209 VA 24

Return to
FILE COPY
Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 6575

In the Supreme Court of Appeals of Virginia at Richmond

PROGRESSIVE CONSTRUCTION COMPANY, INC.

v.

LINWOOD A. THUMM, et al., t/a, etc.

FROM THE CIRCUIT COURT OF THE CITY OF NORFOLK

RULE 5:12—BRIEFS

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

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

HOWARD G. TURNER, Clerk.

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

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6575

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 12th day of January, 1967.

PROGRESSIVE CONSTRUCTION COMPANY, INC.,
Plaintiff in error,

against

LINWOOD A. THUMM AND WILLIAM H. BROWN, T/A VIRGINIA HEATING DISTRIBUTORS,
Defendants in error.

From the Circuit Court of the City of Norfolk
Thomas M. Johnston, Judge

Upon the petition of Progressive Construction Company, Inc., a writ of error is awarded it to a judgment rendered by the Circuit Court of the City of Norfolk on the 1st day of August, 1966, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and Linwood A. Thumm, et al., t/a, etc., were defendants; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

* * * * *

page 1 }

* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

Pursuant to the Rules of the Supreme Court of Appeals of Virginia, Rule 5, Section 4, the plaintiff hereby gives notice of its intention to apply to the Supreme Court of Appeals of Virginia for a Writ of Error to the judgment of said Court for the defendants in the above-styled cause; and it hereby designates as the Assignments of Error in this case the following, to-wit:

1. The Court erred in sustaining the defendants' Motion to Strike Plaintiff's evidence.
2. The Court erred in entering summary judgment for the defendants.

PROGRESSIVE CONSTRUCTION COMPANY, INC.
By ROBERT E. BROWN
Of Counsel

Filed Sept. 28, 1966. T. A. W. GRAY, D.C.

* * * * *

page 2 }

* * * * *

MOTION FOR JUDGMENT

TAKE NOTICE That the plaintiff moves the Circuit Court of the City of Norfolk, Virginia, for a judgment against you in the amount of Fourteen Thousand Nine Hundred Sixty-Eight and 72/100 Dollars ($14,968.72), together with the costs of this proceeding by reason of the following alternative causes of action, to-wit:

FIRST CAUSE OF ACTION

1. In June, 1964, and at all times pertinent to this cause of action, you were the sole proprietor and owner of that air conditioning and heating business known as Virginia Heating Distributors with offices at 535 West 25th Street, Norfolk, Virginia. Also in June, 1964, and at all times pertinent to this cause of action, you were an officer and controlling stockholder in National Sheetmetal, Inc. (hereinafter called National), a Virginia corporation, with its principal office located at 1298 East Indian River Road, Norfolk, Virginia.

2. On or about June 19, 1964, National contracted with Southside Plumbing Company, Inc. (whose name has subsequently been changed under applicable Virginia statutes to Progressive Construction Company, Inc., hereinafter called the plaintiff herein) to supply and install certain air conditioning and heating equipment for certain family housing units located at the Armed Forces Staff College and Camp Allen in the City of Norfolk, Virginia.

3. By March, 1965, it appeared that National, page 3 } which had been delinquent in its performance of said contract almost from the outset, would be unable to properly complete said contract. At that time, National was indebted to you for certain materials supplied it. In March, 1965, primarily for your own benefit, you did enter into a contract of guaranty with Progressive whereby you agreed to insure the proper performance of the aforesaid contract between Progressive and National you having entered into said contract of guaranty as an inducement to Progressive not to declare National in default of its aforesaid contract with Progressive.

4. In fact, National did default in its performance of its contract with Progressive, by reason of which Progressive, the plaintiff herein, has been caused to expend various sums to complete the work contracted to be performed by National, and guaranteed to be performed by you.

SECOND CAUSE OF ACTION

1. Plaintiff adopts, incorporates and realleges the allegations set out in Paragraph 2 of the First Cause of Action as if fully set out herein.

2. Plaintiff adopts, incorporates and realleges the allegations set out in Paragrajh 2 of the First Cause of Action as if fully set out herein.

3. By March, 1965, it appeared that National, which had been delinquent in its performance of said contract almost from the outset, would be unable to properly complete said contract. In March of 1965, you contracted with Progressive to undertake the completion of the aforesaid contract between Progressive and National, you being substituted for National and assuming all of its liabilities under the aforementioned contract between National and Progressive, National having agreed to this novation through you as one of its duly elected officers.

4. You did default in the performance of your said contract to complete the performance of the aforesaid contract between Progressive and National, by reason whereof Progressive, the plaintiff herein, has been caused to expend various sums necessary to effect such proper completion.

page 4 } THIRD CAUSE OF ACTION

1. Plaintiff adopts, incorporates and realleges the allegations set out in Paragraph 1 of the First Cause of Action as if fully set out herein.

2. The plaintiff adopts, incorporates and realleges the allegations set out in Paragraph 2 of the First Cause of Action as if fully set out herein.

3. By March, 1965, it appeared that National, which had been delinquent in its performance of said contract almost from the outset, would be unable to properly complete said contract. You, acting on your own behalf and as the duly authorized officer of National, did contract with Progressive to be jointly and severally liable with National to Progressive for the completion of the aforesaid contract between Progressive and National.

4. Both you and National did default in your joint contract to complete the performance of the aforesaid contract between Progressive and National, by reason of which Progressive, the plaintiff herein, has been caused to expend various sums necessary to effect said completion.

WHEREFORE, plaintiff moves the aforesaid Court for a judgment against you in the amount of Fourteen Thousand

Nine Hundred Sixty-Eight and 72/100 Dollars ($14,968.72), together with the costs of this proceeding.

PROGRESSIVE CONSTRUCTION
COMPANY, INC.
By H. LEE KANTER
Of Counsel

* * * * *

Filed in the Clerk's Office the 25th day of March, 1966.

Teste:

W. R. HANCKEL, Clerk
OLIVE C. GLODE, D.C.

* * * * *

page 15 }

* * * * *

In the Circuit Court of the City of Norfolk, on the 1st day of August, in the year 1966.

This day came again the parties, by counsel, and thereupon came the jury sworn herein on July 29, 1966, and having fully heard the evidence, said defendant, by counsel, moved the Court to strike out said plaintiff's evidence on all counts, which motion having been fully heard and maturely considered by the Court is sustained, the members of the jury discharged, and summary judgment entered thereon. Whereupon it is considered by the Court that said plaintiff take nothing by its suit herein and that said defendant go hence without day and recover against said plaintiff his costs about his defense in this behalf expended, to which action of the Court said plaintiff, by counsel, duly excepted.

* * * * *

page 4 }

* * * * *

LINWOOD A. THUMM, defendant, called as an adverse witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION (Adverse)

By Mr. Kanter:

Q. I am sorry, Mr. Thumm, I keep pronouncing it the other way. Will you tell us your name, sir?

A. Linwood Thumm.

Q. And your age, address, and occupation?

A. Fifty-one. My address is 2030 Hunters Trail. My occupation is distributing of heating and air conditioning equipment.

Q. And what is the name of your business, sir?

A. Virginia Heating Distributors.

Q. And do you now have a partner in that business, Mr. Thumm?

page 5 } A. Mr. William Brown, yes.

Q. And when was it that he became a partner?

A. Last year.

Q. Actually, when this matter started back in June of 1964 he was then an employe and not a partner. Correct?

A. That's correct.

Q. All right. Now, Mr. Thumm, will you tell us, sir, how long had you known Mr. Charles Jackson, your partner in the National Sheet Metal?

A. Roughly about ten years.

Q. Had you helped him theretofore in terms of the financing of any of his heating and air conditioning jobs?

A. No, sir.

Q. What connection, if any, did you have with Air Comfort, Inc., his own corporation?

A. As a supplier of materials.

Q. And did you ever have with him any relation like you had in National Sheet where you were to split some of the profit on the job in connection with that?

A. No, we did not.

Q. You just sold Air Comfort heating materials to go in various jobs?

Linwood A. Thumm

A. That's correct.

page 6 } Q. And you had known him for how long, sir?

A. About ten years.

Q. All right. Now, as I understand it, Mr. Thumm, you submitted a number of bids to a number of heating and air conditioning subcontractors for—or proposed prices of materials—I am sorry, rather than bids, proposed prices of materials that were to go into Camp Allen and Staff College job that Progressive eventually was awarded by the United States. Is that not correct?

A. That's correct.

Q. And amongst those people that you submitted cost of materials to was a Mr. Charles Jackson, who intended in turn to submit a bid on the heating and air conditioning work?

A. That's correct.

Q. Now, do you remember, Mr. Thumm, when it was that you and Jackson first had a conversation about his inability to handle the financing of the particular job for Joe Wood and suggested that you and he go into a partnership on the deal?

A. Actually, Mr. Jackson was indebted to Virginia Heating Distributors for a fair amount of money from his company, Air Comfort.

Q. How much did he owe you?

A. We had been talking about this for quite some

page 7 } time.

Q. I am sorry.

A. And when this particular contract came along or when this opportunity came along to get a contract, Mr. Jackson approached me and said, "Here is a way for you to recover some of your money that I owe you."

Q. How much did Charles or Air Comfort, which was Jackson's then operating corporation, how much did it owe Virginia Heating at the time this business, the bid to the United States, came up?

A. About twenty thousand dollars.

Q. So, in other words, Jackson eventually came to you and said that if you would go into a partnership with him and help him handle the supplying of materiel—

Mr. Hollis: If Your Honor please, Mr. Kanter has twice called this a partnership, and in his opening statement he acknowledged that it was a corporation.

Linwood A. Thumm

By Mr. Kanter:

Q. I beg your pardon. When I speak of National Sheet Metal, Inc., I mean it is a corporation which, as I understand it, you were fifty percent owner and Mr. Jackson was a fifty percent owner. Correct?

A. That's correct.

page 8 } Q. All right, sir. When he came to you he said that this was a chance to get back part of the twenty thousand that he owed you if you would help him with the materiel, the supplying of the materiel on the Camp Allen and Staff College job. Correct?

A. Yes.

Q. So I understand then that you and he went to counsel and formed or caused to be formed a corporation called National Sheet Metal, Inc.?

A. That's correct.

Q. That was a Virginia corporation?

A. (Indicated yes)

Q. As was mentioned before, you each owned half of the stock and resolutions were filed, I take it, with the banks that required your signature, together with his, in order to write corporate checks?

A. That is correct.

Q. Was there anybody else that was authorized to sign checks in National Sheet besides yourselves?

A. No one.

Q. All right, sir. Now, did you occupy any office at all in National Sheet?

A. I was assistant treasurer.

Q. Assistant treasurer. Who was the president of the company?

page 9 } A. Charles Jackson.

Q. And who was the vice president?

A. I don't believe we had a vice president. We had one other officer, who was a member of the legal firm of the company that—

Q. Bryan—Stanley Bryan's firm?

A. Stanley Bryan and Burk Moss.

Q. Firm of Moss and Bryan. And who was the secretary? Mrs. Jackson?

A. Yes.

Q. So it was Mr. Jackson and his wife were the main officers and you were being assistant treasurer primarily so you could countersign checks?

Linwood A. *Thumm*

A. I don't believe Mrs. Jackson was an officer. I think there were just three officers involved.

Q. Who was the actual treasurer of the company?

A. We had no treasurer. I was assistant treasurer and that was all.

Q. There was no treasurer at all?

A. None at all.

Q. But at any rate, I take it that you took the office of assistant treasurer so as really to protect yourself on the joint signing of the checks?

A. Primarily so that I could write the checks and have the access to the financial—

page 10 } Q. All right, sir. Actually, National Sheet, its office was out on 39th Street, as I understand?

A. Yes.

Q. Did it have an office before or when you formed this corporation did you-all rent this building or just how did you acquire that office?

A. We acquired this location after the contract had been secured, because it was a location much closer to the jobsite and much more advantageous than the location that Jackson previously had.

Q. All right. So National Sheet was operating out of the 39th Street address?

A. That is correct.

Q. And I take it that you were operating out of your own business headquarters of Virginia Heating?

A. Yes.

Q. And where is that, sir?

A. 25th Street.

Q. And did you spend most of your time at Virginia Heating or at National Sheet?

A. I went to National Sheet usually on Fridays to sign payroll checks and to go over the details of the workweek with Mr. Jackson and that was the only time that I spent at National Sheet Metal office.

Q. In other words, you were virtually inactive

page 11 } in National Sheet other than to go over there on Friday and sign checks and discuss generally the workweek with him?

A. And to make occasional trips to the jobsite, yes.

Q. Did you go onto the job at all for inspection, Mr. Thumm?

A. Once in a while, yes.

Q. But the balance of your time you stayed in your headquarters at Virginia Heating Distributors?

A. Yes, sir.

Q. And I assume, of course, that Virginia Heating Distributors was involved in selling materials to many other customers than National Sheet?

A. We wouldn't have been in business otherwise.

Q. And you were busy preparing proposed costs on other jobs and attending to the business of your own company?

A. That's right.

Q. All right, sir. Now, I hand you this contract, sir, and ask you if you can recognize that to be the subcontract for the heating and the air conditioning that was entered into between Progressive Construction Company and National Sheet Metal, Inc.?

A. This is the original contract.

page 12 } Q. And that was signed by whom on behalf of National Sheet, sir?

A. I would imagine Charles F. Jackson. I am looking for it.

Q. I think it is on there.

A. Yes, that's correct, as president.

Mr. Kanter: All right, sir. If Your Honor please, I would offer that as Plaintiff's Exhibit No. 1.

The Court: Any objection?

Mr. Wilcox: No, sir.

The Court: Plaintiff's 1.

(So marked by the court.)

By Mr. Kanter:

Q. Mr. Thumm, I understand that the contract price of $143,000.00 for the complete job was amended for a couple of additional fans by two hundred eighty-five dollars and some cents. Do you remember that, sir?

A. Yes, there was correspondence about that, which Mr. Jackson handled, and there were involved also a couple of other extras which I don't know whether approval was ever granted or not, but he handled the details of the approvals on that and he had records at the National Sheet

page 13 } Metal office which when he moved to Washington he took with him, unfortunately.

Q. Well, that's what I wanted to ask you. As I understand it, Mr. Thumm, you are not now and never have been in possession of the records of the National Sheet Metal, Inc.?

A. The only records I have are the records which Virginia Heating kept, such as ledger sheets, invoices, delivery tickets, et cetera, involving the contract, which would be a normal record which we would keep with any customer that you have.

Q. In other words, for your sale of materials to this company?

A. That's correct, yes.

Q. Now, Mr. Thumm, when he came to you and you caused this corporation to be formed what was the arrangement between you and Mr. Jackson with regard to the profit that was to be made on this job? How was it to be divided, if at all, between you?

A. The profit was to be divided just as our stock was, on a fifty-fifty basis upon completion of the contract, with the understanding that in addition to this I would sell my half of the stock back to Mr. Jackson for five hundred dollars and it would then be his business to operate as he pleased.

page 14

Q. In other words, I take it, Mr. Thumm, that this was sort of a one-shot deal whereby you were going to finance this job for him and then sell your interest out to him for a very small sum of money at the end of it so he could continue the business, in which you hoped to, number one, make a profit on your sale—when I say yours, because it was then your business, Virginia Heating Distributors—sale of the materials to National Sheet. That's the first profit. Correct?

A. Right.

Q. And secondly, you were going to make a profit in terms of how much cheaper you-all could do the job for the con—the difference between that and the contract price of a hundred forty-three thousand?

A. This I thought would enable me to recover some of the money that Mr. Jackson owed me from his original company.

Q. That's the third element I am coming from—coming to. There were really three profits: the first was your profit selling materials to National Sheet, Virginia Heating selling materials to National Sheet?

A. That is correct.

Q. The second profit that you had involved was the splitting of the profits that you and Mr. Jackson were going to make at the end of the job on this contract. Correct?

page 15 } A. That is right.

Q. And then there was a third profit that you hoped to derive, and that was that if you-all made a profit on the job you were going to get from Mr. Jackson at least part of, if not all of, the twenty thousand dollars that he owed you when you started. Right?

A. That's absolutely incorrect.

Q. Well, I thought you just said—

A. That profit was to come out of our split of the corporations profit and there couldn't be—you can't split something up twice, Mr. Kanter.

Q. Well, do I understand, Mr. Thumm, that you are telling His Honor and the jury that you were willing to forget the twenty thousand dollars that Air Comfort owed you in return for fifty per cent of this contract?

A. We had no way to recover from Air Comfort. The Air Comfort was in very poor financial condition. This was the only recourse that we had to recover on this money.

Q. In other words, what you expected to get was nothing on the twenty thousand that you had ever had before but to get the twenty thousand indirectly by getting a share of the profits here?

A. We estimated we could recover fifteen—

Q. In other words, you-all thought that you page 16 } had in this whole contract how much profit?

A. Thirty thousand dollars gross profit. Gross profit without any overhead.

Q. And you, in addition, were going to make how much profit by selling the materials from Virginia Heating to National Sheet?

A. On roughly sixty thousand dollars worth of materials on a job of this sort your normal profit is about ten to fifteen percent, so we figured to make between six and ten thousand dollars.

Q. And then there was thirty thousand profit on this, of which you were to get fifteen or the whole thirty?

A. Fifteen.

Q. Well, what was to happen to the twenty thousand that Jackson owed you at the time you went into this deal with him?

A. That had nothing to do with this at this point. That twenty thousand was down the drain as far as we were concerned.

Q. I see. At any rate, you say, in other words, there were only two profits you were looking for here: half the contract profit and then your normal profit in selling National Sheet materials from Virginia Heating?

page 17 } A. That's correct, yes.

Q. All right, sir. Now, let's start with the time that the job opened up. When did the work begin, Mr. Thumm, approximately?

A. I'm not sure of the actual date. I would say somewhere in late June or early July.

Q. And you have heretofore said, and I know you are not going to change today, that your first conversation with Joe Wood was on or about August 31, 1964?

A. I think that's correct, yes.

Q. Will you tell us now from late June or early July when they started the job what happened that caused you to become concerned—

The Court: What year is that, Mr.—

Mr. Kanter: 1964, Your Honor.

The Court: Go ahead.

Mr. Kanter: The contract, judge, is June 19th and I believe the work started a couple weeks after that or within a couple weeks after that date.

Right, Mr. Thumm?

A. Yes.

By Mr. Kanter:

Q. All right. Now, what happened between about

page 18 } the 1st of July 1964 and the 31st of August 1964, when you called Joe Wood up in Farmville and told him that you were worried, that you had heard this fellow Jackson was trying to build a house out of this contract? What happened?

A. One of the assistant foremen on the job had come to me about a conversation that he had heard between Mr. Jackson and one of Mr. Wood's superintendents in that Mr. Jackson intended to build a house using materials from this job and labor supplied by Southside or Progressive and all of it would be back charged against our contract.

Q. In other words, he was going to take your materials and take some of his laborers off the job and build himself a house?

A. That was my understanding.

Linwood A. Thumm

Q. At least that was what one of the workers told you?

A. My understanding, yes.

Q. Well, now, Mr. Thumm, you have seen this batch of checks before, I presume, at the time you cashed them and then again in my office a couple months ago?

A. Yes, I have seen them all.

Q. All right. Let's take the first one—

Mr. Kanter: Your Honor, I think I will offer
page 19 } these as a batch rather than to take all that twenty checks, and just mark them as Plaintiff's 2 for that.

The Court: Any objection to this matter, gentlemen?

Mr. Willcox: Do I understand these are all the checks went from the general contract to National Sheet or National Sheet Metal and Virginia Heating together?

Mr. Kanter: Yes, sir.

The Court: Are these in order?

Mr. Kanter: I believe they are, unless somebody shifted them since yesterday, judge.

The Court: All right. Let me mark these—how many checks are here? Do you know?

Mr. Kanter: Judge, there's more than twenty I think. I didn't count them. They run right from September, the first payment, up to July of 1965, when the contract—

The Court: In order to get the record straight I will have to get the number off them.

Mr. Kanter: All right, Your Honor.

The Court: There are thirty-four checks, running in date from August 1964 through July 22, 1965. They
page 20 } will be clipped together and marked Plaintiff's Exhibit 2.

(So marked by the Court.)

By Mr. Kanter:

Q. Mr. Thumm, I am showing you the top check dated August 8, 1964, as being the first one in order of Plaintiff's Exhibit 2, and I notice that that check, sir, was to National Sheet Metal, Inc., by itself as the payee, in the amount of $7,871.89. Did that represent Progressive's first payment on account of the contract price of a hundred forty-three thousand?

A. On the basis of work performed on the job and submitted in a monthly breakdown.

Q. As I understand it, and probably the jurymen do too, but maybe some of them are in different businesses and don't understand it, at the first part of every month the subcontractors submit to the general contractor the percentage of their contract work that's supposedly complete and the general he then in turn submits the overall percentage completion to the United States and then the United States pays him ninety percent of that. They hold back ten percent, just like he holds back ten percent on the subs, and they pay him ninety percent and then he gives you your share of—less ten percent. If you had twenty percent completed he'd

page 21 } give you eighteen percent. It would be twenty less two percent. Right?

A. That's right.

Q. So this represents the first check, and that went only into the bank account of National Sheet. Correct?

A. Yes, sir.

Q. I notice, sir, that that check is endorsed National Sheet Metal, Inc., L. A. Thumm, for deposit only, Virginia Heating Distributors, Norfolk. Now, can you tell us why the very first check that came in would go into the Virginia Heating Distributors bank account, even though it was payable to National Sheet?

A. That's very easy to explain. At that particular point—as we formed this National Sheet Metal corporation the five hundred dollars in my stock was all the money that was actually invested in the corporation. My understanding had been with Mr. Jackson that my company, Virginia Heating, would supply enough money to get the job under way until money could be received in payment of work performed by Progressive. Therefore, when this check came in in August I would—I am not sure of the actual figures, but I would say that Virginia Heating had at that time invested fifteen to twenty thousand dollars in meeting payrolls, putting materials, getting things done to get the job under way, which is

page 22 } the way we had contracted to do this or we had agreed to do this thing. Therefore, when this check came in we applied this check to Virginia Heating's account, because we knew we had other payrolls to make before another payment would come in in another thirty days, so this was partly to reimburse Virginia Heating for the money that had been put out.

Linwood A. Thumm

Q. In other words, right off the bat National Sheet was into Virginia Heating for probably about seven or eight thousand dollars, the difference between this—

A. Considerably more than that by that point, but there was no other way.

Q. No other way. Let him use that to refresh his recollection.

Your counsel, I take it, has just handed you certain ledger sheets showing the running account between Virginia Heating and National Sheet?

A. That is correct.

Q. All right, sir.

A. And I would like to point out at the end of July, which is when we would submit for payment and receive a check in August, we had $9,278.00 in materials and $9,798.00 in additional moneys that had been advanced for payrolls and other miscellaneous items.

Q. In other words, almost nineteen thousand
page 23 } you had advanced him and that's why you took this $7,800.00 back, to repay part of it?

A. That's correct.

Q. And the next check was dated the same day. That was payable to National Sheet Metal, Inc., and Globe Iron Construction Company, Inc., for eleven hundred some dollars and apparently that thing was turned over to Globe, because it bears an endorsement from the bank for deposit to the Globe account. They were a material supplier like Virginia Heating?

