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210 VA 423

Record No. 7032

In the Supreme Court of Appeals of Virginia At Richmond

ATLANTIC STATES CONSTRUCTION CO., ET AL.

v.

McCANN STEEL COMPANY, INCORPORATED

FROM THE CIRCUIT COURT OF THE CITY OF FREDERICKSBURG

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. 7032

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 9th day of October, 1968.

Atlantic States Construction Company and
ASC Company of Virginia, Incorporated, Appellants,

against

McCann Steel Company, Incorporated, Appellee.

From the Circuit Court of the City of Fredericksburg
S. Bernard Coleman, Judge

Upon the petition of Atlantic States Construction Company and the A S C Company of Virginia, Incorporated, an appeal is awarded them from a decree entered by the Circuit Court of the City of Fredericksburg on the 20th day of March, 1968, in a certain chancery cause then therein depending, wherein McCann Steel Company, Inc., was plaintiff and Danter Associates, Inc., the petitioners and others were defendants.

And it appearing that the suspending and *supersedeas* bond filed with the record in this case does not recite the proper code section pertaining to the terms and conditions for a *supersedeas* bond, the petitioners, or some one for them, shall enter into a *supersedeas* bond with sufficient security before the clerk of the said circuit court in the penalty of $60,000, with condition as the law directs.

RECORD

* * * * *

BILL

TO THE HONORABLE S. BERNARD COLEMAN, JUDGE OF SAID COURT:

The bill of your orator, McCann Steel Company, Inc. would respectfully show unto the Court:

page 2 } 1. That it is a corporation organized and doing business under the laws of the State of Tennessee with its principal office at Nashville; that its business, among other enterprises, consists of the fabrication and sale of miscellaneous and architectural metal work of steel, aluminum, bronze and other nonferrous metals.

2. That Danter Associates, Inc. is a foreign corporation organized and doing business under the laws of the State of Missouri, principal office being at 818 Olive Street, St. Louis, Missouri, and has contracted to supply services or things in this State.

3. That Atlantic States Construction Company, Inc. another of the respondents, is a foreign corporation organized and doing business under the laws of Georgia with its principal office at 1958 Monroe Drive, N. E., P. O. Box 1738, Atlanta, Georgia, but is doing business in Virginia under the name of The A.S.C. Company of Virginia, Inc., a Virginia Corporation, whose registered agent is Mosby B. Perrow, Jr., National Bank Bldg., Lynchburg, Virginia.

4. That Security Bank, a respondent, is a foreign corporation organized under the laws of the State of West Virginia, with its offices at 9th & G Streets, Washington, D. C.

5. That Samuel J. Rosenfeld, Allan Bratman and David Lawson, other respondents in this action, are not residents of the State of Virginia, and their last known post office addresses are as given in the caption.

6. That on or about July 15, 1965, Danter Associates, Inc., as general contractor for Samuel J. Rosenfeld, Allan Bratman and David R. Lawson, entered into a contract with your orator for the purchase of steel to be used in the

page 3 } construction of a certain building known as the Montgomery Ward Store in Fredericksburg Park and Shop Shopping Center, Fredericksburg, Virginia, as follows:

A. Steel joist and accessories		$18,550.00
1½ 22 gauge painted metal roof deck		13,840.00
B. Structural steel framing, including roof beams and columns, canopy framing and columns, beam and angle lintels, C bucks for O. H. Doors, floor beams for mezzanine, channel framing above entrance doors		14,536.00
C. Anchor placement on top of walls for joist and deck, steel ladder to roof scuttle, steel stair, mezzanine over battery room and pipe hand rails	$1,500.00	
credit for ladder, steel stair, and pipe rails not furnished	890.00	610.00
Total		$48,536.00

