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Record No. 5176

In the Supreme Court of Appeals of Virginia at Richmond

FRANK PAULSON, ETC., ET AL.

v.

HAJOCA CORPORATION

FROM THE CIRCUIT COURT OF NEW KENT COUNTY

RULE 5:12—BRIEFS.

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

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

HOWARD G. TURNER, Clerk.

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

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 5176

VIRGINIA:

In the Clerk's Office of the Supreme Court of Appeals at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 12th day of April, 1960.

FRANK PAULSON, ETC., ET AL., Plaintiffs in Error,

against

HAJOCA CORPORATION, Defendant in Error.

From the Circuit Court of New Kent County

Upon the petition of Frank Paulson doing business as Peninsula Construction Company and Aetna Casualty and Surety Company a writ of error and *supersedeas* was awarded them by one of the justices of the Supreme Court of Appeals on April 11, 1960, to a judgment rendered by the Circuit Court of New Kent County on the 30th day of November, 1959, in a certain motion for judgment then therein depending wherein Hajoca Corporation was plaintiff and the petitioners were defendants.

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

RECORD

* * * * *

Filed in the Clerk's Office the 4 day of March, 1959.

Teste:

VIVIAN L. ANDERSON, Clerk.

MOTION FOR JUDGMENT.

Plaintiff Hajoca Corporation represents to the Court that:

1. On or about December 27, 1957, Defendant Frank Paulson entered into a contract with the School Board of the County of New Kent, Virginia, for the construction by Defendant Frank Paulson of an elementary school building in the County of New Kent, Virginia.

2. On or about December 27, 1957, Defendant Frank Paulson as principal and Defendant Aetna Casualty and Surety Company as surety executed a performance and payment bond in the amount of $174,400.00 to secure faithful performance of such contract between the School Board of the County of New Kent and Defendant Frank Paulson. A copy of such performance and payment bond is attached as *Exhibit A*.

3. Such performance and payment bond obligated Defendants Frank Paulson and Aetna Casualty and Surety Company to pay those persons who furnished, sold, and delivered materials for the construction of such elementary school building.

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4. Such performance and payment bond has remained in full force and effect between its obligors and obligees since its execution.

5. During the period of July 1 through October 31, 1958, Plaintiff furnished, sold, and delivered on open account to Burlee Rowe, doing business as B. Rowe Plumbing and Heating, various materials which were used in the construction of such elementary school building in the County of New Kent, Virginia, and on November 1, 1958, the amount of $5,644.74 was justly due by Burlee Rowe to Plaintiff on such open account.

6. Although Plaintiff has demanded the payment of such open account by Burlee Rowe and by both Defendants, it has

remained unpaid and is now due from Burlee Rowe and such Defendants.

WHEREFORE, Plaintiff moves the Court for judgment against Defendant Frank Paulson and Defendant Aetna Casualty and Surety Company, jointly and severally, in the amount of $5,644.74, together with interest from November 1, 1958, and the costs of this action.

GEORGE B. LITTLE
ANGUS H. MACAULAY, JR.
Of Counsel for Plaintiff.

* * * * *

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* * * * *

Filed in the Clerk's Office of the Circuit Court of New Kent County, Virginia, Mar. 19, 1959.

VIVIAN L. ANDERSON, Clerk.

DEMURRER.

The defendants, Frank Paulson, doing business as Peninsula Construction Company, and Aetna Casualty and Surety Company, a Connecticut corporation, by their attorney say that the Motion for Judgment in this action is not sufficient in law for the following reason:

1. The action is based upon a performance and payment bond attached to the Motion for Judgment as *Exhibit A*, and under the terms of the bond, Frank Paulson as principal, and Aetna Casualty and Surety Company as surety, undertake to "pay all persons who shall have furnished labor or material directly to the principal for use in the prosecution of the aforesaid work * * *," and under paragraph 5 of the Motion for Judgment it is alleged that the "Plaintiff furnished, sold and delivered on open account to Burlee Rowe, doing business as B. Rowe Plumbing and Heating, various materials which were used in the construction of such elementary school building in the County of New Kent, Virginia, * * *."

2. That the Motion for Judgment does not allege that ma-

terials were furnished directly to the principal,
page 4-A } Frank Paulson, for use in the construction of the G. W. Watkins School, New Kent County, Virginia.

FRANK PAULSON, DOING BUSINESS AS PENINSULA CONSTRUCTION COMPANY, AND AETNA CASUALTY & SURETY COMPANY, ETC.
By FRANK H. PITCHFORD
Their Attorney.

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MOTION FOR BILL OF PARTICULARS.

The defendants move the Court to require the plaintiff to submit a Bill of Particulars showing each and every item of labor and/or material furnished by it for use on the elementary building, or G. W. Watkins School, New Kent County, Virginia, the dates such labor and/or materials were furnished, the total amount claimed for such labor and/or material, the payments made on account of labor and/or material furnished, together with the dates of such payments, and the balance alleged to be due for such labor and/or material.

FRANK PAULSON, DOING BUSINESS AS PENINSULA CONSTRUCTION COMPANY, AND AETNA CASUALTY & SURETY COMPANY, A CONNECTICUT CORPORATION
By FRANK H. PITCHFORD
Their Atty.

Filed in the Clerk's Office of the Circuit Court of New Kent County, Virginia, Mar. 19, 1959.

VIVIAN L. ANDERSON, Clerk.

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Filed in the Clerk's Office of the Circuit Court of New Kent County, Virginia, March 19, 1959.

VIVIAN L. ANDERSON, Clerk.

ANSWER AND GROUNDS OF DEFENSE.

The defendants, Frank Paulson, doing business as Peninsula Construction Company, and Aetna Casualty and Surety Company, a Connecticut corporation, for their answer and grounds of defense to the Motion for Judgment filed against them in the above captioned matter, or to so much thereof as they are advised it is material they should answer, answer and say:

1. The defendants admit the allegations contained in paragraphs numbered 1, 2, and 4 of the Motion for Judgment.
2. The defendants deny the allegations contained in paragraphs numbered 3, 5, and 6 of the Motion for Judgment, and call for strict proof of each and every allegation insofar as relevant.
3. The plaintiff at no time furnished materials directly to Frank Paulson, doing business as Peninsula Construction Company of Hampton, Virginia, designated as principal in the bond attached to the Motion for Judgment marked *Exhibit A,* but rather dealt directly with B. Rowe Plumbing and Heating Company, except that when the financial arrangements were made for furnishing material to be used in and about the construction of the elementary school building, or G. W. Watkins School, in New Kent County, Virginia, the plaintiff had Burlee Rowe sign an authorization, and then

page 6-A } requested the defendant, Frank Paulson, to make checks, when due and payable, jointly to Hajoca Corporation, 1208 W. Marshall Street, Richmond, Virginia, and Burlee Rowe, trading as B. Rowe Plumbing and Heating, and the defendant, pursuant to said request, made checks jointly to Hajoca Corporation and Burlee Rowe, trading as B. Rowe Plumbing and Heating aggregating $15,245.68, and the defendants affirmatively allege that the payments so made should have been credited toward the purchase price of the materials furnished to Burlee Rowe, trading as B. Rowe

Plumbing and Heating and used by Burlee Rowe in and about the construction of the G. W. Watkins School in New Kent County, Virginia.

4. That there was no privity of contract between the plaintiff, Hajoca Corporation, and Frank Paulson, and no material was furnished directly to Frank Paulson by the plaintiff for use in and about the construction of the G. W. Watkins School.

5. The defendant, Frank Paulson, doing business as Peninsula Construction Company, has already paid to Burlee Rowe, trading as B. Rowe Plumbing and Heating, on account of labor and material furnished in and about the work Burlee Rowe was to accomplish an amount in excess of the contract price made between Burlee Rowe and the defendant, Frank Paulson, for all of the work to be accomplished and for material to be furnished by Burlee Rowe in and about the construction of the G. W. Watkins School.

6. The defendants expressly request a reply to the new matter and affirmative defenses contained in this Answer and Grounds of Defense.

7. The defendants will rely on such other defenses as may be assigned at or before trial, or which may be justified by the evidence upon trial.

FRANK PAULSON, DOING
BUSINESS AS PENINSULA
CONSTRUCTION COMPANY,
AND AETNA CASUALTY &
SURETY COMPANY, ETC.
By FRANK H. PITCHFORD
Their Atty.

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Filed in the Clerk's Office of the Circuit Court of New Kent County, Virginia, Apr. 4, 1959.

VIVIAN L. ANDERSON, Clerk.

REPLY.

In reply to the new matter set up by the Grounds of Defense filed in this action by Defendants Frank Paulson and Aetna

Casualty and Surety Company, Plaintiff Hajoca Corporation says:

1. Plaintiff reaffirms the allegations of paragraphs 1 through 6 of its Motion for Judgment and by reference incorporates all of such allegations in this Reply.

2. In response to the allegations of paragraph 3 of the Grounds of Defense filed by Defendants, Plaintiff says that it is without knowledge or information sufficient to form a belief as to the truth of such allegations. Plaintiff says further that such allegations regarding payments made by Defendant Frank Paulson represent a conclusion of law to which no response by Plaintiff is required, but Plaintiff says that any failure of Plaintiff to furnish materials directly to Defendant Frank Paulson is immaterial in view of Chapter 279, Acts of the General Assembly of Virginia, which was approved on March 15, 1954.

3. In response to the allegations of paragraph 4 of such Grounds of Defense, Plaintiff says that it is with-
page 7-A } out knowledge or information sufficient to form a belief as to the truth of such allegations. Plaintiff says further that such allegations regarding lack of privity of contract between Plaintiff and Defendant Frank Paulson represent a conclusion of law to which no response by Plaintiff is required, but Plaintiff says that any lack of such privity of contract and any failure of Plaintiff to furnish materials directly to Defendant Frank Paulson are immaterial in view of the legislation to which reference has been made in paragraph 2 of this Reply.

4. In response to the allegations of paragraph 5 of such Grounds of Defense, Plaintiff says that it is without knowledge or information sufficient to form a belief as to the truth of such allegations. Plaintiff says further that any payment by Defendant Frank Paulson to Burlee Rowe, trading as B. Rowe Plumbing and Heating, in excess of any price for which provision was made in any contract between Defendant Frank Paulson and Burlee Rowe is immaterial in view of the legislation to which reference has been made in paragraph 2 of this Reply.

ANGUS H. MACAULAY, JR.
Of Counsel for Plaintiff.

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BILL OF PARTICULARS.

Plaintiff Hajoca Corporation files the following as its Bill of Particulars and represents to the Court that:

1. Each and every item of labor and/or material furnished by Plaintiff for use on the construction of the elementary school building known as the G. W. Watkins School in the County of New Kent, Virginia, the dates that such labor and/or material were furnished, and the total amount claimed by Plaintiff for such labor and material are set forth in *Exhibit A* hereto attached.

2. Each and every payment made to Plaintiff on account of such labor and/or material furnished by Plaintiff, as described in the foregoing paragraph 1, and the dates that such payments were made are set forth in *Exhibit B* hereto attached.

3. The balance due on account of such labor and/or material furnished by Plaintiff, as described in the foregoing paragraph 1, is set forth in the Motion for Judgment previously filed by Plaintiff and in *Exhibit C* hereto attached.

ANGUS H. MACAULAY, JR.
Of Counsel for Plaintiff.

Filed in the Clerk's Office of the Circuit Court of New Kent County, Virginia. May 29, 1959.

VIVIAN L. ANDERSON, Clerk.

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Filed in the Clerk's Office of the Circuit Court of New Kent County, Virginia, June 1, 1959.

VIVIAN L. ANDERSON, Clerk.

INTERROGATORIES.

According to Sections 8-320 and 8-321 of the Code of Virginia, Plaintiff Hajoca Corporation propounds the following Interrogatories to Defendant Frank Paulson for answer upon oath by such Defendant no later than June 22, 1959.

1. What were the dates and amounts of all monetary payments received by Defendant from the School Board of New Kent County, Virginia, for the construction of an elementary school building known as the G. W. Watkins School?

2. What is the monetary amount, if any, still owed by the School Board of New Kent County, Virginia, to Defendant for the construction described in Interrogatory No. 1?

3. What were the dates and amounts of all monetary payments made by Defendant to Burlee Rowe (trading as B. Rowe Plumbing and Heating), either individually or jointly with any other person or corporation, for material supplied and labor furnished on the construction described in Interrogatory No. 1?

4. What is the monetary amount, if any, still owed by Defendant to Burlee Rowe for material supplied and labor furnished on the construction described in Interrogatory No. 1?

Inpage 10-A

5. Of each monetary payment described in Interrogatory No. 3, what portion was attributable to material supplied and what portion was attributable to labor furnished by Burlee Rowe on the construction described in Interrogatory No. 1?

6. What were the dates and amounts and who were the recipients of all monetary payments made by Defendant to any person or corporation (other than those made to Burlee Rowe, either individually or jointly with any other person or corporation, as described in Interrogatory No. 3) which were attributable to material supplied and labor furnished for the plumbing and heating work on the construction described in Interrogatory No. 1?

7. Of each monetary payment described in Interrogatory No. 6, what portion was attributable to material supplied and what portion was attributable to labor furnished for such plumbing and heating work?

8. If an agreement or agreements, either totally or partially oral, existed between Defendant and Burlee Rowe for the supply of material and the furnishing of labor by Burlee Rowe on the construction described in Interrogatory No. 1, what were the complete terms and conditions of such oral agreement or agreements?

9. If any agreement or agreements existed between or among Defendant and any other persons or corporations including Burlee Rowe for the issuance of checks by Defendant to such persons or corporations jointly for the construction described in Interrogatory No. 1, what were the complete terms and conditions of such agreement or agreements and

between or among which persons or corporations did such agreement or agreements exist?

ANGUS H. MACAULAY, JR.
Of Counsel for Plaintiff.

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ORDER.

On June 26, 1959, all parties appeared by counsel and argument was heard by the Court upon the Demurrer filed by Defendants herein,

Whereupon, it appearing to the Court that such Demurrer is insufficient in law, it is ordered that such Demurrer is hereby overruled, and

It is further ordered that Defendants file an Amended Answer to the Motion for Judgment heretofore filed by Plaintiff in this case within ten days from the entry of this order and that Plaintiff file a Reply to such Amended Answer within ten days thereafter if such Reply is required under the Rules of Court of the Supreme Court of Appeals of Virginia.

Enter.

Date: July 6-59.

C. H. SHEILD, JR., Judge.

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Filed in the Clerk's Office of the Circuit Court of New Kent County, Virginia, July 9, 1959.

VIVIAN L. ANDERSON, Clerk.

ANSWERS TO INTERROGATORIES.

Now comes the defendant, Frank Paulson doing business

as Peninsula Construction Company, in response to Interrogatories propounded by the plaintiff, and the Court order entered herein requiring certain of the Interrogatories to be answered, answers and says:

1. What were the dates and amounts of all monetary payments received by defendant from the School Board of New Kent County, Virginia, for the construction of an elementary school building known as the G. W. Watkins School?

A. April 16, 1958	$ 12,481.56
May 15, 1958	25,409.46
June 12, 1958	24,122.31
July 19, 1958	47,399.02
August 16, 1958	21,886.91
September 18, 1958	27,758.43
November 14, 1958	19,719.19
TOTAL	$178,776.88

2. What is the monetary amount, if any, still owed by the School Board of New Kent County, Virginia, to defendant for the construction described in Interrogatory No. 1?

A. None.

3. What were the dates and amounts of all monetary payments made by defendant to Burlee Rowe (trading as B. Rowe Plumbing and Heating), either individually or jointly with any other person or corporation, for material supplied and labor furnished on the construction described in Interrogatory No. 1?

page 17-A } A. Check #2657 dated 4-16-58 to B. Rowe Plumbing & Heating and Hajoca Corp.	$ 3,073.26
Check #2740 dated 5-15-58 to B. Rowe Plumbing & Heating and Hajoca Corp.	2,790.00
Check #2836 dated 6-12-58 to B. Rowe Plumbing & Heating and Hajoca Corp.	2,337.50
Check #2934 dated 7-18-58 to B. Rowe Plumbing & Heating and Hajoca Corp.	4,044.92
Check #3021 dated 8-15-58 to B. Rowe Plumbing & Heating and Hajoca Corp.	3,000.00
Check #3003 dated 7-28-58 to B. Rowe Plumbing & Heating and Soperior Combustion Industries, Inc.	4,390.00

Check #3359 dated 1-14-59 to B. Rowe Plumbing & Heating and Superior Combustion Industries, pany	120.00
Check #3415 dated 2-3-59 to Johnson Service Co. and Burlee Rowe Plumbing & Heating	4,713.00
Check #2834 dated 6-12-58 to Schultz & James, Inc. and B. Rowe Plumbing & Heating	812.50
Check #2933 dated 7-18-58 to B. Rowe Plumbing & Heating and Schultz & James	250.00
Check #3022 dated 8-15-58 to B. Rowe Plumbing & Heating and American Blower	1,710.00
TOTAL	$27,241.18

4. What is the monetary amount, if any, still owed by defendant to Burlee Rowe for material supplied and labor furnished on the construction described in Interrogatory No. 1?

A. Nothing is owed to B. Rowe.

5. Of each monetary payment described in Interrogatory No. 3, what portion was attributable to material supplied and what portion was attributable to labor furnished by Burlee Rowe on the construction described in Interrogatory No. 1?

A. The Court did not require that this Interrogatory be answered.

6. What were the dates and amounts and who were the recipients of all monetary payments made by defendant to any person or corporation (other than those made to Burlee Rowe, either individually or jointly with any other
page 17-B } person or corporation, as described in Interrogatory No. 3) which were attributable to material supplied and labor furnished for the plumbing and heating work on the construction described in Interrogatory No. 1?

A.

Check #3090 dated 8-28-58 to Herbert H. Smith and Luther Smith	$ 210.00
Check #3097 dated 9-5-58 to Herbert H. Smith and Luther Smith	112.00
Check #3104 dated 9-10-58 to Herbert H. Smith and Luther Smith	156.00
Check #3108 dated 9-13-58 to Herbert Smith	48.00

(These were employees of B. Rowe who stayed on the job after it was abandoned by Mr. Rowe)

Check #3443 dated 2-18-59 to Richmond Crane Service, Inc.	349.28
Week ending 10-29-58:	
Dallas Williams	40.25
Maxie Russell	11.88
F. Dandridge	15.63
Week ending 11-5-58:	
Dallas Williams	96.32
J. Goodman	11.88
Week ending 11-12-58:	
Dallas Williams	28.75
J. Goodman	12.50
Week ending 11-19-58:	
Dallas Williams	46.00
J. Rice	20.00
J. Goodman	20.00
Week ending 11-26-58:	
Dallas Williams	17.25
Week ending 12-11-58:	
Maxie Russell	15.00
Week ending 3-4-59:	
C. Emerson	72.00
R. Bryant	37.50
Maxie Russell	25.00
Week ending 3-25-59:	
C. Emerson	86.25
Maxie Russell	37.50
R. Bryant	37.50

Tool rental and equipment:

Week ending 10-29-58:	
Pickup truck owned by Peninsula Construction Co.	31.25
Gilsulate purchased from Schultz & James	20.10

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Week ending 11-19-58:	
Pickup truck owned by Peninsula Construction Co.	40.00
Week ending 12-11-58:	
Pickup truck owned by Peninsula Construction Co.	30.00

Week ending 3-4-59:	
Welding machine owned by Peninsula Construction Co.	31.00
Pickup truck owned by Peninsula Construction Co.	75.00
Pump rental from Diamond Air Compressor	12.40
Gilsulate purchased from Schultz & James	27.00
Week ending 3-25-59:	
Pickup truck owned by Peninsula Construction Company	75.00
Gilsulate purchased from Schultz & James	20.25
Albert Hutton & Co., Hampton, Va.	296.44
TOTAL	$2,164.93

7. Of each monetary payment described in Interrogatory No. 6, what portion was attributable to material supplied and what portion was attributable to labor furnished for such plumbing and heating work?

A. All payments made to Herbert H. Smith, Luther Smith, Dallas Williams, Maxie Russell, F. Dandridge, J. Goodman, J. Rice, C. Emerson, R. Bryant were attributable to labor. The Albert Hutton bill included $275.00 labor. All other expenditures mentioned in answer to Interrogatory number 6 are insofar as the defendant, Frank Paulson, knows attributable to material and equipment rental.

8. If an agreement or agreements, either totally or partially oral, existed between defendant and Burlee Rowe for the supply of material and the furnishing or labor by Burlee Rowe on the construction described in Interrogatory No. 1, what were the complete terms and conditions of such oral agreement or agreements?

page 17-D } A. Burlee Rowe agreed to furnish all materials and perform all work necessary to complete the heating, plumbing, pipe work and ventilating according to the plans and specifications as prepared by J. Henley Walker, Jr., Architect for the Elementary Building for the G. W. Watkins School, New Kent County, Virginia. The work was to be performed in strict accordance with the plans and specifications and addendums and the general conditions of the specifications, including all excavation, concrete work and masonry work in connection with the plumbing and heating and to the full satisfaction of the architect. Burlee Rowe

further agreed to promptly begin said work as soon as notified by the Peninsula Construction Company and to complete the work so as not to slow up or impede any other work on the project that would delay the completion of the contract on the scheduled time. Burlee Rowe further agreed to execute with surety a one hundred per cent (100%) performance in payment bond and to provide a certificate of workmen's compensation and public liability insurance for the sum of Twenty-Five Thousand Dollars ($25,000.00) for said materials and work to be paid as follows:

Ninety per cent (90%) of all labor and materials which have been placed in position by sub-contractor Burlee Rowe to be paid on or about the tenth (10th) of the following month except the final payment which the said Peninsula Construction Company will pay to Burlee Rowe within thirty (30) days after the Sub-Contractor Rowe shall have completed his work to the full satisfaction of said architect and owner. The contract contemplated a ten per cent (10%) hold back to assure completion on the part of Burlee Rowe.

During the progress of the job a fifty (50) horsepower oil fired boiler was substituted in lieu of a coal burning boiler originally called for in plans and specifications and the contract price was increased by reason there-
page 17-E } of Three Thousand Twenty-Five Dollars ($3,-025.00) making a total of Twenty-Eight Thousand Twenty-Five Dollars ($28,025.00) payable to Burlee Rowe upon completion of the work by him undertaken, all of which will appear from copy of formal contract, not signed, a copy of which is being furnished Plaintiff.