A. That is correct, yes.

Q. All right. Now, the next check is dated September 11th. Before we come to that check, Mr. Thumm, do I understand that you did not know Joe Wood and had never met him, although you might have heard of the company, prior to the time that you made this deal with Jackson?

A. That is right.

Q. And you have told us of your conversation that somewhat perturbed you in August. Do you remember approximately when it was that this workman on the job told you what he had about—what he had heard that Jackson was going to do?

A. I couldn't be sure of the actual date. I'd say sometime in the middle part of August.

page 24 } Q. All right, sir. I hand you—

A. Whenever the conversation occurred I con-

tacted Mr. Wood immediately after that. That's all I know.

Q. I hand you a letter, sir, and ask you if you recognize that piece of paper?

A. Yes, sir.

Q. Is that the letter that you wrote to Mr. Wood on September 1st, the day following your conversation with him on the phone?

A. That's right.

Mr. Kanter: All right, sir. If Your Honor please, I'm going to ask the court to mark this as Plaintiff's Exhibit 3.

The Court: Any objection?

Mr. Hollis: No, Your Honor.

The Court: Plaintiff's 3.

(So marked by the court.)

By Mr. Kanter:

Q. Mr. Thumm, would you read that to the jury, please, sir?

A. "In reference to our conversation of yesterday we very much appreciate your suggestion that all checks to National Sheet Metal, Incorporated, for the Staff College
page 25 } and Camp Allen jobs be written jointly to Virginia Heating Distributors and National Sheet Metal, Incorporated. We are supplying them with all of the materials for this job and, in fact, are financing the entire operation. Also in the light of what has recently come up, of which matter we talked yesterday, we would like to have these checks mailed to us here rather than to National Sheet Metal's office. At this time it is particularly advisable that Mr. Jackson does not get his hands on any of these checks. He has no authority to make any disposition of any moneys coming into National Sheet Metal, but there is no telling what course of action he is liable to take at this point. We would very much appreciate your cooperation in the above matter and we look forward to meeting with you this week when you come to Norfolk. Very truly yours, Virginia Heating," my signature.

Q. Mr. Thumm, I take it that this letter you dictated to your secretary the next morning after you had talked to Joe Wood on the phone and explained to him what you had heard and he agreed to start sending the checks in jointly to you and to the National Sheet?

A. That is correct.

Q. As a matter of fact, do you remember him telling you on the telephone so that when he didn't get a bond from National Sheet that he put the provision in that page 26 } he'd have the right to pay material men to not only protect them but protect himself from any liens on the job?

A. That's correct. And I would like to point out to the jury at this time that there's nothing unusual in this particular procedure. A lot of supply houses operating with people with limited finances who are doing large contracts have such arrangements with the general contractor. It is a standard practice for everybody's protection.

Q. Now, in accordance with your understanding with Joe Wood on the telephone—well, before we get to that, tell the gentlemen of the jury, Mr. Thumm, what had happened as to why you told Joe Wood you wanted him to mail those checks over to you at your office rather than to send them even to the National Sheet Metal office even though they bore the name of Virginia Heating Distributors and would require your endorsement to cash them.

Mr. Willcox: If Your Honor please, I believe we are going far afield. I really have no objection to this question. But as I recall, counsel's opening statement was that he's relying upon a promise made in February, and we have spent an hour and haven't gotten up to September 1964.

page 27 } Mr. Kanter: I will withdraw it.

The Court: All right.

By Mr. Kanter:

Q. At any rate, Mr. Thumm, following your conversation with Mr. Wood, the next check that came down on September 11th, which was for the August work that National Sheet did, was payable to National Sheet Metal, Inc., and Virginia Heating Distributors?

A. Yes, sir.

Q. And that check on the back bears an endorsement again by Mr. Jackson for National Sheet, but again was deposited to the account of Virginia Heating Distributors?

A. Yes, sir.

Q. Now, will you tell us on that date—look at your ledger of September 11th—how much did National Sheet owe Virginia Heating?

A. On materials we had nineteen thousand dollars as of the end of August, on payroll we had twenty-four thousand dollars, a total of forty-three thousand dollars at this point.

Q. So even with this eleven thousand you got you'd still have been in for thirty-two thousand the day you took this check and put it in your bank account?

page 28 } A. Yes.

Q. When I say in, that's what National Sheet would have owed you even after you got this eleven thousand dollars?

A. Was there not another check in September?

Q. May have been. I haven't turned yet.

A. I think there was.

Q. Yes, there's another check dated the same date for $10,212.98, but that bears the endorsement "For Deposit Only to National Sheet Metal," so you did not get that check, sir.

A. That's correct.

Q. So, as I say, National Sheet would have owed you about thirty-two thousand, even after you got the ten thousand on September 11th. Right?

A. Yes, sir. Now, see if there's not another check in September also?

Q. Yes, there is. There is another one dated the same day for $2,800.00 payable to National Sheet Metal, Incorporated, and that does show it was deposited on Virginia Heating Distributors.

A. That's correct.

Q. After the September payments in which you got about thirteen thousand dollars here from Joe Wood's company how much did National Sheet owe Virginia Heating?

page 29 } A. Roughly about thirty thousand dollars, which is not inconceivable in the early stages of a contract of that nature.

Q. Well, I understand you said that of the forty-three-thousand-dollar contract price you figured about sixty was for materials—

A. Right.

Q. —that you were going to supply, and thirty was for profit, ninety. So that the balance of forty-three and seven or about fifty thousand dollars would have been for operating overhead, payroll, et cetera, on the job?

A. Labor, yes.

Linwood A. Thumm

Q. But you say in the early stage that would not be unusual to run it up to within three-fifths of that amount already in the first sixty days?

A. Not if you put in large quantities of materials on the job and if you are preparing as much as you can to have as much equipment and everything available so there is no holdup and delay.

Q. All right. Then we come to the October payments, Mr. Thumm, and there were two checks, one for $4,699.25 payable to National Sheet and Virginia Heating and that shows that that went into your bank account?

A. Yes, sir.

page 30 } Q. And then there was another check for $12,384.28 on the same day, payable to the National Sheet Metal, Inc., by itself, and that shows it was deposited in the National Sheet Metal account.

A. That's right.

Q. So after the October payment how much did National Sheet still owe Virginia Distributors?

A. $24,000.00. This is before—no, this was after credit was received. That's right. $24,000.00, plus—

Q. That was for what? labor or material?

A. It was for labor.

Q. All right.

A. And roughly twenty-three—about $47,000.00 at that point.

Q. All right, sir. So he was into you for forty-seven thousand after you got the October payment total?

A. That's what it looks like, yes.

Q. Now, we come to the November payment, which was paid on November 5th, there was a check for twenty-five hundred to National Sheet Metal, Inc., and that shows that that was deposited to your account, Virginia Heating Distributors?

A. Right.

page 31 } Q. And then there was another check on November 12th, a week later, for $2,800.00 payable to National Sheet, and that looks like it was deposited in the bank account of National Sheet. Then there was another payment—that's all for November. So if you will look at your ledger and tell us how much did National Sheet owe Virginia Heating Distributors after receiving the November payment on account of the contract?

A. Thirteen thousand plus twenty-two thousand.

Linwood A. Thumm

Q. About thirty-five thousand?

A. Yes, sir.

Q. All right. We come to the December payment and there's a first check on December 13th is to National Sheet and Virginia Heating Distributors for $13,713.50, and that shows that it went into the bank account of Virginia Heating Distributors. And on the same day there was another check payable only to National Sheet Metal, Incorporated, for $11,669.46, and that shows it went into the bank account of National Sheet Metal. Two days later there was another check on December 15th from National Sheet Metal—to National Sheet Metal from Progressive for $12,390.00, and that check bears absolutely no endorsement, but I understand that since we discovered that, you and your counsel have checked and the matter was negotiated through the bank?

page 32 } A. It was put through to National Sheet Metal's account.

Q. National Sheet Metal's account. On the same day there was another check to National Sheet and Globe Iron which bears a deposit for Globe Iron. That was all the payments in December and I ask you to tell us how much did National Sheet owe Virginia Heating after the December payment?

A. $22,000.00—all together?

Q. Yes, sir.

A. Roughly forty thousand dollars. I just checked that. Now, I would like to point out at this point that we were getting monthly progress reports from Mr. Jackson as president of National Sheet Metal Company stating what percentage of work had been performed on the job at this point, and each one of these progress reports made it appear as though the money that we had tied up was more than—the work actually accomplished more than compensated for the money that was still outstanding and owed Virginia Heating, so at this point the contract still looked all right.

Q. In other words, the percentage of work still left to be collected for appeared to be well above what you had put into the job?

page 33 } A. According to Mr. Jackson's records we showed about a ten-thousand-dollar profit at the end of November and again at the end of December for what had been done, what was owed National—what was owed Virginia Heating by National Sheet Metal and what work they had submitted for payment.

Linwood A. *Thumm*

Q. Well, when you say according to Mr. Jackson's figures, I would—did you not discuss those matters with him on Friday when you'd go over there to sign checks, sir?

A. Yes, I did, but I was not in this type of business and I was not in position to go out and check everything that he claimed to have done on the job, which—

Q. In other words, you didn't know actually what the percentage of the job completion was in the field because you are not in that line?

A. That is true.

Q. So after the December payment the job still looked pretty good to you, like you'd be making the profit you were counting on?

A. Roughly.

Q. All right. Now, let's—Jackson was still on the job then working after the December payment?

A. Yes.

page 34 } Q. All right. Let's look at the January payments. The first one was on January 8, 1965, the check was payable to National Sheet Metal for $2,400.00, and it bears an endorsement "For Deposit and Credit Within-named Payee," which would be National Sheet. That went into their account. On the 15th of January there was a check to National Sheet Metal and Virginia Heating Distributors for $11,194.00, and that bears an endorsement for deposit apparently to the National Sheet Metal, Inc., account, but it bears your endorsement, L. A. Thumm, treasurer, and then under it it has Virginia Heating Distributors. What's the story with that check on January 15th?

A. I am looking for it. What's the amount of that check?

Q. That check is $11,194.01, January 15th. As I say, apparently the endorsement would show it went into National Sheet's account, but why would it bear your endorsement as treasurer and also Virginia Heating Distributors?

A. Because it is made out to both those companies.

Q. Wouldn't you have to sign Virginia Heating Distributors as somebody in order to cash that check?

A. I assume that should have been done.

page 35 } Q. But the bank cashed it with that. In other words, you didn't get that check?

A. No, that check went to National Sheet Metal's account. I couldn't find it in here.

Q. That's all of the January payments. After that date in January how much was National Sheet still indebted to Virginia Heating total?

A. About $44,000.00.

Q. Now, when was it, Mr. Thumm, that Mr. Jackson left the job?

A. We had a meeting early in January when it was obvious that Mr. Jackson was not staying on the job and attending to the job and I had had numerous complaints from Progressive that the work was not going as well as it should and they could never find Mr. Jackson to complain to him. They could neither find him at the jobsite nor in National Sheet Metal's office, so I had a meeting with Mr. Jackson and at that time Mr. Jackson submitted his resignation, left National Sheet Metal and left town very shortly after that and went to Washington and took a job in Washington.

The Court: When was this, Mr. Thumm?

The Witness: This was in January—our meeting was early in January. Mr. Jackson was given two weeks to clear up his records and—

The Court: January of '65?

page 36 } The Witness: Of '65, that's correct, Your Honor.

By Mr. Kanter:

Q. You say he submitted his resignation—as what, sir?

A. As president of National Sheet Metal.

Q. Do you have any written resignation from him, Mr. Thumm?

A. I do not, but it is in the lawyer's office and in the files of—which Mr. Bryan has.

Q. You have actually seen that?

A. Oh, yes.

Q. Was anybody ever elected to take his place?

A. We couldn't get Mr. Jackson back to have a meeting so that we could even get his signature on checks which needed to be paid and on a number of other items which were outstanding.

Q. Now, let me ask you something, sir: You said that initially there were three officers, Mr. Jackson was president—

A. I think a corporation has to have three officers to be formed. Is that not true?

Q. It has to have three members of the board of directors, sir.

page 37 } A. Three members.

Q. Actually, it can have less officers. But as I understood your testimony, Jackson was the president, Mr.

Bryan, the attorney, was one of the incorporators and on the board of directors?

A. That is correct.

Q. And you had the office of assistant treasurer?

A. Yes, sir.

Q. There was no vice president and no treasurer?

A. No other officers that I recall.

Q. Well, was Stanley Bryan acting as the secretary because he was keeping the minute books, et cetera?

A. Yes.

Q. So you did have a president, a secretary and yourself as assistant treasurer?

A. (Indicated yes)

Q. And I take it that Mr. Jackson and Mr. Bryan and yourself were the three members of the board of directors that are required by Virginia law?

A. Yes.

Q. And you say that in your conversation with Mr. Jackson that he did sign—at least, you have seen a written resignation as president?

page 38 } A. This we could not receive for a matter of sixty days. Mr. Bryan finally got this letter from him.

Q. A letter of resignation?

A. Yes.

Q. And did he resign also from the board of directors?

A. This was never done, and we were supposed to have a meeting in Mr. Bryan's office on several occasions, but Mr. Jackson failed to come down from Washington and nothing was ever accomplished. The stock was never issued. We could never get Mr. Jackson's signature on the stock certificates.

Q. Well, Mr. Thumm, I understood your counsel to say, and I believe you have said it before also, that the reason that the subsequent checks were run through Virginia Heating's account and not through National Sheet was because you couldn't use the National Sheet Metal account any more in that this fellow Jackson was gone off. Isn't that generally what Mr. Willcox said and what you have said before?

A. That's exactly what I have said.

Q. Well, let me ask you something: If you and Mr. Stanley Bryan were left and were a majority of the board of directors—

Linwood A. Thumm

Mr. Willcox: If Your Honor please, this is
page 39 } totally irrelevant to this thing and is a legal question besides.

Mr. Kanter: Your Honor, I think it is extremely relevant that two—

The Court: Just a moment.

Members of the jury, at this time we will take a ten-minute recess. You may go into the jury room.

(The jury withdrew from the courtroom.)

The Court: Mr. Thumm, you may step down if you want to.

Mr. Kanter: Your Honor, the relevancy of the testimony is that Mr. Thumm, and Mr. Willcox in opening statement, said that the reason that Virginia Heating—and you haven't heard it yet, but all of the checks after the February conversations went into the Virginia Heating account and they paid everything on the job, and he said that he did that because Jackson wasn't available and he couldn't use the corporate bank account, but of course, Your Honor is perfectly familiar with the fact that two of a three-man board of directors is a majority and all he'd had to do was forward a new corporate resolution to his banking institution
page 40 } and sign alone or sign jointly with Mr. Bryan or anyone else that he wanted. And I think it is extremely relevant.

Mr. Willcox: If Your Honor please, Mr. Thumm has testified, which is the only testimony here, that he was assistant treasurer of this corporation and that it required two signatures and when he couldn't get one signature he couldn't use the bank account. Now, Mr. Kanter wants to argue legalities as to what could have been done by Mr. Bryan or somebody else. Mr. Bryan I presume is available to process and if Mr. Kanter wants to bring him over here and debate the law with him it is fine. But to argue with this witness over why he couldn't have done thus and so which is legally possible is erroneous, has no part in this proceeding, and I submit Mr. Kanter has now spent an hour and we still haven't gotten up to the point at which he says the contract arose that this suit is here for.

Mr. Kanter: Of course, all this background material is extremely relevant, Your Honor, in view of the Virginia law. But I still submit for the reasons I assign—

Linwood A. Thumm

The Court: You may put it in the record. I am going to sustain the objection.

page 41 } Mr. Kanter: I will respectfully except to it.

Mr. Willcox: Your Honor, we will be glad to give Mr. Kanter the checkbook of National Sheet Metal, which stopped in February.

By Mr. Kanter:

Q. Mr. Thumm, did I understand you to say the three members of the board were Mr. Jackson, yourself, and Stanley Bryan?

A. Not Stanley Bryan. I think he had a secretary that probably was either an officer of the corporation—I'm not even sure that we had—might have been Mr. Jackson's wife who was a member of the board. I'm not actually certain of that. These details were set up by Mr. Bryan and by Mr. Jackson and I was—I went to a couple meetings in which the corporation was formed and they handled all the details.

Q. Do I take it then, sir, that two people of the three-man board were not available here in Norfolk after Jackson left?

A. I can't say yes or no as to that, but I can say that I talked to Mr. Bryan about this thing and we tried every way possible to get Mr. Jackson back. I told him of the dilemma,

I told him of the problems involved, and I said

page 42 } please get him back here so we can get this checking account straight and get the stock certificates signed and everything else that needs to be done and he was unable to get him back.

Mr. Kanter: That's all I have.

The Court: I take it that covers the issue. You may step down.

Ten minutes recess, gentlemen.

(The court recessed at 11:30 A.M., July 29, 1966, and reconvened at 11:42 A.M., July 29, 1966, out of the presence of the jury.)

Mr. Willcox: Your Honor, on the record but before the jury comes in, I objected before because I thought it was irrelevant and because I believe that counsel was arguing with the witness about the legal proprieties or rights of the corporation. Having heard the questions and the answers we will withdraw our objection if Mr. Kanter wants to put it on. I still don't think it is relevant, but we will withdraw

our objection if he wants to put those questions and answers before the jury.

Mr. Kanter: Your Honor, I think in view of Mr. Thumm's answers they are irrelevant. I don't think he page 43 } really knows who are on the board of directors. My files appear different from his. I don't think he really knows.

(At this point the jury returned to the courtroom.)

By Mr. Kanter:

Q. Mr. Thumm, I take it, sir, that you-all had this conference and Mr. Jackson voluntarily agreed to leave or you fired him or just what?

A. I asked for a letter of resignation, which he agreed to give.

Q. You wanted him to leave the job. And when exactly did that conference take place and when approximately did he go ahead and leave Norfolk and go to Washington?

A. Our conference took place early in January, and he left the job I would say between the 15th of February and the 1st of—15th of January and the 1st of February, and he was in Washington I believe after from February on.

Q. Did he take all of the records of National Sheet with him?

A. He had his own company records and, unfortunately, he—these were his cabinets and his office equipment and everything else which had been taken from his page 44 } company, so when he left to go to Washington he took all of this with him.

Q. In other words, Air Comfort records, his old company, was in the same office there with National Sheet in the same cabinets?

A. That is correct.

Q. And he just hauled everything away to Washington?

A. And put them in a warehouse.

Q. Have you been able to get them out of the warehouse since that time?

A. Mr. Jackson says he did not take National Sheet Metal records, but the only thing that was left behind was a lot of stuff which was dumped on the floor, which was not pertaining to anything that we were doing with this government contract.

Q. Well, did you keep the office open after he left?

A. Yes.

Q. And do you say when he left he just dumped some records on the floor?

A. Anything—he took all the file cabinets, all the desks and everything that belonged to him out of there and left us a bare office with a lot of stuff on the floor.

page 45 } Q. All right, sir. Now, at that particular point when he left the job, Mr. Thumm, how much did National Sheet owe Virginia Heating Distributors in round figures?

A. In round figures forty to forty-five thousand dollars.

Q. And I take it that you were primarily interested in doing something to save that $45,000.00 for Virginia Heating. Is that correct?

A. This is true. At this time when Mr. Jackson and I had this conversation and it became necessary that he leave, I brought in another man to give me an estimate on what he thought the job could be completed for as far as the labor was concerned, and this I did as an officer of National Sheet Metal Corporation. He gave me an estimate on labor figures which showed that National could still finish the job and possibly make fifteen to twenty thousand dollars profit, if everything went as it should. At this point all materials—all basic materials had been supplied by Virginia Heating, so it was just a matter of labor, whatever labor was necessary to finish the contract.

Q. How much had you advanced in materials up to that point?

A. (No reply)

page 46 } Q. Take your records and look back from September.

A. Well, they won't show the total, because they will show the total less the—

Q. Well, if you added up in your sheet that you have there on materials just total advances on materials, they would give us a pretty good job—approximation of that, even if you didn't give any credits against—

A. Approximately fifty—$48,000.00 I would say.

Q. So that everything but maybe twelve thousand dollars had been put on the job by Virginia Heating. Correct?

A. That is correct, yes.

Q. You figured total material ran about sixty and you have already put forty-eight on the job?

A. (Indicated yes)

Linwood A. Thumm

Q. And you say in your capacity as an officer of National Sheet you got an estimator and he still showed you that you figured you could make between fifteen and twenty thousand dollars profit by completing this contract?

A. That is correct.

page 47 } Q. And that would be in addition to getting back the whole $45,000.00 that National Sheet then owed Virginia Heating. Right?

A. That is not correct, no, sir. This was all that could be realized—in other words, he gave me a figure which showed that with materials needed to be supplied and labor to finish the contract at this point, that there could be possibly fifteen thousand dollars excess when the contract was completed over money still due on the contract is what I am trying to say.

Q. Well, let me see if I can understand myself. Enough had already been paid on the contract where you had now given up this idea of making thirty thousand dollars excess over and above that $143,000.00 contract. Is that right? That was all gone?

A. I knew at this point there was no profit left in the job.

Q. All right. And at this particular point you knew that National Sheet owed Virginia Heating some $45,000.00 that had been advanced for materials and part payroll and labor. Correct?

A. Correct.

Q. And your primary concern at that point was to get back as much of that $45,000.00 as you could?

A. That is correct.

page 48 } Q. And how much did you figure if you went ahead and completed the job that you could get back of the $45,000.00 that National Sheet owed Virginia Heating at that time?

A. Fifteen to twenty thousand dollars.

Q. So that you were still going to end up with about a twenty-five- to thirty-thousand-dollar loss, apparently?

A. That's what looked like, yes.

Q. But you at least were going to cut your loss down from the $48,000.00 that you were then hooked. Correct?

A. That's correct.

Q. No, this happened, you say, in early January. Did this switch in the Jackson situation cause you to bring in Brown as your partner at that time?

A. That had nothing to do with this—

Q. Nothing to do with it at all?

A. —organization.

Q. Did Mr. Brown have anything to do with this job, actually, Mr. Thumm?

A. No, he did not.

Q. This was really your baby?

A. Unfortunately.

Q. But at any rate, on January 1, 1965, I understand Mr. Brown did become a partner for a very small in-
page 49 } terest in your concern. Correct?

A. Yes. Was it January 1st, Tommy?

Q. January 1, '65, Mr. Willcox indicated approximately is the day.

All right. Now, Jackson, you say, left somewhere between the 15th of January and the 1st of February 1965. Was this the period in which you got this man to give you an estimate of what was left in the job?

A. Right after Jackson and I had had our conversation, yes.

Q. Was he still on the job when you got the estimate?

A. Jackson?

Q. Yes.

A. He was to be around for a period of a couple of weeks.

Q. Was the job continuing in the meantime or did you cut the job off?

A. We didn't stop.

Q. Didn't stop?

A. Not more than for a day, I don't believe, at any time.

Q. In other words, National Sheet was continuing with the job as Jackson was being phased out, so to speak?
page 50 } A. There was more to it than just Jackson leaving at this particular point. We were having a lot of labor problems on the job with union labor. Mr. Jackson had supplied all this union labor with the union labor contract and I felt we could do much better with nonunion labor and the job would go better and when we decided Mr. Jackson was finished we decided also to replace all the men on the job with nonunion labor.