7. That subsequent to the making of the agreement, set forth in Paragraph 6, Danter Associates, Inc. was succeeded as general contractor for Samuel J. Rosenfeld, Allan Bratman and David R. Lawson in the construction of said Montgomery Ward Store by Atlantic States Construction Company, Inc. t/a The A. S. C. Company of Virginia, Inc.; that Atlantic States Construction Company, Inc. t/a The A. S. C. Company of Virginia, Inc., as such general contractor, received the above described steel from your orator thus ratifying and assuming for itself as well as for its employers, Samuel J. Rosenfeld, Allan Bratman and David R. Lawson, the contract between your orator and Danter Associates, Inc; that upon receiving the said steel from your orator, the said Atlantic States Construction Company, Inc., t/a The A. S. C. Company of Virginia, Inc. was put upon inquiry and notice of the contract under which said steel was delivered and all terms, obligations and conditions thereof; that Atlantic States Construction Company, Inc., t/a The A. S. C. Company of Virginia, Inc., as general con-
page 4 } tractor, caused the said steel to be used in the construction of, and to be incorporated into, that certain building known as the Montgomery Ward store in Fredericksburg Park and Shop Shopping Center, Fredericksburg, Virginia, on real estate owned by the respondents, Samuel J. Rosenfeld, Allan Bratman, and David R. Lawson, which real estate is more particularly described as follows:

All that land, together with improvements thereon, referred to in lease from Rosenfeld, Lawson and Bratman as Lessors to Montgomery Ward & Company as Lessee and described

in Exhibit "B" of that lease in Deed Book 128, at pages 20 and 21, this being part of the land owned by said Rosenfeld, Lawson and Bratman in Fredericksburg, Virginia, having been conveyed to them from George Benoit and Mary B. Benoit and recorded in Deed Book 119, at page 236 and Deed Book 127, at page 580 and being also set out in Plat Book 2, at page 99 in the office of the Clerk of the Circuit Court of Fredericksburg, Virginia.

8. That there is due and owing to your orator the entire purchase price of said steel totaling $48,536.00 with interest thereon at the legal rate from August 21st, 1965, and there are no credits due thereon, all of which is shown by sworn statement of account hereto attached marked Exhibit "A".

9. That within thirty days from the time said building was completed, to-wit, on October 22, 1965, your orator caused to be recorded in the Office of the Clerk of the Circuit Court of the City of Fredericksburg, a memorandum of mechanic's or materialman's lien supported by sworn account as provided by statute stating that it claimed a lien upon the said property of Samuel J. Rosenfeld, Allan Bratman and David Lawson to secure the payment of the sum of $48,536.00, plus legal interest from August 21, 1965, together with a description of the property intended to be covered by the said lien, sufficient for identification, with the name of the owners of the said property as above described; which memorandum was recorded in Deed Book 129, at page 680 in the Clerk's Office of the Circuit Court of the City of Fredericksburg aforesaid as required by law, all of which will more fully appear from a copy of said memorandum of mechanic's
page 5 } lien filed herewith and marked Exhibit "B"; and caused notice thereof to be served on the owners of said real estate as follows: Samuel J. Rosenfeld and Allan Bratman by personal service and David R. Lawson by certified mail, and on Atlantic States Construction Company, Inc. and The A. S. C. Company of Virginia, Inc. by certified mail on the statutory agent, Mosby B. Perrow, Jr., National Bank Bldg., Lynchburg, Virginia; which notices with return of service are filed with the papers in this cause.

10. That the only other lien on this property aforesaid is a deed of trust executed by the said Samuel J. Rosenfeld, Allan Bratman and David Lawson to Thomas W. Phillips and Caldwell C. Kindrick, Trustees, to secure an indebtedness in the sum of $1,850,000.00, together with interest on the same, payable to Security Bank, 9th and G Streets, Washington,

D. C. which said deed of trust is recorded in the Clerk's Office aforesaid in Deed Book 129, at page 337.

11. That your orator charges that there is now due and owing to it the sum of $48,536.00, with interest thereon from August 21st, 1965, which is a valid and subsisting lien against the land, property and appurtenances thereon hereinbefore described.

12. That before the expiration of thirty (30) days from the time the said building was completed or the work thereon otherwise terminated, your orator furnished the said owners of the property and the said Atlantic States Construction Company, Inc. t/a The A. S. C. Company of Virginia, Inc., a correct statement of account, verified by affidavits, of its claim herein asserted, in accordance with the pro-
page 6 } visions of Section 43-11 of the Code of Virginia (1950); that the amount of your orator's claim does not exceed the amount in which the said owners of the property were indebted to the said general contractor at the time that notice was given.