9. If any agreement or agreements existed between or among defendant and any other persons or corporations including Burlee Rowe for the issuance of checks by defendant to such persons or corporations jointly for the construction described in Interrogatory No. 1, what were the complete terms and conditions of such agreement or agreements and between or among which persons or corporations did such agreement or agreements exist?

A. Hajoca Corporation by letter dated March 4, 1958 requested that all payments due Burlee Rowe on the job in question be made jointly to Rowe and the Corporation, and by letter dated March 19, 1958, a writing signed by Rowe requesting that checks when due and payable to Rowe be made jointly to Hajoca Corporation and to Burlee Rowe. Frank Paulson was requested to sign this writing, but refused to do so because Hajoca Corporation would not advise him as to the

price and kind of material being furnished for the job. Burlee Rowe also requested that checks be made jointly to Schultz and James, manufacturers agents for American Blower, Modine Manufacturing Company, Superior Combustion Industries, Inc., and to Schultz and James for material and equipment to be used in the fulfillment of the Rowe contract. Prices were quoted and Frank Paulson agreed to this, and checks were issued and honored in accordance with the agreement. Paulson also agreed with Johnson Service

page 17-F } Company to issue a joint check to Rowe and Johnson Service Company for heating controls at a price of $4,713.00. This check was issued and honored in accordance with the quoted price and agreement. Burlee Rowe also incurred an expense with Richmond Crane Service, Inc. in the amount of $349.28 and requested that the defendant, Frank Paulson, pay the same, and this was paid by check directly to Richmond Crane Service, Inc. under date of February 18, 1959.

FRANK P. PAULSON
doing business as Peninsula
Construction Co.

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Filed in the Clerk's Office of the Circuit Court of New Kent County, Virginia, July 14, 1959.

VIVIAN L. ANDERSON, Clerk.

ADDITIONAL ANSWER AND GROUNDS OF DEFENSE.

The defendant, Frank Paulson, doing business as Peninsula Construction Company, and Aetna Casualty & Surety Company, a Connecticut corporation, for additional answer and grounds of defense to the motion for judgment filed against them in the above captioned matter, or to so much thereof as they are advised it is material they should answer, answer and say:

1. That they reaffirm answers one through seven, both inclusive, of the original answer and grounds of defense filed herein, and in addition charge and aver as follows:

2. All the supplies and materials claimed in the bill of particulars was not used on or about the construction of the G. W. Watkins School in New Kent County, Virginia.

3. Material furnished by the plaintiff, Hajoca Corporation, to B. Rowe, trading as B. Rowe Plumbing and Heating, was different from that required by contract and specifications, and this difference was known to Hajoca and/or would have been known by it through the exercise of ordinary care and diligence.

4. Prices charged by the plaintiff, Hajoca Corporation, for material and supplies furnished by it to B. Rowe, trading as B. Rowe Plumbing and Heating, were excessive and higher than prevailing market prices.

5. Hajoca Corporation refused without just cause to reveal to the defendant, Frank Paulson, the prices being
page 21-A } charged by it for supplies and materials furnished by it to B. Rowe, trading as B. Rowe Plumbing and Heating, and allegedly used by the said B. Rowe in and about the construction of the G. W. Watkins School in New Kent County, Virginia.

6. Checks aggregating more than the price charged by Hajoca Corporation for all materials and supplies furnished by it to B. Rowe and allegedly used by him in and about the construction of the G. W. Watkins School in New Kent County were made payable and issued to Hajoca Corporation and B. Rowe jointly at the request of Hajoca Corporation in order that it could protect itself in extending credit to B. Rowe, but Hajoca Corporation failed to protect itself but instead permitted the said B. Rowe to take, keep and appropriate money expressly allocated and paid to Hajoca Corporation by said joint checks.

7. Hajoca Corporation has been paid the reasonable value through checks issued jointly to Hajoca Corporation and B. Rowe, trading as B. Rowe Plumbing and Heating, for all materials actually furnished by Hajoca Corporation to B. Rowe and used by B. Rowe in and about the construction of the G. W. Watkins School in New Kent County, Virginia.

8. And the defendant reserves the right to enlarge upon grounds of defense contained in this answer and grounds of defense and answer and grounds of defense set forth in the original answer and grounds of defense should such become necessary.

FRANK PAULSON, DOING
BUSINESS AS PENINSULA
CONSTRUCTION COMPANY,
AND AETNA CASUALTY &
SURETY COMPANY, ETC.
By FRANK H. PITCHFORD
Their Atty.

* * * * *

page 25 } INSTRUCTION NO. 1.

The Court instructs the jury that in every civil action the burden is upon the plaintiff in the suit to prove by a preponderance of the evidence that the plaintiff is entitled to recover money damages from the defendants, and the plaintiff must prove further by a preponderance of the evidence the amount of money damages it is entitled to recover against the defendants. This burden rests upon the plaintiff throughout the entire trial. The jury cannot infer that the defendants is indebted to the plaintiff from the mere fact that suit has been brought.

The Court further instructs the jury that a verdict cannot be based, in whole or in part, upon surmise or conjecture. The law does not undertake to hold a person who is sued for money damages liable unless and until the plaintiff has established by a preponderance of the evidence that the defendant is liable and the extent of that liability.

Your verdict, therefore, should be based solely upon the evidence introduced and the instructions given you by this Court as to the law applicable to the case.

Therefore, you cannot find a verdict in favor of the plaintiff, Hajoca Corporation, against Frank Paulson, doing business as Peninsula Construction Company, unless and until the plaintiff has proven by a preponderance of the evidence that the defendant, Frank Paulson, is indebted to it and the amount of such indebtedness.

* * * * *

page 25-A } INSTRUCTION NO. 2.

The Court instructs the jury that if you believe from the evidence that Hajoca Corporation acting by and through its agents and employees, by its statements, conduct, action and behavior, led the defendant, Frank Paulson, to believe that material furnished and to be furnished by it to B. Rowe in and about the construction of the G. W. Watkins School was being paid for with checks issued by Frank Paulson to Hajoca Corporation and Burlee Rowe, and that Paulson, relying thereon and believing that said material was actually being paid for with the above mentioned checks, then and in that event Hajoca cannot assert the existence of a different state

of facts from that indicated by its statements, conduct, action and behavior.

Refused.

page 25-B } INSTRUCTION NO. 3.

The Court instructs the jury that even if they believe from all of the evidence that the plaintiff, Hajoca Corporation, is entitled to recover a verdict against the defendant, Frank Paulson, such recovery should be limited to the value of materials furnished by Hajoca Corporation to Burlee Rowe and used by Rowe in and about the construction of the G. W. Watkins School and for which the plaintiff has not been paid.

page 25-C } INSTRUCTION NO. 4.

The Court instructs the jury that if they believe from the evidence that the defendant, Frank Paulson, doing business as Peninsula Construction Company, at the request of Hajoca Corporation paid to Hajoca Corporation and Burlee Rowe by joint checks an amount equal to or exceeding the reasonable value of materials actually furnished by Hajoca Corporation to Burlee Rowe and used by Rowe in and about the construction of the G. W. Watkins School, that Hajoca Corporation is not entitled to recover a verdict against the defendant, Frank Paulson, for Paulson is required to pay only once, and your verdict should be for the defendant, Frank Paulson.

Refused.

page 25-D } INSTRUCTION NO. 4A.

The Court instructs the jury that the defendant, Frank Paulson, as general contractor, is not required to pay for any materials supplied by Hajoca Corporation more than once.

page 25-E } INSTRUCTION NO. 5.

The Court instructs the jury that if they believe from all of the evidence that Hajoca Corporation, through its agents and employees, induced Frank Paulson, doing business as Peninsula Construction Company, to act upon reasonable belief that Hajoca Corporation had or would waive any rights

of action it had a right to assert, then and in that event Hajoca Corporation is estopped to insist upon such rights or remedies to the prejudice of Frank Paulson.

Refused.

page 25-F } INSTRUCTION NO. 6.

The Court instructs the jury that if it appears to you after hearing and considering all of the evidence and circumstances in this case that it is just as probable or likely that the defendant is not indebted to the plaintiff as it is that he may be indebted to the plaintiff, then the law requires you to find your verdict for the defendant, Frank Paulson, doing business as Peninsula Construction Company.

Refused.

page 25-G } INSTRUCTION NO. 7.

The Court instructs the jury that the credibility to be given to the testimony of every witness is exclusively for the jury, and the jury, in determining the weight and credibility to be given to the testimony of a witness, should consider in connection therewith his interest or want of interest, if any, in the result of the case, his apparent intelligence, candor and fairness and demeanor while testifying, and to give such credit to his testimony as he is fairly entitled to from all of the facts and circumstances appearing at the trial.

page 25-H } INSTRUCTION NO. 8.

The Court instructs the jury that by a preponderance of the evidence is meant that evidence which is most convincing and satisfactory to the minds of the jury; and in determining upon which side the preponderance of the evidence is, the jury may take into consideration the opportunities of the several witnesses for seeing and knowing the facts to which they testify, their interest, if any, or want of interest, if any, in the result of the suit, the probability or improbability of the truth of their several statements, in view of all of the other evidence, and the facts and circumstances upon the trial; and from all the circumstances of the evidence, the jury are the sole judges of the weight of the evidence and the credibility of the witnesses.

page 25-I } INSTRUCTION NO. 9.

The Court instructs the jury that if they believe from all of the evidence that Hajoca Corporation failed to protect its interest with money made available for it to protect such interest without fault on the part of the defendant, Frank Paulson, and that such failure on the part of Hajoca Corporation resulted in its not being paid for all of the material furnished, then and in that event the said Frank Paulson cannot be held responsible for the failure of Hajoca Corporation to protect itself.

Refused.

page 25-J } INSTRUCTION NO. 10.

The Court instructs the jury that it is the duty of the plaintiff to prove by a preponderance of the evidence and with reasonable certainty each and every item of its claim against the defendant, Frank Paulson, and the plaintiff, Hajoca Corporation, is not entitled to recover any item of its claim not proven by a preponderance of the evidence.

Refused.

page 25-K } INSTRUCTION NO. 11.

The Court instructs the jury that a duty devolved upon Hajoca Corporation to credit the account of Burlee Rowe for material furnished Rowe by it for use in and about the construction of the G. W. Watkins School with all checks written and cashed payable jointly to Hajoca Corporation and Burlee Rowe, and that Frank Paulson and Aetna Casualty and Surety Company, his surety, were enittled to have the checks applied by Hajoca to the account for materials.

Refused.

page 25-L } INSTRUCTION NO. 12.

The Court instructs the jury that whenever there came into the hands of Hajoca Corporation checks from Frank Paulson payable to the order of Hajoca Corporation and Burlee Rowe, that Hajoca was under the absolute duty to give on its books credit in the amount of such checks for the ma-

terials and supplies sold by it to Rowe for use in and about the construction of the G. W. Watkins School.

Refused.

page 25-m } INSTRUCTION NO. 13

The Court instructs the jury that service charges made by Hajoca Corporation for returned material is a charge for which the defendants, Frank Paulson and Aetna Casualty and Surety Company, are in no wise responsible.

Refused.

page 25-N } INSTRUCTION NO. 14.

The Court instructs the jury that if they believe from all of the evidence and the instructions of the Court that there is no liability on the part of Frank Paulson, or no right on the part of Hajoca Corporation to recover from Frank Paulson, then your verdict should be for both defendants, Frank Paulson and Aetna Casualty and Surety Company.

page 25-O } INSTRUCTION NO. 15.

The Court instructs the jury that even if you believe from the evidence that the plaintiff, Hajoca Corporation, is entitled to recover a verdict against Frank Paulson, then the amount of your verdict should not exceed the difference between the amount paid by Paulson and the reasonable value for materials actually furnished by Hajoca Corporation to Burlee Rowe and used in and about the construction of the G. W. Watkins School.

Refused.

page 25-P } INSTRUCTION NO. 16.

The Court instructs the jury that in determining the reasonable value of the material furnished by Hajoca Corporation to Burlee Rowe and used by Rowe in and about the construction of the G. W. Watkins School, the jury may consider and take into account the terms of the contract existing between B. Rowe Plumbing and Heating Company and Hajoca Corporation, including terms with reference to discounts.

Refused.

page 25-Q } INSTRUCTION NO. 17.

The Court instructs the jury that when one of two innocent persons—that is persons each innocent of an intentional moral wrong—must suffer a loss, it must be borne by that one of them who, by his conduct, acts, or omissions, has rendered the loss possible; and if you believe from the evidence that Frank Paulson provided Hajoca Corporation the opportunity to protect itself from loss, and that Hajoca Corporation failed to do so, then you must find in favor of the defendants, Frank Paulson and Aetna Casualty and Surety Company.

Refused.

page 25-R } INSTRUCTION NO. 18.

The Court instructs the jury that if they believe from all of the circumstances and evidence that Hajoca Corporation should have applied all of the money which Frank Paulson paid by joint checks to Hajoca Corporation and Burlee Rowe for materials and that such payments equal or exceed the amount of the reasonable value of materials actually used in and about the construction of the G. W. Watkins School, then your verdict should be for the defendant, Frank Paulson.

Refused.

page 25-S } INSTRUCTION NO. 19.

The Court instructs the jury that before a materialman can recover for a default of a contractor in his obligation, the material man must show that materials furnished were in accordance with the plans and specifications or used in the building; and if the jury believe from the evidence that any portion of the material furnished by Hajoca Corporation was not in accordance with the plans and specifications, or was not used then neither of the defendants in this suit can be required to pay for same.

page 26 }

* * * * *

INSTRUCTION NO. A.

The Court instructs the jury that you are the sole judges of the credibility of the witnesses which have testified before

you. In determining the weight to be given the testimony of any witness, you should consider any interest, bias, or prejudice which the witness has disclosed.

Further, if you believe that any witness has testified falsely to any material fact, you have a right to disregard any other testimony he has given.

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page 26-A }

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INSTRUCTION NO. B.

The Court instructs the jury that the bond furnished by the defendant, Frank Paulson, upon which the Aetna Casualty and Surety Company is surety, is designed to protect the school board of New Kent County and also all persons, including the plaintiff, who furnished materials used in and about the construction of the G. W. Watkins Elementary School.

The Court instructs the jury that the fact that the defendant, Frank Paulson, entered into a subcontract with Burlee Rowe for plumbing work in the construction of G. W. Watkins Elementary School in no way diminishes the liability of the defendants, Frank Paulson and Aetna Casualty and Surety Company, to persons such as the planitiff who furnished materials.

page 26-B }

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INSTRUCTION NO. C.

The Court instructs the jury as a matter of law that the plaintiff has a direct right of action against both defendants for the price of plumbing materials sold by it to Burlee Rowe which were used in the construction of the G. W. Watkins Elementary School and for which the plaintiff has not been paid.

page 26-C }

* * * * *

INSTRUCTION NO. D.

The Court instructs the jury that, if you believe from a preponderance of the evidence that the plumbing materials sold by the plaintiff to Burlee Rowe were delivered to the site of the G. W. Watkins Elementary School, then there is a presumption that such materials were used in the construction of such school.

page 26-D }

* * * * *

INSTRUCTION NO. E.

The Court instructs the jury as a matter of law that the plaintiff could withhold from the checks of the defendant Frank Paulson, which were payable jointly to the plaintiff and Burlee Rowe, the funds which were legally owing at that time the plaintiff and the Court further instructs the jury as a matter of law that any failure by the plaintiff to withhold additional funds from such joint checks without authority from Burlee Rowe has no effect whatsoever upon the claim of the plaintiff against both defendants.

page 26-E }

* * * * *

INSTRUCTION NO. F.

The Court instructs the jury as a matter of law that even if you believe from a preponderance of the evidence that the defendant Frank Paulson paid the entire amount owed in his subcontract with Burlee Rowe for the plumbing work in the construction of the G. W. Watkins Elementary School, such payment has no effect whatsoever upon the claim of the plaintiff against both defendants for materials furnished.

page 26-F }

* * * * *

INSTRUCTION NO. G.

The Court instructs the jury as a matter of law that the measure of the liability of the defendants to the plaintiff, if

any, is the price of the plumbing material sold by the plaintiff to Burlee Rowe and used in the construction of the G. W. Watkins Elementary School and for which the plaintiff has not received payment.

page 26-G }

* * * * *

INSTRUCTION NO. H.

The Court instructs the jury that, if you find a verdict for the plaintiff, you may allow interest on the sum found by such verdict and you may fix the period at which such interest shall commence, but no earlier than the dates the accounts sued upon come due.

page 26-H }

* * * * *

INSTRUCTION NO. I.

The Court instructs the jury that if they believe from all of the evidence and the instructions of the Court that there is liability on the part of Frank Paulson and that Hajoca Corporation has a right to recover from Frank Paulson, then your verdict should be against both defendants, Frank Paulson and Aetna Casualty and Surety Company.

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* * * * *

In the Circuit Court of New Kent County, July 24, 1959.

* * * * *

This day came the Plaintiff and the Defendants by counsel, and the Defendants filed their Answers and Grounds of Defense, and of this the Defendants putteth themselves upon their Country and the Plaintiff does the like and the issue is joined.

And thereupon came a jury of thirteen from which three were stricken off by the Plaintiff and three were stricken off by the Defendants, the remaining seven constituting a jury for the trial of the issue, to-wit: Marion B. Williams, H. T.

Lipscomb, William B. Hazelwood, Hawthorne Davis, Leroy Crump, Alpheus Johnson and R. B. FauntLeRoy, who were sworn the truth of and upon the premises to speak and having heard the evidence and being instructed by the Court, and having heard argument of counsel, retired to their room to consult of their verdict, and after sometime returned into Court, having found the following verdict, to-wit: "We the jury on the issue joined find for the Plaintiff against the Defendants in the amount of $5,608.21 with interest to begin on the first day of August, 1959, R. B. FauntLeRoy, Foreman."

Whereupon the Defendants moved the Court to set aside the verdict and grant a new trial for the following reasons:

(1) Contrary to the law and evidence.

(2) Without evidence to support the verdict.

(3) Errors of the Court in admitting irrelevent, immaterial and prejudicial evidence.

(4) Error of the Court in excluding relevant evidence.

(5) Error of the Court in limiting cross examination and direct evidence concerning building prior to July 30th.

(6) Error of the Court in *grant* instructions requested by Plaintiff and in refusing and altering instructions offered by defendant particularly all instructions dealing with application of doctrine of estoppel and as the application of proceeds of checks payable jointly to Hajoca and

page 27-A } Rowe.

(7) For the unintentional conduct of the Court in its refusal to declare a mistrial on motion of the defendant.

(8) For all other motions and exceptions taken by defendant during the course of trial and not expressly stated above.

And the case is continued to the 12th of Sept., 1959, at 10:00 o'clock A. M. for hearing on said motion.

C. H. SHEILD, JR., Judge.

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This day came again plaintiff, and defendants, by counsel to be further heard on the motion of the defendants, Frank Paulson and Aetna Casualty and Surety Company, to set aside the verdict of the Jury and to award a new trial on behalf of said defendants.

THEREFORE the Court having heard argument on said motion and now being advised of its judgment to be rendered herein, doth overrule the said motion of the defendants, to which action of the Court the defendants, Frank Paulson and Aetna Casualty and Surety Company, excepted.

WHEREUPON, IT IS ORDERED that the plaintiff recover against the defendants, Frank Paulson and Aetna Casualty and Surety Company, jointly and severally, the sum of FIVE THOUSAND SIX HUNDRED EIGHT—and 21/100 ($5,-608.21) DOLLARS with interest thereon to be computed at the rate of six per cent (6%) per annum from the 1st day of August, 1959, until paid and its costs by it in the suit in its behalf expended, to which action of the Court the defendants, Frank Paulson and Aetna Casualty and Surety Company, except.

And the defendants, Frank Paulson and Aetna Casualty and Surety Company, having indicated an intention to apply to the Supreme Court of Appeals of Virginia for a Writ of Error and *Supersedeas* to said judgment, execution thereon is suspended for a period of four (4) months from this date and until the Appellate Court has acted on a Petition

page 28-A

for Writ of Error presented to said Court, or one of the Justices thereof, within four (4) months from this date, and until this Court shall thereafter authorize execution to issue, upon condition, however, that the defendants, Frank Paulson and Aetna Casualty and Surety Company, or someone for them, shall within thirty (30) days from the date of the entry of this Order enter into bond in the Clerk's Office of this Court with surety to be approved by its Clerk, in the penalty of Eight Thousand ($8,000.00) Dollars with all the condtiion prescribed by Title 8-477 of the Code of Virginia, 1950, as amended, relating to such bonds.

Enter this Nov. 30, '59.

C. H. SHEILD, JR., Judge.

I ask for this:

ANGUS H. MACAULAY, JR.
Counsel for plaintiff.

Seen and objected to:

FRANK H. PITCHFORD
ALEXANDER H. SANDS, JR.
Counsel for defendants.

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Filed in the Clerk's Office of the Circuit Court of New Kent County, Virginia, Dec. 21, 1959.

VIVIAN L. ANDERSON, Clerk.

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

To the Clerk of the Circuit Court of the County of New Kent:

Counsel for Frank Paulson and Aetna Casualty and Surety Company, defendants in the above styled case, hereby give notice of appeal from the final order entered in said case on November 30, 1959, and set forth the following assignments of error:

1. The Court erred in overruling the motion of the defendant, made at the conclusion of the plaintiff's evidence and renewed at the conclusion of all of the evidence to strike the evidence of the plaintiff upon the grounds that the evidence showed, as a matter of law, that there was an agreement between plaintiff and defendant, Paulson, that the checks which were paid jointly to plaintiff and Rowe would be applied to the entire debt of the plaintiff and that such agreement had not been carried out, the specific grounds of the motion being:

(a) That the evidence showed conclusively that there was an agreement between plaintiff and defendant that plaintiff would apply the entire proceeds of the check to the payment of his ultimate material bill.

page 30-A } (b) That the acceptance by plaintiff of the checks made jointly payable operated as a release by plaintiff of its right to proceed under the defendant's performance bond up to the full amount of the checks delivered.

(c) That the duties, obligations or agreements as between Rowe and the plaintiff, which were unknown to defendant were not controlling upon nor did they have any bearing upon the duties, obligations and agreements as between the plaintiff and the defendant.

2. The Court erred in its refusal to grant instructions No. 2, No. 11 and No. 18 offered by the defendant since such instructions correctly stated the law applicable and the effect of such refusal was to take away from the jury the prime issue of fact determinative of the rights of the parties in the case.

3. The Court erred in refusing instruction No. 4 offered by the defendant in that this instruction correctly stated the law applicable and its rejection by the Court took away from the jury one of the prime issues in the case.