Q. Did you do that?

A. Yes, we did.

Q. But as I understand there was not more than a one-day hiatus, so to speak; National Sheet continued to do the work as Jackson was being phased out with the union?

A. I don't believe there was a loss of even a day. I believe the union men were let go on a Friday and a new crew was put on Monday.

Linwood A. *Thumm*

Q. In other words—

A. Alvis Heating.

Q. —he came in and put his men in in place of the ones Jackson had on the job?

A. That's correct.

Q. Now, Mr. Thumm, you thereafter called Mr. Wood on the telephone during that period of time, did you not, the last part of January or very early part of February?

page 51

A. Yes, sir, I did.

Q. Did you wait until Jackson had gone off the job before you called him or was Jackson still on the job when you called him?

A. I can't be positive of the timing on that. I think Mr. Jackson—we had certainly had our discussion. Mr. Jackson—we dissolved our association, and whether he was still around or not I can't say.

Q. Mr. Thumm, when you called Mr. Wood on the telephone he did not know that Jackson had left the job. You were the one that told him. Was that not correct?

A. I am sure that was correct.

Q. In other words, you informed him that Jackson either had just left or was about to leave?

A. And I think Mr. Wood was aware of the situation at this time because there had been so many complaints about the labor deal that they had come to me on it when they could not contact Jackson.

Q. Well, admittedly, the work was far behind schedule and not in the best shape at that point. Isn't that correct?

A. It was behind, but so was Progressive.

Q. Well, even though Progressive was behind, as I understand, there had been a number of complaints concerning the schedule and the condition of the work at that point. Jackson just was not on the job supervising. Isn't that correct?

page 52

A. That's true.

Q. All right, sir. So you called Mr. Wood to the telephone and, Mr. Thumm, did you not tell him that Jackson had left and that you, Virginia Heating, wanted to take this job over and finish it?

A. No, I did not.

Q. Did you tell him that you thought there was still a profit in the job of some thousands of dollars?

A. Yes, I did.

Q. And did you not tell him, sir, that your primary interest was to get that so that you could get some of this forty to fifty thousand dollars that National Sheet owed Virginia Heating at that point?

A. May I tell the court just how I phrased it to Mr. Wood?

Q. Well, you can afterwards, but—

The Court: Did you tell him that?

The Witness: Did I tell him what?

By Mr. Kanter:

Q. What I just said, sir, that besides—

Mr. Hollis: If Your Honor please, maybe in
page 53 } view of Mr. Thumm's question it would be wise to have the court reporter to read it back.

Mr. Kanter: I'd be happy to.

All right, Mrs. Browning, will you go back and read my last question.

(The reporter read the last question.)

Mr. Hollis: If Your Honor please, I object to the question and submit it means nothing when he said your primary object was to get that. I don't know what he was talking about.

The Court: Well, the previous question had indicated the ten thousand dollars profit or ten-thousand-dollar figure that still remained. Is that—

The Witness: I have no objection to answering the question as he's phrased it.

Mr. Willcox: If Your Honor please, before he proceeds, Mr. Kanter has given him no opportunity to say what the conversation was and is asking questions directed to "you." Now, "you" can mean Mr. Thumm individually, Virginia Heating, or National Sheet Metal, and we ask that Mr. Kanter either make his question specific or permit the witness to give his answer to the whole thing.

The Court: I am going to overrule the objec-
page 54 } tion to that question.

You may answer the question and then tell exactly what occurred.

The Witness: I am not clear now as to what my procedure is. Answer the question—

Linwood A. Thumm

By Mr. Kanter:

Q. And then you may explain anything that you like, Mr. Thumm.

A. I did not tell Mr. Wood that there was any forty or fifty—I did not tell Mr. Wood I was trying to recover any forty to fifty thousand dollars. I didn't mention any specific figures. I stated to Mr. Wood that I had talked to some people who said that money still could be—the job still could be completed and some of the money could be recovered and that I was willing to go ahead in my capacity as head of National Sheet Metal and take over the job when Mr. Jackson was no longer available, and my company, Virginia Heating Distributors, would supply the materials if he would meet weekly payrolls, because I could not go any further in jeopardizing my own company. Does that answer the question?

Q. I heard the answer. Just a moment, please, sir.

page 55 } Mr. Wood—Mr. Thumm, as I just heard your answer you said you stated specifically to Mr. Wood that you as an officer of National Sheet wanted to carry on this contract. Did I hear you correctly, sir?

A. That's correct. This is the first time I have been involved in anything in my life that I couldn't finish and I felt an obligation to that extent.

Q. Mr. Thumm, you do remember giving a discovery deposition in my office on April 21, 1966, did you not, sir?

A. Yes, sir.

Q. You remember this question, sir, and your answer: "Now, when you called him, Mr. Thumm, did you say to him, 'Mr. Wood, I am wearing two hats now. I am wearing a hat as the operator of National Sheet since Jackson has gone out of here, and I'm also wearing a hat as the owner of Virginia Distributors, but I want you to understand, Mr. Wood, that the only hat you are going to be able to look to is the hat I am wearing for National Sheet." And your answer was "I don't think that was discussed one way or the other. I called as an officer of National Sheet stating that I would continue his job with his help on payrolls and that I, representing Virginia Heating, would supply materials. I did in no way connect Virginia Heating with financial responsi-

page 56 } bility to the contract or assume the contract for Virginia Heating Distributors."

Now, I ask you, sir, which is correct, what you have just said today or "I don't think that was discussed one way or the other"?

The Court: All right?

Mr. Hollis: If Your Honor please, Mr. Thumm said then that he in no way connected Virginia Heating with this contract. He is saying that today and Mr. Kanter is trying—

The Court: This is for the jury. I think the question is improper, which is correct, what you said then or what you said today. If there is a contradiction he may explain it. I think it is a proper objection. Sustain the objection to the question.

By Mr. Kanter:

Q. All right. Do you remember answering, Mr. Thumm, "I don't think that was discussed one way or the other"?

A. I do.

Q. Well, was that a correct answer that you gave then?

page 57 } A. Yes, at the time I didn't think it was necessary to make a distinction.

Q. In other words, as I understand it, then, you didn't have any specific discussion as to whether you were calling as Virginia Heating Distributors or National Sheet?

A. I think I made it very clear that I was not involving Virginia Heating nor was I taking over National Sheet Metal's contract. I was calling him to state that Virginia Heating would continue to supply materials in the hope of regaining some of its lost money if he were willing to advance payrolls until the job was completed, and that was the extent of my entire conversation.

Q. And you did not tell him about attempting to recoup this moneys that National owed Virginia Heating?

A. I said it looked like we could recover some of this money and that was the reason I was willing to do it. It was also to Mr. Wood's benefit for me to continue, because if we stopped the job at that point and went through the Miller Act to recover on our materials he had all the labor to supply and he would have lost another fifty thousand dollars on the contract.

Q. Let me ask you this—

A. I just thought I'd put this in.

page 58 } Q. That's all right. If it is as you say it is that you were calling as National—as an officer of National Sheet and telling him that you were going to continue the job, why was it necessary for you to call him, because you said the job was in progress, there was no hiatus in the work, that you just continued right on along when

Jackson left Norfolk? Now, why did you have to call him if you were just going to tell him what you said, that "I'm going to continue"?

A. Because I was not going to meet a payroll. Virginia Heating was not going to assume the responsibility of payrolls. We were going to put no more money into this setup and it was up to Mr. Wood to come up with payroll money if he wanted me to supply materials. If he wanted to take the chance on my completing the contract so that the job could be completely taken care of and if he were willing to supply the money for the labor to do that, I would supply the material from Virginia Heating.

Q. Mr. Thumm, Virginia Heating did make payroll after that, didn't it?

A. On the basis that we discussed, yes.

Q. Virginia Heating paid payroll, didn't it?

A. Virginia Heating paid the payrolls upon the submission to Mr. Wood of our payroll expenses each

page 59 } week, yes.

Q. Mr. Thumm, all of the subsequent moneys received on account of the hundred-and-forty-three-thousand-dollar contract price over and above what National Sheet had received up to that day, through January, went into the Virginia Heating bank account, didn't it?

A. There was no other way to handle it.

Q. Well, I ask you, sir, to take a look at the balance of these checks on Plaintiff's Exhibit 2.

Mr. Willcox: There's been no dispute of this. I don't know why we keep going back over it.

The Court: All right.

By Mr. Kanter:

Q. And you say the reason you deposited all these checks after that call to Joe Wood in the Virginia Heating bank account was because there was no other way for you to handle it—

A. That's correct.

Q. —did you not, sir?

The Court: Just a moment. Is the batch of checks—this is marked Plaintiff's Exhibit 3?

Mr. Kanter: 2, Your Honor.

The Court: 2. All right.

page 60 } Mr. Kanter: It's been marked, judge.
The Court: Go ahead.

By Mr. Kanter:

Q. Mr. Thumm, did you not contract with and write a letter to—and I say you, I am talking about Virginia Heating Distributors—Mr. Turbin of Alabama Electric Company—

A. Yes, I did.

Q. —on March 19, 1965? I hand you this letter, sir, and ask you did you not write that letter directly from Virginia Heating Distributors to Alabama Electric Company on that day?

A. Yes, I did.

Q. Will you read that letter to the jury, please, sir?

The Court: Let's mark it.

Mr. Kanter: All right, Your Honor, I will mark it as the plaintiff's next exhibit.

Mr. Willcox: If Your Honor please, we object to this, as it has no connection with this particular plaintiff.

The Court: Let me have a look. Plaintiff's 4. I'm going to admit it and note your exception.

(So marked by the court.)

page 61 } Mr. Willcox: Note my exception.

By Mr. Kanter:

Q. Mr. Thumm, will you read this letter—first of all, on whose letterhead is it?

A. Virginia Heating Distributors.

Q. And it is signed by you as Virginia Heating Distributors, is it not?

A. That's correct.

Q. Did Mr. Jackson take all of the stationery of National Sheet Metal?

A. No, sir.

Q. Was there some paper left out there that you could have written letters on on National Sheet Metal stationery?

A. Had it been necessary, yes, sir.

Q. All right, sir. That's Virginia Heating stationery. Read it to the jury, please, sir.

Linwood A. Thumm

Mr. Hollis: If Your Honor please, Mr. Kanter is arguing with this witness. The fact that that's on Virginia Heating stationery has nothing to do with this case and he knows it.

Mr. Kanter: I do not know it.

Mr. Hollis: I object to the inference.

The Court: Overrule it. Go ahead.

page 62 } By Mr. Kanter:

Q. Go ahead, Mr. Thumm, if you will, read that.

A. "Alabama Electric Company, Norfolk, Virginia, attention Mr. Turbin. Gentlemen: Relative to our conversation in Mr. Wood's office concerning the wiring of the furnaces on the Camp Allen site, you are to proceed with this work at a cost of ten dollars per unit. Invoices will be submitted on a monthly basis until the work is completed and it will be paid promptly on the 10th of the following month by us.

"It is our understanding that in a few of the 'B' buildings the Sheetrock has been installed and there will be some problems in running the wiring to the furnace room. We authorize you to do whatever work is required and any extra time and materials, such as additional wiring, will be chargeable to us on a cost-plus basis. We will also assume full responsibility for any cutting and patching that may be required as a result of this work.

"If this is acceptable, this is your authority to proceed as soon as possible with this work. Very truly yours, Virginia Heating, L. A. Thumm."

Q. Mr. Thumm, when you said "we," I take it that was Virginia Heating you were referring to in that

page 63 } letter?

A. When I said "we," yes.

Q. This was in effect a direct contract between Virginia Heating Distributors and Alabama Electric Company for them to rewire those units out on the job that had been wired improperly, was it not, sir?

Mr. Hollis: Your Honor, may it be understood our objection to this—

The Court: I thought you were going to object to that question. That's a legal conclusion. I sustain the objection to that question. Go ahead.

Linwood A. Thumm

By Mr. Kanter:

Q. Mr. Thumm, this was a—in your meaning a letter of authorization from Virginia Heating Distributors to Alabama Electric to do the rewiring work. Correct?

A. Insofar as being responsible for the payment, which is the only thing that Alabama Electric was looking to Virginia Heating for. They would not accept the responsibility of payment from National Sheet Metal and we discussed this on the jobsite. They said, "The only way we will do the job—" and

page 64 } this is in Mr. Turbin's own testimony which was taken in Alabama, that he would not do the job unless Virginia Heating guaranteed him payment, and that is the reason for this letter.

Q. Well, Mr. —tell me, if that's the case, why didn't National Sheet contract with Mr. Turbin of Alabama and you, Virginia Heating, guarantee the payment rather than you enter into a direct contract with him?

A. Mr. Turbin would take nothing but a letter from Virginia Heating Distributors.

Q. He wouldn't have been happy just to take your guarantee of payment, as you say?

A. We did not discuss that.

Mr. Willcox: Your Honor, that's asking this witness whether Mr. Turbin of Alabama would be happy.

The Court: Sustained.

By Mr. Kanter:

Q. All right. Now, in addition to whatever your arrangement was in this instance with Mr. Turpin of Alabama Electric—

A. Turbin.

Q. —Turbin, did you not—and I say you, Virginia Heating

page 65 } Distributors—hire Mr. Norris Wood, of the D & M Cooling Company of Baltimore, to come down and do the repair work on the air conditioners that were fouled up?

A. At the suggestion of his uncle, Mr. Ralph Wood, yes.

Q. Well, you were looking for some competent air conditioning man to come in and clean up the mess that was over there, were you not?

A. That is not completely true. We were getting along fairly well at this particular point. The job was nearing completion. Progressive had their deadline dates to meet

and they were pushing everything and they suggested—Mr. Ralph Wood suggested that his nephew was available to do this work at a reasonable figure and that he was very competent, so I said bring him down.

Q. All right. And you—and I say you, I mean Virginia Heating Distributors—hired Mr. Norris Wood to do certain work on the job and in fact you paid him, did you not, sir?

A. I paid him, but I did not hire him in the name of Virginia Heating Distributors.

Q. Well, do you have any—

A. I paid him in the same manner that I paid everyone else, with checks—payroll submitted to Progressive Construction.

page 66 } Q. Well, did not Mr. Norris Wood have to come out to your home one evening, Mr. Thumm, to get his check after he had been down here on the job for a couple of weeks?

A. That's not true. He came to Virginia Beach, if you want to be exactly accurate. I was on vacation at the time and he was in a hurry to get back to Washington and he had to have his money, and his money of course had to be paid for him by Virginia Heating Distributors because we were being repaid by Progressive Construction.

Q. Do you deny, sir, that you had a conversation on the job at the construction shack or on the site after Mr. Joseph Shadrick, the field superintendent for Progressive, formally introduced you to Norris Wood, the air conditioning man of Baltimore, in which you went ahead and made your deal for hiring him to get in there and do whatever had to be done on the air conditioning to straighten it up?

A. I don't deny that.

Q. All right, sir. In June around the 19th did you not, sir, hire the Allen Heating and Cooling Company of Portsmouth to go in and clean up the sheet metal mess that was on the job?

A. Yes. I did.

Q. Well, may I ask—

page 67 } The Court: I think we ought to specify when you say "you" whether you are contending that he is hiring for one concern or the other. If you will specify that, Mr. Thumm, it may be helpful.

Linwood A. *Thumm*

By Mr. Kanter:

Q. You hired him in the office of Virginia Heating Distributors, did you not, sir?

Mr. Hollis: If Your Honor please, Mr. Kanter still did not specify which company he was hiring him for.

By Mr. Kanter:

Q. Which company did you hire him for?

A. He was hired to finish National Sheet Metal's contract to replace Mr. Alvis at this particular time.

Q. Did you hire him in the name of National Sheet?

A. Yes, I did.

Q. Did you pay him in the name of National Sheet?

A. No, I did not. I didn't pay anyone in the name of National Sheet after the 1st of January.

Q. Was the National Sheet Metal office on page 68 } 39th Street open at the time you hired him?

A. It had been released May 1st to Mr. Alvis to complete another government contract of his own.

Q. There was nobody in that place of National Sheet's on 39th Street when you hired Allen Heating and Cooling, was there?

A. Oh, yes. The shop was still open and available.

Q. National Sheet's shop was open?

A. Absolutely.

Q. Now, did you ever mention to Mr. Allen under any circumstances at any time that you were hiring him for National Sheet Metal Company?

A. That is absolutely the understanding. He was taken to the National Sheet Metal office and to the jobsite. He was shown the equipment and the materials that were still available on 39th Street and he was told that he could take over the contract if he thought he could handle it.

Q. Virginia Heating paid him, didn't they?

A. Virginia Heating paid him, as they paid everyone.

Q. And he came to your office to get his check every week, didn't he?

A. He came to my office because I had no office page 69 } at National Sheet Metal.

Q. Do you have any writings, memoranda, correspondence of National Sheet that would indicate that National Sheet was the employer of Allen Heating and Plumbing?

A. I have none that Virginia Heating was the employer of Allen Heating and Plumbing either.

Q. You show—you carry him as a bill you paid on Virginia Heating's expenses in your ledger. Right?

A. And charged to National Sheet Metal's ledgers, yes, sir.

Q. But it shows as an expense on Virginia Heating?

A. Not on these records it does not.

Q. Not on your records. You have no writing at all that would in any way bear out what you have said that you specifically told this man that you were hiring him as National Sheet?

A. No, sir. And his weekly payrolls submitted to us did not show anything either to National Sheet Metal or to Virginia Heating. They were just Allen's Sheet Metal's weekly payrolls and submitted to Progressive Construction.

Q. Mr. Wood, I hand you—I mean, Mr. Thumm, I hand you a telegram directed to Virginia Heating
page 70 } Distributors, 535 West 25th Street, and ask you if you remember getting that during the first week of February 1965?

A. Yes, I do.

Q. Will you read it to the jury, please?

The Court: Let's mark it.

Mr. Kanter: Mark it as Plaintiff's 5, Your Honor.

The Court: Any objection?

Mr. Willcox: Let me see which one it is.

Mr. Kanter: Same one. You have got copies of all of them.

By Mr. Kanter:

Q. This telegram—

The Court: Just a minute.

Mr. Kanter: I beg your pardon, Your Honor.

The Court: No objection. Plaintiff's 5.

(So marked by the court.)

By Mr. Kanter:

Q. This telegram is dated February 9th, addressed to you. Will you read it to the jury, Mr. Thumm?

A. "Virginia Heating Distributors, 535 West
page 71 } 25th Street. Attention Tumbs. Reference contract NBY-54115. Unless men are on job by 7:00 A.M.

Linwood A. Thumm

Wednesday, February 10th, to hook up furnaces at Camp Allen we will have to take steps whatever we deem necessary to protect the interest of our company." Signed Progressive Construction Company, Ralph N. Wood, Vice President.

Q. Now, Mr. Thumm, when you received this wire, sir, did you call Joe Wood back on the telephone in Farmville, or Ralph Wood, and say to them, "Gentlemen, you got the wrong bird here. I was wearing my other hat, National Sheet Metal hat, not Progressive's hat—not Virginia Heating Distributors."?

A. This never occurred to me, because I knew that the only way they could contact me was at Virginia Heating Distributors. If they wanted a direct and quick contract that was their only way of doing it.

Q. Did you take the time to sit down and write any sort of letter, sir, and say, "Gentlemen, I want to make sure that you keep this thing straight, Virginia Heating—"

Mr. Willcox: Your Honor please, counsel is arguing the case. He is not asking the witness a question. He is testifying and arguing. He can ask Mr. Thumm what he wrote and get copies of all the letters if he wants to, but he page 72 } is sitting here talking about what—

The Court: I am going to sustain it.

By Mr. Kanter:

Q. All right, did you write any letter or make any other communication as a result of that wire?

A. No, I didn't.

Q. Mr. Thumm, I hand you a wire dated May 19th and ask if you received that one, sir?

A. I am sure I did.

Mr. Kanter: Offer it as Plaintiff's 6, Your Honor.

Mr. Willcox: May we see that?

Mr. Kanter: Offer it, Your Honor, as Plaintiff's 6.

The Court: Any objection?

(So marked by the court.)

By Mr. Kanter:

Q. Mr. Thumm, will you read that wire to the jury, the one that you received—this one was February, that one was in March I think—May is that?

A. I would have thought by all this time after these negotiations they could have at least got my name correct.

page 73 } "Virginia Heating Distributors, Attention Mr. Tumbs, T-U-M-B-S, 535 West 25th Street. Reference contract NBY-54115. Unless air conditioning pads are completed at Camp Allen by Friday, May 21, 1965, we will proceed to do same and back charge you accordingly." Signed Progressive Construction, Ralph Wood.

Q. Mr. Thumm, did you contact Mr. Joe Wood or Ralph Wood to tell them this isn't Virginia Heating, this is National Sheet, or did you sit down and write them any letter to clear the situation up?

A. No, I did not.

Q. All right, sir. I hand you herewith another telegram and ask you if you received that, sir?

A. Yes, I am sure I did.

Mr. Kanter: Ask Your Honor to mark it as Plaintiff's 7.

The Court: Any objection? Plaintiff's 7.

(So marked by the court.)

By Mr. Kanter:

Q. Mr. Thumm, without taking the time to read it again to the jury, did you following receipt of this at Virginia Heating Distributors make any effort to contact them or Mr. Joe Wood or write them a letter to make—

page 74 } A. I would like to make one comment about all of these telegrams. None of these telegrams emanated from Progressive's office in Farmville. These telegrams came from their construction superintendent, Mr. Ralph Wood, at the jobsite. These telegrams were all addressed to me, and in all of his relations with me evidently he didn't know where I was or what my name was and how to spell it correctly, so that shows how much association I had with the job.

Q. At any rate, you did not make any effort to clarify the situation at that point, sir?

A. If he doesn't know enough to spell my name right and find where I am I don't think it is necessary to straighten him out.

Linwood A. *Thumm*

Mr. Willcox: What's the date of that one, Mr. Kanter? It is in July, isn't it, '65?

Mr. Kanter: It is in July. It doesn't seem to bear a date. It says you will have them on the job by July 8th, so it must have been a day or so prior to that.

By Mr. Kanter:

Q. Mr. Thumm, I take it, sir, that in whatever capacity you were operating you did continue the job up until this last part of July. Is that correct?

page 75 } A. Until we no longer received any payroll checks back from Mr. Joe Wood.

Q. Well, you had gotten within seven hundred dollars of this $143,000.00, had you not, when you left the job?

A. That was not my concern. My agreement with Mr. Wood was that he would meet payrolls and I would put materials on the job and we'd complete the contract. I had no interest in whether or not there was money left in the job at this point.

Q. What payments had been received—total payments had been received by you up until July 23rd, the day you left the job, sir?

A. We had not totaled them, but obviously it was within seven hundred dollars of the contract. That's your figure.

Q. In other words, if all of these checks were totaled starting back with the first payment you think that I'm approximately correct in saying it is within—it is a hundred forty-two thousand three hundred forty some odd dollars?

A. I am sure it is correct, and to show my position in this thing, at this point we did not know the total, were not concerned with it. We knew we no longer had the

page 76 } profit. But I felt I had a moral obligation to finish as long as Mr. Wood met payrolls.

Q. Admittedly, the job was not complete in late July '65?

A. I don't think they completed it until October.

Q. You may be right.

The Court: When did you and your concern, whichever concern it may be, go off of the job? What date?

The Witness: In late July after a conversation with Mr. Wood when he refused to send me any more payroll checks.