WHEREFORE, your orator prays that the said Danter Associates, Inc., Atlantic States Construction Company, Inc., The A. S. C. Company of Virginia, Inc. and Security Bank, Thomas W. Phillips and Caldwell C. Kindrick, Trustees, and Samual J. Rosenfeld, Allan Bratman and David R. Lawson, be made parties respondent to this bill and be required to answer the same; that proper process issue; that an order of publication be awarded and executed against said non-resident respondents and foreign corporations; that the liens on the said property and their priorities be ascertained; that your orator's lien be established and the said property be sold to satisfy the same, with interest thereon from the 21st day of August, 1965; that judgment be entered in favor of your orator against the respondents, Danter Associates, Inc., Atlantic States Construction Company, Inc., The A. S. C. Company of Virginia, Inc., Samuel J. Rosenfeld, Allan Bratman and David R. Lawson in the sum of $48,536.00 with interest thereon from August 21st, 1965; and that your orator have all such further and general relief as to equity shall seem meet or the nature of its case may require.

And as in duty bound, your orator will every pray, etc.

McCANN STEEL COMPANY, INC.
a corporation
By Counsel

* * * * *

Filed 12-23-65

Chas. H. Berry, Clerk
By Ellen G. Mills, Deputy

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* * * * *

JOINT AND SEVERAL ANSWER OF
SAMUEL J. ROSENFELD, ALLAN BRATMAN,
AND DAVID R. LAWSON

TO THE HONORABLE S. BERNARD COLEMAN, JUDGE OF SAID COURT:

For their joint and several answer to a bill of complaint exhibited against them in the above styled cause, the respondents, Samuel J. Rosenfeld, Allan Bratman and David R. Lawson, answer and say:

1. That they are without sufficient knowledge to answer the allegations contained in numbered paragraphs one, two, three, four, six, eight, nine, eleven and twelve and therefore neither admit nor deny same and call upon the complainant for strict proof thereof.

2. That these respondents admit the allegations in numbered paragraph five of the bill of complaint.

3. That these respondents are without sufficient knowledge to answer the allegations contained in numbered paragraph seven of the complainant's bill of complaint and therefore neither admit nor deny same.

4. That these respondents deny the allegations contained in numbered paragraph ten of the complainant's bill of complaint.

5. These respondents would specifically allege that any indebtedness owed to McCann Steel Company is not the responsibility of these respondents as owners of the
page 19 } real estate in question, but rather the responsi-

bility of either Atlantic States Construction Company, Inc. or Danter Associates, Inc. or The A. S. C. Company of Virginia, Inc. or all and respectfully request that this Honorable Court determine with clarity what amount is due McCann Steel Company and by whom it is due.

Respectfully,

SAMUEL J. ROSENFELD,
ALLAN BRATMAN
and DAVID R. LAWSON

By Russell D. Roberts
Of Counsel

* * * * *

Filed 1-3-66

By Chas. H. Berry, Clerk

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* * * * *

ANSWER

The joint and separate answers of Atlantic States Construction Company, Inc. and the A. S. C. Company of Virginia, Inc. to a Bill of Complaint exhibited against them and others under the above style.

For answer thereto these two Respondents now come and say as follows:

1. That for all practical purposes they are one and the same company, but for registration purposes were required to use the name The A. S. C. Company of Virginia, Inc. for doing business in Virginia.

2. That they neither admit nor deny the allegations contained in paragraph 1 and 2 of said Bill of Complaint, but believe them to be true.

3. That they admit the allegations contained in paragraph 3 of said Bill of Complaint and neither admit nor deny the allegations contained in paragraph 4 and 5 thereof, but believe them to be true.

4. That they neither admit nor deny the allegations contained in paragraph 6 of said Bill of Complaint but believe that the contract referred to therein was entered into considerably prior to July 15, 1965 and believe that the quanti-

ties and prices set forth therein may be incorrect.

5. That in regard to the allegations contained in paragraph 7 of said Bill of Complaint these Respondents agree that they succeeded Danter Associates, Inc. as General Contractor but allege that said contract was dated May 21, 1965; that they admit that they received various shipments of steel from the Complainant but deny that in so doing they ratified or assumed for themselves or anybody else any
page 22 } contract which might have been created between the Complainant and Danter Associates, Inc.; that they deny that the receipt of such steel from the Complainant put them upon inquiry and notice of any such contract or the terms thereof; that they admit that certain steel supplied by the Complainant was used in the construction of the Montgomery Wards Store as described in paragraph 7 of said Bill.