4. The Court erred in granting, over objection of the defendant, instruction E offered by the plaintiff, as amended by the Court, since this instruction had the effect of telling the jury as a matter of law that the existence or non-existence of an agreement between plaintiff and defendant was dependent upon arrangements, unknown to the defendant, existing between plaintiff and Rowe. The effect of the giving of this instruction by the Court was tantamount to the striking of the defendant's evidence by the Court.

page 30-B } 5. The Court erred in overruling defendant's motion to set aside the verdict upon the grounds that it was contrary to the law and evidence and upon the further ground of misdirection of the jury by the Court.

FRANK PAULSON AND AETNA CASUALTY AND SURETY COMPANY
By FRANK H. PITCHFORD
By ALEXANDER H. SANDS, JR.,
Counsel for Defendants.

FRANK H. PITCHFORD
Law Building
Newport News, Virginia,
and
ALEXANDER H. SANDS, JR.
SANDS, MARKS & SANDS
315 American Building
Richmond, Virginia,

Counsel for defendants.

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PAUL WILLIAM FOLSE,
called as a witness by the plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION.

page 13 } By Mr. Little:

Q. Would you state your full name, sir, and occupation.

A. Paul William Folse, Credit Manager for Hajoca branch.

Court: How do you spell "Folse"?

A. F-O-L-S-E.

Court: F-O-L-S-E?

A. Yes sir, Hajoca branch, Richmond, Virginia.

Q. Mr. Folse, if you will, talk right to the jury so they'll hear you, sir.

A. All right.

Q. Mr. Folse, how long have you been Credit Manager for the Richmond branch of the Hajoca Corporation?

A. Since May 15, 1957.

Q. Where were you employed prior to that time?

A. With Hajoca Corporation at Norfolk, Virginia when I was assistant to the Manager—to the Credit Manager there and I was transferred to the Richmond branch.

Q. Would you explain to the jury very briefly what is the business of the Hajoca Corporation.

A. Hajoca Corporation is a wholesale concern that sells plumbing heating, air conditioning and industrial supplies to plumbers, licensed plumbers who are working for themselves or sub-contracting work for some other people.

Q. Mr. Folse does your company furnish labor page 14 } on plumbing jobs?

A. No, sir.

Q. To your knowledge, has your company ever furnished labor, certainly the Richmond branch, on a plumbing job?

A. I have never heard of it, sir.

Q. Mr. Folse, since you have been in Richmond since I belive the date was May, 1950—

A. The best of my knowledge, May, 1957.

Q. Has the Richmond branch ever sold plumbing supplies to Mr. Burlee Rowe for any project or job project other than the G. W. Watkins Elementary School here in New Kent County?

Paul William Folse.

A. No, sir.

Q. Have they sold him any small miscellaneous items on a personal account?

A. We have sold him miscellaneous items during the project —during the process of this particular job, but it was on a separate account.

Q. Were any of the items that were sold to him for his personal account placed on the George W. Watkins Elementary School account?

A. No sir, not to my knowledge. I'm positive that there wasn't any put on there because the personal account was very small and consisted of just a few items.

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* * * * *

Q. Mr. Folse, I show you a piece of white paper and ask that you explain to the jury what type of form this is.

A. Yes, sir. This is our original invoice.

page 16 } Q. Does the word, "invoice" appear on there?

A. Yes sir, invoice number and under it is the number of the invoice.

Q. All right, sir.

A. This is a dual sort of thing. It's the order pad, you might call it and you might call it the—in its finished form the invoice. We have no other invoice form but this. It comes in one, two, three, four copies and when it's written up, there is this orginal invoice. The second copy is a delivery copy, delivery memorandum. The third copy is the customer's copy and the fourth copy is the copy that's retained in the branch for the use of the auditor.

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page 18 }

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Q. Mr. Folse, coming down now to the George

page 19 } Watkins Elementary School job, I show you a group of invoices that you have previously presented to me, and are you familiar with these?

A. Yes, sir.

Q. Would you read the first date of the first invoice and the date of the last invoice?

A. All right, sir. The date of the first invoice was written

Paul William Folse.

up was March 6, 1958. The date of the last invoice was written up was October 29, 1958.

Q. Mr. Folse, in this stack of invoices right here, do you have every invoice dealing with the George W. Watkins Elementary School?

A. Yes, sir.

Q. For the entire job?

A. Yes, sir.

Q. Do any of the invoices in here do anything—cover any jobs other than the George W. Watkins Elementary School?

A. No sir, no sir.

Q. Are these records of course kept in your normal course of business?

A. Yes, sir.

Q. They are the official records of your company?

A. Yes, sir.

Mr. Little: Your Honor, I would like to in-
page 20 } troduce this entire group.

Court: Has Mr. Pitchford seen it? Have you seen it?

Mr. Pitchford: I have seen the copies. No objection on the part of the defendant.

Court: All right.

Mr. Little: I'd like to introduce these as one Exhibit, sir. Plaintiff's Exhibit Number Two.

* * * * *

(The invoices were then received and marked Plaintiff's Exhibit Number Two, consisting of 199 pages).

* * * * *

page 21 }

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Q. Is it true that wherever we see a yellow copy of the invoice attached to the original, that that means it was delivered by truck to the job site?

Mr. Pitchford: Objection. It's a leading ques-
page 22 } tion.

Court: Let him tell the answer.

Paul William Folse.

By Mr. Little:

Q. Go ahead. You tell the answer.

A. Well, as I said before, when a delivery is made by truck the yellow copy is used and the person on the job site signs for the material. Therefore, the yellow copy would represent a delivery which was made other than by our counterman over the counter.

Q. Now is Mr.—if Mr. Rowe or some other person instead of asking you to ship it via truck in which case I understand it, you use the yellow one to obtain the signature?

A. Yes, sir.

Q. If he came in and picked it up at your plant, where would he sign at your Richmond branch office?

A. If he would come in and give his order, it would be written up and when he received it, he would sign here on the white original copy.

Q. Going back very briefly then, these records, you make the original and three copies?

A. The original and one, two, three copies, yes sir.

Q. This original or the white one never leaves your office?

A. No, sir.

Q. The yellow one is the delivery?

page 23 } A. It's delivery memorandum.

Mr. Pitchford: Objection, leading again.

By Mr. Little:

Q. What is the third copy?

Court: I'll have to sustain the objection.

Mr. Little: Let him answer.

Court: I'll let him tell what the copies are.

Mr. Little: I'm trying to expedite it.

A. The yellow copy is the delivery copy. The white copy is the customer's copy, and the last copy is the auditor and internal control copy.

By Mr. Little:

Q. Did you send copies of every one of these invoices to Mr. Paulson?

A. Yes sir, to the best of my knowledge every one of those went to Mr. Paulson.

Q. What type of copy was that?

Paul William Folse.

A. It would have been a pink copy with the prices marked out.

* * * * *

page 24 } Q. When you say the copy is marked out—

A. I'm sorry, with the prices marked out. However, toward the end of this matter, I did let some go through that had prices on it.

Q. Prices on it?

A. Yes, sir.

Q. Why, Mr. Folse, why—why, Mr. Folse did you block the prices of those items out? Explain that to the jury.

A. When Hajoca Corporation sells Mr. Rowe, Mr. Rowe is a sub-contractor buying materials from us, and he is our customer. The only relationship I have is with Mr. Rowe. I sell him materials and he pays me for them. Now when the general contractor requested copies of our invoice to Mr. Rowe showing materials and prices, I told him that I couldn't give him either a list of the materials or the prices until Mr. Rowe agreed to it because I have no right to give my prices—to give prices which are confidential between Hajoca Corporation and the customer to a third party. I asked Mr. Rowe. Mr. Rowe did not want the general contractor to receive the price but he said he was perfectly willing for him to receive a copy of the invoice with the price blocked out so that he could check the materials on his job as it came on and that is what I furnished.

page 25 } Q. Mr. Folse, you said you sent copies of each of these invoices to Mr. Paulson?

A. Yes, sir.

Q. Or his company?

A. Yes, sir.

Q. At any time during this project did you receive any notification from them to the effect that any of the items enumerated on here had not been received at the job site?

A. No, sir.

Q. Have all of these invoices and Mr. Folse, you may refer to any notes that you have, what is the total amount on all of these invoices covering the G. W. Watkins Elementary School building? Write this figure on the black board, sir.

* * * * *

Paul William Folse.

A. The total amount of these invoices showing what we furnished the school job is $15,885.33.

By Mr. Little:

* * * * *

page 26 } Q. Is that the correct figure? Can you see this? $15,885.33?

A. Yes, sir.

Q. Now how many of these invoices have been paid, according to your records, Mr. Folse?

A. Well, invoices which cover the month of March, April, May, June and part of Judy.

Q. And how much payment do you admit receiving on these invoices?

A. I will have to make a quick figure here, sir.

* * * * *

page 27 } By Mr. Little:

Q. Read that figure off that you admit receiving payments for.

A. $10,240.59.

Q. Leaving a balance at this stage of how much, sir?

A. $5,644.74.

Q. Mr. Folse, at my request did you examine all of these invoices to see if within them there were any tools as distinguished from materials which were used in the building is concerned?

A. Yes sir, I did.

Q. Did you prepare this paper at my request, sir?

A. Yes, sir.

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* * * * *

Q. All right. Now, come back to where I was a minute ago. At my request have you examined all of the invoices subsequent to, including this invoice of July 30, 1958 on through the last invoice you have when the job was completed to ascertain what tools were listed on these invoices?

Paul William Folse.

A. Yes sir, I have.

Q. And what is the total amount of the tools that were included on invoices subsequent to July, '58?

A. After July 30, '58, the amount of the tools purchased by Mr. Rowe and charged to the job was $27.83.

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* * * * *

By Mr. Little:

Q. The total amount you are claiming in this suit is $5,616.91, is that correct?

A. Yes, sir.

* * * * *

page 33 }

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By Mr. Little:

Q. Mr. Folse, at my request did you examine the records of your company to show the date and the amount of all payments made to the Hajoca Corporation by Mr. Burlee Rowe?

A. Yes sir, I did.

Q. I show you a document and ask you if this is

page 34 } it (indicating)?

A. Yes sir, this is it.

Mr. Little: Perhaps the Court would like to examine it (handing document to Court).

Court: That's the monthly proposition.

Mr. Little: Yes, sir.

By Mr. Little:

Q. Now so—so we can look at it together, would you mind standing if the Court doesn't object so we can explain to the jury. Would you explain, taking the top column which shows March and run all the way across there and explain just how you handled the payments you received (indicating)?

A. Yes, sir.

Court: This is Exhibit Number Five.

Paul William Folse.

Mr. Little: I'd like to introduce it as Exhibit Number Five.

(The document was received and marked Plaintiff's Exhibit Number Five).

A. I made the recapitulation by month of the school account, total amount which was owed me by the end of the month by Burlee Rowe.

Q. School account? What school?

A. G. W. Watkins school account by Burlee Rowe and I listed the discount which was due him and the net amount of course which was due us which, subtracting the

page 35 } discount and the school account and I have listed the joint check, the refund, the balance he owed us. In March he owed us $2,377.03.

Q. Now you say in March he owed you that amount?

A. That would be before the end of March, at the end of March.

Q. Right, sir.

A. He is due a two per cent discount for payment of his bill and in figuring the two per cent on this twenty-three seventy-seven zero three, it amounts to forty-seven hundred—forty-seven dollars fifty-four cents. So I deducted that from the amount due and he owed us the net amount of $2,329.49. That's what he owed us. He brought me a joint check made out to himself, his company and the Hajoca Corporation of $3,073.26. When I received the joint check, I figured what he owed me and returned to him a refund of $743.77. This goes March, April, May, June, the same way and he owed no balance until he got to the month of July.

Q. Can you see that, sir?

A. In the month of July he owed me $3465.58 but he only brought me in a check for $3,000.00. In that case, I wasn't going to refund him anything because he owed me more than he brought in. Therefore, I took the check for $3,000.00. I allowed $60.00 discount on the three thousand, two per cent, subtracted it from the net that was due me

page 36 } leaving a balance of $405.58 due me for the month of August. Let's see, July. August, the amount of $4,940.67 went on with no payment. September, $369.03 went on the account with no payment and in October there was some returned material and a few small purchases but the net result of those purchases during that month was a credit balance of $70.00.

Paul William Folse.

Q. What do you mean by credit balance?

A. It means that the amount he returned exceeded the amount he bought. Therefore, we owed him a little money so that reduced the account slightly but the sum total beginning with July amounts to $5,644.74 on open account.

Q. From this total in arriving at the amount you are claiming, you have subtracted $27.00—

A. Yes, sir.

Q. Mr. Folse, at any time—you may have a seat.

A. Yes, sir.

Court : That doesn't show that the tools are off.

Mr. Little: No sir, this does not. This is a record of payments of receipts.

Court: All right.

By Mr. Little:

Q. Mr. Folse, at any time when you received a joint check written by Mr. Paulson to the Hajoca Corporation and to B. Rowe, did you ever fail to collect the total amount page 37 } that was due you except the last check which was not enough to cover what was owed?

A. No sir, each time he brought the check in I took the amount that was owing, legally owing me as of the end of the month and I deducted from that check that amount.

Q. What basis were you selling Mr. Rowe on?

A. I was selling him materials for which he was to pay me each month in this manner. Two per cent discount—for instance, in July if he bought materials, the amount owing at the end of July for all the material he bought he had until the 10th of August to pay for that and get two per cent discount. If he didn't pay for it on the 10th, approximately, then he had in thirty days or the end of that month the account was considered due and payable in the net amount. No two per cent allowed.

Q. In other words sir, any materials he would buy from July first to July 29, the account would be due at what time?

A. It would be due on the 10th of the following month approximately at two per cent discount for cash payment or thirty days in net. Due in the net amount of thirty days with no discount.

Q. Yes, sir. When would you have considered an account overdue, Mr. Folse? In other words, if the materials—if you

Paul William Folse.

page 38 } had sold him materials during any month, say, July just as an illustration, and at the end of the month you added up everything he bought during that month, if you hadn't received money by what date would you have considered it overdue?

Mr. Pitchford: I object to that as irrelevant.

Court: I don't see—go ahead and answer that. Let him answer it. I don't think it makes any difference.

A. I don't remember the month you mentioned in your question but—

By Mr. Little:

Q. Say, July.

A. July. If a person bought materials and they were billed between the first and the last day of July, then on the 10th of the following month which is August, approximately that date, I would expect him to come in and pay me the total due at the end of July if he wanted to take his two per cent discount but because he passes up the incentive which we give which is two per cent for him to pay his bill quickly, I still wouldn't consider it past due. He just passed his discount period, but the bill is due net in thirty days or the end of that month. Therefore, I would consider the account past due on the first of September because he did not pay the July account during the month of August.

page 39 } Q. All right, Mr. Folse. At any time, Mr. Folse, during this construction project did Mr. Paulson or any representative of his company ask you not to send materials to the George W. Watkins school?

A. No one ever contacted me from Mr. Paulson's office and told me not to send materials, no sir.

Q. Based on your communications with Mr. Paulson, was he aware of the fact that the Hajoca Corporation was furnishing materials on this contract for the period covered by the invoices which had been introduced?

A. Yes, sir.

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Paul William Folse.

CROSS EXAMINATION.

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By Mr. Pitchford:

Q. Now your Exhibit Number Five that you have so ably explained to the jury shows a total purchase of $15,885.33, does it not?

A. Yes, sir.

Q. And that is the very same figure that you have here, isn't it?

A. Yes, sir.

Q. All right. Then your very next column you have discount, two hundred three sixty-two?

page 41 } A. Yes, sir.

Q. Where does he get credit for that?

A. He paid—in other words, if a man owes a thousand dollars at the end of the month, he gets a discount of twenty dollars or two per cent. Therefore, the net amount owing on that material is $980.00. He paid that and if there is any refund due him, if that was the only charge there was, the twenty dollars would go back to the person who made the purchase.

Q. So you gave the money to Rowe, is that correct?

A. That is correct, yes sir.

Q. And you didn't choose to credit this account from Paulson that you expected to pay for the material?

A. No, sir because as I told you, when he paid his account that is the only amount that was due me. I had no right to take from my customer money which was not yet due and I'm sure he wouldn't have let me do it.

Q. So you are charging Paulson or attempting to charge Mr. Paulson not only for the material put there but for discounts that you gave Rowe for paying with Paulson's check and handing him the money, is that correct?

A. When an account is paid and the discount—

Q. Just answer yes or no and then make such explanation as you will.

Court. That's right after you answer yes or

page 42 } no you may explain it.

A. Repeat the question please, sir.

Paul William Folse.

Mr. Pitchford: Will you repeat it, Mr. Court Reporter?

(At this time the last question was read to the witness).

A. No. I don't believe that I'm trying to do that, sir, and the reason for it is this. That account of—for the first month for instance, was in a certain amount. When it was paid in the net amount, Mr. Rowe was entitled to the refund of two per cent for cash payment. In other words, I was not dealing with Mr. Paulson. I was dealing with my customer, Mr. Rowe. He made the payment and he paid it in full in accordance with the agreement. Whatever other monies was there, even though it be a cash refund went to Mr. Rowe, not to Mr. Paulson. It went to my customer.

Q. Would not that result in a $203.62 increase in the price you are attempting to charge Mr. Paulson for the materials?

A. Let me see. You're asking me a question that I'll have to think slightly about. No sir, I don't see how it would, according to my figuring because each month the amount of material which was charged to the customer in the full amount was paid. The refund to Mr. Rowe represented the balance that was due him. I had no legal right to

page 43 } take any more.

* * * * *

A. The only way I can answer that question is, sir, he owed me a certain amount of money. I allowed him the two per cent discount which was in accordance with our terms. He paid the account for that month and I returned the money to him.

Q. Mr. Folse, is it not a fact that the net price charged by your company for all material, tools and what not that you billed to this particular job amounted to $15,681.71?

A. No sir, we billed him in the amount of $15,885.33.

Q. I call your attention, Mr. Folse, to line one, two, three, says, "net due, $15,681.71." Is that a meaningless figure?

A. No sir, it is not.

Q. Then what does it mean?

page 44 } A. It means that is the amount which Mr. Rowe paid. However, the amount billed to him was $15,885.33.

Q. Now I'm a little confused again. You said that's the amount Mr. Rowe paid on material billed.

A. Which amount are you talking about?

Q. We're talking about the net due column.

Paul William Folse.

A. That's correct, sir.
Q. All right, sir.
A. But when he pays that amount in cash, he is allowed the discount to make up the difference which actually takes off of our books fifteen—it would take off our books the gross amount due.
Q. Let's see if we get you straight here, Mr. Folse.
A. All right, sir.
Q. Now I understand from what you now say that Rowe has paid $15,681.71?
A. That's correct.
Q. That's what he has paid?
A. That is the actual amount of cash which was given to Hajoca Corporation. However, on that amount he was allowed $203.62.
Q. That was the discount?
A. Yes, sir.
Q. $203.62?
page 45 } A. Yes, sir.

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By Mr. Pitchford:
Q. How much money have you received by joint checks made by Paulson to Hajoca and to Rowe?
A. $15,245.68.
Q. And you elected and did give Rowe back how much of that money?

Mr. Little: Your Honor, I object to the phraseology of the question. He is implying some legal conclusions, namely you elected to give Rowe back how much money. If he was to say how much money did you give Rowe, that's all right.
Court: How much money did you give Rowe?
Mr. Pitchford: I submit the question as put is proper.
Court: Go ahead.
Mr. Pitchford: May I have the witness answer the question?

A. Yes sir, on the school job I refunded to Mr. Rowe $5,208.71.

Paul William Folse.

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Q. All right. I see we have an invoice number 333399, dated April 8, 1958 marked, "post to separate account." Explain that, if you would, please.

A. Yes, sir. All right, in the, "ship" column where I have G. W. Watkins Elementary, New Kent County, Virginia I have put in there, "post to separate account" and the reason for that is in that time Mr. Rowe probably came in between the beginning of the job when he wasn't making any personal purchases and in that time and made a personal purchase which I would call his regular account and to keep these from going on his personal account, I put a stamp on these, "post to separate account" which means to G. W. Watkins school account.

Q. If that's so, sir, look at invoice number 334217 and see why that was not so stamped.

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A. That is exactly the same thing. It doesn't have, "post to separate account" on it. In the operation of a place as large as our's, on an individual account there may be from time to time, the stamp may not appear on it but it doesn't mean it doesn't go on that account. The person posting the account will look at that and see that it should go on that account. It is on that account and it's not on any other account so actually, sir, I would say that it would be—nothing that would effect this account.

Q. So the fact that some the invoices are marked, "post to special account" and some are not has no real meaning, is that correct?

A. Yes, it does have a real meaning, sir.

Q. And the real meaning is what?

A. The real meaning is that it alerts the person who is posting this account that it goes to the G. W. Watkins Ele-

Paul William Folse.

mentary building, New Kent County job. However, if it happens to be left off, those people are then fa-
page 58 } miliar with it enough that they are able to pick it up. I mean there are only two accounts, the regular and the G. W. Watkins, so it's to alert them if it is not there they can have sense enough in dealing with that to pick it up and put it to the right account.

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Q. All right. Look at invoice number 338771.
A. Do you have the date of it, sir?
Q. We have shipping date 7-31, invoice date August 11.
A. August 11.
Q. Date 6 and second.
A. And is it twenty-two one you say, sir?
page 60 } Q. 338771-72.
A. All right, sir, I have it. I don't want to get these out of order. All right, sir.
Q. And the amount of that invoice is what?
A. The amount of that invoice is $3,300.00, sir.
Q. And it was written on what day?
A. The day the order was written?
Q. Yes, sir.
A. June the second.
Q. June the second, 1958?
A. Yes, sir.
Q. And when was that order finally charged against the account?
A. That order was charged against the account on August the 11th, 1958.
Q. And how much money had you had from Paulson by joint checks in the meantime that you turned over to Rowe? You want to see Exhibit Five? You made it.
A. Yes, sir.
Q. All right, sir.
A. To August the 11th?
Q. Yes. Between June the 2nd, the date of the invoice, the invoice was written up and when you finally posted this on your books.

Paul William Folse.

