right.

Q. But he didn't put it in the trust fund?

A. Right.

Joe Godwin

Q. He kept it under a claim of right?
A. Right.
Q. Whether it was right or not, he kept it. Why wouldn't it be income that year?
A. You mean in the year that he did not put it in?
Q. That is right. The year that he received it.
A. I think perhaps it was put in the income because the life of Rosewood Memorial Park came to a close.
Q. You are not answering my question.
A. Maybe I misunderstand.
3-20/21-69 page 151 } Q. I said, in the earlier year when this money was received—
A. The agent permitted that, I guess.
Q. Stick to the question. Let's take the year 1962.
A. All right.
Q. Rosewood received collections on sales of lots, the last ten per cent of that sale, the price, had come in, and Rosewood has that money—
A. Right.
Q. —and they don't report it in the income. They excluded it because they say it's perpetual care. But they don't put it into the trust.
A. Right.
Q. So they had the use of the money in 1962. Why isn't it income in that year? Why isn't it income in this year?
A. My only answer would be that the liability and responsibility is put on the books to put it in the trust. Now, whether they have "X" number of months and years and so forth to do it, I do not know.
Q. Do *you* have any authority to back up that statement, because it's a potential liability to the customer to put it in the trust?
A. Right.
3-20/21-69 page 152 } Q. That that wouldn't be income that year?
Mr. Lam: Your Honor, may I make a point? Mr. Bowers is the one handling the tax case apparently, and they allocated it all to '64. He should certainly know why they did.
Mr. Bowers: Let me say he brought the perpetual care issue up.
Mr. Lam: No, he didn't.
Mr. Bowers: I am just asking him about why it was put in one year. He is telling me it was put in '64 and this is his reason the income would be put in the Cemetery Consultants the year when Mr. Ware paid it.

Joe Godwin

The Witness: Because it would be paid subsequent to the liquidation of the corporation.

By Mr. Bowers:

Q. But I am still asking you the question is why when Rosewood received the perpetual care money from prior years and did not put it in trust and used the money, why would it be income in those years?

A. I don't know. Does the trust say this must be remitted immediately? Is there any agreement?

Q. I don't have the trust here. We know—I am giving you a set of facts as they happened.

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A. Mr. Bowers, I do not know whether it has to be put in immediately, whether it's got 30 days, 60 days, a year of any length of time.

Q. So you don't know why it was put in '64 and you don't know why this should be put in Cemetery—

A. I do know why, because it's subsequent to the liquidation. It's two or three years subsequent to the liquidation of Rosewood.

If this money had to be reimbursed to Cemetery Consultants, is this what you are asking me, how it would be treated on the books? Is this what you are asking?

Q. Right.

A. Okay. And I say it would be my opinion it would be picked up in income.

Q. In a subsequent year?

A. Right.

Q. So that Cemetery would then end up paying income tax?

A. Right.

Q. In a subsequent year?

A. Right. And still maintain their basis in complying with this regulation.

Q. Wouldn't that, in effect, wash out the item? Isn't that all you are telling the Court, really?

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A. No, I am not telling him that. If they were to reverse the entry and if it could be reduced, the basis, this would be washing it out.

Q. It would be washing it out that way clearly, no question about that.

A. But isn't this an income that has been picked up? Here is a liability that is assumed by Cemetery. And if we comply with this regulation, the way I see it, then we are going to

comply with it and do this. If we recover it subsequent, I would think it would be income.

Q. All right, sir. Stop right there.

So you are saying that something that we know did not happen, they did not pick it up, regardless of what the relation may or may not—or your interpretation of it may say, I might say do you have anything other than that regulation that you base this on?

A. No.

Q. Do you have an interpretation—

Mr. Lam: Your Honor, let me object to one thing. He said they—he knows that they did not pick it up. We don't know that they did not.

Mr. Bowers: I am saying Mr. Winquist who—

Mr. Lam: Mr. Winquist said that he had not handled the books, if I am correct, except for this tax settlement, and he doesn't know what you all did with it.

3-20/21-69 page 155 } Mr. Bowers: But the liquidation was prior to—1966, Mr. Lam.

Mr. Lam: Your question is predicated on an assumption he does not know. That is all.

Mr. Bowers: All I am saying, I want the Judge to understand it, is that Mr. Winquist did handle the accounting end of the Cemetery at the time of liquidation which occurred—completed in 1965.

Mr. Lam: But, Mr. Bowers, it's quite obvious that this particular liability was not determined until, as he said, the first of '68. Now, it wouldn't hit the books until the first of '68.

Mr. Bowers: All I am saying is we know from Mr. Winquist's testimony it certainly wasn't put on the books as of the time he concluded his services.

By Mr. Bowers:

Q. Is that correct?

A. Yes, sir.

Q. From his testimony?

A. Yes, sir.

Q. Before I get back into that point I want to ask you: Other than this statement that you read from the regulations, do you have any other authority that this should be picked up at that point?

3-20/21-69 page 156 } A. No. Not—

Q. Is there any case law or revenue ruling that says that?

Joe Godwin

A. I do not recall any revenue ruling. There is a case where income taxes are added to the basis,—

Q. Where income taxes are added to the basis?

A. Under a liquidation. Under 334(b)2.

Q. But this is not income taxes.

A. This is an unsecured liability.

Q. That is right. Do you have any case law on this type of transaction we are talking about?

A. Where—

Q. Where there is a liability which is contested that the Government has either by revenue ruling or case has taken the position that you must add it to basis on liquidation?

A. That you must add it to basis?

Q. That is right. You said it's mandatory and I am asking you if Internal Revenue Service has ever taken that position in one specific case or one ruling?

A. I think I can quote you a tax Court case.

Q. Quote it to me.

A. Where a tax liability was added to the basis
3-20/21-69 on this type of transaction. And I think you will
page 157 } find that—do you want a case?

Q. No, that is not my question, Mr. Godwin. I want you to stay on the point now. We have got a liability, it's not a tax liability, a liability for which the parent corporation claims it is not liable.

A. I am confused. I am thinking this is a tax liability.

Q. No, this is not a tax liability. This is a contractual liability that Mr. Ware is liable for.

Mr. Lam: Mr. Bowers, if you will, don't argue conclusions of law. This is what you are trying to prove today. Just ask your questions and not argue with the witness.

By Mr. Bowers:

Q. I am asking you do you have—you give me the facts of your case that you are talking about and we will discuss it. Give me the facts of the case.

Mr. Lam: May I ask Mr. Godwin, do you have your notes on your cases here?

The Witness: No. I think I do in the brief case.

Mr. Lam: That is what I am asking you. You have the privilege of looking at them.

3-20/21-69 Mr. Bowers: Do you have it there? I will
page 158 } show it to him.

Mr. Lam: I would rather him come and look at his own cases. You can step down. You are not shackled to the bench.

The Witness: I think I know it in my memory, but—this is the National State Bank of New Jersey and it's a tax Court case, Volume 51, Case Number 41.

By Mr. Bowers:

Q. What does it hold?

A. This is where a bad debt reserve of one million dollars was considered as possible acquisition income and the parent paid four hundred eighty thousand dollars worth of income taxes on it. The parent was permitted to add this four hundred eighty thousand dollars to its basis, plus the net which would be five hundred twenty thousand to the earned income under these provisions.

Q. But this is a bad debt reserve, this is entirely different. It's not any disputed item, is it?

In other words, let's get to the point, Mr. Godwin. I want to get to the point now. Do you have any case where a liability has been added to the basis where it is disputed by the parent company, does not contend it's a liability of the parent company?

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A. Not if you are referring to disputed, the parent company with the seller. Is this what you are looking for? No, sir, I have not.

Q. As to whether it's a liability of the parent company or whether it's somebody else's liability?

A. If this is what you are saying, I have no authority on that.

Mr. Bowers: That is all I want to know. You don't have any authority. Now, thank you, Mr. Godwin.

REDIRECT EXAMINATION

By Mr. Spindle:

Q. When you say you have no authority, you mean no case authority other than the regulations?

A. That is right.

Q. And do the Treasury regulations have the effect of law in this field?

A. Yes, sir.

Q. And in your opinion is that the governing law?

A. Yes, sir.

Joe Godwin

Q. Now, you have testified that because of this
3-20/21-69 step-up in basis which they were entitled to they
page 160 } would recover dollar for dollar this $16,000. If
the Court should order Mr. Ware to pay Cemetery this $16,000 would they get a double recovery, Mr. Godwin?