6. That these Respondents have no knowledge as to the amount now due and owing to the Complainant but allege that some of the steel shipped by the Complainant was improperly fabricated and other shipments were incomplete and that these Respondents were required to spend the sum of Four Thousand Seven Hundred Fifty-One and 89/100 ($4,751.89) Dollars to have these errors and deficiencies corrected and that what sum is owing to the Complainant should be reduced by that amount.

7. They neither admit nor deny the allegations contained in paragraph 9 and 10 of said Bill of Complaint but call on the Complainant for strict proof thereof.

8. That they neither admit nor deny the allegations contained in paragraph 11 of said Bill but again allege and represent that they were required to spend the said sum of $4,751.89 to correct the deficiencies and shortages above described.

9. That they neither admit nor deny the allegations contained in paragraph 12 of said Bill except that they do not believe that the statement furnished them by the Complainant was a correct statement.

10. These Respondents affirmatively deny that they are indebted to the Complainant in any sum whatsoever and ask that as to them, said Bill be dismissed and that the lien which the Complainant has filed against said property be released.

ATLANTIC STATES CONSTRUCTION COMPANY, INC.

THE A.S.C. COMPANY OF VIRGINIA, INC.

By Harry B. F. Franklin
Of Counsel

Filed 1-17-66

Chas. H. Berry, Clerk
By Ellen G. Mills, Deputy

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COMPLAINANT'S INTERROGATORIES TO SAMUEL J. ROSENFELD, ALLEN BRATMAN, AND DAVID R. LAWSON

Now comes the complainant, McCann Steel Company, Inc., and propounds to the Respondents, Samuel J. Rosenfeld, Allen Bratman and David R. Lawson, the following interrogatories, in accordance with Section 8-320 *et seq* of the Code of Virginia (1950):

1. State whether the said Respondents, Rosenfeld, Bratman and Lawson employed the Respondent, Danter Associates, Inc. or any agent, employee, associate or subsidiary thereof, in connection with the design or construction of the building the complainant's lien against which is the subject matter of this suit, and if so, in what connection and in what capacity the said Danter Associates, Inc. was so employed.

2. Exhibit any and all contracts which the said Respondents, Rosenfeld, Bratman and Lawson, may have had with the Respondent, Danter Associates, Inc., its agents, employees, associates or subsidiaries, in connection with the design or construction of said building.

3. State the date on which the said building was completed and the date on which work in the construction thereof was terminated.

4. State the date on which the said Respondents, Rosenfeld, Bratman and Lawson, and their tenant, Montgomery Ward & Company, took possession of said building.

McCann Steel Company, Inc.
By Counsel

On January 23, 1967, I delivered the foregoing interrogatories to Leland L. Baker, Jr., Commissioner in Chancery.

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J. M. H. Willis, Jr.

Filed 1-23-67

Chas. H. Berry, Clerk

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COMPLAINANT'S INTERROGATORIES TO ATLANTIC STATES CONSTRUCTION COMPANY, INC. AND THE A. S. C. COMPANY OF VIRGINIA, INC.

Now comes the complainant, McCann Steel Company, Inc. and propounds to the Respondents, Atlantic States Construction Company, Inc. and The A. S. C. Company of Virginia, Inc. the following interrogatories, in accordance with Section 8-320 *et seq* of the Code of Virginia (1950):

1. State whether the fabricated steel items shown on the attached itemized schedule were received on the job site for the construction of the building the complainant's lien against which is the subject matter of this suit, by the said Respondents, their agents, servants or employees, or by any other person.

2. If the entire amount of steel fabricated items shown on the attached itemized schedule was not so received, state with particularity such shortages or deficiencies as the said Respondents allege occurred.

3. If any of the items shown on the attached itemized schedule, received by the said Respondents were misfabricated, state with particularity which items were misfabricated, and in what way.

4. State whether the said Respondents gave notice to the Complainant, McCann Steel Company, Inc., of any shortages, deficiencies or misfabrications, and if so, when, and by what means, such notice was given.

5. State when the construction of said building was substantially completed, when the said Respondents terminated work thereon, and when possession thereof was

page 45 } delivered to the owners, the Respondents, Rosenfeld, Bratman and Lawson.