A. From these records I couldn't say accurately,
page 61 } sir.

Q. You got your refunds there, haven't you, Mr. Folse right here?

A. These are refunds.

Q. The refunds you got over here in this column, right?

A. I made a refund in June of $1,623.48.

Q. Even though that was written up.

A. On June the second.

Q. On June second?

A. Yes, sir.

Q. Of thirty-three hundred dollars?

A. Yes, sir.

Q. It wasn't posted until August?

A. That's correct.

Q. And you gave him a refund of sixteen hundred some dollars in June?

A. Yes.

Q. Even though you had written your invoice out?

A. May I explain something, sir?

Q. Go right ahead, if you can.

A. All right, sir. This invoice which Mr. Pitchford is speaking about is a thirty-three hundred dollar invoice for radiation material apparently. Let's see, it's convectors and enclosures and so forth. It was written up by the
page 62 } person writing this order on 6-2-58, June second, '58. That's quite true. We did not have the material in stock and therefore, we ordered the material from the National U. S. Radiator Company for the job and we asked them to ship it direct to the job and they did ship that material and they shipped the material on July 31—let's see—they shipped that material on July 31, 1958 and the material was signed for on the job, it looks—looks like August the 5th, 1958 and what I would like to explain is it's true that he did get a refund. First of all, for the simple reason that some materials when ordered similar to this, it takes time for it to come from the manufacturer to the job site, and we cannot bill the man legally for the material until the material is on the job. That's the answer to that, sir.

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Paul William Folse.

Q. Now Mr. Folse, I didn't quite follow your reasons for refusing to tell Mr. Paulson how much this material was costing. Why? Would you explain that to us again.

A. Well, it's the generally accepted ethics in the business that the wholesaler does not divulge to the general contractor without the consent of the customer the prices which he is paying for materials, and I think one good reason for that is the fact that the sub-contractor going out bidding jobs with general contractors is on a competitive market and it is possible he may be doing business later with the same general contractor and therefore if he reveals prices to the general contractor, he would be, to put it bluntly, maybe be cutting his throat. I don't say he's doing it in this case but it could be. It's just not a generally recognized practice. The second thing is when the customer refuses to allow me to give the prices which is his privilege, I'm not going to go and give it because he could come back to me and say, "well, I told you not to give it to him and you went ahead and did it." I am under no—I have no—no contract with Mr. Paulson which would make me give him that information.

Q. You had no contract with him but you took his joint checks?

page 65 } A. That would make me give him that information, no sir.

Q. You took his joint checks?

A. Yes sir, I did.

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Q. I believe you testified earlier in your direct examination that under no circumstances did Hajoca ever arrange for labor, is that correct?

A. To the best of my knowledge Hajoca has never arranged for labor, no sir.

Q. Did you in this particular instance take from Mr. Rowe a direction or writing requesting that Mr. Paulson make checks jointly to Hajoca and to Rowe (handing

page 66 } witness a document)?

A. Yes sir, I took this letter from Mr. Rowe.

Q. Read it to the jury, if you will, please.

A. It is headed, "B. Rowe Plumbing and Heating, Selden, Virginia. To Mr.—dated March 4. To Mr. Frank P. Paulson, trading as Penninsula Construction Company, Post Office Box 363, Hampton, Virginia. "Gentlemen: In reference to

Paul William Folse.

the financial arrangements being handled by you in connection with the plumbing and heating work for the house"—this is a form so it reads, "house for the G. W. Watkins Elementary School on Route 33, near Tunstall, Virginia and for which I" and this is signed by Rowe, "which I have arranged with you to furnish certain materials and labor, will you please make the check for same due and payable jointly to Hajoca Corporation, 1208 West Marshall Street, Richmond, Virginia and to the undersigned. Thank you for your cooperation." It's signed, "B. Rowe, Owner, B. Rowe, Plumbing and Heating" and below that, it has approved and accepted and it has our contract price with B. Rowe, Plumbing and Heating for subject job is blank, signed—unsigned by Frank Paulson, trading as Peninsula Construction Company.

Q. By whom was this prepared?

A. That was prepared by myself, sir.

Q. And it says for labor and material, does it not?

A. That's what it says, sir. However, this is—

page 67 } Q. I just asked you if it did or did not.

A. It did.

Mr. Little: He can explain the answer.

Court: After the answer I'll let him explain.

A. It does say that but what it is saying is to ask Mr. Paulson to make a joint check for Mr. Paulson—for Mr. Rowes money' whether it includes for materials or labor direct to Hajoca and himself—jointly to Hajoca and Mr. Rowe but it has no implications that we're involved in any labor.

Mr. Pitchford: I offer it in evidence as Defendant's Exhibit Number One.

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Q. Now along with that, Mr. Folse, after you obtained this writing that you prepared that one of the jurors is reading, did you not on March the 4th and again on March 19, 1958 write to Mr. Paulson concerning this very assignment?

A. I did I believe.

(At this time a document was handed to the witness).

Paul William Folse.

page 68 } A. Yes sir, I wrote this letter on March 4, and this on March 19.

Q. Would you read those letters to the jury?

A. Yes sir. This is a letter to Peninsula Construction Company, Post Office Box 363, Hampton, Virginia. Attention, Mr. Frank P. Paulson. "Dear Mr. Paulson: After I spoke with you today, I visited Mr. Rowe at the job site of the G. W. Watkins Elementary School and obtained the attached request directed to you that all payments due him on this job be made jointly to him and this corporation. I would appreciate your signing your acceptance of this arrangement and inserting in the appropriate space the amount of your contract price with B. Rowe Plumbing and Heating for the job. Also, I would appreciate your inserting the date below your signature. In accordance with your request, Mr. Rowe has authorized me to send you a duplicate copy of the invoice we send him unpriced so that your superintendent may check the materials shown as being delivered to this job. I understand from Mr. Rowe that he is now in the process of getting a bond on this job, and I would appreciate your insuring that it is quickly obtained for I consider this an essential requirement in the extension of credit. I appreciate your calling me this morning and if I can be of help to you I will appreciate your calling me." Signed by myself as credit manager.

page 69 } Q. There's a letter directly beneath that.

A. Yes, this is also the letter to the same party, Mr. Paulson. "I am sorry I neglected to attach a copy of the request from Mr. Rowe for a joint check agreement on the G. W. Watkins Elementary School at New Kent County, Virginia. I am attaching his request to this letter and if it is acceptable to you, would appreciate your signing and dating the acceptance. Also, I would appreciate your inserting in the appropriate space the amount of your contract with Mr: Rowe. Also attached is a complete listing of all materials which have been shipped to Mr. Rowe at the G. W. Watkins School. In the future as the material is billed, you will receive a copy of the invoice less the price as was authorized by Mr. Rowe."

* * * * *

Q. Now Mr. Folse, I refer to Exhibit Number Two, letter dated March 19, 1958, the last paragraph and sentence in which you say, "in the future as the material is billed you

will receive a copy of the invoice less price as was authorized by Mr. Rowe."

A. That's correct.

page 70 } Q. Now tell us how you sent the invoices to Mr. Paulson pursuant to what you said you would do in this letter?

A. How they were sent to him?

Q. Yes, you sent them to him weekly or monthly or the end of the job?

A. The invoices were sent to Mr. Paulson at the time that we sent the invoice to Mr. Rowe. That's to the best of my knowledge correct.

Q. Did Mr. Rowe pick up much of the stuff and get his invoice when it was picked up?

A. No, sir, he got a customer's copy of the invoice.

Q. And didn't you invoice them at the end of each month? You didn't do it daily, did you?

A. We invoiced daily as the registers are ready to run—to run through the machine, yes, sir, daily.

Q. Now, did Mr. Paulson comply with your request and sign this writing that you prepared that has been put in evidence as Exhibit Number One?

A. Yes, sir, he did.

Q. He signed it?

A. Yes, sir.

Q. Mr. Paulson?

A. Oh, I'm sorry, no. I thought you meant Mr. Rowe. No, Mr. Paulson did not sign it.

Q. Did you discuss that with him?

page 71 } A. I don't believe that I discussed with Mr. Paulson after there was no signing. I discussed of course the thing with him before that. After it was not signed, I called Mr. Paulson the second time and his wife spoke with me and I asked her about that and she said, "well, Mr. Paulson cannot give you the contract price" and I said, "well, I had discussed with Mr. Paulson previously about this and he had indicated that a joint check agreement would be agreeable" and she told me in effect that Mr. Paulson would not sign.

Q. Mr. Folse, I asked you about your conversation with Mr. Paulson, not Mrs. Paulson.

A. I'm sorry. Well, to the best of my knowledge I had no conversation with Mr. Paulson about not signing.

Q. But you did have a lot of conversation with him because

Paul William Folse.

you wouldn't quote him the prices of the material, didn't you?

A. I had spoken with Mr. Paulson. I don't know about your saying a lot of times. I don't believe that was so.

Q. One, two, three or four times?

A. I had spoken to him about that, yes.

Q. And did he not insist on your furnishing him with the prices?

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A. I wouldn't say that Mr. Paulson's attitude was that of being insistent. He did ask for the prices.

By Mr. Pitchford:

Q. And you did refuse to give them to him, didn't you?

A. Yes, sir.

Q. Now what was your purpose in getting Mr. Paulson to write checks jointly to Hajoca and to Rowe?

A. My purpose in doing that was this. First of all, let me explain that Mr. Rowe came to us for the first time and I was selling him for the first time. I was willing to go along and furnish this job provided I could find some security of some sort. The only thing that I was looking for in this joint check agreement is this, that when Mr. Paulson paid Mr. Rowe, Mr. Rowe would have to come to my company and pay me what was then due and that's all there was to it.

Q. So your arrangement was to secure the payment of the material that you would furnish Rowe because he had no established credit with you, is that right?

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A. It's a little difficult that question from the wording of it. I still don't get the sense of it. Would you repeat it again for me, please?

Paul William Folse.

By Mr. Pitchford:

Q. Is it not a fact that you requested Mr. Paulson to issue checks jointly to you, Hajoca and to Rowe, because Rowe had not been dealing with you; Rowe had no credit and these checks would afford you a measure of security for the material that you, Hajoca, would furnish to Rowe. Is that not a correct statement?

A. Well, not all of it because the checks weren't made to me.

Q. I say you, Hajoca, the Hajoca Corporation.

A. Hajoca.

Q. You, the representative of Hajoca, considering that question.

page 74 } A. As I testified, the reason I took the checks was to insure that when the payment was made to the sub-contractor, he would come to Hajoca Corporation and I could then take from that check or secure payment from him. I'm not taking from the check. He's giving it to me out of the check, payment for the materials then due.

* * * * *

Q. This purports to be another order to pay signed by Burlee Rowe. Did you obtain that (indicating)?

A. Yes, sir, I did.

Q. State when, where and under what circumstances that writing was obtained?

A. I believe that this letter was obtained at—at the Capehart Housing Project at Fort Belvoir from Mr. Rowe.

Q. Did you go up there to get it?

A. Yes, sir.

Q. Why?

A. Because Mr. Rowe was up there.

Q. You already had one order to pay, didn't you?

A. Sir?

Q. You already had one order to write joint

page 75 } checks, didn't you?

A. Yes, sir, but this—this came after the time that Mr. Paulson apparently had no more money except the retainage and this letter was just further to—to give him authorization to pay me the monies that were left.

Q. Is that what you were looking then for the money that was left on the job on September 4, 1958?

A. Yes, sir.

Paul William Folse.

* * * * *

Q. Now Mr. Folse, I have here a series of checks. The first is number 2657, payable to Burlee Rowe Plumbing and Heating and Hajoca Corporation for $3,073.26. It is dated April 16, 1958, signed Peninsula Construction Company, Mrs. Frank P. Paulson. The next check is number 2740, dated May 15, 1958 payable to Burlee Rowe and Hajoca Corporation, made for $2,790.00, signed by Peninsula Construction Company, Mrs. Frank P. Paulson. The next is check number 2836, signed, dated June 12, 1958 payable to Burlee Rowe,

page 76 } Plumbing and Heating and Hajoca Corporation, twenty-three thirty-seven fifty. Signed by Peninsula Construction Company, Mrs Frank P. Paulson.

Check number 2934, dated July 18, 1958 payable to B. Rowe Plumbing and Heating and Hajoca Corporation for $4,044.92 and check number 3021, dated August 15, 1958 payable to B. Rowe Plumbing and Heating, and Hajoca Corporation, $3,-000.00, signed Peninsula Construction Company, Mrs. Frank P. Paulson to which has been attached an adding machine tape totalling $15,245.68 and ask you if all of these checks were received and deposited to the credit of the Hajoca Corporation?

A. That's correct, sir.

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REDIRECT EXAMINATION.

By Mr. Little:

Q. Mr. Folse, just one or two questions. Let's

page 77 } refer back to the invoice for some thirty-three hundred dollars that you were questioned about.

A. Yes, sir.

Q. The invoice was written June second, 1958.

A. Yes, sir.

Q. What is the custom in the trade when you order something from a manufacturer to be shipped to the job site insofar as when you blil your customer is concerned?

* * * * *

A. When that original invoice is prepared, it's for a great deal of complicated material, in this instance which is then ordered from the manufacturer. When that order goes out,

we have done our part. We have asked them to assemble it and ship it to the job site. We cannot bill Mr. Rowe until such time as the material is on the job site and second of all, we couldn't bill him until such time as we are billed by the —the manufacturer in some case so that we could page 78 } determine from that information which is needed on our invoice but there is a delay in the billing.

Q. Mr. Rowe—I mean Mr. Folse, when then did you testify that—I believe you testified that it was signed for on August the 5th, 1958.

A. That appears to be the date on the—

Q. On the bill of lading?

A. On the bill of lading.

Q. When was that account due then so far as Mr. Rowe was concerned?

A. It was due for two per cent discount on approximately the 10th of September and wouldn't have been past due until the end of September.

Q. Even though it was ordered in June?

A. The material was ordered yes, sir and it was bought under those terms which would have made it come due in the month of September or past due after the last of September.

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BURLEE ROWE,

called as a witness by the Plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Little:

Q. Mr. Rowe, would you look at the jury while you're answering the questions, sir. Would you state your full name?

A. Burlee Rowe.

Q. Where do you live, Mr. Rowe?

A. I live at Gloucester.

Court: What did he say?

Burlee Rowe.

page 81 } A. Gloucester.

By Mr. Little:

Q. What is your business?

A. Well, been plumbing and heating.

Q. Mr. Rowe, did you have the sub-contract on all of the plumbing, heating and ventilating work for the G. W. Watkins Elementary School here in New Kent County?

A. Yes, sir.

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page 82 }

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Q. I show you this stack of invoices of the Hajoca Corporation designated as Plaintiff's Exhibit Two. Did you review all of these invoices with Mr. Folse at one time or another?

A. Yes, sir.

Q. Have all of those invoices, showing the sale of materials and some tools to you, were all of those bought for this G. W. Watkins Elementary School here in New Kent County?

A. Yes, sir.

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page 84 }

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Q. Now Mr. Rowe, with the exception of this Orangeburg pipe that you said you gave to Mr. Paulson and with the exception of these scraps or—that you just testified to, are you satisfied that all of the materials contained on these invoices that you got in your lap right now were used by you in the construction of this George Washington—George Watkins Elementary School?

A. Yes, sir.

Q. You didn't take them to any other place and use them?

A. No, sir, no, sir. I didn't have any other place to take them and if I—in fact, I didn't have any other job to do at the time. I had no need for them. I had no place at
page 85 } home to keep them.

Q. If asked by another attorney, could you take

any item on those plans and take the plans and specifications and show them just where you used them?

A. I can identify them fitting for fitting.

Q. Fitting for fitting?

A. That's right.

Q. As being in that school?

A. As in the school, that's right, under the ground and out of the ground.

Q. Mr. Rowe, starting with invoice dated—I apologize sir, but I'm looking for a certain invoice. I'm sorry to delay it. Starting with invoice dated or numbered 342904, bearing the date of July 31, 1958 in the upper corner, would you go through there and see if anything that you bought from Hajoca was tools as distinguished from materials with the exceptions of what is listed here on Plaintiff's Exhibit Four which has been introduced as showing what tools were on the invoice subsequent to that date. To the best of your knowledge and belief, is that all of the tools that are on those invoices subsequent to this date (indicating)?

A. Yes, sir, that's—that is it.

Q. And those tools are priced to you at what amount?

A. Twenty-seven eighty-three.

page 86 } Q. On these invoices, some of them show the name, "B. Rowe" as receiving them. Is that you, sir?

A. That's right, yes, sir.

Q. Every time you signed as receiving them did you take them down to use them in that job at this school?

A. Yes, sir.

Q. Who is W. C. Jenkins?

A. Well, that was one of the men I had working.

Q. On this job?

A. Yes, sir.

Q. And he was authorized to receive those for you?

A. That's right. I sent him to Hajoca to pick it up.

Q. Who is H. H. Smith?

A. That's another man working for me.

Q. Was he authorized to pick up?

A. Yes, sir.

Q. And accept delivery of material from Hajoca for this job?

A. Yes, sir, and pick it up from Hajoca.

Q. How about Dallas Williams Who was he?

A. He was an employee of Mr. —

Q. Paulson?

Burlee Rowe.

A. Paulson, yes.

Q. Was he authorized to accept delivery of mate-
page 87 } rials on the job?

A. Yes, sir, he went in for me once, one time.

Q. Now Mr. Rowe, would you look at the jury and simply tell them what arrangements you had with Mr. Folse. You know Mr. Folse?

A. Yes, sir.

Q. With regard to paying for these materials covered by these invoices that you have just had had and known as Plaintiff's Exhibit Two?

A. Well, I went in to Hajoca and had a talk with the credit manager and told the credit manager that I had this job for plumbing and heating up here at New Kent and I would need necessary materials to do the job with a few tools and I asked him could he make any kind of an arrangement to go along with me on thirty day basis for the material. So he says, "yes, I can do that. I think that can be worked out all right." So he says, "you come back in the next day" or I believe it was the next day and he would let me know. The next day I went back and Mr.Folse said he had a setup and I was suppose to have given Mr. Paulson a bond,, $25,000.00 bond on the job and at the time that I taken the job, I was bonded on the school—on the church job and it wasn't finished out and of course I couldn't be released and I didn't have capital enough to obtain another bond so anyhow, we worked along and worked along

and so he says, "well. I'll take the—let you have
page 88 } the material providing that the checks are made
jointly to B. Rowe and Hajoca Corporation." I

said, "that's perfectly all right and you send me a requisition of what I owe you each month and then I in turn will send it to Mr. Paulson with my labor" which I did and Mr. Paulson sent me the check made payable to Hajoca and myself so when I go and take the check into Hajoca, Hajoca would take out the mount I owed them at the time for materials and reimburse me the money that I had turned in for labor on the job and that went on up until the last payment. In other words, if I hadn't been able to get the money back from Hajoca for any labor, he had all the labor and everything in was payable to him I couldn't continue on with the job. I couldn't have went over one week to save my life because I didn't have it. The best I could go was thirty days.

Q. Mr. Rowe, then do I understand you to say that any time you brought a joint check for Hajoca Corporation, they deducted every penny that you had authorized them to deduct?

A. They deducted every penny that was coming to them.

Q. Every penny. Suppose they had held back some more money? What would you have done?

A. The only thing I would have done would have waited.

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page 89 }

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A. That's right, the onlything I could have done was knock off the job. I couldn't pay the men. I had money enough to go thirty days and that was it.

Q. In other words, you had to get some of this money back?

A. I had to definitely get the money or I couldn't continue.

Q. To do what?

A. To do the work on the job.

Q. What would you have paid out?

A. I paid all my labor, my labor had to come out of it.

Q. Hajoca didn't furnish any of the labor for you?

A. Hajoca didn't furnish anything on the job other than the materials.

page 90 } Q. And if Hajoca had tried to keep that check or all of the check, you would have had to abandon the job right then?

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page 91 }

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By Mr. Little:

Q. At any time or at the beginning of this contract did you ask Mr. Folse not to give Mr. Paulson the prices on the materials?

A. That's right.

Q. Now would you explain to the jury why you as a subcontractor did not authorize the supplier to give the general contractor the prices?

A. Well that's—that's the usual thing that all good reputable supply houses deal strictly with the plumber and they don't deal with the general contractor. I mean such as builders and stuff like that. It's strictly dealing directly with the

plumbers and of course they're not supposed to know the prices but the prices that I got on the materials was just the same prices. I got from Noland and Company. It was practically the same thing, the same thing all the way down the line as I got from Noland and Company, practically all the same names.

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page 92 }

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Q. Showing you Plaintiff's Exhibit Three, have you gone over with Mr. Folse just what materials that went into this job?

A. Yes.

Q. That you still owe him for?

A. That's right.

Q. Plaintiff's Exhibit Three shows a balance due of $5,644.74. Is that correct to the best of your knowledge and belief?

A. That's right.

Q. You see from that has been deducted what I previously showed you the value of those tools.

page 93 } A. That's right.

Q. Showing a net due of fifty-six sixteen ninety one?

A. That's right.

Q. To the best of your knowledge and belief, is the Hajoca Corporation entitled to be paid on that?

A. Yes, sir, yes, sir.

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CROSS EXAMINATION.

By Mr. Pitchford:

Q. Mr. Rowe, do you owe the Hajoca Corporation fifty-six sixteen ninety-one?

A. Yes.

Q. Have you been sued for it?

A. Yes.

Q. Suit is pending against you now, isn't it?

A. I suppose so.

Burlee Rowe.

Q. In what Court?
A. That I don't know.
Q. Papers were served on you, weren't they?
A. Yes, sir.
Q. In Gloucester or New Kent or where?
A. Well, I disremember what—

Mr. Little: Your Honor. I think this is completely irrelevant. I would acknowledge to the Court we
page 94 } have a judgment against this man.
A. That's right.
Mr. Little: For $5,700.00 but I think it is irrelevant in this suit.
Court: Are you objecting to the testimony?
Mr. Little: Yes, sir.
Court: I'll sustain you at this time.
Mr. Pitchford: All right, sir. Except to the Court's ruling.
Court: All right.

By Mr. Pitchford:
Q. Now, I understood from your testimony that you were to give Mr. Paulson a bond for $25,000?
A. That's right.
Q. And how was that bond arrived at?

* * * * *

A. The only thing in the world I just couldn't get the bond and Mr. Paulson got about half-way done he said
page 95 } might as well continue.
Q. And the amount of your bid was what?
A. The amount of my bid was $25,000.00.
Q. And that was for what?
A. That was for the—the installation of the plumbing and heating and the ventilation of the school, less all excavation which was never done by Mr. Paulson.

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page 96 }

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Q. Did you get all of the materiel of the job from Hajoca?
A. No. I got the unit heaters and the boiler and the glis-

solite, one from James and Shultz, and I had one from Johnson Service and I went—had one from the Nebbitt Control I believe. That's it. Of course them people came to me. I didn't go to them. They came on the job.