A. Yes, sir.

RECROSS EXAMINATION

By Mr. Bowers:

Q. Mr. Godwin, do I understand you to say you get a double recovery? You said that if they ordered them to pay it they would have to put it back in income. That is your testimony; is that correct?

A. Yes.

Q. And pay additional tax on it, is that correct?

A. Right.

Q. Which would have the effect of wiping out the effect on the basis?

A. Not unless it's credited to the basis, the basis would remain the same. It would be gotten—

Q. But additional tax paid on the item would have the effect of offsetting the benefit?

A. I don't follow you. The basis is—when they recover the 14,000 they have got $14,000 in income. They continue to
write off the cost that is in the land and the
3-20/21-69 building through depreciation and so forth over
page 161 } the entire life of the corporation, of the assets.
So they are going to get it through the recovery paid by Mr. Ware, through the depreciation and land cost deductions on future sales, and depreciation.

Q. Mr. *Godwon,* one *quesion* on that, these proceedings are that the Court direct any recovery that Cemetery Consultants is entitled to under the contract here be paid out of the escrow funds which are now being held by two escrow agents in Mr. Ware's name. Now, if the money is paid out of there direct to the Government, is it your opinion still that that would be income to Cemetery Consultants?

Mr. Lam: Your Honor, now, let's hold on here before you answer the question, Mr. Godwin.

The escrow account is a simple agreement between the attorneys and it's only set up for that purpose. It has nothing to do with taxes. I don't know that it would make any differ-

ence, anyway. This was just an accommodation between Mr. Luther White and myself for the fact that it would be available if it came because they didn't want to pay the money on the thing without paying it to him and Mr. Ware not be around and have the money at the time. That is the only reason it's sitting there available, only by agreement of counsel. It has nothing to do with the merits of the case.

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page 162 } Mr. Spindle: All the Court could do would be to enter judgment at the most and then follow the usual process of law.

The Court: I will allow him to answer it.

By Mr. Bowers:

Q. Can you answer that?

A. Restate your question, Mr. Bowers.

Q. Read the question back, will you?

(Whereupon, the pending question was read by the reporter.)

Mr. Lam: Judge, I would object again because it calls for a legal conclusion on his part. If the Court entered a Judgment against Mr. Ware we would have to pay it to the complainant in the case, not to the Government.

Mr. MacMillan: Your Honor, let the record show that the Court has full power to direct the escrow agents who are before the Court to pay the money directly to the Government.

Mr. Lam: I would like to know what authority the Court has to direct me to do something with the money. It's not before the Court. It's not in the Court's hands. I am not before the Court in the matter.

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page 163 } The Court: I will allow him to answer, if he can.

Mr. Lam: Your Honor, he can't answer it because it's a legal conclusion.

The Court: If he can't he can say, "I don't know."

Mr. Lam: All right, you don't know, then.

By Mr. Bowers:

Q. Can you answer the question? Can you answer the question, Mr. Godwin?

A. Anything I say may be wrong. With that—

Joe Godwin

Q. All right, sir. Let me ask you one other question—

Well, he says that he didn't know. Your answer may be wrong, is that correct? All right, sir.

If we take the testimony of Mr. Winquist that the liability was never set up as additional step-up in basis by Cemetery, the parent corporation, if that is correct, and if Cemetery should recover under its contract with Mr. Ware in this case, how could there be a double recovery?

A. Well, you are saying that Mr. Winquist didn't set it up?

Q. If, yes, if it was not set up. If no benefit

3-20/21-69 was obtained by Cemetery because it was not, in

page 164 } fact, set up, how could they—

A. If it was not set up?

Q. That is right. That is what Mr. Winquist's testimony was because it's in dispute, it was not an assumed liability. It was not added to basis, no benefit has flowed to Cemetery from that assumption, because it was in dispute.

A. If it's not set up then there would be no double recovery.

Mr. Lam: Excuse me, I didn't hear your answer.

The Court: He said if it was not set up there would be no double recovery. But the regulations say it must be set up.

REDIRECT EXAMINATION

By Mr. Spindle:

Q. But they had the opportunity and still have that opportunity to get the tax advantage, don't they, under the law?

A. Right, that is correct.

Q. What you testified would apply equally well to the liabilities of Rosewood for its accountant and legal fees, would it not?

3-20/21-69 A. That is correct.

page 165 }

Mr. Spindle: All right, sir. Come down, Mr. Godwin.

(Whereupon, the witness was excused.)

Mr. Spindle: Mr. Ware.

Your Honor, we would like to call for the tax returns of Rosewood Memorial Park. I can't find them in here. I suppose that the gentleman here—

Gordon H. Ware

The Court: For what years?

Mr. Spindle: For the years 1961 through 1963. And we would also like to call for the engineer's estimate of cost, the document that was in the Rosewood file.

(Whereupon, a short recess was taken.)

GORDON H. WARE, the Defendant, having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION

By Mr. Spindle:

Q. Mr. Ware, I believe you have been previously sworn in the case, have you not?

A. Yes.

3-20/21-69 page 166 } Q. Mr. Ware, I want to ask you a little bit about the documents of Rosewood. First, did you turn over to the new owners all of the financial records of Rosewood?

A. Yes, sir. I gave them all the records I had, on or about February 12th or 13th. I gave them to Mr. Castle who was acting as an agent for Mavis Cobb, Norman Cobb and J. D. Williams to start with.

Q. Let me identify some of these documents first. Was there among the records of Rosewood when you owned it, some sort of—

Mr. MacMillan: Your Honor, we object to the leading. He can ask him what records he turned over but I don't think he ought to lead the witness. He is now with his own client.

Mr. Spindle: That is true, your Honor, but that rule has to be confined to some reason. If I asked him what he turned over we might be here a week. I think it would be helpful to indicate what I am driving at here.

The Court: Well, it's not before a Jury, anyway. I will let him ask the question.

By Mr. Spindle:

Q. What records were turned over relating to the expenses that were estimated to be spent on the improvements of Projects Three and Four?

3-20/21-69 page 167 } A. We gave them the general ledger book, the

Gordon H. Ware

engineer's estimate, which was vital to them, they had to have that because without it they wouldn't be able to figure their costs. And also the—

Q. What was this engineer's estimate? Explain that a little bit more to the Court, if you would.

A. Basically he certifies to its correctness. What they do, they sit down with the maps when they draw a section out when they first complete the section, and put the lots in it and they figure how much shrubbery is going to cost, how much the features are going to cost, how much the roads will cost and paving, grass, labor, and raking and seeding and that sort of thing. In other words, any expenses, walks, and anything that goes on top of the walks, like stone or brick or something. You tell them about what you want and this is what they figure in.

Q. Did Rosewood have such a report for Project Three and Project Four?

A. Had them for all the projects we had been in.

Q. Was this report among the documents that were turned over to the purchasers?

A. Right. It was turned over in my office. I kept both the tax forms and the engineer's estimate in my office locked up in my private—

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Mr. Spindle: Your Honor, we had asked during the recess for that document but I couldn't describe it very well. With that explanation of what it was, we ask again for the complainant to produce that document.

The Court: Do you have it here? Do you understand what document he is looking for?

Mr. Bowers: Dick, we have some place—I have got a sheet which is not prepared by anybody, but is a typed sheet. But it's not—

Mr. Spindle: According to Mr. Ware this is a document of seven, eight pages typewritten and bound on the side.

Mr. Bowers: Never seen it.

The Witness: It's either bound or stapled together.

Mr. Spindle: All right, sir. Now, we also call for the tax returns of Rosewood for 1961 and 1962.

Your Honor, I have asked during the recess for this and they couldn't find it but I wanted the record and the Court to realize that we are attempting to produce these documents.

Do I understand they are not available?

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page 169 } Mr. Winquist: I have copies of pieces of them.

Mr. Spindle: That would be your own office file as an accountant?

Mr. Winquist: Yes.

Mr. Spindle: What I am interested in is producing the client's copy, in other words, Rosewood's own copy of the income tax returns for those prior years, which I believe the testimony is going to disclose was in its files at the time it turned the files over to the new purchaser. That is what I call for.

Mr. MacMillan: My understanding is that Mr. Winquist was not the accountant during that period. It was another firm in North Carolina, or some place. I don't know where they were from.

Mr. Bowers: That is correct.

Mr. MacMillan: I don't know when Mr. Winquist came in. Was it '63 or '62?

Mr. Winquist: 'Sixty-two.

The Court: He has them from '62 on.

Mr. Spindle: Well, the corporation files have them for '63 and '64. I want to show that we called for them for '61 and '62. If they are not here I think we can go ahead,

3-20/21-69 your Honor.

page 170 } The Court: All right. I just thought maybe if Mr. Winquist prepared the return for '62 he would possibly have that copy.