McCann Steel Company, Inc.
By Counsel

On January 23, 1967, I delivered the foregoing interrogatories to Leland L. Baker, Jr., Commissioner in Chancery.

J. M. H. Willis, Jr.

Filed 1-23-67

Chas. H. Berry, Clerk

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* * * * *

ANSWER TO INTERROGATORIES
SUBMITTED BY THE
COMPLAINANT

For answer to interrogatories submitted to them by the Complainant, the Respondents Samuel J. Rosenfeld, Allan Bratman and David R. Lawson would answer as follows:

1. In answer to numbered interrogatory one (1) Danter Associates, Inc., was employed by these Respondents to design and build the second section of the Fredericksburg Park and Shop Shopping Center. Danter Associates, Inc., however, was unable to provide a satisfactory bond and the agreement with them was cancelled. A second contract was then entered into between these Respondents and Atlantic States Construction Company.

2. In answer to numbered interrogatory two (2) these Respondents attach hereto a copy of the contract entered into between Danter Associates, Inc., and these Respondents.

3. In answer to numbered interrogatory three (3) these Respondents would state that Atlantic States Construction Company completed the second section of the Park and Shop Shopping Center on or about March 23, 1966.

4. In answer to numbered interrogatory four (4) these Respondents would state that Montgomery Ward, the principal tenant in the second section of Fredericksburg

page 50 } Park and Shop, took possession of the premises leased by them on October 20, 1965. The three (3) smaller stores in the second section were not occupied until March 23, 1966.

Respectfully,

SAMUEL J. ROSENFELD
ALLAN BRATMAN
DAVID R. LAWSON

By Russell D. Roberts
Of Counsel

Filed February 3, 1967

Chas. H. Berry, Clerk

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ANSWER TO INTERROGATORIES SUBMITTED BY THE COMPLAINANT

For answer to the interrogatories submitted to them by the Complainant, the Respondents Atlantic States Construction Company, Inc., and the A. S. C. Company of Virginia, Inc., answer as follows:

1. In Answer to interrogatory number one (1), these Respondents answer and say that they do not know whether the fabricated steel items shown on the schedule attached to the interrogatories were received on the job site for the construction of the building the Complainant's lien against which is the subject matter of this suit. They do admit that the fabricated steel used in the construction of the building was all supplied by either the Complainant or by the Respondent, Danter, except for those items referred to in answer number two (2) below. They further say in answer to this interrogatory that since they did not contract with the Complainant, did not order the materials and had been advised by the Respondent Danter that all *stell* items had been paid for, they simply used, to the extent that they were able to do so, the steel materials supplied by Danter or the Complainant,

and to the extent they were unable to do so, they refabricated such materials or purchased such additional materials as they needed.

2. In answer to interrogatory number two (2) these Respondents say that they were required to purchase some additional steel items, a complete list thereof with cost to these Respondents, being attached hereto.

page 57 } 3. In answer to interrogatory number three (3) these Respondents say that they were required to refabricate some of the steel materials provided by Danter or the Complainant, a complete list thereof with cost to these Respondents being hereto attached.

4. In answer to interrogatory number four (4) these Respondents gave notice of the shortages and deficiencies and misfabrications to one Carl Smith, the agent and representative of the Respondent Danter, with whom these Complainants contracted, said agent Smith at that time having an office in Washington, D. C.; that these Respondents have no knowledge of whether Danter or its agent forwarded these communications to the Complainant; that on November 15, 1965, C. E. Kirk, Project Manager for these Respondents, notified complainant by letter of the shortages and misfabrications, copy of said letter being attached.

5. In answer to interrogatory number five (5) these Respondents say that to the best of their recollection the building was substantially completed on or about November 1, 1965, and possession thereof was delivered to the owners on or about November 10, 1965.

ATLANTIC STATES CONSTRUCTION
COMPANY, INC.
and
A. S. C. COMPANY OF VIRGINIA, INC.