Court: Is that the material in this particular
page 97 } job?

A. Yes sir, yes sir. They came up to the job and asked to bid on the Johnson Control Service and the man asked to bid on the boiler.

By Mr. Pitchford:

Q. Did you sign those people authorization for Paulson to pay money by joint check?

A. No.

Q. Were joint checks issued?

A. Joint checks were issued, that's right.

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page 100 }

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Q. Did your original $25,000.00 bid increase by
page 101 } reason of substituting the oil fired boiler for the coal fired boiler?

A. Did it increase?

Q. Yes.

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page 112 }

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Q. Now why did you say that you didn't want Mr. Paulson to know what the materials cost?

A. Well, it's not a practice in the plumbers usually make as to let the general contractor know what the ma-
page 113 } terials cost. It's none of his business.

Q. None of his business at all, is it?

A. No sir, when he's got a price set on the job, he had a set price on the job, he had no right to know what those prices were. If Mr. Paulson had came to me and asked me the prices, I'd have gladly told him, but he didn't ask me at the time,

nothing. I understand Mr. Paulson asked Mr. Folse, and I advised Mr. Folse not to give it to him.

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page 141 }

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Q. Now Mr. Rowe, I'm going to hand you a
page 142 } sheath of five sheets of paper on the top of which is written, "Burlee Rowe, Sub-contractor, Selden, Virginia" and ask you to state what they are.

Mr. Little: Your Honor, I know what these are. I don't mind them coming in, but I object to the admissibility as being irrelevant. These are the estimates that he made to Mr. Paulson upon which he was paid and then the joint checks came to Hajoca. There's a lot of good evidence for me, but I think it is irrelevant to the issues in this case.

Court: I don't know what he is trying to show except what statement you made.

By Mr. Pitchford:

Q. Would you state what they are, sir?

A. Yes, sir.

(At this time the documents was handed to the witness).

Court: What is the purpose of that, if that is true.

A. This is the amount of requisitions I sent in each month to the general contractor for labor and material. In other words, when this check was made out, it was made out to Burlee Rowe and Hajoca Corporation. Whenever I would get my check each month, I would—I had an under-
page 143 } standing with Mr. Paulson which I told—I mean with Mr. Folse which I told you before. Whenever I get my check, I take it in. I say, "here's the check." All right, he'd get his bills out and he say, "all right, Rowe, you owe me so much this month" and he would deduct it. If I owed him fifteen dollars and I got twenty-five, his company would write me a check for ten dollars. Then I would endorse the check and give it to him and go about my business until another month, and I think there's every one here, that you

can see them, that I got and he gave me back every penny that I had coming every month. If I hadn't gotten this money at the end of the month, I mean, sometimes it was delayed. I was short once a thousand dollars in my requisition, and I had to borrow money to continue so when I was—if I hadn't have gotten it through when I did, I just couldn't pay the men the following week. In other words, if I got out of my money, how was I going to pay the men for working. Every one here must be right I imagine. No need for me to look at it because I know what I gave him. He did give me my money back.

Mr. Pitchford: I offer it in evidence.

A. The last one I gave him, the last one and he kept it all.

Court: Tell me the purpose of this.

Mr. Pitchford: The purpose of this is to indicate to the Court and jury that under the evidence available

page 144 } to Mr. Paulson and on which he issued checks jointly, there is nothing in any of the requisitions to show how much material was purchased and how much labor was performed.

Mr. Little: Your Honor has previously ruled on that, and I think it is prejudicial to this case and of our claimant, and I'm going to make a motion for a mistrial on the next time it happens. Mr. Pitchford is denying the ruling of the Court. He's trying to sneak in what the Court told him he couldn't do.

* * * * *

page 156 } Court: I'm going to rule on it right now. I'm not going to let it go in.

Mr. Pitchford: I take exception for the reasons stated and I ask you to take them now and mark them as rejected so they become a part of the record.

Court: I mark them rejected.

(The documents were received and marked Defendant's Exhibit Number Ten (Refused).

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Mrs. Frank Paulson.

RE-DIRECT EXAMINATION.

By Mr. Little:

Q. You were talking about the architect approved every bit of the work you did in there?

page 160 } A. He has to approve your fixtures before you put them in and also approve your work before you cover it up.

Q. In other words, you dig a trench, you can't cover it over?

A. Every bit of pipe has to be approved and tested and it was done.

Mr. Pitchford: I stipulated it was all inspected and approved.

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page 164 }

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page 165 } Mr. Pitchford: If the Court please, the defendant moves to strike the evidence of the plaintiff because the evidence discloses that the plaintiff received in joint checks written by Paulson to Hajoca and to Rowe the sum of $15,245.78. That's the plaintiff's exhibit, Exhibit Number Three. It shows that there was a refund to Rowe of fifty-two zero eight seventy one and I submit that under the—what law I have been able to find, that the duties devolve upon Hajoca to apply the money so paid to his material bill and not to make any refund and therefore Paulson is entitled to all of the credit represented by those checks. I contend further that this $203.62 discount that was handed to Rowe under the table and twenty-seven eighty-three tools admittedly bought, subsequent to July and tools bought before that time are not properly chargeable to Mr. Paulson.

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page 172 }

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MRS. FRANK PAULSON,

page 173 } called as a witness by the defendant, being duly sworn, testified as follows:

Mrs. Frank Paulson.

DIRECT EXAMINATION.

By Mr. Pitchford:

Q. State your name, please.

A. Mauree J. Paulson; Mrs. Frank Paulson.

Q. Are you the wife of the man sitting here?

A. Yes, sir.

Q. Mrs. Paulson, where do you and Mr. Paulson live?

A. We live now at 128 Salt Pond Road, Hampton.

Q. In what business is Mr. Paulson engaged?

A. General construction.

Q. And that involves what?

A. Building buildings, schools, churches and some houses.

Q. Now do you have anything to do with the operation of the business?

A. Yes, sir.

Q. What do you do?

A. I do the bookkeeping, the book work and just general secretarial work.

Q. In connection with your secretarial work for your husband trading as Peninsula Construction Company, have you ever had occasion to discuss the G. W. Watkins school with Mr. — the credit manager of Hajoca, whatever his name is?

A. Yes, I have. When Frank was not at home.

page 174 } Q. Tell us what discussions.

Court: What man did she discuss it with?

By Mr. Pitchford:

Q. Folse, was his name.

A. That's right.

Q. Can you recollect approximately when you first had a discussion with him?

A. Well, I think it was in March or I will say that it was in March of 1958.

Q. Tell us about that discussion, please.

A. He called concerning a letter he had written to us requesting that we make all payments to Burlee Rowe Plumbing and Heating; to Hajoca and Burlee Rowe combination; that check which would pay for labor and material, and I told him at that time we could not do that because we were already obligated to several other companies for the material—not material but well, stuff as the boiler and different other items that was necessary that Hajoca did not furnish.

Mrs. Frank Paulson.

Q. What reply, if any, did Mr. Folse make to that statement?

A. He still wanted to talk to Mr. Paulson concerning it.

Q. Did you ever talk to him at any other time?

A. To my knowledge I did not actually talk to him at any other time. I listened on our extension at one other time to a conversation between he and Mr. Paulson.

page 175 }

Q. Tell us about that, please.

* * * * *

Q. The conversation you overheard between Mr. Paulson, your husband, and Mr. Folse, the credit manager for Hajoca, could you tell the Court and jury what statements you heard Mr. Folse make?

page 176 }

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A. Mr. Folse was in Gloucester at the time at the Severn Insurance Agency with Mr. Rowe in the presence—in the presence of Mr. Rowe and at that time we had written it—it was in August we had written this check for $3,000.00 which Mrs. Rowe had come over and requested us to make direct to her which I told her we could not do. That we—we had to make the check to Mr.—to Hajoca Corporation and Mr. Rowe—B. Rowe Plumbing and Heating combination and so when the check—I mean this was the check that was being discussed over the telephone. We had called our bank and asked them to hold the check or if it came in, we would not—

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page 177 }

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Q. Tell us about the statements Mr. Folse made that you heard.

A. Mr. Folse told Mr. Paulson that if he would go ahead and have the check—let the check go through the bank that he would see that Mr. Rowe finished the job and would have men on the job the following day, which he did not.

Mrs. Frank Paulson.

Q. Is this the check to which you are referring (indicating)?

A. Yes sir.

Q. I hand you a check for $3,000.00, number 3021 in evidence as Defendant's Exhibit Five.

A. Yes sir.

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page 178 }

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CROSS EXAMINATION.

By Mr. Macaulay:

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page 179 }

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Q. I'll show you a document and I would ask you to describe it and state to the jury whether or not you received it.

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page 180 & 181 }

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Q. Mrs. Paulson, I'm now referring to Defendant's Exhibit Number Two, a letter Mr. Paulson—Mr. Folse to the Peninsula Construction Company to which is also attached the letter dated March 19, from Mr. Folse to Peninsula Construction Company and the second paragraph of this letter states, "also attached is a complete listing of all the materials which have been shipped to Mr. Rowe at the G. W. Watkins school. In the future as the material is billed, you will receive a copy of the invoice less price as was authorized by Mr. Rowe." Do you recall that letter?

A. If I recall the letter and I also recall it did not have the invoices included with the letter. If that was sent as a letter,

it couldn't have included very many invoices and the invoices did not come to us in any way.

Q. What time—when did that job first begin, page 182 } roughly?

A. That job started in January but it was no work done until March, late in March due to the weather.

Q. If I told you—I told you this letter was dated March 18, 1958; would there have been many invoices by then?

A. I wouldn't say there were too many by then, no sir.

Q. Are you prepared to state you did not get invoices covering all the material delivered to that site?

A. I am not going to say we did not. I'm not going to say we did.

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page 183 } FRANK PENNY PAULSON,

called as a witness in his own behalf, being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Pitchford:

Q. State your name.

A. Frank Penny Paulson.

Q. What's your age?

A. Forty-two years old.

Q. Where do you live?

A. 128 Salt Pond Road now.

Q. Are you in the construction business?

A. I am, sir.

Q. What background or training have you had to engage in that business?

A. Ever since I was a little boy my father started me out and then my father died when I was just a small child and I was toting water for him and I stayed in the construction work from then on.

Q. How long have you been engaged in business in your own right?

A. Since 1950 I think it is, '50 or '51.

Q. During that period of time from 1951 or '50, '51 up until to date and before have you become accustomed to the practice and customs in the trade?

Frank Penny Paulson.

A. Yes sir.

page 184 } Q. Now I direct your attention to December of 1958 and ask you if you then bid on a school building in New Kent County?

A. That was December of '57, the 19th day of December, 1957.

Q. Were you the successful bidder?

A. I was.?

Q. When you bid successfully, did you receive from the School Board a contract to build a school?

A. I did. They met here—I met with the architect on Christmas Eve in Richmond. Then I came back here and met with them right after Christmas and the contract was then sent to me.

Q. Did you sign the contract?

A. I signed the contract.

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page 185 }

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By Mr. Pitchford:

Q. Now Mr. Paulson, after signing that contract did you also execute a bond with Surety?

A. I had started the job before I signed the contract I believe and issued the bond. I did not send it with the contract. It went all together.

Q. Is that a true photostatic copy or Verifax copy of the bond that you signed?

A. Yes, but I don't see my signature on this one but it's the same type. I don't see my signature on this. I can't figure whether it is or not. It has the writing on it but it doesn't have my signature.

Mr. Pitchford: If the Court please, the paper I have just shown him is Plaintiff's Exhibit One.

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Court: He had a bond.

page 186 } Mr. Pitchford: Yes sir, he had a bond. We put that in by stipulation as the bond.

Frank Penny Paulson.

By Mr. Pitchford:

Q. Now Mr. Paulson, after you got the contract and posted the bond, what did you do with reference to the plumbing, heating and ventilation on the school building?

A. The night that the bids were opened here in the Court House at 8:00 o'clock, Mr. Rowe met me in the anteroom in the last room back and begged me to give him the job which he had given me the price. I had several other prices I think was one other one in there with his, local man that I had been doing business with. So then I told him, I said, "you'll have to come over and see me and we'll sit down and talk the job over." So Mr. Rowe came over and talked to me and he said he would post a bond on the job and so his insurance agent said, which was Mr. Rowe Severn Insurance Company called me and said the bond will be coming through, let him go ahead and start. So I let him go ahead. So then the job started, the first thing I had to do, we needed the ventilator grills. So then the first person that approached me was Mr. Smith with Schultz and James and asked me, he told me that he had talked with Mr. Rowe about payments and he would like to know if I would agree to it if Mr. Rowe had agreed too and then would I agree to making the check for the boiler alone, not the boiler but for the other things and

page 187 } the different ones, the stuff he was supplying direct to them to go jointly.

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Q. Let's skip over a little bit, Mr. Paulson. At what point in the project did you first have contact with Hajoca Corporation?

A. Hajoca called me around the first of March.

Q. Now Hajoca called you or who did call you?

A. I'm trying to think of his name. He has been called a dozen times today.

Mr. Little: Mr. Folse?

A. Mr. Folse called me and said that he was on the job with Mr. Rowe and up at the G. W. Watkins school and says he was—wanted to let Mr. Rowe have the material and would I agree to make payments for the money due Mr. Rowe on the job direct to him so he could protect himself for all the material on the job and I told him I would, except that I had already obligated myself to these other people for the supplies

Frank Penny Paulson.

that they were supplying and I couldn't make all of their checks to Mr. Rowe unless he would give me a
page 188 } letter stating that he would then in turn pay these other suppliers for the material and then I would make all the checks payable to him and he said well, he only wanted the checks that would be balance due after paying these bills so he could secure himself and make sure he got all of the money for all of the materials they were going to supply on the job.

Q. Did you make any requests at that time about billing or invoices?

A. Not at that time. He called me back at another—he sent me a letter just stating that he wanted all of the money due Rowe paid directly to him. Then he called me and I told Mr. Folse, I said, "Mr. Folse, I can't make it all, like I told you to start with. I already obligated myself to these other firms that's furnishing equipment on the job." He said, "well, you make all the checks to me" and I told him, I said, "if you will send a copy to my superintendent on the job that he can sign them, sign the copies, check the material and send it to me." This was never done. I got the photostatic copies of the—which appeared to me to be a photostatic copy of the invoices after the job was practically completed. Some after the job was completed.

Q. Did you receive any invoices, any appreciable number of invoices while the job was in progress?

A. No sir, and I had no way of checking the invoices. He did not do it as he promised to do. He promised
page 189 } to send them to the job and have the superintendent check them when the material was delivered and then he would know where the material was going and what it was being used for.

Q. I hand you a sheath of a great many pink sheets of paper and a few white sheets and ask if these are the invoices that you received?

A. These are the copies that I received when the job was over with.

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Mr. Pitchford: I'd like to offer these invoice copies in evidence as Defendant's Exhibit Twelve.

Court: Are they any different from the others?

Mr. Pitchford: Yes sir, they're blind. The others got prices on them.

Frank Penny Paulson.

Court: Any objection?

Mr. Little: Sir, I think they're completely irrelevant. If he wants to put them in the record, it's perfectly all right.

Court: No objection. This is Exhibit Twelve.

page 190 }

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Q. Now Mr. Paulson, as the job progressed did you from time to time discuss the material and the pricing of the material with Mr. Folse, the credit manager of Hajoca?

A. I did and Mr. Folse assured me that he was—knew the estimate when they quoted the job to Mr. Rowe which when you go to bid a job, you get quotes from the different manufacturers, agents and suppliers so therefore Mr. Folse and them knew the amount of the material going into the job and so he was going to take the checks, the reason he wanted them made and I couldn't see the prices was because that he wanted to, the checks, so he could assure that Hajoca got the money for the material in the job. That's why he wanted a joint set-up and made them a partner in Rowe's organization.

Q. What do you say? You say you start a job, you do what to it, price it?

A. You get estimates quoted to you on all the materials.

Q. A quote?

A. A quote. I get a quote on everything, on the job except like on the plumbing, electrical and those things, I do not get a quote. I'll have an electrical supplier or plumbing supplier will call me and say who is quoting you this job

page 191 } and I'll tell them. Then they will call up these plumbing sub-contractors and quote them the prices to use on the job which they know at the outset of the job if they get it, how much the material would cost for that job.

Q. Is that the usual customary practice followed in the trade?

A. That's the way it always is done.

Q. And it's been done, so far as you know, how many years?

A. Well, I have been estimating and working at it for well actually estimating for over eighteen years, seventeen—well, maybe fifteen years to eighteen years.

Q. Have you previously had experience with Hajoca Corporation?

A. No, sir.

Frank Penny Paulson.

Q. In your discussion with Mr. Folse, the credit manager, did you make known to him the amount of Rowe's bid?

A. He asked me the amount of Rowe's bid and I told him $25,000.00 less these other things that—enumerated the different things that I had obligated myself to.

Q. Did you indicate to him how much you had obligated yourself to other people for?

A. I did. I give him the—each one because I had the reference to go by.

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Q. After having your first discussion with Mr. Folse, did you thereafter cause one or more checks to be issued payable to Burlee Rowe Plumbing and Heating and to the Hajoca Corporation?

A. I did.

Q. I have here five checks in number already put in evidence and marked Defendant's Exhibit Five and ask you
page 193 } if they are the checks you caused to have issued to Mr. Rowe and Hajoca Corporation?

A. They are.

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Q. Mr. Paulson, what prompted you to cause those checks to be issued?

A. To protect the job.

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Q. All right.

A. The checks were issued according to Mr. Folse asked me to have them issued that way for his protection that he could see because he knew what the material would cost in the job; that Mr. Rowe couldn't get too much money out of the job; that he would know what material; he knew what the material

was amounting to and he could protect himself which I had no way because Mr. Rowe refused and he refused to give me the prices. I had no way of knowing how much material he was furnishing on the job, the cost of it.

Q. Now when—it first come to your attention that Hajoca had not paid itself out of these checks that you sent—

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A. I did not know how much money that they had retained.

Court: Go ahead.

A. Out of those checks until the—I believe it was the brief or so forth, I did get a bill from them saying Hajoca—Rowe owed Hajoca so much money but I did not know until they filed how much had been paid them. I did not know how much of the checks that they had retained for themselves.

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Court: We have gone into everything except what we ought to go into. There might be thought of misconduct on the man or he might have waived the statute and that sort of thing. I don't think he has but you beat all around the bush trying to get to that one thing you haven't done. You haven't shown any misconduct on the part of Hajoca. My opinion is they did not waive any rights they had under that statute.

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Mr. Pitchford: The reason for him doing it and I think—

Frank Penny Paulson.

Court: Because Hajoca asked him to do it for their protection but that doesn't waive it, does it?

Mr. Pitchford: It certainly does.

Court: That's where the difference is.

Mr. Macauley: You disagree with our theory of the case.

Mr. Pitchford: I also disagree with the Judge taking sides.

Court: I am not taking any sides.

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Mr. Little: Your Honor, this motion is between the Court and counsel who made the motion, but for the record I would like to state in my judgment and I say this without any desire to incur favor which wouldn't be granted by the Court, that I have never seen a trial conducted with more liberality toward the admissibility of evidence.

Court: I certainly have. I have given him every inch of rope I could.

Mr. Little: I just didn't want the record to be silent in our view. In our view if any prejudice has resulted, it has resulted in letting so much evidence come in that it might confuse the jury.

Court: I have let in more than I should, trying to follow something that I should that the man did waive it or the materials were not in the building and so on.

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CROSS EXAMINATION.

By Mr. Little:

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Frank Penny Paulson.

Q. You have been paid in full for that job up there, have you not?

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page 238 }

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A. I have been paid for it.

By Mr. Little:

Q. What was the amount of the contract?

A. $174,400.00 plus $3,225.00 plus one thousand some dollars and I'd like to look at the figures to get the exact pennies on it.

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Q. Mr. Paulson, in your experience as a contractor how is the best way for a general contractor like yourself to protect himself from any defaults by a sub-contractor such as Mr. Rowe? In other words, if you give a contract to Mr. Rowe or any other sub-contractor, how can you best protect yourself against such claims as you are here on now?

A. I have never been in this position before except that the man asked me to pay him direct joint so that he could protect himself and Rowe wouldn't get too much money.

Q. Let me rephrase the question. When you gave him the contract, didn't you ask him to furnish a bond?

A. I did.

page 240 } Q. Why?

A. I asked all the subs.

Q. Isn't that the best way to protect yourself?

A. I have never had a bond on any other sub before and I never—on the job until now, the new law has come out on schools, you have to have a bond on it.

Q. Go back to my question. Isn't that the best way to protect yourself?

A. He did and he promised to furnish a bond.

Q. Right, sir.

Frank Penny Paulson.

A. And Hajoca wrote me a letter and said they had assured him the bond was coming through.

Q. So you took a risk in not making him—in letting him get on that job without giving you a bond?

A. I did that.

* * * * *

Q. All right. Now, let's come to this payment to Hajoca. The first five checks that you paid to Hajoca are the only five checks you paid to Hajoca and Mr. Rowe; didn't you know that Hajoca did not furnish the labor on that building?

A. Mr. —

Q. Yes or no.

A. I didn't know how they had made it among
page 241 } themselves. I'll have to say that.

Q. You didn't know what the arrangement was?

A. Because the credit manager, Mr. Folse, called me and said, "we want the labor bill, the check for the labor and material that we *furnishing* and all the labor and all the material sent to us so we can protect ourselves as we are taking over with Rowe as a partner."

Q. Have you ever seen Hajoca Corporation send—furnish laborers to a plumbing job in all of your experience?

A. I never had any dealings with Hajoca.

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Q. Put it this way. You knew that Mr. Rowe was employing laborers, did you not?

* * * * *

A. I did not know what arrangements Mr. Rowe or Mr. Folse had made. They would not give me any quantity prices of money as the other suppliers furnished Mr. Rowe, each one of them give me a bill on how much material would be when it was delivered so I could protect them but Mr. Folse refused to do that, said, "we'll take care of it. I want the money for the labor and all" as if to say we're going in a joint venture.

page 243 } Court: What did he say?

A. He said, "we're taking care of the labor and material" and says, "to protect ourselves." That's what Mr. Folse told me.

By Mr. Little:

Q. And you really thought Mr. Folse, a credit man was supplying the labor for the plumbing to be done on this school?

A. He could have been furnishing the money or what, I don't know. I did not know anything.

Q. Do you sincerely believe he would furnish labor on a job? I'm asking you if he would furnish any money to get that?

A. I couldn't say that he didn't or wouldn't, no sir.

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RE-DIRECT EXAMINATION.