Mr. Spindle: I don't want his office copy because I want to show these were in the files that were turned over to the purchaser.

By Mr. Spindle:

Q. Now, Mr. Ware, you have identified the engineer's report. Did the corporation retain, were there in Rosewood's files, copies of your Federal tax returns for 1961, '62, '63 at the time that you sold your stock to Cemetery?

A. That is correct. It started from the year we started right on up. We had them for every year.

Q. And was this engineer's estimate of costs among the Rosewood papers?

A. Yes, sir. There was three or four of them, for each section, one for each section.

Q. Were there any documents which showed the actual costs expended to date at the time you sold your stock to Cemetery?

Gordon H. Ware

A. They had access to the general ledger book which they could get the expenditures out of there for each section.

Basically once a week the workers would come in and say where they had been and the bookkeeper would charge it to the appropriate section.

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Q. Now, at the time that you were discussing sale with these purchasers—and at one time I understand it was contemplated to be an individual purchase—were these documents delivered to the principals involved, the Cobbs and their agent, Mr. Castle?

A. Yes, sir. I gave them to Mr. Castle because the first thing he wanted was the income tax and the engineer's estimate and from that he wanted to get the cash flow, so he had access, complete access, to everything. In fact, they operated the thing three or four weeks before the purchase and I got out of it except when they would call me to come over for questions.

Q. All right. Now, I would like to be a little more specific, if you will. When and where did you deliver these documents to Mr. Castle?

A. In my office. I gave them to him the second day he took over. It think it was around the 13th, 14th of February. I gave them to him because these are the two documents he needed to ascertain his cash flow from. And I gave them to him.

Q. All right. Did you have any further discussions with any of the principals relative to these documents prior to the closing?

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A. Yes, sir. I have forgotten the exact date but it was two occasions it could have been. One was in the middle of February when Miss Cobb came down with another lady in a Cadillac. I think they were doing shopping, going to a wedding, or something. I have forgotten the exact reason they came down. But they came down and I am not sure whether it was that time or about March 8th or 9th that they came down. Everybody was there the second time, I remember that part, and she asked me where the taxes were kept.

Q. Where were you, now?

A. I was in my office. And at this particular time, if it was the first occasion, she called me up and said she talked to Mr. Castle and Mr. Castle called me and said she was coming down. And if it was—I have forgotten which occasion it was.

Gordon H. Ware

But, anyway, she was interested in finding where the taxes were kept. Well, I was concerned a little bit because I knew Mr. Castle had taken them out of my files, so I went over to see if they were in there and they were and I pulled them up and showed them to her.

Q. When you say "files" tell the Court specifically. Were they in a cabinet or drawer, or what?

A. Cabinet. They were in the top drawer of a four-tier cabinet. The top of it was about this high. (Indicating.)

Q. Was Miss Cobb with you at that moment?

3-20/21-69 page 173 } A. Yes, she was with me. She saw where they were kept.

Q. Tell us specifically now what transpired when you walked over to the filing cabinet.

A. I just opened the top drawer and I says, "They are supposed to be here," and I said, "If they are not here Mr. Castle might have them," and I opened the top file and there they were. He had put them back where they were.

Q. "They" refers to what?

A. Both the tax forms and the engineer's estimate. Because they would have been lost without the engineer's estimate to figure costs with. It had to be there.

Q. Well, I show you what documents of those we have called for they have been able to produce, and ask you if you can identify those two.

A. Yes, they are very similar to this. I have forgotten whether it was blue or white paper.

Q. Well, the white was for Virginia and the blue was Federal, wasn't it?

A. Yes, I guess so.

Q. Can you identify that as the '63 and '64 Federal tax return for Rosewood, your office copy?

A. Yes, sir.

Q. Were they among the papers turned over to Mavis Cobb that day?

3-20/21-69 page 174 } A. That is right.

Mr. Spindle: I would like to introduce that in evidence, your Honor, please.

The Court: Defendant's Exhibit Number 3.

Mr. Spindle: As far as we are concerned they can be attached together.

The Court: I will clip them and call them Defendant's Exhibit Number 3.

(Whereupon, the foregoing documents were marked for identification as Defendant's Exhibit Number 3.)

By Mr. Spindle:

Q. I will show you another document and ask you if you can identify that Revenue Agent's report.

A. Yes, sir.

Q. Just briefly can you describe for the record what that is?

A. That is the Internal Revenue's check up in 1961 for the five prior years and the Internal Revenue Service come in and checked our books out all the way through on it.

Q. Was this document made available to Mr. Castle and Miss Cobb?

A. Yes, this was in the file, but what I gave her along this line was a brief outline on cards of the assess-
3-20/21-69 ments and how much I had to pay and all. This
page 175 } was in the files, but I didn't actually show her this when I did it. But I did give her the others, the assessments and the other things about how much it would be.

Q. But you did show her the engineer's estimates and the tax returns?

A. Right, sir.

Mr. Spindle: We would like to introduce that in evidence, your Honor.

The Court: Defendant's Exhibit Number 4. I will staple this.

(Whereupon, the foregoing documents were marked for identification as Defendant's Exhibit Number 4.)

Mr. Spindle: That is all we have, your Honor.

The Court: All right.

CROSS-EXAMINATION

By Mr. Bowers:

Q. Mr. Ware, you have been in all the hearings before the open Court, have you not, in this proceeding?

A. I think I have, yes.

Q. And you were here when Miss Mavis Cobb was testifying on the stand?

3-20/21-69 A. Yes, sir. I was.

Gordon H. Ware

page 176 } Q. Do you recall her telling you or telling the Court specifically that she doesn't recall ever meeting with you and you handing her any documents?

A. I don't remember that particular point.

Q. You don't remember that testimony?

A. When she said she didn't come down from the time we went over—when we first started to negotiate from the time of the sale she said she didn't come down, but she did because—

Q. But if that was the purport of her testimony, what would be your response to that, that she did not meet you and did not receive any documents?

A. I figure she has made an honest mistake when she said she didn't come down.

As far as meeting me and getting the documents she didn't pick the documents up. I took her over to the file cabinet and picked them up and showed them to her because I wanted to be sure they were there because this is germane to the operation of the cemetery. Without them you would be in trouble.

Q. So you say that she is not telling the truth, is that what you are saying?

A. I never said that.

3-20/21-69 page 177 } Mr. Lam: Your Honor, I think the law has often said you can't call for a conclusion like that from the witness. She has testified. It's up to the Jury or the Court to determine who is telling the truth or whether it's an honest mistake. But it's not a conclusion that could be asked of one of the witnesses.

By Mr. Bowers:

Q. Mr. Ware, your attorney has just introduced through *you* Defendant's Exhibit Number 4 which purports to be a letter from the District Director, Richmond, to Rosewood Memorial Park, containing the results of an agent's report and examination and final determination of taxes for the years 7/31/58 through 7/31/60 for Rosewood Memorial Park, is that correct? Is that what that is?

A. 'Fifty-eight through 'sixty, right.

Q. All right, sir. Now, if you would turn over to this second sheet here which—

Mr. Bowers: Let the record show it is attached to the District Director's letter and it's Form 1907.

Gordon H. Ware

By Mr. Bowers:

Q. If you would be good enough, if you would, read off the years involved and the tax deficiency determined

3-20/21-69 against Rosewood for each one of those years.

page 178 } A. In '58 it was $3715.83; '59 is $2,535.33; 1960 1960 is $661.36. Total six nine one two, five two.

Q. Now, directing your attention down to the first paragraph in writing under there is written down by the agent who made the examination. Read that to the Court, please.

A. The principal causes of changes were to adjust cost of graves sold from estimated basis to actual cost basis and to disallow travel and entertaining expenses held to be personal expenses.

Q. All right. So that the principal reason for the deficiencies in the years 1958 through '60 was because, as the agent put it, to adjust cost of graves sold from estimated basis to actual *acsis,* actual cost basis, was it not?

A. No, the reason—

Q. The same problem in those years?

A. No, the reason for this adjustment was the fact that the engineer had made a miscalculation on the number of lots in sections. The agent sit down, he counted the lots. We stayed up there until about 3:00 o'clock in the morning. He counted every lot in the cemetery and he said, "In this particular section you have got eight or ten more lots than you are supposed to have." And actually this was the basis

3-20/21-69 of the adjustment.

page 179 } Q. That is your answer?

A. That is correct.

Mr. Bowers: That is all I have of him.