The Court: Late July '65?

Linwood A. *Thumm*

By Mr. Kanter:

Q. And at that time, admittedly, the work called for in that contract had not been completed. Correct?

A. That is correct.

Q. All right, sir. And as I understand it, Mr. Thumm, this was a voluntary leaving on your part; whether it be because of payroll or any other reason, you left the job yourself. Mr. Wood didn't throw you off?

A. I called Mr. Wood when we did not receive the weekly payroll check and asked him why. He told me
page 77 } that all the moneys had been used up and we would not receive any more money, so I asked that I have a chance to talk to him. He said he would be in Norfolk the next day and I could meet him on the jobsite, which I did. When I met him he told me that all the contract money had been used up and that that was the end of it. I said, "Well, if that's the case we can't proceed, we can't go any further." He said, "Well, will you please give me a letter stating that you are in default on the job?" I said, "I will be glad to do that."

Q. Mr. Thumm, I hand you this letter dated July 27, 1965, and ask you if that was the letter that you handed Mr. Wood out in the construction shack on that day?

A. No, sir. This letter had not been written until we had this meeting at the construction shack.

Q. Well, then maybe your meeting was a day before you wrote that letter?

A. I would assume so, yes, sir.

Q. But at any rate, is that the letter you handed to him?

A. That's the letter.

Q. That's on whose stationery?

A. National Sheet Metal, Incorporated.

Q. Why did you write that letter on National
page 78 } Sheet Metal, Inc.?

A. Because the contract was with National Sheet Metal, Inc.

Q. There was apparently, at least on that date, that stationery available. Correct, sir?

A. Oh, yes.

Mr. Kanter: I offer it, Your Honor, as the plaintiff's next exhibit.

The Court: Plaintiff's 8. Any objection?

Mr. Willcox: (Indicated no)

(So marked by the court.)

By Mr. Kanter:
Q. Mr. Thumms—

The Court: Hold it just one minute and let me read it.
Mr. Kanter: Yes, Your Honor.

By Mr. Kanter:
Q. Mr. Thumm, I hand you, sir, this letter dated August 3rd and ask you, sir, if you did not receive that letter from Mr. William Watkins, the Farmville counsel for Progressive Construction Company a day or so following that August—well, about August 4th, I guess?

page 79 } A. Yes.

Q. And immediately after receiving that is when you referred the matter to your counsel, Mr. Willcox. Is that correct, sir?
A. I did not even discuss this with Mr. Willcox at the time. I didn't feel like it was necessary, and Mr. Willcox was in Europe.

Mr. Kanter: All right, sir, Your Honor. I will offer that as Plaintiff's No. 9.
The Court: Any objection? Plaintiff's 9.

(So marked by the court.)

A. I did, however, answer that letter.

By Mr. Kanter:
Q. Yes, I know you did, sir.

Mr. Kanter: Your Honor, I will offer this as Plaintiff's 10.

By Mr. Kanter:
Q. This was your answer to the letter, was it not, sir?
A. Right. That's correct.

Mr. Kanter: I offer it as Plaintiff's 10 so we will have them all together.
The Court: Any objection? Plaintiff's 10.

page 80 } (So marked by the court.)

By Mr. Kanter:

Q. Mr. Thumm, at this shack on the construction site when you said you met Mr. Wood and talked about getting some payroll checks, was not Mr. Fred Allen of the Allen Cooling Company there?

A. I think he was.

Q. And Joe Shadrick, the general field superintendent, was there too, was he not?

A. I believe so.

Q. And do you not remember Mr. Wood saying to you in their presence, "Mr. Thumm, why are you pulling off on me? I thought you told me that there was a profit in the job." And your answer was "I thought so too at that time."

A. I am sure that conversation took place. I don't remember it.

The Court: Anything further?

Mr. Kanter: No, Your Honor, that's all I have at that point.

The Court: All right, Mr. Willcox or Hollins, you want to examine at this time or reserve it?

Mr. Willcox: No, we will reserve it.

page 81 }

* * * * *

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

DIRECT EXAMINATION

By Mr. Kanter:

Q. What is your name, sir?

A. My name is J. E. Wood.

Q. And, Mr. Wood, you are the president and the majority stockholder of Progressive Construction Company, Incorporated, the plaintiff in this case?

A. I'm the secretary and the treasurer and I own two-thirds of the stock.

Q. And what sort of business is the company's business?

A. General construction.

J. E. Wood

Q. And what was its name prior to Progressive?

A. Southside Plumbing Company.

page 82 } Q. You started in the plumbing business, Mr. Wood?

A. In 1950.

Q. And have come on since that time to be general contractor?

A. We started doing general construction in 1954.

Q. And has Progressive been a general contractor since that time?

A. Yes, sir.

Q. Now, Mr. Wood, did you bid the Camp Allen and Armed Forces Staff College and a couple units at Northwest and Driver, Virginia, for the United States in 1964?

A. Yes, sir.

Q. What were you-all building out there?

A. Two hundred forty housing units.

Q. What was the total contract price?

A. Just under four million.

Q. All right, sir. Does your company do general contracting work around Virginia and other states here in the east too?

A. Yes, sir, we do strictly government construction.

Q. Been doing that since 1964?

A. Well, we have been doing it—practically

page 83 } everything we have done has been government right on through since 1951.

Q. Are you doing any work for the government now?

A. Yes, sir.

Q. Whereabouts?

A. We are doing an emergency job at Fort Bragg and one at Belvoir and we are doing two hundred housing units at Langley Field.

Q. And that's in progress at this time?

A. Yes, sir.

Q. Mr. Wood, did you know that man Charles Jackson at the time your company started to take bids from subcontractors on various phases of the work?

A. I have meet him at the hotel while we were preparing our bid.

Q. Here in Norfolk?

A. I didn't know him prior to that time, no, sir. At the Golden Triangle Motel.

Q. Where is the headquarters of your company?

A. Farmville, Virginia.

Q. Who introduced you to this gentleman, Mr. Jackson?

A. Mr. C. D. Moseley from Lynchburg, who used to be a mechanical contractor and a good friend of mine.

page 84 } Q. All right, sir. At any rate, did he give you a bid on the heating and air conditioning work for this Armed Forces Staff College job?

A. Yes, sir.

Q. And did you subsequently get the job awarded you by the United States?

A. Yes, sir.

Q. As general contractor?

A. That's right.

Q. Did you in turn choose to award the heating and air conditioning subcontract to Mr. Jackson based on his bid?

A. I had no choice. He was the only bidder on the ductwork.

Q. The only bidder?

A. Yes, sir.

Q. Well, from your estimates of your own people was this bid in line of a hundred forty-three thousand?

A. Well, we don't know, because we don't do our own ductwork. That's one phase of the mechanical we have never done.

Q. Ductwork is putting those metal things in the walls where the hot air comes through or the cool air?

A. Yes, sir. We thought his price was pretty

page 85 } well in line from past jobs that we had worked up.

Q. All right, sir. Now, when was it that you first heard about or came into contact with this corporation that you entered into an agreement with, National Sheet Metal, Inc.?

A. Well, originally it was bid through Air Comfort.

Q. Air Comfort was Jackson's old company that had been operating?

A. Yes, sir, I have found since that time that it was.

Q. So what happened?

A. We agreed to let him write it through National Sheet Metal.

Q. Did he give you any reason for doing that?

A. None that I can remember.

Q. Did you try to get a bond from him?

A. He said he couldn't give bond and I didn't pursue it.

Q. What, if anything, was inserted in the contract in view of the fact he couldn't give bond?

J. E. Wood

A. Well, whenever a subcontractor can't give bond we usually write in there reserving the right to pay the material people jointly.

Q. Why?

page 86 } A. Well, to protect us in the event mainly that they don't pay, and then when the payrolls are paid weekly your contract is reasonably assured that the bills are paid.

Q. Well, what sort of arrangement here did you have with Jackson? Was there anything special on payrolls or was he submitting regular monthly vouchers?

A. For partial payments?

Q. Yes, sir.

A. He submitted his partial—his vouchers monthly for partial payments.

Q. Well, there are a bunch of odd checks in there in small amounts. What are they for, sir?

A. Well, occasionally he would run short making his payroll and we would agree to let him have it, which isn't unusual. We try to help these contractors.

Q. Mr. Wood, what—had you ever known Mr. Thumm when you came down to bid this job here in Norfolk?

A. No, sir.

Q. Did you ever meet him at the time you made this contract with this corporation that he owned half of?

A. No, sir.

Q. Did you know of any of the deal between him and Jackson on materials, anything like that?

A. None whatsover.

page 87 } Q. I am talking about at the time you made this contract with him?

A. No, sir.

Q. When was the first time that you ever heard from Mr. Thumm, this gentleman?

A. I believe it was—

Q. Well, I am going to hand you—

A. —'64.

Q. Excuse me, sir. I'm going to hand you Exhibit No. 3, which is a letter from Mr. Thumm to you, and see if that in any way helps you refresh your recollection?

A. Yes, sir. He apparently called me—this was written the day after, probably August 31st.

Q. '64?

A. Yes, sir. He said he had heard that Jackson was going to build a house and charge it to the contract, and I at that time told him I didn't see how it was going to be done, but it did concern me somewhat to think maybe I might have a foreman or superintendent that was trying to do something that wasn't right.

Q. Well, what did you suggest to him when he told you told him you'd do to help him out, did you begin to write he had heard this?

A. Well, I suggested that we make the payments jointly for materials, and he readily agreed to it.

page 88 } Q. And did he write you that letter, that Plaintiff's Exhibit 3—

A. Yes, sir.

Q. —the next day?

A. Yes, sir.

Q. And did you—following up on this letter and what you these checks jointly to Virginia Heating and National Sheet, at least some of them, after September 1st?

A. All of the material checks we did, yes, sir.

Q. Well, Mr. Wood—

A. Of course, now—

Q. I show you this check—there were actually three checks in September, one was for ten eight to National Sheet and Virginia Heating and one was for ten two, just to National Sheet. You signed all these checks?

A. Yes, sir.

Q. And another one on the same day to National Sheet for $2,800.00?

A. I think this must have been money for a weekly payroll that he needed.

Q. That's signed by Ralph Wood, not by you?

A. Yes, sir.

page 89 } Q. That's a different check?

A. This was done in the field, the field office.

Q. Is that a twenty-eight-hundred-dollar check?

A. Yes, sir.

Q. How about these big checks for $21,000.00, one of them half of it is to Virginia Heating and National Sheet?

A. This was written—all First and Merchants checks come through the office. And this is a First and Merchants that come through the office.

Q. What I am asking you—

A. This is a Farmville bank.

Q. People's National?

A. Yeah, we have a miscellaneous account there in order that the field can write small checks in case they need to.

Q. What I am asking you, Mr. Wood, was why was one of these checks just to National Sheet and the other one to National Sheet and Virginia Heating?

A. Well, of course, I can't say definitely, but I would think that they billed me both for material and labor for that partial payment.

Q. And the material when you made out both of them?

page 90 } A. Yes, sir.

Q. All right, sir, now—

A. I would think.

Q. Hum?

A. I would think that was the reason for it.

Q. Tell the gentlemen of the jury and His Honor what was going on physically in the field with regard to how this heating and air conditioning contract was being performed, Mr. Wood? Did you go down the job and look at it at all?

A. Yeah, I usually went down the job once or twice a month, and while I didn't particularly, you know, get into it, I was told that there was quite a bit of sloppy work, and I did—

Q. Did you have Mr. Shadrick, the general field superintendent, also make inspections?

A. Mr. Shadrick was down there quite often and he would be more in a position to explain to you in detail.

Q. What did you yourself actually see concerning the work when you went down there?

A. As I said, I didn't pay no attention.

Mr. Willcox: If Your Honor please, there's no dispute the work was sloppy. It has nothing to do with this particular defendant at this time.

page 91 } Mr. Kanter: Judge, if that's—Mr. Willcox, will you stipulate—

The Court: Just a minute, gentlemen. The testimony is that he went down to the field and made personal observations. He has testified to those. The question now is to amplify this.

Mr. Kanter: No, I am going to withdraw it. As I understood, Your Honor, Mr. Willcox didn't deny it in his pleadings and I haven't heard him say he was going to deny it. I under-

stood that the fact that the work wasn't completed and done properly and the excess amount—

The Court: His position is that it is not material at this time as between these two parties.

Mr. Kanter: I realize that, but can we stipulate that particular fact so I don't have to waste the time of the court or the jury on those proofs?

Mr. Willcox: We are not stipulating to immaterial facts, judge.

The Court: I think it is a proper objection. Sustained.

By Mr. Kanter:

page 92 } Q. All right. Mr. Wood, directing your attention from the time after your first conversation with Mr. Thumm on August 31st up through Christmas time and early January, did you have any personal contact at all with Mr. Jackson, the plumbing and heating man for National Sheet, or Mr. Thumm?

A. No, sir.

Q. What, if anything, did you have personal knowledge of concerning the condition of that phase of the job, say, as close to Christmas time 1964?

A. Well, the only thing I heard, that the job was way behind schedule.

The Court: I missed your reply. What was that?

The Witness: The job was way behind schedule, the mechanical part of it.

By Mr. Kanter:

Q. All right. Now, Mr. Wood, when was your next contact with Mr. Thumm?

A. He called me up sometime in February. I believe it was probably the early part of February—

Q. Well, now, let me ask you, at that point when you got his telephone call did you know that Mr. Jackson of the National Sheet Metal, Inc., had left the city and the job?

page 93 } A. No, sir.

Q. Who told you that?

A. Mr. Thumms on the telephone that day.

Q. All right, sir. Now, if you will, Mr. Wood, tell us exactly what Mr. Thumm told you that day on the telephone concerning the condition of the job and the various moneys owing and what he wanted to do?

A. Well, the conversation was very short. He said that Mr. Jackson had left and that he would like to take the job over and complete it, and that he figured he could make fifteen or twenty thousand dollars, and he said if I would make the payrolls that he would furnish the material. Well, I certainly agreed to furnishing the labor, there is no question about it, but not beyond the contract. I mean we had no idea it was going beyond the contract.

Mr. Willcox: If Your Honor please, I object to this. The question asked was exactly what the conversation was and he's recited that. Now he is going on to his interpretation of it.

The Court: Just limit his answer to the question.

By Mr. Kanter:

page 94 } Q. All right. Mr. Wood, would you go ahead and tell us anything else he said? What, if anything—

Mr. Willcox: If Your Honor please, I object to Mr. Kanter's leading. The proper question would be what was the conversation? What, if anything, was said, not any references to concerning this or that.

The Court: I can't rule on your objection. I don't have the question. State the question.

By Mr. Kanter:

Q. Well, I want to ask—

The Court: Just state the question.

By Mr. Kanter:

Q. Yes, what else, Mr. Wood, if anything, was said concerning the condition of the job, moneys owing, et cetera, in the course of that conversation and tell us what it was to the best of your recollection?

Mr. Willcox: If Your Honor please, the damage is already done, because the court—Mr. Kanter has now suggested a line of discussion for Mr. Wood. I object to it. I think the only proper question Mr. Wood can be asked on this occasion is what was said in that conversation, and not any-

page 95 } thing else or any interpretation he might have put upon it or any other discussion. It is my under-

standing he has already related to you the entire conversation.

The Court: Let me ask you this, Mr. Wood: Was there any further conversation other than what you have related?

The Witness: Nothing that I know of. As I said, the conversation was very short and, of course, I agreed that Mr. Thumms could take the job over and I assumed—can I say that?

The Court: No, you may not tell what you assumed.

Mr. Willcox: No.

The Witness: Then I won't say it.

The Court: But you have related the full conversation?

The Witness: Yes, sir.

By Mr. Kanter:

Q. Did you agree with him, that he could take it over?

A. Yes, sir.

Q. And what, if anything, else was said?

The Court: He's answered that question.

A. That's all I think was said.

page 96 } The Court: Just a moment, he's answered that question. What's your next question?

By Mr. Kanter:

Q. Did you have any further conversation with him at that particular time?

A. No, sir.

Mr. Willcox: If Your Honor please, that's—

The Court: We have been into this three times.

Mr. Kanter: All right. I presume the phone was hung—

The Court: Just a moment. He's answered he had no further conversation at that time as far as he recalls. Now go ahead.

By Mr. Kanter:

Q. Now, Mr. Wood, after that telephone conversation, what, if anything, did Mr. Thumm do in connection with the job down in Norfolk?

A. Well, I think it continued.

J. E. Wood

Mr. Willcox: If Your Honor please—

The Court: Just a moment.

Mr. Willcox: I presume the question is directed
page 97 } to what Mr. Wood knows of his own knowledge and not what was told him by someone else.

By Mr. Kanter:

Q. No, not what was told you. You came down to Norfolk on your inspections, as you say, about once or twice a month?

A. Once or twice a month, something like that.

Q. What, if anything, occurred on the job after that? What did Mr. Thumm do?

A. Well, to actually know exactly what he done I think one of our people who are more familiar with the job should answer it.

Q. Was he on the job to your knowledge?

A. He was on the job, yes, sir.

Q. All right, sir. Now, Mr. Wood—I will use your other gentlemen, the experts in the field, to give the specifics—when was your next meeting or conversation with Mr. Thumm and how did it come about?

A. Sometime in late July or in July he had drawn practically all the money and I told Ralph, my brother, that I simply couldn't go any further, it would be up to Mr. Thumms to finish the job, and we met him down at the office trailer and that is when he handed me a letter of voluntary default.

page 98 } Q. I hand you herewith Plaintiff's Exhibit 8, sir, and ask you if you recognize that as the letter that he handed you that day in the trailer?

A. Yes, sir.

Q. And what was your conversation with him, Mr. Wood, that day in the trailer when he told you he was going to leave the job?

A. Well, there was very little said. I asked him did he tell me over the phone that he could make fifteen or twenty thousand dollars, and he said, "Yeah, I thought I could," and then when we got the letter of default, why, I just told him we would go ahead and finish and back charge him.

Q. All right, sir. I show you herewith Plaintiff's Exhibit 9 and I ask you if you had your general counsel, Mr. Watkins, in Farmville, direct that letter to National Sheet and Virginia Heating?

A. Yes, sir.

Q. Did you in fact finish the job, sir?
A. Yes, sir.
Q. Who did you finish it through, Mr. Wood?
A. Mr. Allen, Allen Sheet Metal, I believe, finished it.
Q. All right, sir. Does Mr. Shadrick, your general field superintendent, have a detailed analysis of the
page 99 } extra costs over the $143,000.00 that it took to complete this particular contract?
A. Yes, sir.
Q. All right, sir. And you would suggest it would be better I get that from him than you?
A. I would think so, yes, sir.

Mr. Kanter: Hold on just a moment, sir.
Answer Mr. Willcox, please, sir.
The Court: I don't know whether you want to—I don't know how long you expect to have the witness under cross-examination, Mr. Willcox. Some little time?
Mr. Willcox: I suspect it is going to be more than fifteen minutes, Your Honor.
The Court: I expect it will be some little time and I don't like to interrupt during cross-examination.
Members of the jury, at this time I am going to release you for lunch. During your absence from the courtroom, gentlemen, do not discuss the case among yourselves or with anyone else and do not permit anyone to discuss it with you. Return at two o'clock, gentlemen.

(The court recessed at 12:46 P.M., July 29, 1966, and reconvened at 2:00 P. M., July 29, 1966.)

page 100 } Mr. Hollis: Your Honor please, Mr. Willcox went to a meeting with the mayor and he told me he'd be here on time.
The Court: All right.
Mr. Kanter: Judge, I have just one or two questions.
The Court: Perhaps you better wait.
Mr. Hollis: I would have no objection to—
The Court: All right, go right ahead.

By Mr. Kanter:
Q. Mr. Wood, just one or two questions. You said you had never known Mr. Thumm at all prior to the time he first called you on the phone in September. Is that correct?

A. That's correct, and I never met him until late in July at the field office.

Q. Mr. Wood, did—at any time did you know that—when he called you in February and said "I am taking the job over," did you know that he had any connection at all as a stockholder or half the profit or anything with National Sheet Metal?

A. No, sir.

Q. The only time you'd ever talked to him before—

page 101 } Mr. Hollis: If Your Honor please—

The Court: Don't lead him. Sustained.

A. I believe that maybe a letter or two did come in signed as assistant—

The Court: Whoa, whoa. Sustain the objection. Listen to the question.

By Mr. Kanter:

Q. When he called you in September, sir, when he talked to you about making out the joint checks, in what capacity did he call you and talk to you about at that time, sir?

Mr. Hollis: If Your Honor please—

The Court: I think he can relate what was said to him at the time, which he has already done, but as to what capacity he called him in I think—

Mr. Kanter: I think that's sufficient, Your Honor.

Mr. Hollis: Your Honor, we'd like to—

The Court: You want to go forward or you want to wait?

Mr. Hollis: I'd like to wait just a moment.

page 102 } The Court: Mr. Hollis, I expect you better go forward. Mr. Willcox can take over when he comes.

Mr. Hollis: If we can do it with that understanding.

Mr. Kanter: I have no objection to that, Your Honor.

CROSS-EXAMINATION

By Mr. Hollis:

Q. Mr. Wood, you have indicated that there was no bond

taken on this job by your company from National. Now, isn't it true that it is customary for a general contractor to take bond in a job of this type under a government contract?

A. It is whenever the subs are financially in position to give bond. We like to have bond, but in many cases they are unable to furnish it.

Q. And of course when they give a bond you get a performance bond which protects you in the event of default?

A. Exactly so.

Q. Isn't *what* what happens?

A. Yes, sir.

Q. Well, now, is there—when they don't give a bond is there some advantage to you in this connection?

page 103 } A. No, there is no advantage except that we like to help the subcontractors whenever we can, when we think they are reliable.

Q. Well, isn't it true that this would result in a lower bid from the subcontractor when they don't give a bond?

A. Not always. We—it wouldn't always happen that they would be low, I mean not necessarily.

Q. Well, now—

A. We get bids from many different people, usually.

Q. Did I understand correctly that there were no other bidders, no other subcontractors who bid on the work which National Sheet Metal did?

A. On the ductwork, that's right, sir.

Q. Well, did you have any bidders on any other work which National did on this job?

A. I didn't quite understand your question.

Q. Well, was the ductwork all they did?

A. Yes, sir, ductwork and setting of the air conditioning equipment, which we furnished, and hooking it up.

Q. But you actually made no purchase directly from Virginia Heating on this job, did you?

page 104 } A. No, sir.

Q. However, isn't it true that before the job started that your company did negotiate with Virginia Heating to buy some equipment for this job?

A. If there was any equipment bought through Virginia I don't know it. I don't know anything about it.

Q. I didn't say there was any bought, but didn't your company go to them and price some equipment?

A. It's a possibility that they—our company got quotations on certain materials from Virginia Heating. That I don't know.

J. E. Wood

Q. You don't know that?

A. No, sir.

Q. And you don't know who they dealt with at Virginia Heating if they went there?

A. No, if they did they probably dealt with one of our estimators.

Q. I see.

A. It isn't unusual for supply people, regardless of whether you request prices or not, they will send them in to you in hopes that they can be used.

Q. Now, you have testified that you had no contract—contact with Mr. Thumm prior to September. You meant you individually rather than someone else for your company. Is that what you are saying?

page 105 } A. He probably met Ralph, the field superintendent in Norfolk. I just don't know. He probably did.