By Mr. Pitchford:

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Q. Now in—what is your usual way of protecting yourself against claims of materialmen when you have sub-contractors?

A. You usually pay, we get a price from the supplier and it's sent to you the amount. You would hold that for them and pay them on demand a joint check.

Q. Is that the custom usually followed in the trade?

A. That's the custom that I have always been accustomed to and also maintained from the first job of any size of school that I went on business, the first job I had to do with plumbing contract.

page 245 } Q. Is this the first instance you had where a materialman came back on you where you issued a joint check?

Mr. Little: That's irrelevant.

A. The first time.

Frank Penny Paulson.

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Q. Has that method of issuing checks to the sub-contractor and materialmen always protected you up to this point?

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A. I have done it always before when you make a check joint, they are automatically for labor and material to them. They are automatically considered part of the sub-contract and leaves me completely bound no further than just giving him the check for the amount of the contract.

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Q. Now this Smith and Smith about which you have been questioned so severely about checks, whose employees were they?

A. They were Burlee Rowe's and Mr. Folse called me from Mr. Rowe's secretary's office, Severn Insurance and told me, said, "Mr. Paulson" he says, "if you will let this job go, let this check go through" he says, "I will have Mr. Rowe and his men back on the job and guarantee that he will complete the job." I said—I had already told him, Mr. Folse, that I would have to get a contractor on the job the next day in order to complete the job because my time had run out and the school was ready to move in.

* * * * *

A. Mr. Rowe had left the job. Mr. Folse had accepted the $3,000.00 check, the last one he got and Mr. Folse says, "I will put him back on the job if you let the check go through."

Mr. Little: Your Honor, I hope you understand I don't want to keep jumping up but your Honor is bound
page 248 } to know that I do object to this type of testimony.
Court: I sustain the objection.

Mr. Pitchford: For what reason?

Court: The only thing we're suing on is the principal insured on the bond. Isn't that what the suit is on?

Mr. Pitchford: Not entirely. We have here a man who is assuring him he's going to get the person back on the job.

Court: I ruled on that today twice.

Mr. Pitchford: You permited Mrs. Paulson to testify about it, admission against interest.

Mr. Macaulay: You were going to link it up, if you remember.

Court: Yes, you haven't linked it up at all, no connection that I can see, sir. It goes right back to what I have already ruled on.

Mr. Pitchford: I'm lost again. I don't understand.

Court: All right. Any more questions of this witness?

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PAUL WILLIAM FOLSE,

recalled as a witness by the plaintiff in rebuttal, having been previously sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Little:

Q. Mr. Folse, I draw your attention to the testimony you heard of Mr. Paulson. First, Mrs. Paulson, if you will, said that, and Mr. Paulson that they did not get copies
page 253 } of these invoices until practically when the job was over or very late. Is that true?

A. No sir, it's not true. I have the person who was preparing these invoices, each time that they were billed, put them in an envelope and send them to the Peninsula Construction Company, attention Mr. Paulson. On many, many occasions I did it myself because it was an exceptional type thing where I was giving someone else a copy of the invoice and I personally made them up from time to time, and to the best of my knowledge I didn't count them but I do know from the routine of business that they went out constantly to them. At no time did I make any group of them or save any group and send them at one time.

Paul William Folse.

Q. Mr. Folse, in connection with this question of sending invoices to Mr. Paulson so he would know what materials were going on the job, I show you the letter that they have introduced as Defendant's Exhibit Two, the second letter attached to that, the letter of March 19, and I read you this paragraph. This is the letter from you to Peninsula Construction Company?

A. Yes. sir.

Q. Where you say on March 19, '58, "also is attached a complete listing of all the materials which have been shipped to Mr. Rowe at the G. W. Watkins school." Are you sure that these invoices went out with this letter?

page 254 } A. Well, of course over that period of time I couldn't recall and say honestly and definitely that they went out with this. However, the letter does show enclosures.

Q. Where does it show that, sir?

A. It shows.

Q. That little "encl"?

A. Which my secretary puts on something which has enclosures attached to it. In other words, she wouldn't put that there just from the reading of the letter, but she puts that on there when she sees there are enclosures to go, and I might point out that the invoice shown to me by Mr. Pitchford was typewritten which would indicate it was run through the *the* machine, and I didn't have it at the time that I wrote this letter and I had to make them up, and that's probably one of them.

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Q. Mr. Folse, Mr. Paulson also testified that you promised to send these invoices to the job site. Is that true?

page 255 } A. No sir, it is not true.

Q. Will you tell the jury why?

A. Mr. Paulson testified that I promised that I would send those to the job superintendent and that his job superintendent would sign for them. Of course to me who knows the operation of the office so well, that's ridiculous. I have a customer, B. Rowe. I wouldn't send it to the general contractor's superintendent to sign for the material and have the material and charge Mr. B. Rowe. Mr. B. Rowe is paying me. He's the one who should get the invoice and the copy. I promised I would send them to him. He sees his superintendent, or he can give them to his superintendent. Under those circumstances,

Paul William Folse.

would I send them to the job site? I wouldn't have known very well how to address them even to get them there and that—I might say this, I didn't know who his job superintendent was until later by name.

Q. Finally sir, Mr. Folse, Mr. Paulson testified that he told you and that you knew the amount of the contract he had with Mr. Rowe very early in the game or in the early stages of this construction. Is that true?

A. No sir, he didn't tell me the price—the contract price at all. He, as I remember, I think his wife testified that she wouldn't give it to me either. Why would I be calling for it later if he gave it to me then? He never gave it to me at all. He said he couldn't give it to me.

page 256 } Q. As a credit man, are you supposed to be able to know what the amount of the materials would be that would go in a particular job?

A. Not—not particularly.

Q. Are you qualified to take off plans and specifications to determine the cost of materials that go into a particular job?

A. No sir, I have no knowledge of it. My function is merely a credit man.

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CROSS EXAMINATION.

By Mr. Pitchford:

Q. Mr. Folse, doesn't your Corporation make a proposal or estimate when a sub-contractor comes to you with the proposition about building or fulfilling a contract so you will know how much material you are supposed to furnish?

A. I don't believe I could answer that truthfully, sir, as to the way that the sales department handles that.

Q. You know nothing of that then?

A. Well, I know of course that in certain cases a quotation is given, but you're referring to the specific case. I do not know.

Q. You don't know whether it was given this time or not?

A. No, sir.

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page 260} RE-CROSS EXAMINATION.

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Mr. Pitchford: The defendant renews its motion to strike the plaintiff's evidence for the reasons already assigned and the authorities cited to the effect that all joint

page 261 } checks issued by Paulson, trading as Peninsula Construction Company and payable to Hajoca and to Rowe jointly should have under the circumstances obtaining in this case, as disclosed by the evidence be applied on the material bill and that such checks, if so applied would extinguish the material bill and therefore the bills no longer exist. There might be a difference of two or three hundred dollars but no more and for the further reason that the plaintiff has utterly failed to prove by competent evidence that the material claimed to have been used in this job was actually used in this job. The only witness they have produced to attempt to accomplish that or carry that burden is one, Burlee Rowe, who has testified that he used all of the material but it is perfectly obvious it is a self-serving declaration in that he himself still owes the money. He even has a judgment against him for some fifty-seven hundred dollars arising out of the same transaction and for the further reason because that evidence discloses that the plaintiff has made its election by pursuing Burlee Rowe and reducing its claim to judgment.

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Mr. Little: Your Honor, we have a motion we would like to make to the effect, with the exception of those specific items upon which there is a conflict in the evidence, that as a matter of law we are entitled to recover the amount of our claim less the disputed items for the following reasons.

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The second point, so far as payment is concerned, our evidence can be briefly summarized in this manner. The evidence is uncontradicted as to the agreement which existed between Burlee Rowe and the plaintiff as to the terms and conditions upon which joint checks were to be made out to Hajoca and Burlee Rowe. The uncontradicted testimony is that Burlee

Rowe was to be sold on a thirty day account. That there are times he submitted an estimate and he was to bring the check —and receive the payment, he was to bring the joint check to Hajoca, and Hajoca was to deduct for every penny's worth of materials that were due at the time covered by the

page 264 } estimate payment. In further proof of that, you can see that is exactly what happened. I refer to plaintiff's Exhibit Eight, which is a summary of all the invoices together with Exhibit "B" which I respectfully show to the Court as follows. We have received a total of five payments or five joint checks from Hajoca—I mean from Peninsula Construction Company. Referring to Plaintiff's Exhibit Eight, we see that the total balance owed by Burlee Rowe, the cumulative total as of the March account was $2,377.03. The amount that we deducted was twenty-three seventy-seven zero three. The account was paid in full. Nothing else was owed under the uncontradicted testimony until at least thirty days later.

The next monthly account was the April account which showed the total of materials delivered during the month of April to be $1340.41. When we received the check upon which this—upon which an estimate was furnished for this work, we deducted $1340.41, and without going into detail I ask the Court to check. I have marked each payment, the third payment, the third payment ninety-nine two twenty-nine, cleaning out the account in full as of the end of May.

page 265 } Similarly on the next page we cleaned out the account in full for the June account, $2470.86. Finally when the last check was brought to us, the amount that Mr. Rowe owed was $3,365.58. The check presented as the evidence shows, was $3,000.00. We kept every penny of it.

I submit under those facts, sir, that if you submit to the jury the question as to whether these accounts have been paid in full, it will have the effect of doing this: one, saying that, regardless of the amount that Rowe and Hajoca had worked out as to the payment, the jury can decide that they should have worked out a different agreement; that even though legally no debt was owed to Hajoca by Rowe after each one of these checks was received, that the Hajoca Corporation should have withheld funds which it had no legal right to withhold under the uncontradicted testimony in this case; and, for that reason, sir, with the exception of the disputed items which I don't think amount to $300.00, I do not see where a jury issue is presented as to the balance of this account.

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Mr. Little: May I add one more remark on that. This is what generally concerns me about the submission on a case such as this on the undisputed evidence. Namely, whereas this Court has previously ruled that in its opinion—there's no question of waiver of the rights which Hajoca had under eleven twenty-three, if you now submit this question of payment to the jury, you are in effect giving the jury an opportunity to decide if they have waived their statutory rights under this section, and, if they have, it's going to be a shock in the building industry to know that by trying to get additional measures of security you give up your basic statutory right which you have under Section Eleven
page 267 } twenty-three. For that reason I think the motion should be sustained.

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Court: Even if you were right, there would be a lot of things in dispute in the things even by Mr. Paulson himself so I think that matter would have to go to the jury.

Mr. Little: We note an exception.

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page 268 } INSTRUCTIONS.

Mr. Little: Your Honor, I want it stated for the record that some of these Instructions are only offered in light of the previous ruling of the Court on our motion for—that we are entitled, as a matter of law, to judgment on all of the items on the invoices from July 30, through completion date, except those particular items that were contested. In view of the Court's ruling on that, we have to offer these Instructions.

PLAINTIFF'S INSTRUCTION "A" (Granted):

Court: All right, the first paragraph.

Mr. Pitchford: No objection to the first paragraph.

Court: None at all. All right.

Mr. Pitchford: There's no objection to paragraph two until we get down to the word, "given" next to the last line. I

don't know of any law to substantiate that statement unless such testimony has been corroborated by evidence which you do believe.

Court: You want to take out, "given"?

Mr. Pitchford: I want to take out from, "given" on, "unless such testimony has been corroborated by evidence which you do believe." I don't think that's the law. I have never seen it before.

Mr. Little: What do you want to do?

page 269 } Court: He wants to strike out—

Mr. Pitchford: "Unless such testimony has been corroborated by evidence which you do believe."

Court: "Given" period.

Mr. Little: He has, "given" period. That's good. Fine. We agree to that.

Court: I struck that out and he had no objection to striking it.

PLAINTIFF'S INSTRUCTION "B" (Granted):

Mr. Little: You ought to knock out, "performed labor."

Court: I wondered why you wanted "labor" in there.

Mr. Little: No, I don't. Strike out that "performed labor and" in the fifth line.

Court: "Furnished materials" is all you want.

Mr. Little: That's right.

Mr. Macaulay: Strike the words, "performed labor and".

Court: How about the next paragraph?

Mr. Pitchford: I object to the last paragraph.

Court: The last one?

Mr. Pitchford: Yes, sir.

Court: The second one you do not, do you?

Mr. Pitchford: I do not object to the sec-

page 270 } ond paragraph.

Court: All right.

Mr Pitchford: I do object to the last paragraph and I object to the words, "not only" on the third line of the first paragraph.

Court: "Not only" on what?

Mr. Pitchford: On the third line which reads, "and surety company"—"his surety is designed to protect not only the School Board." I don't think we should have "not only"—

Mr. Little: Let's leave out all reference to the School Board. "Not only the School Board of New Kent County."

Mr. Pitchford: I want the words, "not only" to come out.

Mr. Macaulay: Strike "and only" and substitute the word "and" for "but".

Mr Pitchford: Strike out "not only."

Court: "Designed to protect the School Board of New Kent County and also". Put an "and" there.

Mr. Little: Right, sir.

Court: You have no objection to that. He objects to the last paragraph on the page. That's a matter of law for the Court, isn't it; not for the jury?

Mr. Little: No sir, they go and explain it, any question of doubt should be resolved against the bonding
page 271 } company.

Court: I won't hold that.

Mr. Little: We object to the exclusion—you are excluding the third paragraph. We note our exception to that, sir.

Court: I have already said, "designed to protect them" up there. Read your first paragraph.

Mr. Little: But I think we're entitled to this business of a liberal construction on this bond which is given in the highway bond cases very, very often.

(At this time, the Court then struck the last paragraph).

Court: Granted as amended.

PLAINTIFF'S INSTRUCTION "C" (Granted):

Court: That's certainly true or you wouldn't be here.

Mr. Pitchford: I don't agree with the Instruction in its entirety.

Court: All right, what do you object to?

Mr. Pitchford: I object to the language "Burlee Rowe" in the last three words of the Instruction. It should stop, "has not been paid."

Court: I don't see it, leaving it in there. If you haven't got that, you haven't got anything.

Mr. Pitchford: This Instruction, if you are
page 272 } going to give it in this form, totally ignores the payments that have been made.

Court: I'm going to—"by Burlee Rowe".

Mr. Macaulay: There's no contention in this case that any material was sold to anyone else by Hajoca than to Burlee Rowe.

Mr. Pitchford: There's a contention as to who made the payments and the manner in which the payments were made.

Court: "Has not been paid."

Mr. Pitchford: Stop right there.

Mr. Little: These joint checks, that was money rightfully coming to Burlee Rowe.

Court: He couldn't cash it by himself though.
Mr. Little: But Hajoca—yes, he could.
Court: They couldn't. Rowe had to sign it.
Mr. Little: We'll take it out.
Court: Two of them had to sign it.
Mr. Pitchford: Deleting "Burlee Rowe."
Court: Granted as amended.

PLAINTIFF'S INSTRUCTION "D" (Granted):

Mr. Pitchford: Now the defendant objects to instruction "D". There is no evidence anywhere in the record to support such an instruction, namely that there has been no proof of delivery of the material to the job site.

page 273 } Court: Oh yes some people signed it on the job, according to the testimony.

Mr. Macaulay: Rowe himself testified it was all delivered to the site.

Mr. Pitchford: A few signed tickets but not signed by—

Mr. Little: Burlee Rowe testified he examined all those from July 31 and many of it came to the job site.

Mr. Pitchford: I observed something else about the instruction. It is a finding instruction and does not contain all the elements necessary to find a verdict. It ignores payment completely. It ignores the joint checks and ignores the agreement between Paulson and Rowe. It is a finding instruction; when you have a finding instruction you must include all the elements necessary to find a verdict and that is not included within "D".

Court: Yes, this is a find instruction. I'm afraid that's right. I think you should take off, "you shall find a verdict for the plaintiff." That would be the only thing.

Mr. Little: We are going to ask for it as written.

Court: It doesn't put all the facts in it. I'd have to amend it. I'd have to add some more to it. I'll give you the presumption, the presumption that such material was used.

page 274 } Mr. Little: What you do, sir, if you feel that way, we're not consenting to it, but you can, if you want to, you want to give us the presumption; what you have to do is stop at "school". We object to deleting the balance of it but that's what the Court—

Court: Yes, that's right. Do that.

Mr. Little: We note an exception to amending the instruction as stated

Mr. Pitchford: The defendant excepts to the granting of instruction "D" even as amended for there's no reason to

support the instruction. There's no credible evidence the material was ever delivered to the site.

Court: Yes, there was. You got a whole lot of evidence that went to the jury.

Mr. Pitchford: We except.

PLAINTIFF'S INSTRUCTION "E."

(Granted):

Court: I don't know whether you have enough in this one or not. That's what bothers me.

Mr. Little: This is the crux right here. We are sticking right on this one.

Court: You ought to put the facts in there and let them decide on the facts. I'm ruling on the evidence now.

Mr. Little: You're not, under our view of the case. When the checks came in, there was a definite amount owed. There was only one amount, that was owed, that could have been deducted and that amount, by the uncontradicted
page 275 } testimony, was deducted.

Court: Well, I go along with you but I'm not saying it that way in this instruction. That's what I am talking about. I ought to say more, even though what you say is right.

Mr. Little: I don't follow you, sir.

Court: I'm telling the jury positively as a matter of law, the plaintiff withheld on the checks from Frank Paulson.

Mr. Little: That's our view.

Court: I ought to set up a factual proposition and not rule on the evidence.

Mr. Little: Where there is uncontradicted testimony as to what the relationship was between two people, namely the two people involved, Burlee Rowe and Hajoca, and they haven't said, "Oh no, Mr. Rowe told Hajoca to withhold more than what was owed."

Court: What you are trying to tell the jury is that they had a right to withhold all the money owed but no more.

Mr. Little: That's right.

Court: You don't say that in this instruction. That's what I am talking about. They had a right to withhold all that was legally owing to them at the time and no more. That's what you are trying to say but you didn't say that.

Mr. Pitchford: Of course I don't agree that's the law at all. I've got something in here that says it isn't.
page 276 } Aren't you ignoring the agreement that was between Paulson and Folse that he was going to

protect the materials, protect himself as materialman when you give such an instruction as this or anything akin to it?

Court: No, I don't think so.

Mr. Pitchford: I certainly do. That's the crux of the whole case.

Court: That's right.

Mr. Pitchford: You're directing a verdict if you entertain such an instruction like "E" or anything like it.

Court: According to that case, 200 Virginia, that's pretty nearly the same.

Mr. Pitchford: 200 Virginia didn't say anything like that; not a single case in Virginia can you find where any money has been paid by joint check. We can find a case in 157 Virginia, the *C. S. Luck* case.

Mr. Macaulay: We're relying on that too.

Mr. Little: We're relying on that Luck case.

Mr. Pitchford: Where the offer is made once and the Court said you can't make him make it but once.

Mr. Little: I'm willing to amend to this extent, "The Court instructs the jury that as a matter of law the plaintiff could withhold."

Court: That's better.

page 277 } Mr. Little: "Could withhold"—let me read it and then I'll go back if you think it is worth-while to make the correction.

(Mr. Little then make some amendments to the instruction).

Mr. Little: This is what I have if you want to copy that (indicating).

Court: "Which were legally owing the plaintiff." I got "legally owing the plaintiff at that time."

Mr. Little: All right.

Court: Of course he could agree to do it; unless Rowe agreed to do it.

Mr. Little: There's no evidence he agreed to it.

Court: I understand that. All right, Frank. What do you want to say about it?

Mr. Pitchford: I want to object most violently.

Court: You want to look at it?

Mr. Pitchford: I heard you and I still object to it and I'm prepared to state my reasons. The instruction as now amended reads, "The Court instructs the jury as a matter of law that the plaintiff could withhold from the checks of the defendant, Frank Paulson, which were payable jointly to the plaintiff and Burlee Rowe, the funds which were legally owing the plaintiff at that time, and the Court further instructs the

jury as a matter of law that any failure by the plaintiff to withhold additional funds from such joint checks page 278 } has no effect whatsoever upon the claim of the plaintiff against both defendants." Now I submit that that—

Court: That's got to be "without authority" ought to be in there. "Withhold additional funds without authority from the joint checks."

Mr. Little: Have you finished with your objection?

Mr. Pitchford: No sir, I'm just starting. The Judge interrupted me there.

Court: I think myself they couldn't withhold additional funds without authority.

Mr. Little: From whom?

Court: Burlee Rowe could have done it.

Mr. Little: I think he ought to be put in there.

Court: All right.

Mr. Little: If you are going to give it in that fashion.

Court: All right, Frank. Go ahead.

Mr. Pitchford: Now you propose to amend it in what respect now?

Court: I'm going—"The Court further instructs the jury as a matter of law that any failure by the plaintiff to withhold additional funds, without authority from Burlee Rowe, from such joint checks has no effect whatsoever."

Mr. Pitchford: All right, the amendment in that fashion, the instruction written in that manner totally page 279 } ignores the testimony of Paulson, the agreement made between Paulson and Folse, effectively cuts off all defense, directs a verdict.

Court: Almost does.

Mr. Pitchford: And is in violation of the mandate laid down in the case of *C. S. Luck* v. *Boatwright,* 157 Virginia 490, where the Court said, "A payment once made at Boatwright's request is enough." We have here a payment once made at Hapjoca's request is enough. You're ignoring this.

Court: I don't think that's the same thing myself.

Mr. Pitchford: I do think it is the same thing. The Broyhill case has not changed this part of the *Luck* vs *Boatwright* case at all. It has been Shepardized and it has been run down through the key system. We have run it through ALR and the digest and as I pointed out to your Honor in arguing the motion to set aside the verdict, the closest case that can be found on the subject is that of United States Use of Carroll Beck, Circuit Court of Appeals—

Mr. Little: What's the citation?

Mr. Pitchford: 166 ALR; case commences at Page 637.

(Mr. Pitchford then proceeded to read a portion of the case referred to above).

Mr. Pitchford: Here the man advanced money. In the case at bar, they refunded money, I cannot see
page 280 } the difference.

(At this time Mr. Pitchford then read additional portions of the case referred to above).

Mr. Pitchford: Now I say that this is applicable because of the testimony of Paulson, that you do not, as the Judge, have a right to take away from consideration of the jury and by granting Instruction "E" that is exactly what you are doing. You're directing a verdict and telling the jury in effect to disregard all of that.

Court: I'm not directing the verdict.