REDIRECT EXAMINATION

By Mr. Spindle:

Q. They well knew that you had this tax problem resulting from costs not matching up with deductions before?

A. Quite right. Yes, sir.

Q. That was discussed between you, wasn't it?

A. Yes, sir, they knew there would be a tax liability there unless a certain amount was spent on the sections and charged to the proper sections.

Mr. Spindle: Your Honor, I think the record does disclose that from our colloquy that this document was produced from the records of Rosewood today.

Vernon Winquist

The Court: All right.
Mr. Lam: Cemetery Consultants.
Mr. Spindle: Now, Cemetery Consultants.
That is all we have. Thank you, Mr. Ware.
The Court: Come down, Mr. Ware.
3-20/21-69 page 180 } Mr. Spindle: Your Honor, would you indulge us a moment? I think just one minute if—
The Court: Take two minutes, that will be all right.

(Whereupon, a short recess was taken.)

Mr. Spindle: Your Honor, the respondent rests.
The Court: All right.
Mr. Bowers: May I just recall you just one minute?
The Court: Stay right where you are, Mr. Ware.

RECROSS EXAMINATION

By Mr. Bowers:
Q. I just want to clarify one thing, because it wasn't clear to me. At the time you testified the Defendant's Exhibit 3 is one exhibit, it's the Rosewood Memorial Park Corporation income tax return for the fiscal year ended July 31, 1964, and the return for the year, both Federal returns, for the July 31, '65, prepared by Edmondson, Ledbetter & Ballard, C.P.A.'s, did I understand you, Mr. Ware, to testify that these documents were in your files?
3-20/21-69 page 181 } A. I said they were similar to those.
Q. Some similar to those?
A. Yes.
Q. But these were not in your files?
A. No, you see, I didn't have '64 then.

Mr. Bowers: All right, sir, I just wanted to clarify that.
The Court: Anything else with regard to that?

(Whereupon, the witness was excused.)

Mr. Bowers: I would like to call Mr. Winquist back to the stand, please.
The Court: All right.

VERNON WINQUIST, called as a witness on rebuttal, having been previously duly sworn, was examined and testified further as follows:

Vernon Winquist

DIRECT EXAMINATION (Rebuttal)

By Mr. Bowers:

Q. Mr. Winquist, I would just like to ask you to begin with when did you become accountant for Rosewood Memorial Park as owned by Cemetery Consultants Inc.?

3-20/21-69 page 182 } A. In the summer or fall of 1962. The year ended July 31, 1962 was the first year-end work I did.

Q. At that time, Mr. Ware owned the stock of Rosewood, is that correct?

A. That is right.

Q. And at that time did you attempt to secure from Mr. Ware any corporate tax returns for Rosewood Memorial Park, Inc.?

A. Yes, I did.

Q. And did Mr. Ware supply you with those returns?

A. Yes, he did.

Q. What years were those returns?

A. Well, the immediate prior year, I think is the return that I was concerned with, because it contained the information that would follow.

Q. And what year would that be?

A. July 31, 1961.

Q. And was that in the files or did you obtain that return from some other source?

A. I don't know the answer to that. I got it from Mr. Ware. I don't know whether it was in the files out there or what source he received it from.

Q. Did you have to get any copies of any of those earlier returns from the Federal Government?

3-20/21-69 page 183 } A. Yes, I did. I have had to in connection with the settlement of the case request through the agent that was working on it.

Q. That you did not have access to?

A. That I did not have, that is correct.

Q. Now, Mr. Winquist, getting back to this item which is the tax liability we are talking about in this suit which Mr. Godwin—you were here when Mr. Godwin testified—Mr. Godwin testified that in his opinion should have been picked up as an assumption of liability and added to basis on liquidation by the parent corporation. It was your testimony, I believe, you can correct me if I am wrong, that that was not done in this case; is that correct?

A. That is correct.

Vernon Winquist

Q. Now, if that is the case, the parent, Cemetery, got no step-up in basis; is that right?

A. That is correct.

Q. So they got no tax benefit from that to this date?

A. That is correct.

Q. Now, what effect, in your opinion, would the recovery in this case of judgment that we are seeking, that Cemetery is seeking in this case, if it were recovered?

A. There is no provision for this liability—or I should say, there was no provision made for this liability at the date the assets were transferred to the parent, or transferee corporation.

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Q. Because it was in dispute?

A. Because it was in dispute. And because it was not intended that there be any for this particular period. And if there is a recovery of this amount there would be no consequence whatsoever. It would be received in one account, paid to the Federal Government in the other, would make no difference whether it was paid directly to the Federal Government out of the escrow or any form whatsoever. There would be no basis—

Q. So for the Court, if Cemetery should recover under its contract that it claims Mr. Ware is liable under for the prior tax deficiency, there would be no other tax benefit that would benefit Cemetery; is that correct?

A. No, sir, none that would benefit them that I know of.

Q. All right, sir, now, you have heard Mr. Godwin testify from the stand and give his opinion of the regulation without any authority construing those regulations.

Mr. Lam: Now, your Honor, please—

Mr. Spindle: I object to his categorization of the witness's testimony "without any authority." I think he can ask this witness. He has heard the testimony but he doesn't have to criticise or pass his views on it.

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The Court: He can argue to me a little later.

Mr. Spindle: That is right, sir.

Mr. Bowers: I merely stated he gave his authority based on regulations but with no interpretation of those regulations. It was his own interpretation, as I understand it.

The Court: I understand. Mr. Winquist gave his interpretation.

Mr. Bowers: That is right, sir, there is no authority on it.

Vernon Winquist

By Mr. Bowers:

Q. You heard Mr. Godwin testify and he testified that according to his understanding of the regulations that regardless of the fact that the amount is not known or was not known at the date of liquidation and regardless of the fact that the amount was in dispute, you would pick up the assumption of liability and add it to basis. And presumably sometime in the future the parent corporation would get some tax benefit from that step-up in basis.

Now, he further testified as I understood him, that if Cemetery recovers in this suit, it would—its recovery would be taxable income to it in that year of recovery. If it was this year, it would be '69, and it would have to pay income tax on it.

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Now, can you give me your opinion or judgment as to what the net effect or the benefit, even assuming Mr. Godwin were correct, would be as a result of that sequence of events?

A. First let me say I said previously I do not have authority for my testimony other than my interpretation of that provision of the Code. I cannot say that Mr. Godwin—or that I have authority to dispute what Mr. Godwin says insofar as my opinion of it is concerned.

But if this is the interpretation of it, if this is correct, the first instant at which you know what adjustment is to be made on the records would be when the liability is finally determined. Anything prior to that would have to result in an adjustment. So the corporation, if this is the case, the corporation would be put in the position of adjusting the assets to the tune of $16,500, if this is the figure, which it would recover over a period of years. And immediately have to pick up $16,500 in income and pay income taxes on it. Now, I don't think this is the intent of the Code. But if it is they are in worse position than they would be in handling it in the other manner.

Q. In your opinion what would be the effect, if Mr. Godwin were correct, if you had to pick it up and pay income tax immediately on the sixteen five, if we recover, if Cemetery recovers, as compared with any incidental benefit by the step-up in basis?

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A. Well, the step-up in basis would be in the same amount as the inclusion of income, but the recovery of that would extend over a period of years and you obviously, if you incur a tax liability, immediately you lose the right to use that money over a period of years until you are able to get

a deduction from it. And then it's predicated on taxable income, on the fact that you will have taxable income in the future. If you do not, you wouldn't get a deduction.

Q. Wouldn't get a deduction at all?

A. Now, the cemetery has not had taxable income in the couple of years since its liquidation and I don't know what the net result of it would be. But it doesn't seem to me that it could be as great as the amount of tax that they would have to pay.

Q. In other words—

A. Immediately.

Q. In other words, your opinion is that—

Mr. Spindle: Now, I object to his leading. The witness has given his opinion and the question is "Now your opinion is—" he has him now as a direct witness and should ask a question, not make a statement to him, and lead him.

The Court: He wants to summarize.

3-20/21-69 page 188 } Mr. Spindle: Well, I think the summary should be by argument before your Honor.

The Court: All right.

By Mr. Bowers:

Q. I want to know if in your opinion you feel that—

Mr. Spindle: And I object to this form of question. This is precisely what I am objecting to, "I want to know if in your opinion—" He has got a witness on direct examination. He should ask him what his opinion is.

The Court: Go ahead, ask him the direct question. What is your opinion about a particular item.

By Mr. Bowers:

Q. What is your opinion insofar as the projected or expected tax benefit to Cemetery if Mr.—on this particular transaction if Mr. Godwin's premise is correct?