(Mr. Willcox entered at this point.)

Mr. Hollis: Excuse me. Indulge me, Your Honor.

The Court: We will take a minute.

Mr. Willcox: I apologize to the court for being late here. I had a meeting scheduled with the mayor which I showed up at long enough to speak.

The Court: Go ahead.

By Mr. Willcox:

Q. Mr. Wood, am I correct in believing that prior to the telephone conversation between you and Mr. Thumm in February 1965 there was no connection and you don't claim any connection between your corporation and Virginia Heating?

A. No, other than checks being made payable jointly for the materials that he requested at an earlier date.

Q. This you-all had worked out and you were doing?

A. Yeah.

page 106 } Q. But you do not claim that Virginia Heating was made a subcontractor of yours by virtue of that arrangement?

A. No, sir.

Q. So that your claim, if any, against Virginia Heating arises as a result of this telephone conversation?

A. That's right. He called me and asked that he be allowed to take the contract over, and why would he have called me if it had been National Sheet?

Q. I will get to that in a minute, but am I correct then in whatever claim you have arises from that telephone conversation?

A. Exactly so. As far as I was concerned it was a contract then. I mean he entered into the picture.

Q. Mr. Wood, you can explain that at your time. Just answer my questions, please. This conversation was between you and Mr. Thumm by telephone?

A. Yes, sir.

Q. There was no one else that participated in your office or in his?

A. Not to my knowledge. I can't say for his office, now.

Q. And you didn't do anything different with respect to this job after that telephone conversation than you had done before, did you?

page 107 } A. No, we still continued to advance payroll checks.

Q. Which you had done before?

A. Yes, sir.

Q. And the checks were made jointly to National Sheet and Virginia Heating?

A. I think in most cases.

Q. As you had done before?

A. Yes, sir.

Q. And when the full amount of the money that you were supposed to pay out for the ductwork was paid you stopped payment?

A. Well, certainly we didn't intend to go beyond the contract price.

Q. And you didn't release National Sheet Metal from the contract?

A. At that time National Sheet Metal hadn't defaulted and we were doing business with both National and Virginia as far as I'm concerned.

Q. So National Sheet Metal had not defaulted?

A. They hadn't at that point.

Q. And you continued to look to them to complete the job?

A. To National and Virginia after the telephone conversation. Mr. *Thumms* explained to me in detail that

page 108 } he thought he could make some money on it.

Q. You didn't promise to pay Virginia Heating any money, did you?

A. I promised to advance payrolls on the money.

Q. Which you had been doing before?

J. E. Wood

A. That's right.

Q. And you didn't advance any more than the gross amount of money you were supposed to put out for that work?

A. Yet our office slipped up on that or I wouldn't have went that far, because ninety percent is all we ever put out.

Q. You didn't intend to pay out any more money than the contract called for?

A. No, sir. The government doesn't pay me any more than is called for.

Q. All right. You didn't write any letter to Mr. Thumm after February saying that he was taking over the job or he was going to be held responsible or any of those things, did you?

A. No, sir, and neither did he write a letter to me confirming it. I thought Mr. *Thumms* was a man of his word.

Q. You did continue to write National Sheet Metal, or your office did, didn't it?

page 109 } A. I think in some cases we wrote National and in some cases we wrote Virginia.

Q. Have you got your correspondence file with you?

A. No, I don't.

Q. Does Mr. Kanter perhaps have it?

Mr. Kanter: I am sorry, I wasn't listening, Mr. Willcox.

Mr. Willcox: Do you have his correspondence file?

Mr. Kanter: I do have everything that you got in my office that day.

Mr. Willcox: Would you give it to him?

Mr. Kanter: Well, a lot of these exhibits have been put into evidence and I'm going to fish them out. This is the chronological order of all correspondence from back in '64 to '65. Let me pull these out.

Mr. Willcox: That's all right. If he's got the others that's all I want.

Mr. Kanter: Well, let him have it all.

A. What date did you have in mind, Mr. Willcox?

By Mr. Willcox:

Q. Well, I want to see what correspondence

page 110 } you have of any kind after the first week in February 1965. Do you have a letter dated March 12th from Progressive to the resident officer in charge?

A. Yes, sir, signed by Ralph N. Wood, Jr.—Sr.—Jr.

Q. Yes, and referring or requesting approval of I guess a specification change requested by National Sheet Metal, Inc.?
A. Um-hum.
Q. May I have that, please?
A. Yes, sir.

Mr. Kanter: No objection to it. No objection, Your Honor.
The Court: This will be Defendant's 1.

(So marked by the court.)

By Mr. Willcox:
Q. That makes no reference to Virginia Heating being interested in the job, does it, sir?
A. No, sir.
Q. All right. I hand you another letter dated March 18th from you to National Sheet.

Mr. Kanter: That's Ralph Wood, not Mr. Joseph—

page 111 } By Mr. Willcox:
Q. This is your file, isn't it?
A. It is the company's file.
Q. Is that a copy of your company letter?
A. I assume it is; Ralph N. Wood signed it vice president.

The Court: Any objection?
Mr. Kanter: No, sir.
The Court: Defendant's 2.

(So marked by the court.)

A. It is actually field correspondence, not office correspondence.

By Mr. Willcox:
Q. I understand you don't type all the letters, but these are letters from your file?
A. No, sir. I don't sign them all, either.
Q. Would you read the first paragraph of that, at least, sir, more if you want?
A. "As per telephone conversation as of this date in which you stated Alabama Electric Company, Incorporated, will

have contract to wire thermostats at Camp Allen jobsite. In which I have stated to you many times I am still expecting National Sheet Metal to fulfill their contract."

page 112 } Q. Now, is there any reference in that letter to Virginia Heating having any responsibility for that contract?

A. Mind if I read it on further?

Q. Please do.

A. "As you know, your contract states that you will wire the thermostat. As of this date we have units in which the heat is on as we have no control whatsoever, and the temperatures are from one hundred to a hundred and ten degrees. In which we expect compensation from your company for our gas bill from Camp Allen is running one thousand dollars per month. As I may state, not only heat is involved, but with temperatures as high as this, you know as well as I that damage can be done to our units. Such as opening of the trim work and cracking joints in Sheetrock, which we also expect compensation for. Another thing I would like to bring to your attention is that we have several units at Armed Forces Staff College that are wired which do not have stacks. By any chance, someone should pull the switch to the furnace and in case there should be a fire we'd expect your company to be responsible for same.

"I would like to state in reference to the air conditioning on pads at Camp Allen, I do not know that you

page 113 } are aware of the fact but the first one hasn't—the first one has not been installed as of this date."

Q. There is no reference in there whatsoever to Virginia Heating, is there?

A. No, sir.

Q. And it is addressed to National Sheet Metal, attention who?

A. Attention Mr. Thumm.

Q. Thank you.

A. And it is signed by Ralph N. Wood.

Q. It is a letter that was sent to Mr. Thumm in his capacity with National Sheet. Is that correct?

A. Um-hum.

The Court: Is that marked as Defendant's 2, Mr. Willcox?

Mr. Willcox: Yes, sir.

Mr. Hollis: Date?

Mr. Willcox: March 18th.

J. E. Wood

By Mr. Willcox:

Q. I hand you another copy of a letter from your vice president to the naval inspector requesting the approval of a change in specs dated March 19th.

A. Yes, sir.

Mr. Willcox: We offer this.

page 114 } The Court: Defendant's 3.

(So marked by the court.)

By Mr. Willcox:

Q. Mr. Wood, this refers to a request by National Sheet Metal, Inc., does it not?

A. Yes, sir.

Q. No mention of Virginia Heating?

A. No, and it is signed by Ralph Wood.

Q. Who is Clarence Wood?

A. He's a bother of mine.

Q. Ralph is also your brother?

A. Yes, sir.

Q. I hand you another letter dated March 27, 1965, addressed to National Sheet Metal, Inc., attention L. A. Thumm, and ask you if that went from your office to Mr. Thumm?

A. I would assume so, yes, sir.

The Court: This is a letter with a pencil notation to it. Is this simply a copy of the letter?

Mr. Kanter: I think it is, Your Honor. I'd tear it off. I think it is a handwritten draft.

The Court: There is a pencil memorandum on

page 115 } which the letter is written. These are clipped together and will be marked Defendant's 4.

(So marked by the court.)

By Mr. Willcox:

Q. The last paragraph contains a threat to charge it back to National Sheet Metal if the work isn't accomplished. Is that right?

A. Does it say National Sheet Metal is going to be back charged? "These are just a couple of the items. Unless this work is taken care of immediately, we will have it done and back charge all costs to your account."

J. E. Wood

Q. Who is the letter addressed to?
A. Mr. *Thumms.*
Q. No, who is it addressed to?
A. National Sheet Metal, attention Mr. *Thumms.*
Q. I hand you another letter dated May 26, 1965, from Progressive Construction Company, Inc., to National Sheet Metal, Inc., attention Mr. Thumm, and ask you if that's a copy of a letter from your office?
A. Yeah, this is a letter sending a copy, one from the government, things they hadn't done.
Q. Addressed to National Sheet Metal, Inc., attention Mr. *Thumms?*
page 116 } A. Yes, sir.
The Court: It will be Defendant's 5.

(So marked by the court.)

By Mr. Willcox:
Q. Is that a telegram sent by you to the National Sheet Metal Company, attention—
A. I assume it is. My name's been torn off of there, but here is a copy of the telegram written in longhand.
Q. This was sent by you—
A. That is right.
Q. —on July 1, 1965, to National Sheet Metal Company, attention Mr. *Thumms?*
A. Yes.

The Court: This is Defendant's 6.

(So marked by the court.)

By Mr. Willcox:
Q. Now, up to July 1965 we have been through all of the things which existed in writing, have we not, between you and National Sheet Metal and you—your company and Mr. Thumm?
A. I would imagine. I just don't know whether it is all of it or not, but what you have submitted here.
page 117 } Q. Was there ever anything in writing between February 1965 when this telephone conversation was had and the day in July whenever it was when National Sheet Metal quit work?
A. Not that I know of.

Q. All right. Did you thereafter instruct your attorney to write a demand letter to National Sheet Metal for the excess cost of the job?

A. If you have got the letter I can refer to it.

Q. (Handed to witness)

A. Yes, sir.

The Court: Any objection? Defendant's 7.

(So marked by the court.)

Mr. Kanter: Where is that last exhibit, Your Honor?

(Mr. Kanter handed last exhibit to the witness.)

By Mr. Willcox:

Q. The letter was sent, was it not, sir, at your instruction?

A. Yes, sir.

Q. And—

page 118 } A. There are two August 3rd letters here.

Q. Yes, sir, one addressed to Progressive—I mean one addressed to Virginia Heating and one addressed to National Sheet Metal.

A. Both addressed the same day.

Q. Right. And is it not correct that that letter dated August 3, 1965, which is Plaintiff's Exhibit No. 9, is the first thing in writing indicating that you expected Virginia Heating to pay anything on this job?

A. So far as I know, yes, sir.

Q. And then you very promptly—or your attorney very promptly got a reply from Virginia Heating denying any responsibility, which is Plaintiff's Exhibit 10?

A. Yes, sir.

Q. All right, sir. This was in August 1965?

A. Um-hum.

Q. When did you send a bill to Virginia Heating for what you say was due you from them?

A. I don't remember the date.

Q. Did you ever send a bill?

A. I'm not too sure.

Q. Never did, did you?

A. I am really not sure whether I did or not.

Q. And you never wrote any further letters

page 119 } demanding payment?

J. E. Wood

A. No, sir.

Q. But you later got another job in Langley, didn't you?

A. Yes, sir.

Q. And the sheet metal contractor on that job is who?

A. Tidewater Sheet Metal Company.

Q. And Virginia Heating is supplying materials to Tidewater Sheet Metal on the Langley job?

A. That's right.

Q. And there is owed to Virginia Heating by Tidewater Sheet Metal on that job approximately fifteen thousand dollars for materials, isn't it?

A. Well, I guess there was a total maybe of fifty or sixty thousand dollars.

Q. But you are holding back fifteen thousand?

A. I am holding fifteen thousand of it, yeah, but do you have the letters where Mr. *Thumms* agreed to that, and Tidewater Sheet Metal?

Q. No—we have a letter—excuse me. I don't think I should answer. Let me ask the other way around.

The Court: Your counsel will make that—

page 120 } By Mr. Willcox:

Q. You had the same agreement with Virginia Heating on that job that you had here, which was that you could bypass Tidewater Sheet Metal and pay Virginia direct for material?

A. I never had any agreement with Virginia Heating until we got consent that we could pay jointly.

Q. All right. So that you are now holding back fifteen thousand dollars on the Langley job which is due to Virginia Heating?

A. Yes, sir.

Q. And you didn't bring this suit to try to get fifteen thousand dollars from the Norfolk job until after you held up that fifteen thousand dollars on the Langley job. Isn't that correct?

Mr. Kanter: Now, Your Honor, I'm going to object to that.

The Court: I think it is a proper objection. Sustained.

Mr. Willcox: If Your Honor please—

The Court: You want to argue it out of the presence of the jury?

Mr. Willcox: Not at this time, sir.

page 121 } By Mr. Willcox:

Q. Mr. Wood, what can you show me from your files in the way of a letter, bill, telegram or anything else indicating any demand made upon Virginia Heating for any money in connection with the Norfolk job before you held up the fifteen thousand dollars from Langley?

Mr. Kanter: Excuse me. Let me find it. There's a credit memo that was issued. I think a copy was—

The Court: What's your objection, Mr.—what is your comment?

Mr. Kanter: Your Honor, I might have misunderstood Mr. Willcox's questions.

Did you say before what time, Mr. Willcox?

Mr. Willcox: Before you held up the fifteen thousand dollars on the Langley job.

Mr. Kanter: No, this credit memo was issued immediately upon holding up the fifteen thousand dollars. We have that.

By Mr. Willcox:

Q. All right. So from August or July 1965 until sometime in 1966 you never made demand upon Virginia Heating for one red cent?

A. It was from August until sometime in July?

page 122 } Q. No, from July or August 1965, whenever—

A. Yes, sir.

Q. —National Sheet Metal went off that job, until sometime in 1966 you never made any demand on Virginia Heating for the first red cent?

A. No, we sent them a credit memo.

Q. In which you attempted to take credit on the Langley job for what you claim was due you on the Norfolk job?

A. Yes, sir. We did that on legal advice.

Q. And you saw that as an opportunity to get some money, as sort of a windfall, didn't you?

A. Well, my attorney was handling it and that was his method of doing it.

Q. And until such time as you were holding that fifteen thousand dollars you hadn't done anything?

A. Except that I told Mr. *Thumms* that I was going to back charge him for it.

Q. When did you tell him?

A. But I don't think—the day that he defaulted. The day that he and National Sheet Metal defaulted is the date of it.

Q. You are talking about in July '65?

A. Yeah.

Q. And you didn't do anything from that day—
page 123 } A. No, sir.
Q. —for six or eight months.
A. But that isn't unusual. We are way behind schedule in our office many times.
Q. Now—and you continued to look to National to complete its contract right up to the end?
A. I looked to both of them.
Q. You looked to National, didn't you?
A. I looked to both of them.
Q. Well, I guess the answer is the same, Mr. Wood. We are trying to not be English teachers.
A. I know.
Q. You expected National to complete all the way through?
A. I expected National to complete, and Mr. *Thumms*. I was holding both of them responsible for completion after he told me he wanted to take the job over.
Q. But you thought you were holding Mr. Thumm as additional assurance that National would complete?
A. He volunteered it, I didn't.
Q. Mr. Wood, let's go back to this conversation. You testified—

The Court: The question asked by counsel just a moment ago is did you look to Mr. Thumm as assurance
page 124 } that National would complete its job?
The Witness: Yes, sir. You see, when he called me up and said he wanted—
The Court: This is not what—the question is what you were looking to him for.
Mr. Kanter: Excuse me, Your Honor. I certainly don't—
The Witness: I'm confused.
The Court: The question is—
Mr. Kanter: Your Honor, pardon me. I certainly don't like to impose an objection to the court's question, but you are asking for—
The Court: The question is a question of counsel. I did not hear an objection to the question of counsel.
Mr. Kanter: Well, Your Honor, when you start to use it in the technical words of assurance it concerns me, because Your Honor knows the matter of law involved here.
The Court: All right.
Mr. Kanter: I do feel that again it is a legal conclusion, just as Mr. Willcox objected when I asked the witness about contractual matters.

The Court: All right.

page 125 } By Mr. Willcox:

Q. Mr. Wood, you testified, did you not, before a court reporter in the presence of me and Mr. Kanter in April 1966—

A. Yes, sir.

Mr. Kanter: What page are you on, Mr. Willcox?

Mr. Willcox: Page 10.

By Mr. Willcox:

Q. —at which I asked you with reference to the telephone conversation in the early part of February, my question was, "And what was said on that occasion?" And your answer was, "Well, he called me and said that Jackson had left and wanted to know if it would be all right for him to continue with the contract, and I agreed to it."

Is that what you said on that occasion?

A. Yeah.

Mr. Kanter: Keep reading, sir. Don't stop there. Don't just take that out of context.

By Mr. Willcox:

Q. "And when you say 'for him to continue—'" your answer was, "Now, he stated at that time that he
page 126 } felt he could make several thousand dollars on that if he continued with it and that it would help him to offset previous losses that he had had with Jackson on another deal. That was the extent of the conversation." That was your answer?

A. Yes, sir.

Q. And my question was, "He was referring to sums owed by Jackson to Virginia Heating in some other transaction?" And your—

A. He said it would help him to offset some other losses.

Mr. Kanter: Keep going, Mr. Willcox. I don't mind you using this transcript, but read it all in the sequence through line 8.

The Court: Now, gentlemen, you can read—when you get him on redirect you can read anything you want. If it is a part of the same answer you must read the whole thing.

J. E. Wood

By Mr. Willcox:

Q. Your answer was, "No, Jackson had gone and he wanted to continue with the job, take the job over."

My next question was, "Well, in what capacity did you understand he was speaking at that time?" "Well, I considered that he was going to continue to finish the job." Is that your answer?

page 127

A. Yes, sir.

Mr. Kanter: Read the rest.

By Mr. Willcox:

Q. "Well, by 'he' you mean National Sheet Metal?" Your answer was, "Both of them." Is that correct?

A. Yes, sir, just what I said a few minutes ago.

Q. Next question: "What made you think that Virginia Heating was going to take over the job?" Answer: "Well, no reason to believe otherwise. Why would he call me up?" "Well, you had no prior subcontracts with Virginia Heating?" Answer: "No, I didn't." Is that correct?

A. That's right.

Q. "You had no contact at all with Virginia Heating except agreeing to make checks payable jointly as a result of the conversation back in August." Answer: "That's right."

A. That's right.

Q. Question: "In this conversation was there any mention from Mr. Thumm that Virginia Heating was going to take over this job?" Answer: "He didn't say who." Question: "Did you know—" Is that correct?

page 128

A. The answer was did you know?

Q. No, the question was, "In this conversation was there any mention from Mr. Thumm that Virginia Heating was going to take over this job?" Your answer was, "He didn't say who."

A. He didn't say who, no, sir.

Q. That's the correct answer?

A. (No reply)

Q. The next question was, "Did you know—" Your answer was, "But I assumed he was going to go in with National Sheet Metal to do it. I just don't know."

A. That's right exactly.

Q. That was correct then and it is correct now?

A. It's been my contention all along. Why did he call me if National Sheet Metal was going to continue? It was a

corporation. I thought I was helping Mr. *Thumms* when he said he could make fifteen or twenty to offset some losses.

Q. The question—I think you have covered several questions in there. The next question was, "Well, did you know he was an officer in it?" Your answer was: "It didn't make any difference to me whether Jackson left or page 129 } Thumm left or who left as long as his job was completed. I don't know why he called me, but the fact is that he did." Is that your answer?

A. That's right, sir.

Q. That was correct then and it is correct now?

A. Yes, sir.

Q. "When did you know for the first time that Mr. Thumm was an officer of National Sheet Metal?" Your answer was, "Well, he always signed as assistant secretary."

A. I believe he signed as assistant treasurer. I was probably in error in naming the officer.

Mr. Willcox: All right. Lee, on page 13.

By Mr. Willcox:

Q. Question: "In this telephone conversation which you placed in early February or—" excuse me, the question was "which you placed," but I know you didn't place it—"in early February, what, if anything, was said about financial arrangements?" "Well, I agreed to go ahead and advance him moneys for payrolls by the week the same as I had been doing for some time." Is that correct?

A. That's right.

Q. Page 22. You were asked this question: "Well, is the sole basis of your claim against Virginia Heating page 130 } the conversation you had in February?" Answer: "Yeah, I mean that is when he decided he wanted to take over or go in with National or whoever he wanted to handle it. I couldn't read his mind." Is that your answer on that occasion?

A. I guess so.

Q. "Mr. Wood, would you tell us now specifically as best you recall the exact language used in your conversation of February 1965 on which you base this claim, what you said and what he said?" Answer: "I didn't say much of anything. He is the man that called me and asked me if he could take the job over, I mean if he could continue operating it." Is that your answer?

A. Yes, sir.

Q. "Was there any mention in that conversation of Virginia Heating?" Answer: "No, sir, I don't believe there was." Is that your answer?

A. Yes, sir.

Q. "Was there any mention of Mr. Thumm individually?" Your answer was, "Neither was there any mention of National Metal."

A. That's right.

The Court: Anything further?

page 131 } By Mr. Willcox:

Q. Mr. Wood, coming down to July 1965, the conversation which took place in the trailer here in Norfolk.

A. Yes, sir.

Q. Did I understand you to say that Mr. Thumm handed you that letter on that day?

A. Yeah, I believe so.

Q. Wasn't it mailed to you several weeks later?

A. Several weeks later? I'm not too sure. I think I had the letter in my hand that day. I wouldn't be positive about it.

Mr. Willcox: That's all, Your Honor.

The Court: Anything further, Mr. Kanter?

RE-DIRECT EXAMINATION

By Mr. Kanter:

Q. Mr. Wood, I have one question, prior to that day in early February when Mr. Thumm called you on the telephone and this conversation took place, had you ever had any dealings with him other than in the capacity as owner of Virginia Heating Distributors, the seller of materiel to National Sheet?

page 132 } A. I had never had any dealings with him, no, sir.

Q. Did you know of any of his arrangements with National Sheet?

A. I had no idea, but I was a little concerned about what was going on down there between the two of them.

Mr. Kanter: All right, sir.

RE-CROSS EXAMINATION

By Mr. Willcox:

Q. One last question, sir. Mr. Wood, the fact that you in Farmville had no particular contact with Mr. Thumm doesn't mean your people here on the job didn't know him, does it?

A. They probably did. I am sure Mr. Shadrick knew Mr. Thumms very well.

The Court: All right, anything further, gentlemen?

By Mr. Willcox:

Q. What was Ralph Wood's position on this job?

A. Superintendent.

Q. And he is an officer of the company as well?

page 133 } A. Yes, sir.

* * * * *

Dep.
page 146 }

* * * * *

(The deposition of GENE TURBIN was read to the jury, during which the following objections were made:)

EDITOR'S NOTE: The questions in this deposition were read by H. Lee Kanter, Esq., and the answers were read by Robert E. Brown, Esq.