By Harry B. F. Franklin
Of Counsel

* * * * *

Filed 2-10-67

L. L. B. Jr.

* * * * *

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COMMISSIONER'S REPORT

* * * * *

Your Commissioner, Leland L. Baker, Jr., would respectfully report unto Your Honor that pursuant to Decree of Reference entered in this matter on January 23, 1967, he had heard testimony concerning the issues in this matter as will appear from the depositions filed herewith, and that he has examined the records found in the Office of the Clerk of this Court which pertain to the subject real estate and would, therefore, respectfully answer the inquiries contained in the Decree of Reference of January 23, 1967, as follows:

1. Whether all necessary and proper parties are before the Court in this cause.

Your Commissioner would report that the following necessary and proper parties are before the Court.

A— Danter Associates, Inc.—Service upon the Secretary of the Commonwealth of Virginia (represented by counsel)

B— Atlantic States Construction Company, Inc.—Order of Publication (represented by counsel)

C— The A. S. C. Company of Virginia, Inc.—Personal service on registered agent (represented by counsel)

D— Rosenfeld, Bratman & Lawson—Order of Publication (represented by counsel)

page 85 } E— Phillips Kindrick, Trustees—Personal service

F— Security Bank—Order of Publication (represented by counsel)

2. Whether the Complainant, McCann Steel Company, Inc., is entitled to a lien upon and against the real estate described in the Bill of Complaint, and if so, in what amount.

3. Whether the Complainant, McCann Steel Company, Inc., is entitled to judgment against the Respondent, Danter Associates, Inc., Atlantic States Construction Company, Inc., The A. S. C. Company of Virginia, Inc., Samuel J. Rosenfeld, Allan Bratman and David R. Lawson, or any of them, and if so, in what amount.

The second and third inquiries will be reported together. For purposes of this Report, the term Atlantic should be taken to indicate Atlantic States Construction Company, Inc. in its individual capacity and/or in its capacity trading as

The A. S. C. Company of Virginia, Inc. The term Danter will refer to Danter Associates, Inc. The term Owners will refer to Rosenfeld, Bratman and Lawson. The term McCann will refer to McCann Steel Company, Inc.

Your Commissioner refers the Court to the memoranda filed by counsel and sets out below a brief summary of the facts:

A. By contract dated April 16, 1965 (filed with Owners' answer to interrogatories) between Owners and Danter, Danter agreed to construct the Montgomery Ward building and three small shops on land at Fredericksburg Park & Shop for $450,000.00.

B. Subsequently Danter and McCann entered into an agreement whereby McCann was to furnish steel for said building.

page 86 } C. By contract dated May 31, 1965, (respondent's Exhibit 3) between Owners and Atlantic, Atlantic agreed to construct the said buildings for $450,000.00. This contract is a virtual duplicate of the April 16, 1965, contract which was cancelled.

D. Subsequently Danter agreed with Atlantic to furnish the steel to Atlantic for the buildings.

E. McCann delivered steel to the job site. No payments were made to McCann who claims $48,536.00 as evidenced by their memorandum of mechanic's lien filed in this Court.

F. Atlantic contends that since there was no contractual relationship between Atlantic and McCann, there can be no liability in contract against Atlantic.

G. Atlantic further contends that the maximum lien which McCann could claim would be $41,808.00, the reasonable value of the steel, *or* in the alternative, the sum of $44,428.03 which represents the $48,536.00 claimed less back charges of $4,107.97. However, Atlantic claims that McCann is not entitled to a lien against the property.

H. By Order of this Court dated January 28, 1966, the subject property was released from the mechanic's lien heretofore filed and bond in the amount of $97,072.00 was filed by Atlantic conditioned for the payment of such judgment as may be rendered by this Court.

I. RECOVERY UNDER CONTRACT

As to the question of recovery by McCann in contract against Atlantic, your Commissioner finds no evidence of any knowledge, ratification or assumption by Atlantic of Danter's contract with McCann.

It should be noted that Atlantic knew that someone other than Danter was actually furnishing the steel
page 87 } and that Atlantic expected the steel to arrive at the job site because of arrangements Danter had agreed to make for the delivery of the steel. Your Commissioner refers the Court to Respondent's Exhibit #4 dated December 18, 1965, which states that "Daniels did represent to Atlantic that said steel had been purchased from McCann . . .", and to Complainant's Exhibit #6 whereby the delivery tickets dated July, 1965, show McCann as consignee and show them being signed for by Atlantic's foreman on the job.