Mr. Lam: I thought he just asked him that question.

The Court: I will let him ask it again.

3-20/21-69 page 188 } The Witness: If this is correct, you have an immediate tax liability or you would have a tax liability that is immediate on the amount that you have to include in income. Now, obviously if you don't get a deduction of this same amount until over a period of years or the deduction is spread over a period of years,

because of the fact that you lost the benefit of the income tax, it appears to me that you would have—it would be to your detriment to handle it in this manner.

By Mr. Bowers:

Q. All right. Would it be a double benefit to Cemetery if we recovered here?

A. It wouldn't be a double benefit. I don't see how it could occur.

Q. Mr. Winquist, the defendant in this case introduced Exhibit Number 4 as their exhibit which purports to be a Revenue Agent's report for Rosewood Memorial Park for years 1958 through 1960, during the time Mr. Ware was the sole owner of this corporation, the report of an examination and final settlement. I am going to ask you to look at that report just a minute and tell me if you are somewhat familiar with it.

A. Yes, I am.

3-20/21-69 page 190 } Q. Will you turn to the second page and tell me if you will and from your examination of this report and all of the documents attached, was *was* the chief reason for that deficiency for those years?

A. Chief reason was because of the adjustment of the cost of graves sold from an estimated to an actual basis. This is the principal reason for it. There were some adjustments—

Q. Can you give me from your examination of it the dollar amounts as compared to any other adjustments in that report?

A. In the year 1968 the adjustment to income that resulted—

Q. What year was that?

A. That is in the year that ended July 31, 1958, excuse me. The increase in income that resulted from *adjustmnet* of cost is $6,709.83. And the amount that resulted from travel and entertainment disallowance is $436.

Q. Four hundred thirty-six dollars for travel, is that right?

A. That is correct.

Q. How about '59?

A. In the year 1959 the reduction—the increase in income that resulted from a reduction in cost amounted to $4,317.75, and travel and entertainment of $583.88. They were the only adjustments.

3-20/21-69 page 191 } Q. In '60 was there an adjustment there?

A. 'Sixty, the cost factor amounted to

$1,762.80, and travel and entertainment of $414.72. They were the only adjustments there.

Q. So most of the adjustments had to do with the over-applied cost issue; is that correct?

A. Yes, sir.

Q. Great bulk of them. Now, can you explain exactly how that came about as a result of the attachments to that report?

A. The report indicates that the cost figures as projected under estimates were greater than the actual cost when the actual area was developed, and basically that is what it says, in each of those years. And this is for Projects One and Two.

Q. Is that adjustment predicated on the same basis as the Revenue Agent Rothblum, predicated as to Sections Three and Four for the over-applied cost issue?

A. The cost, applied cost issue, is the same thing.

Q. The same thing happened?

A. Type of thing.

Q. When Mr. Ware was in control of the cemetery, is that correct?

A. Yes, sir, it is.

Mr. Bowers: That is all.

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page 192 } CROSS-EXAMINATION

By Mr. Lam:

Q. Mr. Winquist, let me ask you this: I think the report you have before you, you said you were familiar with it, and when did you first have knowledge of that report?

A. Mr. Lam,—

Q. Well, I will be more specific. Now, I know that you had explained previously that you had some dealings with Section Two in even the recent adjustment and that this report was available because I mean—

A. That is right.

Q. Because we found it in the records. But I wonder if you first gained knowledge of this at this time or some time earlier when you first started representing Mr. Ware in July of '62.

A. It was at—I was not familiar with the error or the adjustment in the cost in Section Two until we got into this second examination. But the report, itself, I had reviewed prior to this time.

Q. And that report had then apparently since it was in the

files of Cemetery Consultants today, it continued right on in the files from the time that you first saw it on up to date; is that correct, up to this time?

3-20/21-69 page 193 } A. I think it's either been there or I have had it in my possession.

Q. And available not only to Mr. Ware and you, as his accountant, but available to the purchasers and you as their accountant, also, to Mr. Swart, as far as that is concerned; am I correct?

A. As near as I know this is correct.

Q. In other words, if it's there in a drawer and you can look at it and you don't look at it it's still there available to do so?

A. Like I say, I don't know where it was—when I had it, I know where it was. And it probably should have been somewhere in my possession or their possession; that is correct.

Q. Now, the thing that I don't quite understand is this: That in testifying and in answering Mr. Spindle, when you are Mr. Ware's accountant—we go back to that, you are exclusively serving him at that time, do you advise him? I mean, is this part of your function as an accountant, to advise him if he is not using the proper accounting procedures or if there are errors? If somebody asked me advice as an attorney I give them advice on their problem. And I am wondering in your scope as a C.P.A. you were the sole one working for him after you took on that employment, were you not?

A. Yes, sir.

3-20/21-69 page 194 } Q. I mean, I know he has bookkeepers and so forth to do the manual labor, but so far as the overall policies of the books this was yours, is this correct?

A. To the best of my knowledge, yes.

Q. I think you testified when you answered Mr. Spindle that the costs were being under-applied and interest was growing on them, naturally, because the income tax on the specific years would be under-paid?

A. That is right.

Q. Now, at any time did you ever tell him that "We should readjust these costs," that, "They are under and we better bring them up or we are going to get caught with a tax subsequent to this date when they make an audit"?

A. I am not positive that I did. I can't—I may have or I may not have, Mr. Lam.

Q. All right. Now, well, let me see if I have this correct. And you could easily see that the actual costs were under the

estimated cost that you were using in the returns you filed each year; am I correct?

A. Well, you could not easily see this, Mr. Lam. You have to make a determination of the percentage of completion of a particular garden and calculate it. It's not an easy thing to do, but—

Q. This is what I am coming to. You did have—and if you didn't you would have probably set them up—the fiscal books that he talks about where the people came in and put down the amounts—all you had to do when you were going through those, and I am sure you went through those books, you could tell at that time whether the estimate you were using for the income tax return was greater than the actual amount spent as of that time, could you not?

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A. Oh, there is no question you could tell this. But this wouldn't necessarily give you an idea as to how the final result would be.

Q. Right. So actually as a practical matter if you had feared that it was going to end up badly you would have probably in good faith and in keeping with your position, you would advise Mr. Ware to readjust this thing currently, rather than to wait at some later time, would you not?

A. Yes. I would have at some point where it approached the cut-off period, this is correct.

Q. Then it is obvious since you apparently didn't do that that you felt the costs yet to be put into the thing would offset these particular deficiencies as of that time?

A. Well, it would not be obvious because I would not come to that conclusion as a matter of inspection of the records. And, again, you would have to go through a calculation.

Q. But when I say with knowledge of the estimates that you were working with, and you certainly had that because you had to file the returns—

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A. Yes.

Q. —and with actual knowledge of the amounts expended and there is a difference which you already agreed exists, if you did not think these expenditures as they were projected were going to be close to being accurate when they ultimately finished a development, you would have notified him to change it back in '63. '64 and so forth so he would become more current with the amount of taxes he was actually paying, wouldn't you?

A. Well, if at that point—

Q. You could determine it?

A. The amount could be determined and a reasonable period had gone by within which there would be no further development, this is correct.

Q. So I say, you wouldn't have been doing your job if you could see it and didn't tell him? We will agree with that? So it was obviously, then, so far as Mr. Ware was concerned and you advised him that it was not a problem that you could anticipate that wouldn't be met in the projected estimates of costs to be expended?

A. Well, I have to admit that this may have been an obligation of mine, but whether or not I did this, I don't know. And I may have failed to. But I will admit that.

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Q. In hindsight you may have failed?

A. You can use hindsight a little better than foresight. If I recognized this I should have advised him.

Q. Now, the next thing, in any of your dealings with Mr. Ware if you made any suggestions to him with regards to any different accounting procedures or expenditures, how was his reaction? Did he conform to what you requested?

A. I seriously did not have any real issue with the accounting procedures. I don't remember telling him anything other than minor things, which I am confident—

Q. Anyway, there was no time at any time you were keeping his books that if you told him anything he said, "No, I am not going to do it," or something?

A. Oh, no, sir.

Q. Now, let's switch back to this, what is it, 334(b)2, I think, the section. I think some questions have been asked that you may have answered, but I don't know that I am clear precisely in understanding your answers.

We have agreed that that section says that unsecured liabilities assumed by the parent will be added to basis?

A. Yes, sir.

Q. And therefore that if an unassumed or unsecured liability, and we will take a round figure of $16,000, appears, then it's added to the basis of the new corporation, the parent corporation, following liquidation, right?