Mr. Kanter: "Gene Turbin, being of lawful age, being first duly sworn, testified as follows:

"Where do you live?"

Mr. Brown: "214 Colby Street, Eufaula, Alabama."

Mr. Willcox: If Your Honor please, just for the record, we object to any of the transactions between this defendant and Alabama Electric Company as coming well after February 1965. May it be understood our objection to all this testimony would follow through on the same basis?

The Court: All right.

* * * * *

Dep.
page 147 } Mr. Kanter: "And do you know Virginia Heating Distributors? Who were they at that time?"

Mr. Willcox: Your Honor please, we object to that on the grounds the answer doesn't respond. It is phrased in the language of "my understanding."

Mr. Kanter: I will withdraw it, judge. I don't care about that.

The Court: Go ahead.

Mr. Kanter: "And do you know Mr. Thumm?"

Mr. Brown: "Yes, sir."

Mr. Kanter: "What was his connection with them, if you know?"

Mr. Willcox: Your Honor please, same objection. Start off "to the best of my knowledge."

Mr. Kanter: Well, I think that's perfectly permissible.

The Court: Gentlemen, it comes a little late as to the objection. I don't know, is there any stipulation here that objections are reserved to trial?

Mr. Kanter: No, Your Honor.

The Court: Overruled, Mr. Willcox, and note your exception.

Dep. page 148 } Mr. Willcox: Note my exception.

* * * * *

Mr. Kanter: "What, if anything, did Mr. Thumm do about the National Sheet Metal part of the work, if you know?"

Mr. Willcox: If Your Honor please, for the record, we would like to object to this answer as being unresponsive.

The Court: All right, go ahead.

Mr. Brown: "Well, he claims Brown came out and claimed that they were going bankrupt and he didn't show up any more and Mr. Thumm after about two weeks of the general contractor trying to get him on the job they had threatened taking the contract over and bringing in another contractor to finish the job and at that time Mr. Thumm came out and they got their problem ironed out; he was going to take the contract over himself and finish the thing because he already had too much money invested in National Sheet Metal to try to lose it all and he was taking all responsibility and the full contract as Virginia Heating and was going to finish and he did finish the job; not like it should be, he put between one and two men at the time on Camp Allen and the Staff College. He—" Let me rephrase that.

Dep. page 149 }

The Court: Gentlemen, step up here for a minute.

Mr. Kanter: Strike that last one, judge, and I will come on his dealings with Thumm.

(The court and counsel for both sides conferred out of the hearing of the jury.)

The Court: Now, members of the jury, the last question and answer are to be disregarded by you. They cannot be used as evidence in this case. You are to disregard the last question and that answer.

Let's go to the next question after the tirade.

* * * * *

Mr. Kanter: "Now, this paper that I have here, is that a copy of the letter?"

Mr. Brown: "Yes, sir, it is."

Mr. Kanter: It is marked as Exhibit 1 of this deposition, and I might say, Your Honor, that that letter, to save the time of reading it—

Dep. page 150 } The Court: It's in the evidence as a plaintiff's exhibit at this stage, is it not?

Mr. Kanter: It is. It was marked, just to keep the record straight, Your Honor, as Plaintiff's Exhibit 4.

Mr. Kanter: "Then following that authorization for Mr. Thumm you did go on and complete this control wiring and what else?"

Mr. Willcox: If Your Honor please, again I would like to note an objection. This—the effect of the existence of the contract has been admitted by everyone in evidence. There isn't any dispute of it. The letter is in evidence. The following testimony has to do with performance, which is totally irrelevant to this proceeding.

The Court: Let me look at it, gentlemen.

Mr. Kanter: Yes, Your Honor. Of course, it is relevant to the damage aspect and it is relevant to the whole issue here.

Mr. Willcox: It shows that the questions are quite leading.

Mr. Kanter: Well, you should have had somebody there, Mr. Willcox.

Mr. Willcox: Couldn't afford it, Mr. Kanter.

Dep. page 151 } The Court: Now, what page are we on?

Mr. Willcox: Page 9—7, beg pardon.

Mr. Kanter: Page 7, Your Honor, about the middle of the page, "Then following that authorization—" See, that following conversation, Your Honor, is of course clearly very relevant to the issue here.

(The court and counsel for both sides conferred out of the hearing of the jury.)

Mr. Kanter: "Then following that authorization for Mr. Thumm you did go on and complete this control wiring and what else?"

Mr. Brown: "Yes, sir, and we billed him each month but never did receive any payment from him."

Mr. Kanter: "And when you made this trade with Mr. Thumm as Virginia Heating what did he say had become of the other subcontractor, National Sheet Metal?"

Mr. Brown: "They had gone bankrupt. They had lost so much money that he was having to take their contract over because he said, 'As you know, I have furnished the money even for that contract and I have got to bankrupt it and close it out and take it over in order to get the job finished with what little money is left to do it with.'"

Dep. page 152

Mr. Kanter: "And Virginia Heating—Mr. Thumm as Virginia Heating did go on and do the work that had originally supposed to have been done by National Sheet Metal?"

Mr. Brown: "Yes, sir, he did it as good as he possibly could, which was pretty poor for a contractor to the best of my knowledge. He didn't do any of the gassing of the air conditioning units for Camp Allen. They had to pull a contractor from Baltimore in and serviced all of the air conditioning units and even piped in several of the air conditioning units because they couldn't get Mr. Thumm and them to come out there and get them in in time to get the contract finished by deadline."

* * * * *

page 154 } FREDERICK C. ALLEN, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Kanter:

Q. What is your name?

A. Frederick C. Allen.

Q. And your age, address, and occupation?

Frederick C. Allen

A. Thirty years old. I am a sheet metal worker employed by Allen Heating and Air Conditioning.

Q. Is that your own business?

A. It is my wife's business. Because of a union rule I can't have the business in my name.

Q. All right. Mr. Allen, how long have you been in the sheet metal business?

A. Since I served by apprenticeship. I started in 1963.

Q. 1963?

A. I mean 1953.

Q. And have you been continuously engaged in the sheet metal business for the last thirteen years?

A. Yes, sir.

page 155 } Q. Mr. Allen, did you have any contact with the sheet metal work at the Armed Forces Staff College and Camp Allen job in which Progressive Construction Company was the general contractor to build houses for the government?

A. Only with the Staff College part of the job.

Q. All right, sir. Will you tell us when—first of all, how was it that you came to get into—strike that. Who was the gentleman that you had contact with on the job to go and perform sheet metal work there?

A. Mr. Thumm.

Q. And what company?

A. Virginia Heating Distributors.

Q. Had you known him prior to that time, sir?

A. No, sir.

Q. Well, will you tell the gentlemen of the jury—and don't give us any hearsay as to what anybody else told you, but how was it that you came to get in contact with Mr. Thumm concerning this job?

A. I understood—well, to start off, I mean actually I had heard about the job through numerous local members, and I understood they were having problems with this job. Since I had just went in business the first of June—

page 156 } Q. You mean your own business?

A. Yes, sir, for myself—that I could get on the job and straighten it out on a time-and-material basis.

Q. When was it, approximately, the date that you first went to visit Mr. Thumm concerning this job?

A. It was on or about between June 17th, I'd say, and June 19th.

Frederick C. Allen

Q. Of what year, sir?
A. 1964, I think—'65.
Q. Last—little over a year ago?
A. Yes, sir.
Q. Now, where did you see Mr. Thumm first?
A. At the office in Virginia Heating on 25th Street in Norfolk.

Mr. Willcox: Your Honor please, now that the date is in evidence we renew our motion to exclude any evidence from this witness that would have anything to do with other than the cost of completing the job.
The Court: All right. Overruled, note your exception.

By Mr. Kanter:
Q. Mr. Allen, how was it that you came to get in touch with him? Did he call you or you call him?
page 157 } A. Now, to the best of my memory I talked with someone at Coley Petersen and I was asking them about work and they said, "Well, why don't you call up Mr. Thumm at Virginia Heating? I understand he's having some problems on the Staff College." I did this.

Mr. Hollis: If Your Honor please, the answer is hearsay, strictly.

By Br. Kanter:
Q. Let me ask you did he call you or did you call him?

The Court: Let's get the ruling for the record. Sustain the objection and disregard it.
All right, what is next?

By Mr. Kanter:
Q. Without regard to what anybody told you, Mr. Allen, did you call Mr. Thumm or did he call you?
A. I called Mr. Thumm.
Q. And did you go over to his office?
A. Yes, sir.
Q. Now, Mr. Allen, will you tell us in your own words, sir, what conversations that first time that you went over there with Mr. Thumm did you have with him about this Staff Forces College job? What did he tell you was
page 158 } going on and what did you tell him about it?

Frederick C. Allen

A. I told him I understood he was having some problems and I believed I could straighten it out, that I had had right much experience in underground ductwork and that I could show him some progress and that I would make a progress report to him I think each day or each week. I don't remember whether it was actually by the day or the week now.

Q. All right, sir. And what did Mr. Thumm tell you about his connection with the job, if anything?

Mr. Willcox: If Your Honor please, I will not rise up any more if Mr. Kanter will just ask him what was said without suggesting lines of discussion to him. I think that's leading. I will be perfectly happy to have this witness say what was said to him and what said without leading questions from Mr. Kanter.

The Court: I think we have got to confine it to the conversation with him. Tell it and all of it and that's all.

By Mr. Kanter:

Q. All right.

A. Well, we discussed the job and we reached an agreement on the—actually, I think at this time to the best page 159 } of my memory I had just went in business—I think I quoted him one price over the phone as to the labor per hour and I talked with a man that had been in business a little longer and he said, "Fred, you can't make any money at this," so we agreed at the figure of five dollars per hour for each mechanic and $2.50 per hour for each laborer, and he said this is fine, so I went on to work.

The Court: "He said," you mean Mr. Thumm?

The Witness: Mr. Thumm. He said, "I think we can make this."

By Mr. Kanter:

Q. Mr. Allen, state whether or not there were any conversations and, if there were—

Mr. Willcox: Your Honor please—

By Mr. Kanter:

Q. —what they were?

Mr. Willcox: If Your Honor please, I object.

The Court: Just a minute. The witness was asked the full conversation between Mr. Thumm and the witness. If you have not told it, tell it. If you—

page 160 } A. Well, the only other conversation was about the money. I was little and didn't have any money and I had to be paid every week, which I was paid every week from the job up till I think the last day I worked was July 23rd. I went to Virginia Heating each week and picked up my check from the bookkeeper there.

By Mr. Kanter:

Q. Who hired you, sir?

A. Mr. Thumm.

Q. Mr. Allen, did Mr. Thumm ever say anything to you at all concerning a corporation called National Sheet Metal, Incorporated?

Mr. Willcox: If Your Honor please, it is leading. I object to it.

Mr. Kanter: If Your Honor please—

The Court: Sustained.

Mr. Kanter: If Your Honor please—

The Court: We have been into this several times and this witness was asked to tell what Mr. Thumm told him.

Mr. Kanter: I agree with Your Honor. Now, there's a separate point here. You will remember on direct examination —on my cross-examination Mr. Thumm testified—

page 161 } The Court: Just a moment. I am going to sustain the objection, Mr. Kanter.

Mr. Kanter: On a matter of impeaching Mr. Thumm's testimony, Your Honor, is it not—

The Court: Sustain the objection. Go ahead.

By Mr. Kanter:

Q. Mr. Allen, was there any other conversation at all between you and Mr. Thumm at that time or at any other time?

A. To the best of my memory—I mean I don't remember, other than we established the pay scale and that I was, you know, to be paid each week and I went on to work.

Q. Did you ever go to any other office or work out of any office other than the Virginia Heating office on 25th Street?

Frederick C. Allen

A. That was the only place. I did use a place down on 39th Street to do some welding on some stacks. I think it was 39th Street.

Q. What was there on 39th Street?

A. There was about sixteen thousand dollars worth of metal working equipment.

Q. Any signs or anything on 39th Street?

page 162 } A. No, sir. I didn't notice any.

Q. Mr. Allen, when you went to the job what was the first day that you went out there?

A. Actually, I imagine the first day I went out there was June 20th—19th.

Q. Will you tell the gentlemen of the jury what the condition of the sheet metal work on the job was at that time?

A. In my opinion it was the worst I have ever seen.

Q. Well, will you tell us in detail, sir, what was wrong with the sheet metal work that had theretofore been done before you were hired?

A. The job wasn't taken care of properly. The materials were not locked. I know on one occasion I had to dig registers out of mud. The fans were scattered from one end of this building to the other and parts missing off of all them. Registers were left off in a building where would be all complete but putting up one register, and it just looked like to me that someone had been out there laying down.

Q. Well, how long did it take you, sir, of actual inspection from the time that you went on the job to determine what had to be done to remedy what you found there?

page 163 } A. Until the day I ended the job.

Q. And how long were you on the job all together, sir?

A. From June 19th until September 7th was the last day of my payroll, of 1965.

Q. Well, was all of that from Virginia Distributors or did somebody else come in between that time?

A. I worked for Virginia Heating from June 19th until July 23rd.

Q. And what, Mr. Allen, did he pay you during that some month or six weeks that you worked for him?

A. I don't have the totals. I can give it to someone and they can total it up. I can give you for each week what the payroll was.

Q. Give us for each week what he paid you?

Frederick C. Allen

A. From June 22nd—I mean 19th to the 22nd was four hundred dollars. June 24th through the 28th was seven seventy-five. June 30th through July 6th was $920.00. June 9th through the 12th was twelve forty-five.

Q. Is that June or July you just said?

A. July.

Q. $1,245.00?

A. Yes.

Q. Go ahead, sir.

page 164 } A. July 17th—the 14th through the 20th was $1,756.92. On Saturday June—July 17, 1965, which was a premium time day for that one day, it was $216.92.

Mr. Hollis: If Your Honor please, as I understand it, he is now testifying what Mr. Thumm paid him. I don't know what the relevancy of that is with respect to the damages claimed by the plaintiff.

Mr. Kanter: Well, one of the relevancies is who was doing the job.

The Court: I am going to allow it.

Mr. Hollis: All right, sir.

By Mr. Kanter:

Q. And the last week?

A. Which was June 24th—I mean July 21st, 22nd, and 23rd, was $840.00.

Q. All right. Now, Mr. Allen, I direct your attention to that period around July 23rd. Were you in the construction shack out here on the job and present when Mr. Wood and Mr. Thumm had a conversation wherein Mr. Thumm told him he was finished and leaving the job?

A. Yes.

Q. Will you tell His Honor and the gentlemen of the jury exactly what happened and what the conversation

page 165 } was between Mr. Wood and Mr. Thumm and then what conversation you had with Mr. Thumm, what he said?

A. Actually, the conversation, Mr. Thumm came out on the job and Mr. Wood was there. Mr. Thumm said, "I can't go any further. I'm already—" I think— "sixty thousand dollars hooked." It was some figure in there that he had lost, and I think it was sixty thousand dollars. He said—I think it is sixty thousand dollars— "This could very well break my

company. I can't go any further." And in turn Mr. Wood said to him, "You wanted this job as long as you thought there was a profit in it." And Mr. Thumm said, "I thought there was a profit in it, but I didn't realize I was going to lose this much," or something on that line.

Q. And then what was the conversation, if any, between you and Mr. Thumm concerning his defaulting the job at that time?

A. Actually, I think Mr. Thumm—I think I told Mr. Thumm, "I think he is going to go to court over this thing," or something like that. It didn't amount to a whole lot.

Q. What did Mr. Thumm say to this?

A. Well, he didn't seem too concerned over it at the time.

* * * * *

page 166 }

* * * * *

CROSS EXAMINATION

By Mr. Willcox:

Q. Mr. Allen, you had just entered business and solicited this work for your company. Right?

A. Right.

Q. And you arranged with Mr. Thumm in talking with him at his office, Virginia Heating Distributors, over a pay rate?

A. Right.

Q. Now, the office of Virginia Heating Distributors, is that a sheet metal shop?

A. No, sir. That's Virginia Heating.

Q. What do they do?

A. They primarily sell heating equipment and ventilating equipment and metal. More or less.

Q. They are not installers of it? They are not contractors, are they?

A. Not in the sense that you are thinking of, no.

Q. They don't go on a job and install ductwork and registers and whatever comprises air conditioning units and furnaces, do they?

page 167 } A. No. They don't have any men to do it.

Q. They sell the material to people like you who install it?

Frederick C. Allen

A. Yes. I have an account there.

Q. And you didn't perform any work at the offices of Virginia Heating Distributors?

A. No, sir.

Q. And you did perform some work at a sheet metal shop on 39th Street?

A. The reason for me performing this work at the shop on 39th Street—it was about one day for two men—was saving an eighty cents tunnel fare.

Q. But there was a shop there?

A. This work could have been performed at my shop. There was a shop there.

Q. Was that National Sheet Metal shop?

A. I don't know for sure. I took it for granted it was National Sheet Metal.

Q. And you picked up materials there too, didn't you?

A. Yes, sir.

Q. And those were National Sheet Metal equipment and National Sheet Metal material?

A. Well, actually, the way that I thought about the thing—in fact, I tried to buy the equipment. I thought it

page 168 } belonged to Chuck Jackson. It was his shop.

Q. And Chuck had a corporation called National Sheet Metal, didn't he?

A. I don't know what Chuck had.

Q. You said you had heard in the business that the job was going badly. That was a National Sheet Metal job?

A. Actually, when I heard the job was going badly Al Alvis was running the job. That was Al's Sheet Metal.

Q. He was working for National Sheet Metal, wasn't he?

A. Right. I don't know who Alvis was working for. I mean as far as I am concerned, I actually couldn't say who Alvis was working for.

Q. It wouldn't surprise you to learn he was working for National Sheet Metal, would it?

A. It wouldn't surprise me.

Q. Before you undertook the job did you make any estimate of what it would cost to complete?

A. Well, from the way I walked over the job and, you know, just looked, glanced in each building. I think I did give him some kind of a figure.

Q. Do you remember what it was?

A. I think I told him in a number of weeks,

page 169 } but after I got into it, like I said when I got on

the stand, I didn't know what it was going to take until the last day on the job, what else I was going to find wrong.

* * * * *

page 172 }

* * * * *

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

DIRECT EXAMINATION

By Mr. Kanter:

Q. What is your name, sir?

page 173 } A. Norris Wood.

Q. How old are you, Mr. Wood?

A. Twenty-four.

Q. What is your address?

A. Box 80C, Dare Road, Yorktown, Virginia.

Q. And what was your address back in the time—well, let me ask you this: When was it that you went to work on the Staff College job doing air conditioning?

A. Around June, I believe.

Q. What was your—June of 1965?

Mr. Willcox: If Your Honor please, for the record may we repeat our objection to any testimony along this line that took place six months after the alleged contract was made.

The Court: All right.

Mr. Willcox: Note the exception.

The Court: Overruled, note the exception.

By Mr. Kanter:

Q. What was your address in June of 1965?

A. Blue Ridge Manor Apartments, Wheaton, Maryland.

Q. Did you have your own business then, sir?

A. Yes, sir.

Q. What was the name of it?

page 174 } A. D. & F. Heating and Cooling Company.

Norris Wood

Q. Do you have your own business now?

A. No, sir, I don't.

Q. What business are you in now?

A. I am employed by Progressive Construction Company.

Q. All right, sir. At the time that you were in your own business, sir, what was the business?

A. Heating and air conditioning.

Q. And where were you educated and trained for that?

A. I went to Chrysler Airtemp School in '63, and before that I worked as an apprentice with Southside Plumbing Company.

Q. All right, sir. Now, how did you first come in contact with the air conditioning work on the Staff College job in June of '65?

A. I was in Maryland at the time and I received a telegram from my father saying they needed some air conditioning work to be done and so I came down and he said that—

Q. Don't—let's not get into what anybody told you. Did you at all ever meet or have any contact with Mr. Thumm, the gentleman over at the right-hand table?

page 175 } A. Yes, sir, I did.

Q. Who introduced you to him, sir?

A. Mr. Shadrick introduced me to Mr. *Thumms*.

Q. Who is Mr. Shadrick?

A. Mr. Shadrick is connected with Progressive Construction Company, field superintendent.

Q. All right, sir. And will you tell us, sir, what conversations took place between you and Mr. Thumm when you were introduced to him and what arrangements came about, if any, between you and Mr. Thumm?

A. Mr. Shadrick introduced Mr. *Thumms* to me and Mr. *Thumms* made the statement that he had taken over the sheet metal and air conditioning work and asked me how was it coming along. I said there's a big mess, but I said I'd do the best I could to straighten it out.

Q. What sort of deal did you make with him, if any?

A. Well, I was working for Mr. *Thumms* at twelve dollars per hour.

Q. And what did you give him for that twelve dollars per hour, sir?

A. I furnished my truck, labor, and I had a helper with me and my tools to work with.

Q. And approximately how long did you work for Mr. Thumm?

page 176 } A. Mr. *Thumms*—I worked I believe it was approximately two weeks.

Q. And will you tell us what you did on the job for Mr. Thumm while you worked for him?

A. Well, I found a lot of defects in workmanship.

Q. What were they, sir?

A. Well, I found kinked lines, tubing, just—

Q. What is that you have there in your hand?

A. This is two pieces of pipe that came off the job. You can see where obviously it is poor workmanship. It is twisted tubing.

Q. Tell us what's wrong with that pipe from the air conditioning point of view?

A. When this tube was installed it was twisted, causing restriction in the suction line. Instead of swaging this or putting a coupling in it, they reduced it to just—three-quarter to half inch. Used soft copper and lead to solder it, which also caused restriction in your lines.

Q. Were those the only two instances of that you found on the job?

A. No, sir.

Q. Well, what did you find, Mr. Wood?

A. I found units—air conditioning units that were back to back, lines were crossed under the ground and the
page 177 } thermostat controlled the opposite unit in the apartment.

Q. You mean the thermostat in one apartment would control the heat in the next apartment?

A. Right; yes, sir.

Q. And vice versa?

A. Right.

Q. And what else did you find when you got out there, sir?

A. The tubing assembly—the access tubing assembly which was supposed to be coiled in a horizontal plane just looked like a mass of spaghetti; it was vertical and everything else.

Q. All right. Now, what did you do for Mr. Thumm during that two weeks with regard to remedying that situation, if anything?

A. I tried to straighten out as much of it as I could. I explained to him that it was costly and it would just take a lot of time. I straightened out some of this tubing, got a lot of units in operation. Some of them were out of gas and I recharged them and so forth.

Q. And who paid you for that work, sir?

A. Mr. *Thumms.*

Q. And where did you go to get your money?

page 178 } A. Down at the office of Virginia Heating Distributors in Norfolk.

Q. What sort of check was it delivered to you on? On what company was the check payable?

A. The check I believe it was made out to me, or the company. D. & F. Heating and Cooling Company I believe.

Q. Yes, and whose check was it?

A. Mr. Thumm's checks, Virginia Heating Distributors.

Q. And did he pay you for the two weeks that he had you down here straightening out those defects?

A. Yes, sir.

Mr. Kanter: If Your Honor please, I would like to offer these two pieces of pipe as Plaintiff's Exhibit 12 and 13.

The Court: It will be—any objection? It will be Plaintiff's Exhibits 12 and 13.

(So marked by the court.)

By Mr. Kanter:

Q. Mr. Wood, from the point of view of an expert in your industry, the air conditioning field, how would you characterize the work that you found on the job in connection

page 179 } with the air conditioning which was part of the contract originally between Progressive and National?