Mr. Pitchford: The Instructions are read, as I understand the law, in a group.

Court: Read as a whole. This is not a finding Instruction.

Mr. Pitchford: But you're cutting off every single defense we have. You're cutting off every agreement and understanding that existed between Paulson who was actually paying the money to Hajoca, the plaintiff in this case. We find another case, *Schwartz Supply Company* v. *Breen,* decided in 1938, Louisiana case.

Mr. Macaulay: What page?

page 281 } Mr. Pitchford: Page 199 of 130 ALR.

(Mr. Pitchford then proceeded to read portions of the case referred to above).

Mr. Pitchford: You're protecting Burlee Rowe but Paulson is the man right here.

Court: What I am saying to the jury, they couldn't take out any more than owing to them at the time without authority from Burlee Rowe.

Mr. Pitchford: Doesn't Paulson, in view of the facts have some rights?

Court: The check was made payable to Burlee Rowe and Hajoca.

Mr. Pitchford: For what? To protect the material man because the material man requested that the checks be so made. This check.

Court: They got to agree to that.

Mr. Pitchford: Yes sir and if you give this Instruction, it takes away that very understanding and the very reason

for which the checks were given. The man has testified and it has not been controverted that it is a practice of the trade and it is the practice that has been followed for years by him and others to protect himself. If you give this Instruction, you ignore that also.

page 282 } Mr. Macaulay: Mr. Pitchford, you are ignoring the fact we're suing on this bond.

Mr. Pitchford: I don't think the bond is something that there's no defense in the world to. I don't think—

Court: It's—that's what it is given for and that's what the—

Mr. Pitchford: Isn't the contractor and the surety entitled to some protection when they have made agreements to protect themselves? Can this Court say that agreement amounts to nothing and you got to disregard it, toss it out of the window because you got a little statute saying they have to pay it?

Mr. Macaulay: Your rights are not limited by the subcontract between Hajoca and Rowe as far as this claim goes.

Mr. Pitchford: But you're right I submit by all the facts and circumstances in the case, I have read the statute, 1113, many times. I have read your *Broyhill* case and the other cases and I can't see where you cut off all defenses completely. The closest thing approaching it is that of *Luck* against *Boatwright* where the Court said that you are not required to pay twice.

page 283 } Court: I'll put it in there you're not required to pay twice anywhere you tell me.

Mr. Pitchford: Will you write on the bottom of the Instruction that Paulson is not required to pay the same bill twice?

Court: I'll give you an Instruction, not required to pay twice.

(At this time the Court then read Instruction "E" aloud).

Mr. Pitchford: That last part is really objectionable. "From such joint checks has no effect whatsoever upon the claim of the defendant against both defendants." It most certainly does. That is the very reason Paulson is being sued today because the money was not withheld and it was not withheld because—because of some secret—

Court: This man told him he wanted to pay labor.

Mr. Pitchford: What did he tell Paulson? "I want these checks so I can protect myself" and you're ignoring that.

Mr. Little: What you are contending, there was accord and satisfaction whereby these parties agreed to rely on the

joint checks in lieu of the statutory procedure. If
page 284 } there's been any evidence along that line, I have
not heard it and I think—

Mr. Pitchford: The evidence has been over and over and over and it has not been disputed, "give me the joint checks and I'll protect Hajoca from the material men's claim."

Mr. Macaulay: He can only protect him.

Mr. Little: That money was owed to him. It's against the law to hold back money that doesn't belong to you.

Mr. Pitchford: What are you going to do?

Mr. Macaulay: If he withheld all the money, Rowe would have quit the job five months ago before he did.

Court: There it is. I'm going to let it go like that because I don't think it effects you.

Mr. Pitchford: It puts me out of Court.

Court: Near about.

Mr. Pitchford: It's not the law and I take exception. Will you let the reasons I stated stand or shall I state them again?

Court: Let them stand.

Mr. Little: In regard to that Instruction, I want the record to show that we do not feel—strike that.
page 285 } That we frankly feel the jury should be instructed
as follows. "The Court instructs the jury that under the facts which have been presented to you the plaintiff withheld from the check of the defendant. Frank Paulson, which were payable jointly to the plaintiff and Burlee Rowe, all funds which the plaintiff had a legal right to withhold."

Court: You said that before.

Mr. Little: "And the Court further instructs the jury"—I want this in if I may, sir. "That the failure of the plaintiff to withhold any additional funds from these joint checks has no effect whatsoever upon the claim of the plaintiff against both defendants", but the one that the Court has given is certainly preferable to not getting one.

Court: Granted as amended.

Mr. Little: For the reason, Judge, if I may say for this reason, that the Instruction that the Court has given is sound to a point, but I say where it is unsound because the jury is being given the decision to what was legally owing under a specific agreement between two men which is uncontradicted
and the additional evidence that under that agree-
page 286 } ment which is uncontradicted.

Court: Let them decide it on the facts rather than me determine what the conclusion is.

Mr. Little: **I note an exception.**

Court: You did that before.

PLAINTIFF'S INSTRUCTION "F."

(Granted):

Court: All right, what do you have to say?

Mr. Pitchford: The defendant objects to Instruction "F" in its entirety because there is no evidence that payments were made directly ever to Burlee Rowe. All the checks went to Hajoca and other checks that the Court struck out over my objections were made to Burlee Rowe and other suppliers.

Mr. Little: Put, "Burlee Rowe and assigns."

Court: At his direction.

Mr. Little: The point I am making, regardless of how much money Paulson has paid, the fact still remains if the building materials in that building haven't been paid for, he's liable under that bond. That's all I want to get over.

Court: You got that covered in earlier Instructions because I did not object to it.

Mr. Little: I don't think I have.

page 287 } Mr. Pitchford: I call your attention to Instruction, "B". "B" and "C". It's covered in both of them.

Mr. Little: That's not covered a bit in "B", sir. I'll be glad to amend "F"' to the extent of putting, "to Burlee Rowe or to Burlee Rowe and others." In other word, the evidence is in that there were other joint checks payable.

Mr. Pitchford: Then you again are taking away from me all the defenses we have. You are again ignoring the agreement between Paulson and Folse.

Mr. Little: My authority for this is well stated in the case of *Bristol Steel Iron Works* v. *Plank,* 163 Va., 819 which by a very strong inference supports this. In that case there was a suit on a bond, and the Court glibly stated that they had to sue on the bond because the general contractor had paid the sub —I mean the owner had paid the general contractor in full so the people who furnished materials had to rely upon the bond given by the owners, and that's the case where the owners had paid in full to the general contractor but were hooked, not because they hadn't paid off in full to the general contractor, but because they had given a bond guaranteeing payment of materials and labor.

Mr. Pitchford: That case can be readily distinguished on the facts. In the case at Bar we have joint checks. In the case cited, 163 Virginia 819, there was a direct payment and the

page 288 } material men and subs had no chance to get the money. Here they did have a chance. They had access to it.

Court: I'll give it.

Mr. Little: I want to show—

Court: You got it down at the bottom again.

Mr. Little: What?

Court: Such payment to Burlee Rowe has no effect whatsoever.

Mr. Little: We can say Burlee Rowe and Burlee Rowe and others.

(At this time the Court then continued on to the other Instructions after which the Court returned to Instruction "F").

Mr. Little: I have amended it as I am now presenting it to the Court and request that it be given in its amended form.

Court: All right.

Mr. Pitchford: The Instruction as now amended reads, "the Court instructs the jury that, as a matter of law, even if you believe from a preponderance of the evidence that the defendant, Frank Paulson, paid the entire amount in his subcontract with Burlee Rowe for the plumbing work in the construction of the G. W. Watkins Elementary School, such payment has no effect whatsoever upon the claim
page 289 } of the plaintiff against both defendants." The defendant objects to Instruction "F" as proposed for the reason that it does not—it is not supported by the evidence. It ignores the agreement existing between Paulson and Folse. It is prejudicial to the interest of Paulson and his surety, the Aetna Casualty Surety Company in that it ignores the fact that they were joint checks and a joint right of control on the part of the plaintiff in this case and Rowe and for the further reason it is covered by other Instructions that I have already objected to and granted over my objection.

Court: Pay for what? Pay Burlee Rowe for the work?

Mr. Little: I didn't say pay Burlee Rowe.

Court: You said pay Burlee Rowe for the plumbing work.

Mr. Little: The entire amount owed on his sub-contract with Burlee Rowe for the construction. In other words, I'm saying the amount of the sub-contract—how much has been paid for plumbing work has nothing to do with this case.

Court: No, this is for material.

Mr. Little: That's right.

Court: That's what I want to understand. You ought to say since it is for materials furnished

Mr. Little: All right, sir.

Court: Granted as amended.

page 290 } Mr. Pitchford: Note my exception. I except for the reasons stated.

PLAINTIFF'S INSTRUCTION "G."

(Granted).

Mr. Pitchford: "Reasonable price."

Court: I don't think that makes any difference.

Mr. Macaulay: No evidence in the record of unreasonable.

Mr. Pitchford: You might show a reasonable price, I submit.

Court: All right.

Mr. Pitchford: I object to it unless amended in that respect.

Court: Granted.

PLAINTIFF'S INSTRUCTION "H."

(Granted):

Court: There ought to be some limitation.

Mr. Macaulay: I didn't know whether under the statute, your Honor, it was permissible to state a date because that might—

Court: They can find it but they can't find something absurd. If they do, I would have to throw it out. Suppose they find from 1900.

Mr. Little: How much power do you have? I think we have to gamble if they gave us interest from 1956, you would throw it out, throw the interest out.

Court: That's right.

page 291 } Mr. Little: Throw the interest part out. If they pick the date—could be supported by the evidence. We're willing to say if Mr. Pitchford will agree to it, no earlier than December 1, 1958.

Mr. Pitchford: Then you're calling attention to one particular phase of the case.

Court: What do you want to put in there?

Mr. Pitchford: It is not my Instruction. I can't write it for them.

Court: You have an objection?

Mr. Pitchford: Yes sir. The objection is as written it is confusing and indefinite.

Mr. Macaulay: Just as the statute is indefinite.

Mr. Pitchford: I didn't make the law. I have never been to the Legislature and I can't apologize for it.

Court: I think it ought to be some limitation for it.

Mr. Little: I'm perfectly willing to agree to say, "but not before December 1, 1958" which is—

Mr. Macaulay: We're giving away—

Mr. Little: We're giving away a lot of interest because the July—well, the August invoices of course were past due by October the first, and the September ones were past due by November the first.

Court: We ought to say within the time—

page 292 } Mr. Macaulay: We ask for November first in our motion for judgment and we—

Court: They could find certain parts from the time it was first due back from July to August. You can give them that thirty days, say the 30th of August. They can find some on that.

Mr. Macaulay: The record shows your Honor, that we had no objection to not letting it begin before December first, 1958.

Mr. Little: I think it would be harmless error, sir, if we suggest putting a limitation in December the first, where under the evidence conceivably they could go back further but if the Court wants to put a limitation in, we'd be willing to go along with that.

Court : "Not earlier than the account was due" or something like that.

Mr. Little: All right, if you want to phrase it that way.

Court: Let's put it in the language you want.

Court: "But not earlier than the date the accounts sued the accounts sued upon were due."

Court: "But not earlier than the dates the accounts became due."

Mr. Little: That's better.

Court: "But not earlier than the dates"—

page 293 } Mr. Little: "The accounts sued upon became due."

Court: "But not earlier than the dates the accounts sued upon became due." Granted as amended.

Mr. Pitchford: I still object to "H" because of the way it is drawn and amended. It is still confusing, indefinite and uncertain.

Court: Granted.

Mr. Pitchford: Prejudicial.

DEFENDANT'S INSTRUCTION NUMBER 1

(Granted):

Court: "Money damages."

Mr. Pitchford: On the bond to recover money damages.

Court: Recover money. I don't think you need "damages". No damages in here.

Mr. Pitchford: Breach of contract.

Mr. Little: I don't think you need, "for money damages." I'll agree—the standard instruction along this line, I believe, reads, "the Court instructs the jury that in every civil action the burden is upon the plaintiff in the suit to prove by a preponderance of the evidence that the plaintiff is entitled to recover and that the plaintiff must prove further by a preponderance of the evidence the amount of his damages." I mean that's all. He's just trying to throw in money damages. I don't see any need for it.

page 294 } Court: How about leaving it down in the other place? "Recover money damages". Can the jury walk around?

Mr. Little: No objection.

Mr. Pitchford: I'm agreeable to the jury walking around.

Court: I'm going to strike it out one place.

Mr. Pitchford: How many times are you going to strike it out?

Court: Just one place.

Mr. Pitchford: All right, then as long as the Court is going to do that, "the Court instructs the jury that in every civil action" we'll delete, "for money damages" and pick it up, "the burden is upon the plaintiff."

Mr. Little: I object to the next—I think the whole—you want me to state my objection to this, or do you want to go ahead?

Court: Let's get through with it first.

Mr. Little: This is as redundant as can be, I think.

Court: Yes.

Mr. Little: I think the only way—

Court: This is just a general Instruction.

Mr. Little: That's right. All you're trying to say, "the Court instructs the jury that in every civil action the burden of proof is upon the plaintiff to prove not only that he is entitled to recover but the amount of his damages"

page 295 } and that's—it. I think it's too redundant to put in the sense this burden rests upon the plaintiff throughout the entire trial.

Court: That comes out of automobile cases.

Mr. Little: That's right.

Court: You ought to have "defendants."

Mr. Pitchford: I'm willing to change wherever you got, "defendant" change it to "defendants."

Court: I put an 's" in.

Mr. Little: In the second paragraph, "upon surmise and conjecture." I think that's fine. I have no objection. I think the next sentence in the second paragraph is just a repetition of what has been said before.

Court: That's pretty well been said up there too.

Mr. Little: It has.

Court: Granted as amended.

Mr.Little: That's all right now.

DEFENDANT'S INSTRUCTION NUMBER 2

(Refused):

Court: All right, number 2.

Mr. Little: Sir, I think this is going again right into what we—the record will show that we have had several conferences on today and I just think it's completely against the entire theory.

Court: I couldn't do this. I couldn't go back page 296 } and put the evidence all back.

Mr. Little: That's right, sir.

Mr. Pitchford: I submit to you sir, that we are entitled to Instruction Number 2, on the evidence of Paulson, if for no one else to the effect that he issued these checks or caused these checks to be issued jointly to Rowe and to Hajoca with the distinct understanding that Hajoca would protect its claim as a material man and there was one other. Let me think for a second. That he was never advised in anywise about the check being applied for any purpose other than for material. This Instruction is the only way we can submit to the jury and have it consider the testimony of Paulson and the defense to which we're entitled under the testimony. It comes out of the case of *Sutton Company* v. *Wise Contracting Company,* 197 Virginia, 705.

Court: I refuse it. I got to be consistent.

Mr. Pitchford: I except to the ruling of the Court for the reasons stated.

DEFENDANT'S INSTRUCTION NUMBER 3

(Granted):

Mr. Macaulay: Your Honor, we object to this Instruction because at this time it attempts to inject some question as to value of material. No evidence whatsoever as to that.

Court: No attack of it anywhere.

Mr. Pitchford: I don't have to attack it. Rea-
page 297 } sonable value.

Court: I refuse it as offered. You say, "reasonable value, fair and reasonable value."

Mr. Pitchford: Should be limited in view of the Court's ruling, I now move to delete the words, "fair and reasonable" on line six of the Instruction.

(At this time Mr. Pitchford then read the Instruction as amended).

Court: What's the objection to that?

Mr. Little: Sir, actually I don't believe—I think the only term that could be used is the price on the invoices because there's no other evidence.

Court: Not saying it isn't. Furnished by them. That doesn't only do that but to use in the school is another thing too.

(The Court then deleted the words "fair and reasonable").

Court: I don't see how that can hurt you any way in the world now. Limited to value of the materials furnished by them, used in the school.

Mr. Little: Unless he stands up and starts arguing before the jury about now you got to decide what the value of these materials are. I mean they have got to have evidence on it.

Court: I'll tell them right now, nothing on
page 298 } either side to show the value on either side except
what has been introduced by Hajoca Corporation.

Mr. Little: Right, sir.

Mr. Macaulay: With that understanding only, we'll go along with that Instruction.

Court: Granted as amended.

DEFENDANT'S INSTRUCTION NUMBER 4

(Refused):

Mr. Macaulay: The same objection as to the one that was refused, your Honor. What the amount of this—these joint checks totalled is completely immaterial in this particular case.

Court: I have to hold that again.

Mr. Pitchford: Now just a minute, please. I wish to amend that Instruction by taking out, "reasonable" so that we can consistent with Instruction Number 3. This Instruction is what the Court said it would give me a while ago.

Court: I said I'd give you one that Paulson is not required to pay but once, but this says more than I told you.

Mr. Pitchford: This Instruction is supported by the evidence of Paulson. It's supported by the case of *Luck* v. *Boatwright.*

Mr. Macaulay: No evidence that he's paid twice, your Honor, as far as this Plaintiff is concerned.
page 299 } There's no evidence whatsoever. There's evidence he has paid once, and this says he's required to pay only once. That infers he may have paid more than once It's a clear—

Court: I'll give you a simple Instruction, "the Court instructs the jury that the defendant is not required to pay but once for materials furnished."

Mr. Pitchford: I take it from what the Court said you refused Instruction 4 as offered?

Court: Yes sir.

Mr. Pitchford: I offer a substitute for 4, and I will ask it to read in this Instruction, "the Court instructs the jury that the defendant, Paulson, as general contractor is not required to pay for the materials supplied by Hajoca more than once." Is there any objection to that?

Court: I can't see any objection.

Mr. Macaulay: I object to that strenuously because that infers he's paid Hajoca more than once. There's no evidence he's paid more than once.

Court: This man said he paid for some items they didn't give him credit for. They may infer they didn't give him credit for it.

Mr. Little: We note our objection. It is very misleading to the jury, particularly in the light of the Court's ruling on these other Instructions.

Court: I'm saying he's required to pay only
page 300 } once. Let's see what he is going to offer first.

Mr. Pitchford: I dictated it. Did you listen?

Court: No, I didn't listen. "For any materials."

Mr. Pitchford: "For any materials more than once" instead of, "materials," for any materials more than once.

Mr. Macaulay: We think the jury could reasonably be instructed they may deduct from the claim any item which is not shown by a preponderance of the evidence.

Court: They're entitled to those that didn't go in the school that he testified he doesn't know is in there. There's a question about whether the gas thing is in there.

Mr. Macaulay: But this Instruction goes much further than that and the jury could infer from that he's already paid —Hajoca has been paid more than once.

Court: I don't see how they could.

Mr. Macaulay: What's the basis for it? There's no—

Court: There is some basis for that part of it because the man said it was never put in the building in the first place, if thats the one. This man testified an electric was put in there and the specifications call for a gas. Refuse the original 4, as offered.

Mr. Pitchford: We re-wrote 4, and reoffered it

PLAINTIFF'S INSTRUCTION 4-A.

(Granted):

page 301 } Mr. Pitchford: You refused 4, and I dictated another one in your presence and you indicated you would give it. They objected to it. It is now typed up.

Mr. Macaulay: Your Honor, we object.

Court: What is your objection to it?

Mr. Macaulay: We object most strenuously to this Instruction because it implies—

Court: It doesn't imply a thing in the world. He's not required to pay but one time for any material.

Mr. Macaulay: There's no evidence in the case that the general contractor paid for any materials more than once so far as my recollection is concerned. and it injects a note for the consideration of the jury which would be highly prejudicial to the plaintiff. For that reason we strenuously object to the granting of the Instruction.

Mr. Little: May I add one statement to it. I want to congratulate Mr. Pitchford because after twenty Instructions he's finally gotten in the back door with this one because

this will immediately allow him to get up there and start arguing all of this estoppel which is misleading..

Court: No, he won't.

Mr. Little: The only way he can prove that they paid for it once already is to go into the agreement that he says existed between Mr. Paulson and Mr. Folse. In other words, this instruction is just another way of expressing page 301-A } the many that you have refused on the grounds we would have to start trying the case over again.

Court: I won't let him do that.

Mr. Little: All right, sir.

Court: Granted.

Mr. Macaulay: The plainitff would like to except to the granting of Instruction 4-A.

Court: Granted.

page 302 } DEFENDANT'S INSTRUCTION NUMBER 5.

(Refused):

Court: I refuse 5, as offered.

Mr. Pitchford: Wait a minute. You have held that it didn't. I still offer the Instruction and point out to you again that we're entitled to it under the *Luck* case and under the testimony of Paulson that has not been disputed.

Court: Refused.

Mr. Pitchford: Exception.

DEFENDANT'S INSTRUCTION NUMBER 6.

(Refused):

Mr. Little: You covered that in that very long number 1 Instruction.

Mr. Pitchford: No sir, it is not covered and it's an entirely different principal of law and I submit I'm entitled to it. You look at it again before you mark it refused.

Court: All right, what have you got to say about it?

Mr. Pitchford: It is much different from 1, in that this Instruction number 6, states that if there is—if the evidence is evenly balanced then a duty devolves upon the defendant—the jury to bring in a verdict for the defendant.

Mr. Little: I submit this is just another way of expressing preponderance of the evidence which we have covered I think three times already.

Court: Yes, we certainly covered it. Refused. Note your exception.

page 303 } Mr. Pitchford: I except to the Court's refusal to grant Instruction Number 6, for the reasons stated.

DEFENDANT'S INSTRUCTION NUMBER 7.

(Granted):

Court: Credibility of witnesses. We got one.
Mr. Pitchford: This is written differently.
Court: It's a stock Instruction.
Mr. Pitchford: This is not a stock Instruction.
Court: I give it pretty nearly every time.
Mr. Little: I don't mind. You have given it once.
Court: No, there are some things in your's that are not in this.
Mr. Little: I don't object to this.
Court: Granted.

DEFENDANT'S INSTRUCTION NUMBER 8.

(Granted):

Court: Haven't you got that in the other Instruction?
Mr. Macaulay: This is not an automobile case.
Mr. Pitchford: Still a civil action we have here, my friend.
Court: You got a whole lot of this.
Mr. Little: This is wonderful for eye-witnesses in an automobile accident.
Mr. Macaulay: What's there about seeing and knowing it in this case?

page 304 } Court: I don't know why this one fits this one to save my life.

Mr. Pitchford: I think it is a general Instruction that instructs the jury generally and to the law of preponderance and what preponderance is and how they arrive at preponderance. It is the correct statement of the law and the Instruction to which the defendant is entitled.
Mr. Little: They're going to be asleep by the time they hear the Instructions.
Court: I don't see anything that could hurt anybody to save my life.
Mr. Little: This is inapplicable to the facts in this case.
Court: It is an automobile case.