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A. If the transferee liability is assumed by the parent, yes, it would be added to basis.

Q. Now, the adding of that liability would—or the adding of that to the basis would not occur until that determination had been made, not necessarily at the time of liquidation, it would be when it finally occurred, wouldn't it?

A. That is correct.

Q. In other words, we can presume a liability that might start in force and go over a five-year period and it may not finally come to a conclusion and be a liquidated liability until five years after the liquidation had been complete, am I correct?

A. That is correct.

Q. At that time the transferee corporation would have to add its basis according to that section of the Code?

A. This again is my opinion of it. Because it's an impractical, illogical position to assume any other treatment of it until it is finally determined to be the liability.

Q. And that's because the Code Section—

A. I have no authority and I don't mean to disagree with a fellow practitioner, but I mean, I do disagree, but it's not on authority that I have. It's my own interpretation

3-20/21-69 of the Code.

page 199 } Q. But in reading the section of the Internal Revenue Code that we have reference to, it uses the word "shall."

A. Yes, sir.

Q. Which is a positive thing.

Now, I think you indicated that so far as actually keeping the books and records of Cemetery Consultants, Inc., you completed your work with them, save and except this tax proposition, the adjustment of this tax thing, in 1966; is that correct?

A. Yes, sir.

Q. Did you state what part of 1966?

A. It would be the end of 1966 or the early part of '67, something like that.

Q. And have not kept the books and records of that corporation since that time?

A. That is correct.

Q. Now, the report of the particular assessment that you worked on, and this is the one we have been talking about all along, this adjustment before the Internal Revenue Service, was dated October 27, '67 and you even carried it a little bit further and said its final conclusion was reached in January of '68, did you not?

A. This is correct.

3-20/21-69 Q. So have you seen the books and records of

page 200 } Cemetery Consultants for 1968?

A. No, sir.

Vernon Winquist

Q. So personally you have no idea whether that has been added to the basis or not, do you?

A. Correct, I do not know.

Q. Now, let's go back. It's a little different situation because we are dealing with different sections of the Internal Revenue Code.

If I have a bad debt of $10,000 and I charge it off as a bad debt in 1966, as a reasonable proposition what I do is I reduce my total income by the bad debt, right?

A. Yes, sir.

Q. Now, if by chance in 1968 I recover that same bad debt of $10,000, what do I do with it?

A. Insofar as income tax purposes is concerned?

Q. Yes.

A. It would constitute taxable income.

Q. I add it to my income tax for that year, am I correct?

A. Yes, sir.

Provided yoi don't have a reserve.

Q. Right. Now, there is no step-up in basis or any change in the bad debt proposition that I was just giving you an example of, is there?

3-20/21-69
page 201 } A. No step up?

Q. No step-up or change in my personal income tax basis as a result of this bad debt item I have just given you, am I correct?

For instance, when I recover it in 1968 I don't step-up my basis or anything, I just include it as income?

A. Well, yes, but, of course, you actually get an increase in the total assets that you have. If you recover it.

Q. Absolutely.

A. To what extent, I don't know exactly.

Q. Well, what I was simply saying, the only difference between that liability, the bad debt liability, and this particular liability, is that, and we are speaking now of the parent corporation, of the transferee corporation, is that this particular liability assumed by the transferee corporation is covered by that specific section of the Code which says it shall step up its basis by that. Am I correct?

A. The only difference—well, this is a liability and the other is a recovery. I think they are not similar at all.

Q. All right, I was saying they are not similar but I want to find out from an income tax treatment, if Cemetery Consultants had a bad debt in '64, and they took it off as a bad debt, they would reduce their income by the amount of the bad debt, right?

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page 202 }

Vernon Winquist

A. This is correct.

Q. If in '68 they recovered it, they would simply add it as income, am I correct, and pay the income tax that was due on it?

A. This is not correct because they were not on a basis by which you do this. They were on a cash basis so there would be no charge or recoveries. Now, if you—insofar as they are concerned this would not apply.

Q. I see. All right. Well, my example probably then was poor. The distinction I am trying to draw is, though, that when a corporation, one corporation purchases another and takes it through the process of liquidation, by reason of 334(b)2 it is handled as a different factor if they pick up a liability from the corporation; am I correct?

A. Different from your bad debt deduction, is this what you mean?

Q. Yes.

A. Yes, it is.

Q. Because you would add it to the basis?

A. Yes, you would.

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Q. And if you paid $16,000 for a bad debt that you had assumed as the transferee corporation, in adding it to your basis whether you continued that corporation for the next ten or fifteen years selling cemetery lots, you would get dollar for dollar back by adding it to your basis?

A. Yes, you would.

Q. Now, then, if they turned around and they sue a third party, in this case Mr. Ware, and recover from him, and let's suppose they recovered the sixteen thousand from him, and let's, to make it a little bit clearer so your time elements are not construed, let's say this thing went on for another two years, and they didn't recover it. Do you follow me, and this has already been added pursuant to 334(b)2 on the basis. Now, if they recovered it at that time this would come as income to them, would it not?

A. I think that would be correct.

Q. If they recovered $16,000 as income, then the highest, probably, bracket they would be in would be a 50 per cent bracket, wouldn't it?

A. Yes, sir.

Q. So it would mean if they paid seventy-five hundred they would still have the $16,000 stepped-up basis plus—I use the word "seventy-five", it would be 8,000 on a 50 per cent basis —they would still have a $16,000 stepped-up basis plus $8,000 income in their pocket, wouldn't they?

Vernon Winquist

A. They would have—if they recovered.

3-20/21-69 page 204 } Q. Sixteen thousand dollars and paid fifty per cent, if their tax bracket was that high, which would mean they would pay $8,000 taxes?

A. Correct.

Q. They would still have $8,000 in their pocket plus they would have the sixteen thousand in their stepped-up basis, wouldn't they?

A. Correct.

Mr. Lam: Thank you.

REDIRECT EXAMINATION (Reb)

By Mr. Bowers:

Q. Just continuing right along there, Vernon,—Mr. Winquist, the sixteen thousand step-up recovery in the future years over a period of years, would they necessarily obtain the benefits of that step-up in basis?

A. Well, first of all, they would have to pay out the $16,000 at the time of determining the liability, so obviously that is gone. To that extent the benefit of that is gone. Can't take it out of their pocket and still retain it. Now, true enough, if they picked it up in income and paid income tax on it, they would have—this portion would be taxed at whatever rate there is and the remainder would be their recovery. They would have had to pay the liability in the first place.

3-20/21-69 page 205 }

Mr. MacMillan: Your Honor, I don't know whether it's a problem. We are advised that that—that the $16,000 has never been put on the basis down to this present day. And we have made it clear, Mr. Lam keeps bringing it up, Mr. Cobb will be glad to testify to that. He just checked and found that it's never been put on the basis.

Mr. Spindle: We don't think it makes any difference whether they put it on or not. The law requires it. That is our position. The physical book entry we think is entirely irrelevant.

The Court: Could even be put on now?

Mr. Bowers: Yes, sir.

Mr. Lam: The last time they put him on in a spot like this they came back and corrected his testimony.

Mr. Spindle: It wouldn't make any difference whether it's physically entered or not.

Vernon Winquist

The Court: I know he said it has—if it hasn't been, couldn't a corrected income tax for '68 be filed?

Mr. Lam: Actually it doesn't go on the income tax, Judge. Goes on a net worth proposition.

The Court: I understand.

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Mr. MacMillan: We just wanted the record to be clear, is that the evidence in this case is it was never added to it to date.

The Court: Put it in the record it was never complied to according to what Mr. Spindle says, 334(b)2.

Mr. Spindle: Yes, sir.

The Court: Because you don't think it's necessary?

Mr. Bowers: Yes, sir.

The Court: Let Mr. Winquist go now.

Are you finished with him?

Mr. MacMillan: Yes, sir.

We don't have any more redirect.

The Court: All right. You gentlemen have nothing else?

Mr. Spindle: No, sir, we rest.

The Court: Argument? You want to argue it?

Mr. MacMillan: Yes, sir.

Mr. Spindle: Yes, we want to argue it, your Honor.

The Court: Do you think you will argue better if you have a little something to eat?

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Mr. Spindle: I think this matter is one of considerable importance and I gather both sides feel very strongly about this matter. We would think it would be helpful to the Court to get the record written up because this testimony has been spread out over a period of some time and some of the evidence that was taken in the January 11th hearing relative to disclosure of this potential tax liability is applicable to our argument so we intend to argue the disclosure point with force. And we think there is much evidence there. I think it would be helpful to the Court and while I want to dispose of the matter just as much as the Court and counsel for the complainant, I think we would get a better result if we get the record written up and then argue.