A. I'd say it was very poorly installed, very poorly. I have never in my life seen units in the mess they were.

Mr. Kanter: All right. If you will, answer Mr. Willcox.

CROSS EXAMINATION

By Mr. Willcox:

Q. How old are you, Mr. Wood?

A. Twenty-four years old.

Q. And your father was the superintendent of this job?

A. Yes, sir, he was.

Q. And your uncle is this Mr. Wood?

A. Yes, sir.

Q. And Mr. Clarence Wood also with the company is another uncle?

A. Yes, sir.
Q. Any more Woods in the company?
A. That's all, I am afraid.

Mr. Willcox: That's all.

* * * * *

page 180 }

* * * * *

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

DIRECT EXAMINATION

By Mr. Kanter:
Q. What is your name, sir?
A. What's that, sir?
Q. Your name?
A. My name is Harry R. Rudin.
Q. And your age and address?
A. I am sixty-nine and I live at 1007 Redheart Street, Williamsburg, Virginia.
page 181 } Q. And what is your occupation?
A. I'm a construction inspector for the U. S. Navy.
Q. Were you in that capacity during 1964 and 1965 when Progressive Construction Company as general contractor was building the housing for the Navy at Camp Allen and the Armed Forces Staff College?
A. I was.
Q. What was your connection with that job, Mr. Rudin?
A. Well, I was mechanical inspector on the Camp Allen and the Armed Force Staff College housing units.
Q. And what is a mechanical inspector?
A. Well, mechanical inspector to see that the jobs are put in according to plans and specifications and to see that when they are installed that they function properly and see that the Navy gets what they pay for.

* * * * *

page 185 }

* * * * *

CROSS EXAMINATION

By Mr. Willcox:

Q. Mr. Rudin, you were on the job from the start?

A. Not directly from the start, no.

Q. When did you take over supervision of this job, approximately?

A. Well, I finished at Camp Perry and then from there I was shipped over to that job I think sometime in
page 186 } June, I don't remember exactly. I can't tell you exact.

Q. June of 1964?

A. Yes, sir, I think that's about the time.

Q. So you were on the job for about a year?

A. That's right.

Q. All right. And you say that the sheet metal contractor had continual trouble with his superintendents?

A. That's right.

Q. And I didn't understand, did you say that you knew Jackson as the first superintendent on the job?

A. Well, I can't tell you—the name strikes a bell, but I don't remember exactly the man himself. I just—that's too far back.

Q. You remember one named Griffith?

A. What is that?

Q. You said you did remember a superintendent named Griffin—Goodwin. Beg your pardon.

A. Yes, sir.

Q. How about one named Alvis? Was Al Alvis out there for a while?

A. I didn't know the names, but I knew there were three different superintendents on the job.

Q. These were all people who were working for
page 187 } National Sheet Metal, the—

A. Well, I don't know whether it is Thumm or National Sheet Metal. We are not concerned with subcontractors. We are concerned with the prime, and the prime contractor is the one that is concerned with the name of the subs.

Q. You didn't know who the sub was at any time during the job?

A. Oh, yes, I did know that Thumm—Linwood Thumm was a sub at that time when I was there.

Q. He was just a material supplier, wasn't he?

A. What's that?

Q. He was just supplying material, wasn't he?

A. I don't know, but all I ever heard was the name of Thumm.

Q. You don't know what his position was?

A. I do not.

Q. Does the general contractor have to furnish the government with a list of his government subcontractors?

A. They do.

Q. With whom would that be listed?

A. That would be listed in the office under files of different listing of subcontractor, under a listing of subcontractors.

page 188 } Q. Do you know whether the general contractor on this job made any changes in its list of subcontractors as the job progressed?

A. All I know is there was a period of time that some transaction was in the works of changing of subcontractor and that's all I know, because there was a period of time that we had no sheet metal workers on the job at all.

Q. Mr. Rudin, what I asked you was, was any list filed with the government to your knowledge after the job began indicating any change of subcontractors?

A. I couldn't tell you.

Q. You don't know. You don't know who the contractor was at the start nor who it was at the finish?

A. Yes, I do.

Q. Who was it at the start?

A. All I knew was the name of Thumm. That's what was handed to me.

Q. He was given you, that name, as a subcontractor in June of 1964. Is that what you are saying?

A. Well, I don't remember that.

Q. Well, when did you first hear the name of Thumm?

page 189 } A. Well, after—when they changed—when they changed superintendents that's all I know, is that Mr. Thumm come down there one time and I told him that the type of work they were doing wasn't properly installed.

Q. He was an officer of the original subcontractor, wasn't he?

A. I couldn't tell you. All I know he represented the subcontractor.

Q. Right. And you don't know who the subcontractor was?

A. I couldn't tell you.

Billy P. Shadrick

* * * * *

page 190 } BILLY P. SHADRICK, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Kanter:

Q. What is your name, sir?

A. Billy P. Shadrick.

Q. Where are you from, Billy P. Shadrick?

A. Farmville, Virginia.

Q. What is your occupation, sir?

A. Field superintendent for Progressive Construction.

Q. What does the job of field superintendent for Progressive involve?

A. Checking out jobs and—along with checking the progress of the subcontractors.

Q. Mr. Shadrick, were you involved—

The Court: How you spell that name?

The Witness: S-H-A-D-R-I-C-K.

By Mr. Kanter:

Q. Mr. Shadrick, were you involved in checking out the work on the heating and air conditioning contract
page 191 } that Joe Wood made with National Sheet to begin with on the Armed Forces Staff College job?

A. As far as National Sheet Metal, I wasn't with the company at that time.

Q. All right, sir. When did you get with the company?

A. I went to work with them the 1st of January '65.

Q. Did you go down on the job down here when you—shortly after you started to work?

A. Approximately the middle of January.

Q. All right. Was Jackson still down on the job at that time for National Sheet or had he already gone?

A. I met him one time.

Q. And how long after that had he gone?

A. That was around the third week in January.

Q. All right. And when was the first time that you met Mr. Thumm down there on the job?

A. Approximately middle of March.

Billy P. Shadrick

Q. All right, sir. Now, did you cause to be made yourself an inspection of the heating and air conditioning work that was being performed under that contract at the time you went down there in January?

A. Was I called to inspect the heating and

page 192 } air conditioning?

Q. Did you inspect it?

A. No, not at that time.

Q. When was the first inspection that you made of it?

A. Around the middle or last of March when I went there. I was on the job permanently.

Q. Thereafter you stayed on it permanently?

A. I stayed on it from three to five days a week.

Q. And what contact—what was your first contact with Mr. Thumm?

A. I called him to see if I could get some men on the job that were qualified people to perform the work.

Q. What was wrong that caused you to call him?

A. Well, the first day I got there we poured the slab and as we were pouring the slab of concrete the duct floated out of the slab, not being installed properly.

Q. Will you just tell us—not in great detail but in brief, Mr. Shadrick, tell His Honor and the gentlemen of the jury what was it that you found that was right or wrong with that job down there on the heating and air conditioning

page 193 } when you made your inspection in the middle of March?

A. The main thing I found, he didn't have any qualified people on the job.

Q. What was the condition of the work?

A. And he didn't have any supervision as I could see. Seemed like it was about three or four people there that had nobody as a general boss and you didn't know who to talk to on the job when I went—in fact, I didn't know who to call except Mr. *Thumms*. That's the only man I had, Virginia Heating, who I understood was supplying the people to do the work.

Q. And did Mr. Thumm respond in connection with your call as to what you asked him to do?

A. He came to the job after I had called him some three or four times.

Q. And what happened?

A. Well, he'd come out and he seemed upset that they wasn't getting more progress than they was with the job.

Billy P. Shadrick

People were lagging. He said he was really sinking some money in the job and wasn't getting anything out of the men.

* * * * *

page 195 }

* * * * *

Q. All right. Now, when you took over down there, Mr. Shadrick, you said Mr. Thumm came out and he was upset because he wasn't getting any more progress. What conversations and work with him did you have from that middle of March right on up to the time that he left the job the end of July?

A. Well, he brought in another air conditioning man to straighten out some of these air conditioning problems, a fellow Goodman, if I remember it was, wasn't able to complete.

Q. Was not able to complete?

A. He didn't seem to be; he didn't ever get them to work.

page 196 } Q. What happened?

A. We discussed this problem with him and he brought in another air conditioning man to try to correct it.

Q. Who did he bring?

A. Brought Norris Wood.

Q. Has his company in Baltimore?

A. Right, he had a company in Baltimore, at the time, sir, air conditioning company.

Q. Did Wood complete?

A. First trip he didn't. He came in there and worked a week, I believe, then he left and—drawed, if I remember, one check and then he left and went back and Goodman came back on the job.

Q. Was Norris working for Thumm?

A. Well, he paid him. So he had to be working for him, I guess.

Q. All right, sir. Goodman came back. Did he finish up?

A. No, sir.

Q. Well, what happened? How did you-all get it done?

A. Well, I called for a meeting. I asked for a meeting between—or suggested a meeting between Mr. Wood and Mr.

page 197 } Thumms to iron out the problem, what was going to take place on the thing, so we had a meeting in the trailer. In fact, our secretary called Mr. Thumm and he met Mr. Wood and myself.

Q. When was this?

A. The exact dates I can't remember. Sometime around the third week in June I suppose.

Q. Well, what happened?

A. Mr. Thumm made the statement in the trailer that he wanted—he gave him—I remember he handed a letter to Mr. Woods, a letter of default, saying he wanted—he was quitting the job, that he had sunk some sixty thousand dollars in some venture—I took for granted it was National Sheet Metal or whoever he was with—and he had spent all the money he could spend.

Q. Said he had sunk sixty thousand dollars in the National Sheet?

A. Right. That he had sunk sixty thousand dollars in this venture, which I gather it was, and he was pulling off the job, that he wouldn't complete it.

Q. Mr.—

A. He did make one statement that we found differed at the time—

The Court: You will have to speak up. I can't hear you.

page 198 } A. He made a statement at the time that he would sell us any materials needed to complete this job on a C.O.D. basis at his actual cost, and later on about—when Mr. Allen took the contract to finish—he finished it with us, the contract; he agreed to complete the job—and the first order of materials we needed was some dampers made by Walker Manufacturing Company, which was the approved damper, and when we went to—sent Mr. Allen down to get the dampers and he came back and he said, "I thought Mr. *Thumms* was going to sell you these dampers at cost?" I said, "That was my impression." He said, "Well, these prices are not cost." So I called Walker Manufacturing in Saint Joe, Missouri, and found the cost of them and he was almost doubling his money.

Q. Thumm was doubling the price on you?

A. He gave us the price of some nine hundred dollars on these dampers and I bought them for some four seventy-eight or four seventy-six.

Billy P. Shadrick

* * * * *

page 216 }

* * * * *

CROSS EXAMINATION

By Mr. Willcox:

* * * * *

page 221 }

* * * * *

Q. Mr. Shadrick, after you finished this job in September, or whenever you did, did you ever make up a bill and send it to anybody for these back charges?
A. Who you send it to?

Mr. Kanter: What was that?
A. Who would you send it to?

By Mr. Willcox:
Q. Well, I asked you—

The Court: The question is did you send it to.
A. Didn't have anyone to send it to, no, sir.

By Mr. Willcox:
Q. Why didn't you have someone to send it to?
A. Beg pardon?
Q. Why didn't you have someone to send it to?
A. Nobody left on the job in this contract. He had already defaulted. He was pulled off the job.

page 222 } Q. You knew there wasn't any sense sending it to National Sheet Metal?
A. National Sheet Metal and Virginia Heating as far as we were concerned were the same company. They were doing the same work.
Q. Who told you that?
A. Beg pardon?
Q. Who told you that?

Billy P. Shadrick

A. It was the indications of it. Mr. *Thumms* was out there running the job and financing the money. Who owns it?

Q. Did you know Mr. Thumm was an officer and sole stockholder of National Sheet Metal?

A. Did I know that?

Q. Yes.

A. I didn't have any reason to know what the situation was with National Sheet Metal. The only man I had any dealings was with Mr. *Thumms.*

Q. You didn't know what capacity he was there, did you?

A. Well, he was running Virginia Heating when I was calling him.

Q. He is running Virginia Heating today, isn't he?

A. That's true, yeah.

Q. He was running Virginia Heating before page 223 } you ever had that job at Camp Allen, wasn't he?

A. I don't know. I can't tell you anything up to January 1965.

Q. You came on the job in January and you didn't see Mr. Thumm until late March, what you said?

A. That's right. I only came to the job one time, then I went to New Orleans to set up another job, and I was back in March.

Q. And you base your assumption that Virginia Heating was involved because you saw Mr. Thumm on the job?

A. He would call Mr. Woods and that's what Mr. Woods passed on to me, that Virginia Heating was taking over the contract.

Mr. Kanter: No, no, please. Don't tell what Mr. Wood told you.

By Mr. Willcox:

Q. Not what Mr. Wood told you. You never saw any contract with Mr. Thumm?

A. We don't have a contract with Mr. Thumm.

Q. Never did have a contract with Mr. Thumm?

A. Not to my knowledge, no, sir.

Mr. Willcox: Thank you.

* * * * *

page 253 }

* * * * *

WILLIAM H. BROWN, defendant, called as a witness on his own behalf, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Willcox:

Q. Tell us your name, age and residence?

A. William H. Brown. I am forty-five years old. I live 1101 Brunswick Avenue, Norfolk.

Q. And what is your line of work?

A. I am sales manager and partner in Virginia Heating Distributors.

Q. And how long have you been sales manager of Virginia Heating Distributors?

A. Since 1953.

Q. And when did you become a partner in Virginia Heating Distributors?

A. Well, the agreement was formally signed I believe in April 1965, retroactive to January 1, 1965.

page 254 } Q. Mr. Brown, you on Friday heard a deposition read by a man named Turbin from Alabama in which he stated that someone named Brown was working for National Sheet Metal on this job in Camp Allen, did you not?

A. Yes.

Q. Did you ever work for National Sheet Metal in any capacity?

A. No, sir.

Q. Did you ever work on the job at Camp Allen supervising sheet metal work?

A. No, sir.

Q. Did you have any connection with the job at Camp Allen?

A. None whatsoever.

Mr. Willcox: Answer Mr. Kanter.

William H. Brown

CROSS EXAMINATION

By Mr. Kanter:

Q. Mr. Brown, I understand that you were not a partner at the time this contract was let back in 1964?

A. That's right, sir.

Q. And I take it that even though you technically became a partner on January 1, 1965, that you had no connection with this job whatsoever?

A. None, sir.

page 255 } Q. You did not go on the job or deal with Mr. Wood or any people from Progressive?

A. No, sir. I was on the job one time before the job actually even started. I went down in the capacity as sales manager of Virginia Heating and I met Mr. Joe Wood, who happened to be on the job that day. My interest was that we had quoted the air conditioning and heating equipment to Progressive Construction and I was following up the quotation.

Q. But you yourself really do not know anything of the dealings between Mr. Thumm and Mr. Wood?

A. No, sir.

Mr. Kanter: All right, sir. I have no further questions.

RE-DIRECT EXAMINATION

By Mr. Willcox:

Q. Mr. Brown, in your capacity as sales manager for Virginia Heating you were aware Virginia Heating was furnishing materials and cash to National Sheet Metal?

A. Yes, sir.

Q. And were these handled on your books in the normal manner they would have been handled for any

page 256 } customer?

A. Yes, sir. Anything that was sent to the Armed Forces Staff College job was billed normally, as we would to anybody, to National Sheet Metal.

Q. And National Sheet Metal had an account on your books like any other customer?

A. Yes, sir.

Mr. Willcox: That's all.

The Court: You may step down, Mr. Brown.

Linwood A. Thumm

* * * * *

LINWOOD A. THUMM, defendant, recalled as a witness on his own behalf, having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Willcox:

Q. Mr. Thumm, I hand you a ledger sheet labeled in blue ink National Sheet Metal, Inc., and in red ink, material something, and ask you what it is?

A. This is the ledger sheet involving the materials from our invoices supplied to National Sheet Metal to

page 257 } complete their contract.

Q. By "our" you mean who?

A. Virginia Heating Distributors.

(Exhibited to Mr. Kanter.)

Mr. Kanter: Judge, I have no objection. Mr. Willcox wants to introduce the materiel and labor records of Virginia Heating Distributors in connection with the job. I have no objection to it, sir.

The Court: All right. Now, the first group of documents you handed me is the materiel exhibit which shows material furnished to National Sheet Metals, Inc.?

Mr. Willcox: Yes, sir, that is the ledger sheet of Virginia Heating showing the materials furnished to National Sheet Metal, Inc.

The Court: All right. And there is no objection to this being marked Exhibit 9.

(So marked by the court.)

By Mr. Willcox:

Q. Mr. Thumm, I hand you another series of ledger sheets and ask you what they are?

A. These are the actual disbursements of money made by Virginia Heating Distributors to National Sheet

page 258 } Metal covering payrolls, any other items for which we actually paid out money.

Q. This is the—your original record of the other sums advanced or paid by Virginia Heating for the account of National Sheet Metal, Inc.?

A. That is true.
Q. Whereas the other one covers material only?
A. Which is substantiated by our invoices and billings.

The Court: Defendant 10.

(So marked by the court.)

By Mr. Willcox:
Q. Mr. Thumm, I now hand you a book labeled payroll book and ask you what that is?
A. This is the actual payroll records of National Sheet Metal on the Camp Allen and Armed Forces Staff College projects.
Q. And I hand you a similar book and ask you what this is?
A. This is the record of the same.

Mr. Kanter: Excuse me, Your Honor. I—he said it is the same. What is that? same book or same type of record?
The Witness: It is the same type of record.
page 259 } It still—I think it concerns, if I am not mistaken, a different period of time.
Mr. Kanter: Now, if Your Honor please, I—
The Court: Well, if the witness can't identify the book, it is a proper objection.
Mr. Kanter: It is more than that, Your Honor. I don't know whether he can identify them or not, but in discovery Mr. Thumm testified that he neither had nor had access to any records of National Sheet Metal, and if Your Honor please, I don't know when he acquired these, but I don't believe they are properly usable. I don't know what Mr. Willcox is going to ask him about them, frankly, but we—
The Court: Do you want to take this up in the absence of the jury or how do you want to work this?
Mr. Kanter: Whatever Your Honor prefers.
The Court: These books purport to be payroll books of National Sheet Metal.
Mr. Willcox: Yes, sir.
Mr. Kanter: I also have in my possession, Your Honor, that Mr. Willcox just handed me, a group of withholding statements that purport to be employers copies
page 260 } for 1965 withholding for National Sheet Metal, Inc., and of course, I don't know when Mr.

Thumm got them but they should have been furnished me.

The Court: Well, suppose we inquire into that. I will permit you to inquire into that. I don't think it is necessary to send the jury out.

By Mr. Kanter:

Q. Mr. Thumm, when did you get these National Sheet Metal, Inc., records?

A. These records were records which were in Mr. Alvis's office, who took over this job in January or February of 1965 and maintained all the payroll records and actually supplied the men, the labor, then for the job.

Q. Well, why, Mr. Thumm, did you not either inform Mr. Willcox or me that these were available for our inspection prior to trial when you were examined in my office, sir?

Mr. Willcox: If Your Honor please, Mr. Kanter issued a subpoena *duces tecum* for Mr. Thumm to bring everything

page 261 } he could get his hands on. And he did bring them and they were here on Friday.

Mr. Kanter: Here Friday in this courtroom?

The Court: As I understand it the question is directed to the failure to produce at the time of a discovery deposition.

Mr. Kanter: Well, in answer to actual question Mr. Thumm said—

The Court: Well, just inquire—you may inquire of him.

By Mr. Kanter:

Q. Well, remember your telling me, sir, that all of the records of National Sheet had been taken up to a warehouse in Washington by Mr. Jackson?

A. Yes, I do.

Q. And that before the discovery deposition you had actually tried to contact him to get those records out of the warehouse—

A. That's true.

Q. —but had been unable to get them by the time we met in my office? And how about these records, these payroll records? Didn't you know that Mr. Alvis had these in his possession, sir?

A. I was not aware of it at the time of the deposition.

page 262 } I should have realized it possibly, because he kept the payroll records and I had the copies. I didn't know what value they might be.

Linwood A. Thumm

Q. When did you discover these records were in fact available here in his office?

A. When I checked with Alvis just recently after Mr. Willcox informed me that we should come up with everything we had in the way of available records, so I asked him for what he had that had not been supplied previously.

Mr. Kanter: Your Honor, as I say, I tried to get the records from Mr. Thumm. I discovered that Mr. Jackson had been working round Norfolk and was working for the Broudy organization and summoned him.

The Court: Well, gentlemen, the subpoena here—the job was taken over at the request of Progressive—

Mr. Kanter: Virginia Heating.

The Court: —Progressive by Mr. Allen, who completed the job when National Sheet Metal went off the work in July of 1965.

Mr. Kanter: Right.

The Court: And as I understand, this witness's testified that these were records in the hands of Allen, the contractor.

page 263 } Mr. Willcox: No, sir.

The Witness: Not Mr. Allen.

Mr. Kanter: No, Your Honor, there is another man.

Mr. Willcox: These records pertain to January, February, March, April, May, June, sir.

The Court: Who is Allen?

The Witness: Alvis.

Mr. Kanter: Alvis.

Mr. Willcox: He was employed by National Sheet Metal during the period—before, during and after the telephone call that allegedly completed the new contract. These records are intended to show that National Sheet Metal continued with the work, paid the men, withholding, and so forth, even though the money was actually—

The Court: Overrule the objection, Mr. Kanter: Note your exception.

DIRECT EXAMINATION (Cont'd)

By Mr. Willcox:

Q. Mr. Thumm, at how many locations was work going on—different locations?

page 264 } A. Only on the jobsite where we had a warehouse and at the National office at 1030—1080 West 39th Street.

Q. Could one of these apply to one and one the other?

A. It might be possible—now, I have not examined them very carefully—that one of them is just a shop record and the other is the field record of the man working in the field.

Mr. Kanter: Well, Your Honor—

The Court: I sustain the objection. If this gentleman cannot identify them, that's the answer.

By Mr. Willcox:

Q. Where did Mr. Alvis work?

A. Mr. Alvis's main office was on Virginia Beach Boulevard at his shop located there.

Q. But in his employment on this job where was he physically located? in the shop or on the job?

A. He was in the shop at 1080 West 39th Street.

Q. Does one of these books—would you examine it—cover Mr. Alvis?

Mr. Kanter: Well, now, if Your Honor please—

page 265 } The Court: Mr. Thumm, if you cannot identify the papers, simply make that statement that you cannot identify them. If you know them and are familiar with them and can identify them, then tell us that.

The Witness: I know them as payroll records, Your Honor.

The Court: But you cannot identify them. Is that correct?

The Witness: Oh, yes.

The Court: Have you seen them before?

The Witness: Yes, yes, Your Honor. I was trying to differentiate between the two books, which I could not do. The only thing I could see was that they covered a different period of time, that was all.

The Court: All right.

Mr. Willcox: Your Honor, I offer these.

The Court: Defendant's 11 and 12.

(So marked by the court.)

Mr. Willcox: I offer also, sir, the employer's copy of the withholding statements.