Mr. Little: Seeing and knowing the facts to which they testify. If you want to give it, I'll go along.

Court: It doesn't make any difference to me but I don't think it is applicable to this kind of a case.

Mr. Little: I hate to see it go in, that's all.

Court: One without weighing the other, over-balance the other by the slightest degree, that's preponderance.

Mr. Pitchford: That's another way of saying preponderance. You can write preponderance a dozen different ways.

Mr. Macaulay: Your Honor, we think it is
page 305 } surplusage but we have no objection.

Court: I don't think it amounts to anything either but if you want it—

Mr. Pitchford: Yes, I want it.

Court: He wants it. No objection?

Mr. Little: No objection.

Court: Granted.

DEFENDANT'S INSTRUCTION NUMBER 9.

(Refused):

Court: If I gave you that I might as well go back and start the case over again.

Mr. Pitchford: That's exactly what the money was paid to them for. It has not been disputed. Clearly entitled to the Instruction as supported by the evidence. It's undisputed evidence.

Court: Then I'm dead wrong. Refused.

Mr. Pitchford: I most earnestly except to the ruling of the Court for the reason stated.

Court: All right, sir. Refused.

DEFENDANT'S INSTRUCTION NUMBER 10.

(Refused):

Court: Doesn't say that in the cases any more. Not every item.

Mr. Macaulay: If there's conflicting evidence about an item.

Court: That's a different proposition, but there isn't any here. What have you got to say about Instruction 10?

Mr. Pitchford: I think we're entitled to In-
page 306 } struction 10. It properly states the principal of law applicable to this case.

Mr. Little: By a preponderance of the evidence and with

reasonable certainty. I think that's misleading and contradictory.

Court: Yes. I have given you plenty of them. I'm going to refuse that. I gave you 8; sufficiently covered, got it in several other Instructions. You got it in number 1, and 8, and you want it now in 10.

Mr. Pitchford: I except to the ruling of the Court for the reasons stated.

Court: Refused.

DEFENDANT'S INSTRUCTION NUMBER 11.

(Refused):

Court: I can't say that. If I do, I'd have to throw the whole thing out.

Mr. Pitchford: That's the law. 166 ALR 642.

Court: I'll refuse it. I have to be consistent.

Mr. Pitchford: I take exception. You understand I have cited the law in ALR 166.

Court: Yes sir, I understand that. You gave it to me over and over.

Mr. Pitchford: And you won't follow it yet.

Court: No sir, I can't now.

Mr. Pitchford: Exception.

page 307 } Court: Refused.

DEFENDANT'S INSTRUCTION NUMBER 12.

(Refused):

Court: That's the same thing.

Mr. Pitchford: No, 130 ALR 199 under annotation Two, I read you a while ago.

Mr. Macaulay: You're saying Hajoca got to take out all the money for labor and everything else and hold up all the money .

Court: If I held that now, I'd have to go back and try the case over.

Mr. Pitchford: You might have to do that anyway.

Court: Refused.

Mr. Pitchford: I except to your refusing to grant Instructions 11 and 12, for the reasons stated, namely that I cited the law and you refused to follow it.

Court: Refused.

DEFENDANT'S INSTRUCTION NUMBER 13

(Refused):

Court: You want that Instruction?

Mr. Little: We concede that. We're not seeking that eight dollars fifty-five cents.

Mr. Pitchford: There are some others I didn't have time to find.

Court: Tell me. I'll make them take them out.

page 308 } Mr. Pitchford: The jury has the bill of particulars. They can see it. I think we're entitled to 13.

Mr. Little: There's only one service charge on the bill of particulars and we have taken that out.

Court: Eight dollars something.

Mr. Little: Eight dollars seventy cents. I don't believe from July 30, on.

Mr. Macaulay: The evidence disclosed—

Mr. Pitchford: It is supported by the evidence and we're entitled to it.

Court: It's been conceded and taken out.

Mr. Pitchford: Then you're calling attention to the jury one particular fact.

Court: Yes sir.

Mr. Pitchford: I don't think it is proper. I insist on having Instruction Number 13.

Court: Refused. Conceded and it comes out.

Mr. Pitchford: I except to the Court's ruling.

Court: Refused.

DEFENDANT'S INSTRUCTION NUMBER 14.

(Granted):

Mr. Macaulay: We object to that for the reasons previously stated, and we'd like the record to show that we object to any and all Instructions except to the individual items which we contend there's any dispute, but leaving that aside—

page 309 } Mr. Pitchford: All fourteen does tell you, if you don't find against Paulson you can't find against Aetna.

Court: That's the only thing it says.

Mr. Pitchford: That's all the Instruction does say, and I think that's necessary to give to the jury.

Mr. Little: You can give that.

Court: I think I better give that one. I think I have to. Granted.

Mr. Little: Your Honor, I think that should be amended seriously to this effect. By adding on to it, if you are going to give that type of Instruction, we have not requested it, but you should also go along and point out to the jury if from all of the evidence and the Instructions of the Court there is liability on the part of Paulson then your verdict should be in favor of the plaintiff against both defendants.

Court: You put it in an Instruction. I'll give it to you.

Mr. Little: All right.

Court: Granted.

(The Court then continued with the remaining Instructions after which the Court returned to Instruction Number Fourteen).

Mr. Macaulay: We have added certain language in Instruction Number Fourteen which simply states the converse of the part previously provided by the Instruction previously granted or previously offered, I should say, by the defendant.

page 310 } Mr. Pitchford: I thought we covered Fourteen, and granted it.

Court: We did, but he wants to amend Fourteen and put his part on it. I told him I would give his Instruction if he gave it to me.

Mr. Macaulay: The Instruction as amended or proposed to be amended reads as follows:

(Mr. Macaulay then read the Instruction as he proposed).

Court: I'll give you that in a separate Instruction. I told you I would do that a minute ago.

(The counsel for the Plaintiff then prepared Plaintiff's Instruction "I" which was later tendered to the Court).

DEFENDANT'S INSTRUCTION NUMBER 15.

(Refused):

Mr. Pitchford: I want to take out, "reasonable" to make it consistent.

Court: Haven't we got that same thing somewhere?

Mr. Pitchford: No sir, I don't believe so.

Mr. Little: Getting right into that same thing again. Exceed the difference between the amount paid by Paulson and the value of materials actually furnished. He's getting in that back door again.

Court: Trying to. Refused.

Mr. Pitchford: I take exception to the refusal
page 311 } of the Court in not granting Instruction 15, because it is amply supported by the evidence and we're entitled to it.

Court: Refused.

DEFENDANT'S INSTRUCTION NUMBER 16.

(Refused):

Court: What do you base 16 on?

Mr. Pitchford: 16 is the two hundred some dollars they handed back to the man and then charged it to Paulson for materials that went into the job. All they're entitled to is the price of the material, not the price of the material and the discount they gave to Rowe for buying them.

Court: I refuse it.

Mr. Pitchford: Exception for the reasons stated.

Court: Refused.

DEFENDANT'S INSTRUCTION NUMBER 17.

(Refused):

Court: This is wrong, isn't it?

Mr. Pitchford: No sir, no sir.

Mr. Little: It has no more application in a suit on a bond than flying to the moon.

Mr. Pitchford: That's the very reason we have not asserted fraud, deceit and things of that sort. I think it is an honest mistake.

Court: I don't think it is applicable.

Mr. Pitchford: It is applicable. Before you refuse it, I want you to read it carefully.

Court: I'd be going against my own holding
page 312 } if I did that.

Mr. Pitchford: No sir, you would not.

Court: I refused 17 and note your exception.

Mr. Pitchford: I except again to the ruling of the Court for the reason stated and the law cited.

DEFENDANT'S INSTRUCTION NUMBER 18.

(Refused):

Court: The same thing to 18. Refused.
Mr. Pitchford: I except to the refusal to grant the Instruction.

(The Court then continued with the remaining Instructions after which the Court returned to Instruction Number Eighteen).

Mr. Pitchford: Number 18—you refused 18, and this 18 submits to the jury whether or not Hajoca Corporation should have applied all of the money which Frank Paulson paid by joint check under all of the circumstances and I submit that with the word ,"reasonable" deleted, that that Instruction should be granted because that is the gist of the whole case and the very thing that the jury is supposed to pass on. By your refusing to give Instruction 18, after taking out the word, "reasonable" you have taken away from the jury the consideration of the case and depriving the defendant of virtually the only defense he has.
Court: All right.
Mr. Pitchford: What is your ruling?
page 313 } Court: I ruled I refused it.
Mr. Little: May it be understood we have expressed our exceptions to the various Instructions and that we don't have to repeat them again.

DEFENDANT'S INSTRUCTION NUMBER 19.

(Granted):

Court: All right, what is your objection on that?
Mr. Little: No. 19, sir, we have in there the materialman must show the materials furnished were furnished in accordance with the plans and specifications.
Court: I couldn't just dump a load of material and charge it up to them.
Mr. Little: No sir, the undisputed evidence is this building has been accepted. If you let me go on, there's nothing in the statute giving the right of action about plans and specifications as an essential element of the plaintiff's case.
Court: I would think common sense would be that you could not just go there and dump a load of radiators in there if they had no use for them.

Mr. Little: Right, but if it's used in there we're entitled to recover for it. It might have been some agreement that the general contractor and the architect agreed to substitute somethnig for something else.

Court: I'll put the word, "used" in there.

page 314 } Mr. Little: If it's in that building and hasn't been paid for, we're entitled to recover. This doesn't say that

Court: It has got to be used.

Mr. Little: That's what I mean, used in that building.

Mr. Macaulay: In the first place, there's no evidence that any of this material was not in accordance with the plans and specifications.

Court: The heater came in.

Miss Joyce: Orangeburg pipe and heater being different from specifications.

Mr. Macaulay: No evidence it's not better than the specifications.

Mr. Little: You can't—

Court: Your man testified both ways on this thing, but he also said you all must have made the mistake, the person fixed that order must have made a mistake.

Mr. Macaulay: It's imposing an additional requirement not imposed by the architect.

Mr. Little: If the architect accepted it and it is physically in there, we're entitled to be paid for it. Your Honor, I think if you'll approach it from this direction, no supply house is furnished a copy of the plans and specifications.

page 315 } Court: No.

Mr. Pitchford: They were in this case, old friend.

Mr. Little: No, beg your pardon. No evidence whatsoever that we ever had a copy of the plans and specifications. That is the Hajoca Corporation and it's ridiculous, this plumbing supply house sitting up there, and a man orders material delivered to the job site and he uses it in the building, and then do you mean you can come back and tell them, "no, you furnished it and it's in the building. It didn't meet the plans and specifications. You don't get paid for it."

Court: I'll put, "used in the building." Then you can recover.

Miss Joyce: Before you amend that Instruction, I'd like to read you this citation, American Jurisprudence, *American Surety Company* v. *Planks and Whitsett,* 159 Virginia 1, page 11.

(The citation referred to above was then read to the Court).

Mr. Little: Which they never see.

Mr. Pitchford: They have a little duty too.

Miss Joyce: The burden is on them to find out.

Mr. Macaulay: Let's look at an ordinary situation. Hajoca has a warehouse in Richmond. Rowe comes in. "I want five bath tubs going to the school." They may be the
page 316 } right or wrong bath tubs. In any event, they go in the school. The architect says the building has been completed according to plans and specifications. There is evidence that the architect accepted it in there, as being according to the plans and specifications, and now to come up and raise this extraneous matter would mislead the jury.

Miss Joyce: This has been held in the long line of cases followed in *C. S. Luck* vs *Boatwright*. Performance of these conditions were shown in the case and hence the sub-contractor did recover.

Mr. Macaulay: That's the sub-contractor that has plans.

Court: I'm going to put that requirement in there if they used it. I'll put that in there. I want to put in there, "and were used." Put "used" or whatever you want to put in there. What do you want to put in there? "Were used" or put, "in use."

Mr. Pitchford: "Are used."

Mr. Macaulay: "Are used."

Court: In the first paragraph, first, first semicolon. I'm going to put, "are used" up there too.

Mr. Macaulay: "Are used in the building", your Honor.

Court: I just said, "are used."

Mr. Macaulay: "Are used in the construction."

Mr. Pitchford: I think, "are used" is enough
page 317 } to cover it.

Mr. Macaulay: What's wrong with the additional language? It certainly clarifies it.

Court: "Are used in the building."

Mr. Pitchford: "Are used in the school."

Mr. Macaulay: This is general construction. "Are used in the building."

Court: Are used in the building. "Or was not used".

Mr. Macaulay: I object to that last language, your Honor. It's extraneous. Has nothing to do with this case. It has nothing to do with the evidence. The School Board's approval hasn't even entered into this case.

Court: Yes, they have.

Mr. Macaulay: They may. They issue their approval on the basis of the architect's certificate.

Court: I understand but that's approval.

Mr. Macaulay: We're saying there may be material which, in accordance with the plans and specifications, are used in the building for which the materialmen can recover no money.

Court: No, it says the materialman must show the materials furnished were in accordance with the plans and specifications or used in the building. If the jury be-
page 318 } lieve from the evidence that any portion of the material furnished by the Corporation was not in accordance with the plans and specifications or was not used, then neither of the defendants in this suit can be required to pay for the same.

Mr. Macaulay: I would like to note an exception to the Instruction Number 19, as amended, because the position of the plaintiff in this case is that it introduces extraneous matter for the consideration of the jury which has no part in this case.

Court: Granted as amended.

(The Court then continued with the remaining Instructions after which the Court then returned to Instruction Number 19).

Mr. Pitchford: Going over the Instructions, we did it so fast I did not get in my exception to the amending of Instruction Number 19 and to the deleting of the last words of that Instruction, "and this is true even though the material may have later been approved by the School Board." I submit that that Instruction as offered is proper and we were entitled to it as proper. At the same time, I did not voice any objection to the amendment, "that are used in the building," so my objection is really to the deletion of the last paragraph.

PLAINTIF'S INSTRUCTION "I."

(Granted).

Court: Granted.

(The Court and counsel for both sides then re-
page 319 } turned to the Courtroom).

(The jury resumed their seats in the jury box).

Court: You waive the poll?
Mr. Pitchford: Yes sir, we waive the poll.
Court: Both sides waive the poll. Members of the jury, as you have been told many times, you are the sole judges of the evidence in this case. You will now apply the written instructions which I will give you. I'm going to read them to you. It is the law governing the case. You will apply this to what you consider to be the correct evidence in the case and after you have decided on that you will go to your room and consider the case. It is necessary for one of you to be elected foreman.

I'll ask that the foreman write the verdict on the back of anyone of these instructions that would be satisfactory with you all. The foreman may write the verdict—the verdict on the back of any one of these instructions, signed "John Jones" or "James Jones" or whatever your
page 320 } names are, "foreman". Whoever is foreman, sign it as foreman. Put "John Jones, Foreman".

In the event you find for the defendants, it is not necessary to say more than "We, the jury on the issue joined find for the defendants. John Jones, Foreman."

If you find for the plaintiff, you say, "We, the jury on the issue joined find for the plaintiff and assess his damages at" so much, signed, "John Jones, Foreman."

Mr. Little: Against both defendants.
Court: I'm going to instruct them. These are the written instructions of the Court.

(The Court then read the Instructions to the jury).

Court: I'll ask you again to elect a foreman and let him write the verdict on the back of one of these instructions.

All right, sir. Now these gentlemen have agreed to twelve minutes on both sides?
Mr. Little: Yes sir.
Court: Here are the exhibits and here are the instructions.

(Counsel for both sides then presented their closing argument to the jury).

page 321 } Court: I ask the jury to write the verdict on the back of an instruction, signed by the foreman.

(The jury then retired to consider its verdict and returned with the following verdict).

Mr. Little: Waive the poll.
Court: Do you waive the poll?
Mr. Pitchford: Waive the poll.
Court: Have you all agreed upon a verdict?
Mr. Fauntleroy (Juror): Yes sir.

"We the jury on the issue joined find for the plaintiff against the defendants in the amount of $5,608.21 with interest to begin on the first day of August, 1959.

(Signed) R. B. FAUNTLEROY, Foreman."

Court: All right, any motions or anything before the jury is discharged?
Mr. Pitchford: I have no motions before the discharge of the jury, no sir.
Mr. Little: May I approach the Bench with Mr. Pitchford?

(The attorneys for both sides then approached
page 322 } the Bench).

Court: You don't want anything else?
Mr. Little: No sir.
Court: You are satisfied with the form of the verdict?
Mr. Little: Yes sir.

(The jury then left the Courtroom).

Court: All right, sir.
Mr. Pitchford: If the Court please, the defendant moves to set aside the verdict of the jury and grant a new trial for the following reasons. One, the verdict is contrary to the law and the evidence and is without evidence to support the verdict. Two, errors committed by the Court in admitting irrelevant, immaterial and prejudicial errors. Three, errors of the Court in excluding relevant evidence offered by the defendant. Four, errors of the Court in limiting cross examination and direct evidence concerning billing prior to July 30. Five, errors of the Court in granting instructions requested by the plaintiff and refusing and altering instructions offered by the defendant, particularly all the instructions

page 323 } dealing with the application of the doctrine of estoppel and as to the application of proceeds of checks payable jointly to Hajoca and Rowe. Six, for the unintentional conduct, misconduct of the Court in its refusal to declare a mistrial on motion of the defendant. Seven, for all other motions and exceptions taken by the defendant during the course of the trial and not expressly stated above.

Court: You want to be heard on it tonight, tomorrow morning? You have too many on there.

Mr. Pitchford: I can't do it that quick. Not in the morning, no sir.

(The Court then continued the case for argument on the motions until September 12, 1959.

* * * * *

PLT. EX. #5.

7/24/59.

RECAPITULATION OF B. ROWE PLUMBING AND HEATING ACCOUNT ON G. W. WATKINS ELEMENTARY BUILDING JOB.

Month	School Account	Discount	Net Due	Joint Check	Refund	Balance Due
MARCH	2377.03	47.54	2329.49	3073.26	743.77	NONE
APRIL	1340.41	26.81	1313.60	2790.00	1476.40	NONE
MAY	992.29	19.85	972.44	2337.50	1365.06	NONE
JUNE	2470.86	49.42	2421.44	4044.92	1623.48	NONE
JULY	3465.58	60.00	3405.58	3000.00	—	405.58
AUGUST	4940.67	—	4940.67	—	—	4940.67
SEPTEMBER	369.03	—	369.03	—	—	369.03
OCTOBER	(70.54) cr	—	(70.54) cr	—	—	(70.54) cr
TOTAL	15,885.33	203.62	15,681.71	15,245.68	5,208.71	5,644.74
						27.88
					Total	5616.91

DEFENDANT'S EXHIBIT #11.

7/24/59.

AGREEMENT BETWEEN CONTRACTOR and OWNER.

THIS AGREEMENT, Made this Twenty-Seventh day of December, in the year Nineteen Hundred and Fifty-Seven, by and between FRANK PAULSON, tr/as PENINSULA CONSTRUCTION COMPANY, HAMPTON, VIRGINIA, hereinafter called the Contractor; and THE COUNTY SCHOOL BOARD OF NEW KENT COUNTY, VIRGINIA, hereinafter called the Owner;

WITNESSETH: That the Contractor and the Owner, for the consideration hereinafter named, agree as follows:

ARTICLE 1. The Contractor agrees to provide all materials to perform all the work shown on the drawings entitled "Elementary Building for G. W. Watkins School, New Kent County, Virginia," and described in the specifications entitled "Elementary Building for G. W. Watkins School, New Kent County, Virginia," including Addendum No. One, dated 9 December 1957, and Addendum No. Two, dated 11 December 1957; all prepared by the Architect and in these contract Documents, and to do everything required by the General Conditions of the Contract, the Specifications, and the Drawings.

ARTICLE 2. The Contractor agrees to furnish the Owner with bond underwritten by a surety company authorized to do business in the State of Virginia, in the amount of 100% of the contract, at the time of signing the Agreement; such bond to be approved by the Architect and the Owner before any payments are made, as provided under Article 4 of this Agreement.

ARTICLE 3. The Contractor agrees that work under this Contract shall be completed not later than 15 August 1958, and agrees that from the compensation otherwise to be paid, the Owner shall retain a sum of Fifty Dollars ($50.00) per day each day thereafter, Saturdays, Sundays and holidays included, that the work remains uncompleted, which sum shall represent the actual measure of liquidated damages which the Owner will sustain per diem by the failure of the undersigned to complete the work at the time stipulated and this sum is not to be considered in any sense a penalty.

ARTICLE 4. The Owner agrees to pay the Contractor in current funds, for the performance of the Contract, One Hundred Seventy Four Thousand, Four Hundred Dollars ($174,400.00), subject to additions and deductions as provided in the General Conditions of the Contract, and to make payments on account thereof as provided therein as follows: On or about the tenth day of each month, ninety per cent (90%) of the value proportionate to the amount of the contract, of materials suitably stored on the site to be incorporated in the work and of labor and materials incorporated in the work up to the first day of that month, as estimated by the Contractor, certified by the Architect, and approved by the Owner, less the aggregate of previous payments. Upon substantial completion of the entire work, a sum sufficient to increase the total payments to ninety-five per cent (95%) of the contract price and thirty (30) days thereafter, provided the work to be fully completed and the Contract fully performed, and provided further that the Contractor furnish the Architect with a certificate from the surety underwriting the bond, such certificate stating the surety is satisfied the balance be paid, the balance due under the Contract.

ARTICLE 5. The Contractor and the Owner agree that the General Conditions of the Contract, the Specifications, and the Drawings, together with this Agreement, form the Contract and that they are as fully a part of the Contract as if hereto attached or herein repeated.

The Contractor and the Owner for themselves, their successors, Executors, Administrators and Assigns, hereby agree to the full performance of the covenants herein contained.

IN WITNESS WHEREOF THEY HAVE EXECUTED THIS AGREEMENT AND AFFIXED THEIR SEALS THE DAY AND YEAR FIRST ABOVE WRITTEN.

ATTEST:

/s/ WM. O. FREEMAN (Seal)

/s/ FRANK P. PAULSON Owner
Peninsula Construction Company.

Recommended for Approval.

/s/ J. HENLEY WALLER, JR.

ATTEST:

..... (Seal)

By J. HENLEY WALLER, JR. (Seal)
County School Board of New Kent
County, Virginia.

A Copy—Teste:

H. G. TURNER, Clerk.

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