Mr. MacMillan: If he wants to pay to have it written up that is fine with us. We would not contribute to writing it up.

Mr. Lam: Do you want a copy of it?

Mr. MacMillan: No, if you all want to write it up that is fine.

Mr. Lam: We will write it up.

The Court: All right. I want to be fair.

I would like to read what has gone on before. I don't think I read all what happened in the hearings before Judge Wahab. But I am concerned and I don't mind telling you right now, with it, that particular section of the Internal Revenue Code and in effect what you are telling me to do is to construe it. I don't want to—my mind is not made up but I don't want to give any judgment against this man where the plaintiffs are going to recover again the second time. I just don't think it's proper.

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With that, we will have the record written up, and let's see where we go from there. I will set it any time you all want.

(Whereupon, the hearing was adjourned.)

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TRANSCRIPT OF PROCEEDINGS

Stenographic transcript of the proceedings had upon the oral argument and motion for reargument in the above-entitled case, in said court, on the 3rd day of July, 1969, and the 24th day of July, 1969, before the Honorable Paul W. Ackiss, Judge of said court.

APPEARANCES:

Mr. Robert R. MacMillan and Mr. George H. Bowers, Jr., Attorneys for the complainant.

Mr. Richard B. Spindle, III, and Mr. Henry L. Lam, Attorneys for the defendant.

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Mr. Spindle: No, sir. This is the reason that they had back taxes, that they didn't make them. Now, there is testimony in the record from Mr. Winquist that by the time they liquidated the corporation they had completed substantially

the improvements in Section 3. But that ignores the undeveloped portion of Section 3 over which these projected costs were spread. In other words, they figured that for these back taxes to be correct, the ones that they paid, the taxes that Rosewood had paid—for them to be correct you would have to go on and carry out the estimate of projected costs. Now, if they had, if Rosewood had continued, without dissolution and if they had completed the new section—not the new section but if they had completed the undeveloped portion of that section, then we say these engineers' estimates would have been correct. We think that is a valid defense, Your Honor. But I am going to suggest to the Court that the way this case should be disposed of properly in my judgment is on the defense which Mr. MacMillan
3-20/21-69 chooses to categorize as "ridiculous," because
page 93 } this other proposition to me is so clear and it is so equitable and sound in law and sound on the record that it completely disposes of the case.

While I am satisfied that if Rosewood had continued in existence these taxes would not have occurred, this involves, to reach that decision, a culling of the record to bring out the exact facts and figures. So I point out that that defense is there which I think is perfectly valid but I would like to spend my time, rather than completely going over this whole case for many hours, I would like to spend this time and get very briefly down to the points on which I think the case ought to be decided, and that is the proposition that these people are not entitled to a double recovery.

Now, this is so well-founded in the law that we don't have to go to a lot of complex legal theories. It is a quite simple proposition founded on common sense. Nobody gets to recover twice. And this is another way of saying mitigation of damages.

If a person who has been damaged by a breach of contract can mitigate his damages, he can't recover from
July 1969 the person who breached the contract. Now, I am
page 94 } assuming a breach of the contract for the purposes of this defense because I think it completely disposes of the case and I think this is the way the case should be disposed of on this defense standing alone.

Let me give you an illustration of the principle I am talking about.

The Court: You are talking along the line I have been thinking. I want to know how they are going to recover twice. I am not going to allow them to recover twice.

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Mr. Spindle:

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But I think the payment of the $16,000 tax liability, the fact that it was assumed by the parent, the clear evidence in this case that it does not constitute fraud but, quite to the contrary, is required to be added to basis and would be recovered by Cemetery, is the basis on which this case should be disposed of by the Court.

I don't think this is any esoteric tax theory. It is pretty clear and simple to me. This is not the tax case that Mr. Bowers and Mr. Winquist tried up there. This is a simple matter of a double recovery that they are seeking. It is a simple matter of common sense, a simple matter of equity. The law of mitigation of damages is so clear that we are not troubled here with any legal problems.

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The cases which Mr. MacMillan cites deal with requiring somebody to go out and expend monies before they can be entitled to damages. In this case, this is a fact accomplished.

At this point, a recovery here—it boils right down to this. If you make Mr. Ware pay this money, they are going to get it twice. I think that one point is so clear and it is so absolutely backed up in this record that we don't need to examine at any great length the other defenses. I would urge the Court to decide the case on that very simple, clean-cut basis. I say that without diminishing the validity which we ascribe to our other defenses, but if that disposes of the case there is no reason to worry about a lot of accounting and figures on what they could have spent on other things, about post-acquisition earnings, about whether or not it was in fact disclosed in the testimony of witnesses.

That simple point disposes of the case completely. That is the basis on which I would urge the Court to dispose of this case.

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Mr. Bowers: I would like to make this very clear, because I have listened to Mr. Spindle's argument and it is so fantastic from a tax standpoint—and I am a tax man.

The Court: He apparently convinced the
July 1969 Court, now you tell me wherein he is wrong.
page 130 } Mr. Bowers: Totally wrong, absolutely and totally wrong and it couldn't be more erroneous. In the first place—

The Court: How about this mandatory provision of the regulation?

Mr. Bowers: Let's just take his argument. I am starting with his argument. If you talk about this theoretical $16,000, you put $16,000 on your basis so you step up the basis total sixteen thousand more dollars, taking his assumption. And you recover—we recover in this suit, you get the $16,000 recovery and you pay it out to Uncle Sam, so you don't have that $16,000. That is one of his double-recovery statements, is it not?

The Court: Well, it is a receipt, isn't it?

Mr. Bowers: It is a receipt to the extent of their own testimony by Mr. Godwin that it would be additional income. In other words, they get $16,000. Where is the double recovery? I want to ask Your Honor that; in your own mind where do

you get the double recovery? Because—
July 1969 The Court: Here is where I get it. If I give
page 131 } a judgment for $16,000, then you come along and file under the mandatory provision of the regulations and you will recover back—according to Mr. Spindle you have already recovered some, possibly. Then you will have two recoveries. You will get it tax-wise and you will also get it from Mr. Ware.

Mr. Bowers: No, sir. Absolutely wrong. See if I can't clear that up. I want you to ask me the question.

If we get $16,000—and I think he has got it spelled out right in his own motion that he filed for production of documents, one of the underlying bases, so we can go right to this because it is spelled out in the document.

One of his recoveries is the $16,000, but how is that a recovery to Cemetery when it goes out that very minute to Uncle Sam? That is not like a bad debt.

The Court: You say it is not a recovery then? You are going to recover under the regulations, aren't you?

Mr. Bowers: One step at a time. I am going to show you how fantastic his theory is.

July 1969 page 132 } The Court: All right.

Mr. Bowers: You take the $16,000 and you pay it out. That is gone. You haven't any recovery there, right?

The Court: No.

Mr. Bowers: By his own—

The Court: If you follow the statute you are going to recover.

Mr. Bowers: I am going right by the statute. If I had this at a tax court it would be an open-and-shut case, Your Honor.

It wasn't brought out. He only brought out the shell game: you shake now, you don't shake next. But on cross-examination by me of Mr. Godwin, he brought out that if we recovered, if we should be successful here and got $16,000 in, we would have to pay income tax on that. That is, Cemetery would have to pay tax on that. And what would they have to pay? The 50 percent bracket would be $8,000; so therefore Cemetery would have to dig in its own pocket to pay $8,000 because the $16,000 recovery already goes out to Uncle Sam, they don't have that, that is gone. And they take another $8,000 out because they recovered $16,000—under his own statement—and paid $8,000 where? Eight thousand dollars to the bank? That is $24,000 we have paid out.

July 1969 page 133 }

Now, what do we stand to get by Mr. Spindle's so-called "double recovery"? The maximum we could ever get on that, writing up $16,000 asset, depreciating it over a period of years and selling lots over a period of fifty years until it is exhausted, we could never get but half of the $16,000 back, at the maximum, because you only recover the tax rate on the basis. In other words, with a basis of $16,000, if you save a thousand dollars a year in depreciation, knock off a thousand dollars on an item, your saving is only affecting the tax rate. Taking the maximum, it would be 50 percent, so you could never get more than 50 percent of $16,000. So you could never do anything but recover that $8,000 that you are paying immediately. You follow what I am saying, sir?

The Court: Yes.