The Court: Any comments on these? Defendant's Exhibit 13.

(So marked by the court.)

page 266 } Mr. Kanter: What's that, Tom?
Mr. Willcox: It is the checkbook.

Mr. Kanter: Judge, I have no objection to this book. Mr. Willcox is offering the checkbook to show that checks ceased to be issued as of a certain date from this checkbook. I have no objection to it.

Mr. Willcox: If Your Honor please, Mr. Kanter has agreed this is the checkbook of National Sheet Metal, Inc.

Mr. Kanter: I haven't agreed to that. He is going to identify it. I assume that it is.

Mr. Willcox: I am sorry.

By Mr. Willcox:

Q. What is that, Mr. Thumm?

A. This is the checkbook of National Sheet Metal, Incorporated.

Q. This is the book on the account about which you testified on Friday that required the joint signatures?

A. That is true.

The Court: This is Defendant's 14.

(So marked by the court.)

The Court: All right, anything further?

page 267 } By Mr. Willcox:

Q. What is that—no, would you identify that, please?

A. This is the last statement issued by the Southern Bank on National Sheet Metal, Incorporated's, account through January 1965.

Q. What was the balance shown in the account at that time?

A. $137.55.

Mr. Willcox: Your Honor, these can be stapled together.

The Court: Defendant's 15.

(So marked by the court.)

Mr. Kanter: I have no objection to this last statement, Your Honor. It is apparently the last bank statement issued on National Sheet and I accept it as such.

A. This is the statement as of May 20, 1965, $109.94 balance.

By Mr. Willcox:

Q. And what charges have been made against that account to reduce it from the hundred thirty some to a hundred nine since February 1965?

page 268 A. None other than there must have been one or two small checks outstanding which came back after that time, plus the seventy-five cents a month service charged.

The Court: Defendant's 16.

(So marked by the court.)

By Mr. Willcox:

Q. Mr. Thumm, when did you first find out that Progressive was not going to make the payroll?

A. In July. The end of July 1965 we did not receive our usual check in return for payroll submitted and I called Farmville to contact Mr. Wood and Mr. Wood at this time was engaged in a job at Fort Belvoir and was out of town for a period of a couple of days and his office said that he could not be contacted. I discussed the fact that we had not received our check with his bookkeeper and I believe someone else in his office and they told me they didn't know what the trouble was, that I would have to talk to Mr. Wood. Finally, after about three days I did locate Mr. Wood at Fort Belvoir and he told me he would look into it and advise me when he returned to Farmville the next day. The following day I talked to Mr. Wood again and he told me that the balance of the contract had been used up and that they could

page 269 not meet any more payrolls. By this time another full week had gone on and we had another payroll to submit, for which we were not reimbursed. At this time I called Mr. Wood and he told me he would meet me on the job the next day to discuss this matter. And the following day I went down to the shack and we had this meeting and he told me at that time that he wanted a letter of default from me on the job, which was written the following day. We did not then or thereafter receive either of the two payroll checks which owing us—owing—

The Court: Just a moment.

By Mr. Willcox:
Q. Were your weekly payroll submissions made on—

The Court: Just one second, Mr. Willcox. Is that—the letter of default that you mentioned that Mr. Wood wanted, is that your exhibit—Plaintiff's 8?
Mr. Kanter: It is a letter dated July 24th I believe, Your Honor.
Mr. Willcox: July 27th.
The Court: July 27th?
The Witness: That's the letter.
The Court: All right.

page 270 } By Mr. Willcox:
Q. Were your weekly submissions for payroll reimbursement made on Virginia Heating billheads?
A. Made on plain stationery.
Q. I hand you two documents and ask you what they are?
A. This is the weekly payroll submission for week ending July 14th in the amount of $2,803.02 and the week of July 7th in the amount of $1,415.15.
Q. Have those ever been paid?
A. No, Your Honor—no, sir.

Mr. Willcox: Your Honor, we would like to introduce them.
The Court: This will be Defendant's 17 and 18.

(So marked by the court.)

By Mr. Willcox:
Q. In jobs like this, Mr. Thumm, is a subcontractor required to carry workmen's compensation insurance and that kind of thing?
A. Yes, sir.
Q. Did National Sheet Metal have workmen's compensation—
A. Yes, sir.
page 271 } Q. —insurance on this job?
A. Yes, they did.
Q. And all the other various kinds of insurance that are required?
A. Yes, they did.

Q. Did Virginia Heating have any such insurance on this job?

A. No, they did not.

Q. What, if anything, is required to accompany a request for payroll on a government job?

A. Payroll affidavits have to be submitted weekly on a government form and supplied to the general contractor each week so that the general may in turn submit his voucher to the government for payment.

Q. And who submitted that affidavit in connection with these payrolls all through the spring of 1965?

A. National Sheet Metal Company.

Q. They were submitted to Mr. Wood's company?

A. Yes.

Q. And who was the top official of Progressive directly concerned on a day-to-day basis with the jobs here in Norfolk?

A. Mr. Ralph Wood locally.

Q. He was the superintendent on the job?

page 272 } A. That's true.

Q. And he is not one of those gentlemen who has appeared here so far?

A. No.

Q. Did you have frequent contact with him?

A. Infrequent, not frequent.

Q. Did you have any contact with him prior to the telephone conversation of February 1965?

A. Yes.

The Court: This is the local supervisor for Progressive?

The Witness: Yes, Your Honor, on the job.

By Mr. Willcox:

Q. Mr. Thumm, did National Sheet Metal, Inc., ever go into bankruptcy?

A. Never.

Q. Did you ever tell Mr. Turbin—excuse me, I can't remember his name, the man from Alabama Electric—that National Sheet Metal had taken bankruptcy?

A. I don't think I made such a statement, no.

Q. How many contacts did you ever have to Mr. Turbin?

A. Exactly one that lasted about fifteen minutes.

page 273 } Q. And took place where?

A. In the shack on the job at Camp Allen.

Q. And that was the only contact you ever had?

A. That's true.

Mr. Willcox: That's all, Your Honor.

CROSS EXAMINATION

By Mr. Kanter:

Q. Mr. Thumm, Virginia Heating did hire Mr. Turbin to do the wiring control on the air conditioning and heating units out there on the job, didn't you?

A. Virginia Heating agreed to pay him, that is all.

Q. Well, without pulling out that letter again—

Mr. Kanter: May I have the exhibits, Your Honor?

The Court: Is that the one?

Mr. Kanter: Yes, Your Honor.

By Mr. Kanter:

Q. Mr. Thumm—

Mr. Willcox: If Your Honor please—

The Court: Just a moment.

page 274 } Mr. Willcox: Just for the record I would like to restate my objection on the grounds of relevancy, that no transactions between the defendant and a third party are relevant here and with the understanding it continues throughout the examination concerning the relationship between the defendant and Alabama Electric.

The Court: All right.

By Mr. Kanter:

Q. Mr. Thumm, when you wrote to Mr. Turbin, as this letter in Plaintiff's Exhibit 4 shows, and said, "Relative to our conversation in Mr. Wood's office concerning the wiring of the furnaces on the Camp Allen site, you are to proceed with this work at a cost of ten dollars per unit," and this is written as Virginia Heating Distributors and signed very truly yours, Virginia Heating *Distriburors,* L. A. Thumm, do I take it, sir, that you do not feel that that letter is a hiring of the Alabama Electric Company to do that work for Virginia Heating?

A. Yes, that's a definite authorization to proceed with the work.

Q. Well, in other words, the next sentence said,

page 275 } "Invoices will be submitted on a monthly basis until the work is completed and will be paid promptly

on the 10th of the following month by us." Didn't you tell him to submit his invoices to Virginia Heating Distributors?

A. Yes, I did.

Q. Well, wouldn't you say, sir, in fairness, Mr. Thumm, that Virginia Heating Distributors hired Alabama Electric to do the electrical wiring work on the job, sir?

A. I don't know how technical you can be. I hired Alabama Electric to do the job and Alabama Electric insisted that Virginia Heating give him a letter of confirmation and agree to pay. Now if that is a contract between Alabama Electric and Virginia Heating, I can't deny it.

Q. Is there any separate contract or paper between National Sheet Metal and Alabama Electric, sir?

A. No, sir.

Q. Now—

The Court: Hold it just one moment, Mr.—Mr. Willcox or Mr. Hollis?

(The court and counsel for both sides conferred out of the hearing of the jury.)

page 276 } By Mr. Kanter:

Q. Mr. Thumm, I hand you this Defendant's Exhibit 13, which is a list of withholding forms that apparently National Sheet Metal filled out sometime prior to April 15, 1965, for federal income tax purposes for employes. Is that correct?

A. That's correct.

Q. Were they done in your office or Mr. Alvis's office?

A. They were done in National Sheet Metal's office.

Q. Well, who did those—who physically prepared those pieces?

A. Mr. Alvis prepared them all.

Q. Mr. Alvis was then working for the National Sheet Metal—

A. That's true.

Q. —around April of that time?

A. Yes, from January until that June, sometime in June.

Q. Well, did you not know, sir, that those W-2 forms would have to be in existence when you testified in my office in April of 1966?

A. Yes, I did.

Linwood A. Thumm

Q. Well, why, Mr. Thumm, were they not pro-
page 277 } duced for us by counsel?

A. I assumed that these were actually in Washington along with everything else, because I had asked Mr. Alvis to submit everything he had to me.

Q. Well, now, let me ask you this: Do you find any withholding form in there for this young gentleman who came down here and you paid, I believe the testimony was, six hundred and some dollars for two weeks work, twelve dollars an hour, Norris Wood, to do certain air conditioning work on the job?

A. No, and this was after this period.

Q. After that period. Has there ever been any W-2 submitted for Norris Wood?

A. No, because Mr. Norris Wood contracted this and paid his own withholding and social security.

Q. In other words, when Virginia Heating—when you gave him a check of Virginia Heating you gave him the full amount? You didn't take out any deductions?

A. No deductions whatsoever. He was a contractor on an hourly basis.

Q. So you won't file any W-2 form?

A. Nothing.

Q. But he was hired in your office, was he not, sir?

A. He was hired in Virginia Heating's office,
page 278 } yes.

Q. And isn't what he said true, Mr. Thumm, that you told him that Virginia Heating had taken over this job?

A. No, I didn't put it to him in any such words. I think he got that from his father or from someone else concerned with Progressive Construction, if he got such information.

Q. Well, what words did you put it to him in when you hired him from the Virginia Heating office?

A. I told him that I was trying to complete the job and that we were running into certain problems and needed additional help.

Q. Well, now, Mr. Thumm, let me ask you, sir, when you say "I," Tick Thumm is known as Virginia Heating Distributors, isn't that right, around Norfolk and in the trade?

A. Yes, but not as far as this job was concerned.

Q. Well, let me ask you, when you said to this young boy sitting behind your desk at Virginia Heating Distributors office, "I am going to complete that job," do you think that he

would take that to mean Virginia Heating Distributors was going to complete it or I, Tick Thumm, as assistant treasurer of National Sheet Metal, is going to complete the job?

page 279 } A. Well, Mr. Kanter, going back on this thing, my first contact with Mr. Norris Wood was not in Virginia Heating Sheet—Virginia Heating office; it was at the shed at Camp Allen.

Q. But everybody has known you for thirteen years as a competent heating man and material—heating and air conditioning materials man in and around the Tidewater area. You are in the Langley job and jobs all over this area, aren't you, Mr. Thumm?

Mr. Hollis: If Your Honor please, we object. Mr. Kanter is now arguing with the witness.

The Court: Don't argue. Ask questions.

By Mr. Kanter:

Q. In the trade, Mr. Thumm, even from June of 1964, all the way to the time this job was completed isn't Mr. Tick Thumm known as Mr. Virginia Heating Distributors?

Mr. Willcox: If Your Honor please, that's an impossible question for this witness to answer. Mr. Wood about whom he was inquiring was somebody came here for the first time in his life from Baltimore on this job.

The Court: I think that the question when

page 280 } you determine the fact that he owns or at the time owned exclusively the Virginia Heating is as far as it can go in that respect.

Mr. Kanter: All right, sir.

By Mr. Kanter:

Q. What words, exactly—when you say you told young Norris Woods "I am trying to complete this job," did you amplify that at all, Mr. Thumm?

A. No, I did not.

Q. You just said, "I'm trying to complete this job"?

A. Frankly, there was so little conversation at the time I'm not at all certain of what was said or that there was any explanation given. Mr. Norris Wood was a complete stranger in this territory. He was brought in here by his uncle to help solve a problem and that was the extent of it.

Linwood A. Thumm

Q. You and Joe Wood were complete strangers too, essentially, except for the August 31st conversation, weren't you, sir?

A. That is true.

Q. And in the August 31st conversation you were known to Joe Wood as the materiel supplier for National Sheet who was worried about getting his money page 281 } for the materials, weren't you?

A. That's true, but isn't it possible for a man to be involved in more than one particular activity?

The Court: Don't ask counsel questions.

By Mr. Kanter:

Q. Mr. Thumm, when you called Joe Wood and said, "I am going to take over this job and complete it," what amplification at that time did you make as to what you meant when you said, "I am taking over"?

A. I made it very plain to him that I would supply the materials if he put up the money weekly for payroll.

Q. Did you at that time tell him that you were interested financially in National Sheet Metal and that you were taking it over as National Sheet Metal?

A. I don't think any explanation was made. I told him that the job—that I would attempt to finish the job.

Q. Now, Mr. Thumm, in all reasonableness, with a man like Joe Wood or anybody else, knowing you as the *materiel* supplier for National Sheet who had called him three months earlier worried about getting his money and though—

Mr. Hollis: If Your Honor please, Mr. Kanter page 282 } is arguing the case now.

The Court: I sustain it.

Mr. Kanter: I am asking a question.

The Court: Gentlemen, I sustain the objection. Go ahead.

By Mr. Kanter:

Q. Mr. Thumm, do you think it reasonable that Joe Wood would assume when you say "I am taking—"

Mr. Hollis: Your Honor please, I object. The witness is not called upon to say what's reasonable to Mr. Wood.

The Court: I am going to sustain the objection.

Linwood A. Thumm

Mr. Willcox: If Your Honor please, Mr. Kanter has been over it before.

Mr. Kanter: I agree with you, because that is the ultimate issue these gentlemen have got to decide.

The Court: All right.

By Mr. Kanter:

Q. Mr. Wood, you testified on Friday that you lost, I believe, did you say $58,000.00?

A. $57,000.00.

page 283 } Q. $57,000.00. Will you explain to His Honor and the gentlemen of the jury how you computed that loss?

A. I don't quite follow you on this.

Q. I want you to tell Judge Johnston and these gentlemen how you can tell us that you lost on the job $57,000.00?

A. Well, it is simply a matter of billings to National Sheet Metal Company for which we were not paid amounted to $57,000.00 more than we received.

Q. Well, now, let me see if I can understand. You received—I say "you," I am combining National Sheet Metal, Inc., and Virginia Heating Distributors—a total $142,300.00, just seven hundred dollars under the contract price, did you not?

A. That's true.

Q. All right. And what was the total amount of materiel you supplied this job, sir?

A. Approximately sixty thousand dollars.

Q. And what was the total amount of payroll that went into the job?

A. The difference between sixty and a hundred and forty-two, which would be $82,000.00.

Q. All right, sir. And I am asking you did you not collect that much money from Progressive, a hundred forty-two thousand some odd dollars?

page 284 } A. Yes, we did.

Q. Well, tell us then how you contend that you lost sixty thousand dollars—$57,000.00 on this job?

A. Because we billed for evidently close to $200,000.00.

Q. That's what I am asking. You find me where you billed for $200,000.00?

A. Well, Mr. Kanter, if you will total up all these records I am sure they will total exactly that figure. Our ledger sheets don't lie.

Q. Mr. Thumm, you total up. Did you not submit on your last affidavit forms for Progressive that you had put in just what you said, eighty some thousand dollars in payroll throughout the job and some slightly under—about $58,000.00 of materiel?

A. No, I did not. We don't have to submit anything like that.

Q. Well, now, will you tell His Honor and the gentlemen of the jury where you came up with the figure of having lost $57,000.00? Tell me what you spent in payroll and materiel?

Mr. Willcox: If Your Honor please—

The Court: Just a moment.

Mr. Willcox: If Your Honor please, the exhibits page 285 } which are already in evidence clearly show that.

The Court: This is cross-examination, Mr. Willcox. I am going to permit it and note your exception. Go ahead.

A. What is your last question?

By Mr. Kanter:

Q. Mr. Thumm, maybe I misunderstood you. I heard you to say a few moments ago that you had spent on the job in material approximately sixty thousand dollars. And that you had spent in payroll approximately $82,000.00, which comes to a hundred forty-two thousand?

A. I didn't say we had spent that. You misinterpreted my statement, either that or I misunderstood your question. I said we received $82,300.00.

Q. How much did you spend in materiel exactly?

A. I would say sixty thousand dollars.

Q. All right, sir. Well, you didn't finish the job and you didn't deliver all—

A. Obviously we have—

The Court: Just a moment, Mr. Thumm. Will you specify whether you are talking about Virginia Heating or National Sheet Metal as you go?

page 286 } By Mr. Kanter:

Q. Well, I understand Virginia Heating supplied all of the material to the job. Is that correct?

A. That's true. There were a few items bought outside which in all cases went through our books and were billed to National Sheet Metal.

Linwood A. Thumm

Q. All right, sir. And you say that approximates sixty thousand dollars?

A. That's true.

Q. All right, sir. Now, what did you spend on payroll on the job from the time—and I say "you," Your Honor, I mean combined Virginia Heating and National Sheet, and I am talking about everything that went through the National Sheet books and is included on the W-2's and you can include what you paid Alabama Electric and Mr. Norris Wood and to Mr. Allen?

A. I think they would total probably $135,000.00.

Q. All right. Do you have the figures here in court to show us what that total payroll is, sir?

A. Yes, sir.

Q. And have you totaled them up, Mr. Thumm?

A. We didn't carry as a running total, because each monthly check reduced the total and left a balance, and as such the total has never been made.

Q. But it is your contention that those ledger
page 287 } sheets—which one is it, sir?

A. These are the checks.

Q. These are the payroll or the material?

A. They are all the payroll and other items.

Q. It is your—when you say payroll and other items, what other items do you mean, sir?

A. Let me look at this. There were other things, purchased, as I said, outside; for example, Stanley Bryan set up the books. There was a legal fee in there for that. There are a number of miscellaneous things, all of which were carried through these books and charged to National Sheet Metal's account here.

Q. I am not now talking about legal fees for formation of the corporation. I am talking about, sir, the payroll that National Sheet and Virginia Heating combined spent on the job, including such men as Norris Wood and Alabama and Mr. Allen, who you had to bring in there after Alvis left or Goodman left?

A. They would still total $135,000.00.

Q. And it is your contention, sir, that this sixty-thousand-dollar loss has been sustained as a result of your only having collected a hundred forty-two but as between these two ledgers having spent two hundred?

A. That's correct.

Q. And that these ledger sheets will indicate
page 288 } that you spent approximately would it be $140,-
000.00 in payroll?

A. Very close to that.

Mr. Kanter: All right, sir. That's Plaintiff's Exhibit 10.

By Mr. Kanter:

Q. Now, Mr. Thumm, besides no W-2 for this fellow Norris Wood, how about Mr. Allen? Were there any W-2's made out at all on National Sheet for Mr. Allen?

A. Same arrangement with him. He was working as an individual subcontractor on an hourly basis and paid his own withholding and social security.

Q. Mr. Thumm, when Allen came to your office—and I presume he did come to Virginia Heating—

A. Yes, he did.

Q. —did you at that time tell him the same thing you told Joe Wood and Norris Wood: "I am trying to do so and so," or did you say at that time "I as assistant treasurer of National Sheet am attempting to do such and such"?

A. I didn't specify anything to Mr. Allen.

Q. But you feel that all of these people, I take it, knew that when you would do that in your office that you were
talking about National Sheet and not Virginia
page 289 } Heating Distributors?

A. I wasn't concerned with that, actually. Why can't I be involved in ten different operations if it is possible?

Q. If you weren't concerned with it and you were involved in ten different operations, then why are you concerned that you do not want the liability to this transaction to attach to all of your enterprises?

Mr. Hollis: If Your Honor please, it is argumentative, I submit again.

The Court: I will permit it. Overrule your objection. Go ahead.

Mr. Kanter: Read the question back, please.

(The reporter read the question.)

Mr. Willcox: If Your Honor please, I don't believe the question is intelligible to this witness or anyone else.

Mr. Kanter: I will rephrase it.

Linwood A. Thumm

By Mr. Kanter:

Q. If you weren't concerned about whether or not they understood which enterprise you were talking about, Mr. Thumm, then why are you concerned here today that you don't want the liability of this transaction to attach to Virginia Heating as well as National Sheet?

page 290 } Mr. Willcox: Renew the objection, Your Honor.
The Court: All right. Overruled. Go ahead.

A. You are losing me too.

By Mr. Kanter:

Q. Mr. Thumm, you understand what I mean, don't you, sir?

The Court: All right, gentlemen.

A. Vaguely, yes.

By Mr. Kanter:

Q. Well, what's the answer to it?

A. I guess the only answer that I can give is that I didn't find it necessary to make such an explanation.

Mr. Kanter: I have no further questions, Your Honor.

The Court: Anything further? Anything further, Mr. Willcox?

Mr. Willcox: Yes, sir.

page 291 } RE-DIRECT EXAMINATION

By Mr. Willcox:

Q. Mr. Thumm, who did you expect to pay Mr. Allen his salary and Mr. Norris Wood his salary?

A. Progressive Construction Company.

Q. And these two sheets, Exhibits 9 and 10, do they show all disbursements made by Virginia Heating for the account of National Sheet Metal?

A. Everything.

Q. And do they show all sums received by Virginia Heating—

A. Everything.

Q. —from Progressive?

A. Complete ledger sheets.

Q. And did you arrive at your loss by netting those—

Linwood A. Thumm

A. Yes, sir.
Q. —to reach a figure of what?
A. $57,000.00 loss—$57,504.55.
Q. Which was the difference between what you put out and what you got in?
A. That is correct.
Q. Now, in addition to the receipts shown on your books from Progressive, did National Sheet Metal
page 292 } receive some checks direct from Progressive?
A. Yes, they did.

Mr. Kanter: They are all in evidence as Exhibit 2, sir.
Mr. Willcox: I understand that, Mr. Kanter, but you confused the accounting here a few minutes ago.
The Court: No, no, no, no. Go ahead.

By Mr. Willcox:
Q. Would the disbursements in this book, Defendant's Exhibit 14, indicate how those moneys were spent?
A. Yes, they would.
Q. So that the total moneys spent on the job by Virginia Heating and National, directly or in combination, would be reflected in the disbursements in this book and on here?
A. That is true.
Q. And that total would approximate what?
A. Approximately $200,000.00.

Mr. Kanter: I have no further questions.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

INDEX TO RECORD

	Page
Writ of Error Awarded	1
Record	2
Notice of Appeal and Assignments of Error	2
Motion for Judgment	2
Judgment—August 1, 1966	5
Witnesses:	
Linwood A. Thumm	6, 102
J. E. Wood	47
Gene Turbin (Deposition)	75
Frederick C. Allen	78
Norris Wood	87
Harry R. Rudin	91
Billy P. Shadrick	94
William H. Brown	100