Mr. Bowers: So you don't get anything. In other words, if you did follow what Mr. Spindle said, Cemetery would have a total loss in this case; it would be a total loss. They would lose the $16,000 immediately that they got. They

July 1969 would pay $8,000 tax immediately to Uncle Sam.
page 134 } They would have no use of that $8,000 for fifty years while they were trying to recover that same $8,000; and if they were lucky they could recover it over a period of fifty years if they had income in that 50 percent bracket. A corporation, as you know, has two brackets: 26 percent tax and 22 percent surtax—or 22 and 26—rather, it is a total of 48 percent, plus a surcharge on it. And if they didn't have that much income they would never recover half of it back.

So, in other words, your ruling would be so erroneous, I submit to you in all candor, it would be so erroneous that—the argument just doesn't hold. I am surprised at Mr. Spindle making an argument like that. I am really surprised. I submit to you in all sincerity, it is fantastic.

Now, as to a bad debt, which they tried to weave into this thing: The man takes a deduction for a bad debt in the year it is charged off, so he has got a tax benefit right there. When he recovers it, it has to be income to him. But when he recovers it he doesn't pay it to Uncle Sam, he keeps it. Our recovery goes to Uncle Sam.

July 1969 Mr. MacMillan: To pay his debt.
page 135 } Mr. Bowers: To pay his debt. Sixteen thousand dollars come in one day: the next day Uncle Sam says, "Give me the sixteen thousand dollars you owe me."

In addition, I have got to show you what Mr. Godwin said, on Page 147, on cross-examination. Mr. Spindle didn't bother to bring the other side of the transaction out.

The Court: I think he brought in that which is most favorable to his side.

Mr. Spindle: It is perfectly clear.

Mr. Godwin: This is my cross-examination, the first question I asked him. (Reading)

"Q. Mr. Godwin, assuming that your testimony is correct or your opinion is correct, and this is a liability the day of liquidation, suppose that these proceedings brought at the conclusion of this tax settlement ultimately determined that Mr. Ware was responsible for this liability; now, what would happen in that case, now that you have put the liability there as an addition to basis?"—like you are talking about.

"A. Well, in my opinion I think this would be
July 1969 income to Cemetery Consultants."

page 136 } Exactly what I am telling you. We recover because we win; we have $16,000 more income which we have to set up in one year; it would be at the maximum

rate. We would pay $8,000 additional tax on it. We would take the $16,000 we get and pay it to Uncle Sam or pay his liability. We are in the hole another $8,000.

And how can we recover on Mr. Spindle's argument? On that $16,000 stepped-up basis you can never get more than 50 percent of it back at the maximum. And we would lose, because you would put out $8,000 to get something back in fifty years.

That is how simple it is. It is ridiculous to hear an argument such as his. I submit to you, that is the truth and that is the law. He says it is a matter of law. It is a matter of law.

Now, insofar as showing you that it is fantastic I am going to show you this (indicating). Dick, you are familiar with this (showing to Mr. Spindle). I want to quote it.

Mr. Spindle: Go ahead.

July 1969 page 137 } Mr. Bowers: Revenue Ruling 59-412, dealing with a very similar situation that we have here. I will read from the headnote. (Reading)

"Where Section 334(b)(2) of the Internal Revenue Code of 1954 is applicable to determine the basis of the property received by a parent corporation upon the complete liquidation of a subsidiary corporation . . . only the adjusted basis of the stock held by the parent corporation immediately prior to the liquidation is includible in determining the basis of the property received under Section 334(b)(2). However, payments made by the parent corporation"—payments; now, get that, "payments"—"made by the parent corporation after the liquidation to minority shareholders of the subsidiary corporation for their stock are treated as if in release of the liability assumed by the parent corporation with respect to the minority shareholders, and the amounts so paid are included as part of the overall basis of the property received by the parent corporation."

July 1969 page 138 } And this goes on and says—and they never use the names of these corporations: M corporation is the parent and N corporation is the subsidiary. In connection with the acquiring of that subsidiary corporation, the agreement provided that "if all the stock of N corporation was not acquired prior to the liquidation and merger, the parent corporation would be obligated to pay upon the surrender of the certificates" so many thousand dollars "per share for all shares not previously acquired. The minority interests were purchased subsequent to the liquidation and merger."

And it goes on and holds: "Thus, the taxpayer"—talking about the parent corporation, like Cemetery—"is entitled to have a basis attach to the assets to the extent the liability was assumed and paid."

The very case that they cited in this last hearing, I have read it extensively, and it not only doesn't stand, it is not analogous to our situation whatsoever; but, in addition, it refers to an assumed tax liability by the parent corporation and it says right in the opinion that you add it to basis if it was "assumed and paid."

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page 139 }

"Assumed and paid": Well, we submit to Your Honor that this is to be paid by Mr. Ware, not by Cemetery and, therefore, you can't step up your basis by just a mere assumption without paying.

If we followed exactly—because of the technicalities that you are concerned with—and added to the basis, I submit to you we have not a double recovery, we wouldn't even come back whole. We would lose the $16,000 immediately because we have to pay that liability to the Government. We would increase our tax by another $8,000 which we would have to put out of our pocket, and we might get that $8,000 back over fifty years. That is the net effect, what I call the "net effect" of Mr. Spindle's test. Instead of a double recovery, we would have a definite loss, at the best a washout. We would certainly lose the interest on the money that we pay out, $8,000 now, with the hope of getting it back, because you can't get more than 50 percent of that.

So I cite that in addition to this case that was mentioned in the hearings.

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Mr. Spindle: And not the bad debt. But I have thumbed over to another place where on my examination of him the next morning there isn't any question about what we are talking about, and he makes it quite clear that this has got to be added to basis and that there will be a recovery.

Let me just say, in answer to this double-recovery bit, I don't claim that they are going to profit $32,000. I recognize that $16,000 they have paid out to the Government. What I am saying is that they are whole now.

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The Court: Or they will be under this section.

Mr. Spindle: Will be under this section. Then if you made Gordon Ware pay them, that is where the double recovery comes. I am saying they are all right now, they are entitled to this; and Mr. Winquist's position that the mere fact that they haven't claimed it by putting it on their books I say is immaterial. This is a matter of law.

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The Court: Gentlemen, I could take this case and say I will review it and read all the evidence, but my mind is about made up.

As I said some time ago, if there was any evidence here that showed that the plaintiff had recovered or could recover this, I was not going to allow judgment for the plaintiff.

So that you all might go on up and wind it up: I will find for the defendant, to which action of the Court the plaintiff duly excepts.

Mr. MacMillan: Note our exception.

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Mr. MacMillan: Well, Your Honor we had two things we wanted to bring up. One is the form of the order.

As we understand it, we have objected throughout this proceeding to any testimony about taxes. Judge Wahab ruled it out and when we got to trial Your Honor said that you were going to allow them to subpoena the records and have their day in court and that you would reserve until the end of the proceedings the determination as to what effect to give to it.

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Your Honor said at the end of the evidence that what concerned you was the possibility that the purchaser here, Cemetery, would get a recovery by operation of Section 334(b)(2) of the Internal Revenue Code, which you

felt would—first it was said to be a double indemnity and later they said, "Well, it wouldn't be a double indemnity but if they paid it they could recover it over the years." I think Your Honor will recall that.

We have throughout the proceedings strenuously objected to that, to the legality of that, and thought we had presented to Your Honor the authorities on that at closing argument. Frankly, we were surprised by the Court's ruling that taxes could be in mitigation, because as we saw it you could never decide a case involving contract or tort until you also had a subsequent hearing on the tax support effect of it.

We don't come today—we don't even want to argue that. If Your Honor doesn't want to hear it, we are perfectly willing to have an order entered. We do think we have a duty as lawyers to say that if Your Honor is getting ready to enter an order which we know will be appealed and if we are asked from the bench on appeal whether we cited these cases to Your Honor, we want to be able to say we have made an effort to and the Court felt that it had already made up its mind and didn't want to hear those cases.

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We do represent to Your Honor that, as supported by every case in America, the majority rule and the leading rule is that taxes cannot be considered in mitigation of damages. We would say to Your Honor that we can present all the authorities on that this morning. Your Honor's ruling I respectfully say is in error and if it is on that basis, that the appellate court, unless it makes a new rule in Virginia contrary to the law in the United States, will rule that it is not admissible.

So I think we are at the point that if you want to hear those cases, we will give them to you.

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The Court: No. I have been over it in my own mind and I was thinking about it the whole time. Judge Wahab has heard it on I don't *now* how many occasions you have had when I was sitting; probably five, six, or seven. I don't think any further argument would help me. I would hear you out if I thought it would, but I had just as well be frank.

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A Copy—Teste:

Howard G. Turner, Clerk.

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