Your Commissioner finds that there is no liability in contract against Atlantic and in order for McCann to recover, Atlantic's liability must be found under the mechanics' lien statutes of the Code of Virginia. If the Court finds liability on Atlantic under these statutes, McCann's claim will be satisfied from the aforementioned bond which released the mechanic's lien.

II. LIABILITY UNDER MECHANIC'S LIEN

In arriving at a decision in this matter, your Commissioner has followed *Francis, et als* v. *Hotel Rueger,* 125 Va. 106, 121 (1919) which states that "an examination of outside authorities shows that there exists a hopeless diversity of opinion as to whether mechanics' lien statutes should receive a liberal or strict construction. We believe the correct rule deducible from the language and purposes of our statute and the decisions of this Court with respect to it is, that there must be a substantial compliance with the requirements of that portion of the statute which relates to the creation of the lien; but that the provisions with the respect to its enforcement should be liberally construed."

A. PERFECTION OF LIEN

Your Commissioner finds that McCann has perfected their lien in accordance with the requirements of Vir-
page 88 } ginia Code Section 43-7 with respect to the filing, the contents of the memorandum and the requisite notice.

A Memorandum of Mechanic's Lien was filed October 22, 1965, in the Clerk's Office of the Circuit Court of the City of Fredericksburg in Deed Book 129, Page 680, which time of

filing was prior to the expiration of sixty days from the time the structure was completed. Proper notice was given to the Owners of the property of the amount and character of the claim of Complainant.

B. RECOVERY UNDER LIEN

Atlantic contends that McCann is *not* entitled to a lien under two theories:

First: If Atlantic was the general contractor, Danter was subcontractor and McCann was a person furnishing material to a subcontractor who, by Code Section 43-9, could perfect a lien against Danter for the amount Danter could claim a lien against Atlantic. Danter in fact had no claim against Atlantic and therefore McCann has no claim against Atlantic.

Second: If Danter was the general contractor then McCann is a subcontractor and McCann's lien could not exceed the amount the Owners were indebted to Danter as general contractor. Since the Owners cancelled the contract with Danter and were not indebted to Danter, McCann cannot rise above this and therefore has no lien.

The two theories advanced appear to be true by strictly applying the definitions set forth in Code Section 43-1. But Atlantic disregards certain other aspects. Your Commissioner feels that there can be two general contractors for the same job and cites *Northern Virginia Savings and Loan Association* v. *J. B. Kendall Company, et al,* 205 Va. 136, 143 (1964) for this proposition. Danter was the general contractor when McCann became a subcontractor
page 89 } and subsequently Atlantic was the general contractor when McCann supplied the steel.

The question thus arises "is it necessary that the contract between the general and subcontractor contemplated by Code Section 43-1 be between a subcontractor and the general who ultimately completes the job and has a claim against the owner?" Applied here, in order for McCann to have a valid lien. must they have a contract with Atlantic?

Your Commissioner answers this negatively. 12 *Michie's Jurisprudence of Virginia and West Virginia,* Mechanic's Liens, Section 2 (1950) states "the mechanic lien attaches by operation of law when a contract has been entered into and work is done for materials furnished, which adds to the value of the property. But it is not the contract for erecting or repairing the building which creates the lien; it is the use of the materials furnished and labor expended by the contrac-

tors, whereby the building becomes a part of the freehold that gives the materialmen and laborers their liens under the statute." (cases cited)

Let us assume for purposes of illustration that Danter defaulted in its contract with the Owners whereby they were to construct the buildings for $450,000.00. The Owners then arranged with Atlantic to complete the building for $450,000.00. Had this second contract excluded the steel, this amount due Atlantic would have had priority over McCann's claim. But the second contract included the steel and the Court does not have to be concerned about the Owners paying twice.

This was the concern in *Coleman* v. *Pearman,* 159 Va. 72 (1932) which stated at Page 78 that "a party whose labor or material is used in the erection of a building, without the consent of either the general contractor or the owner, is given a right by the mechanic's lien statutes in the sums page 90 } to become due under the building contract, but in order to perfect that right it is essential that such party substantially comply with all the requirements of the statutes . . . laborers and materialmen are favored by the statute, but not to the extent of requiring the owner of property to pay the same bill twice, once to the builder with whom he is contracted, and again to parties with whom he has no contractual relations. Our present mechanic's lien laws deal fairly with both the owner and the subcontractor, requiring the owner, after notice, to withhold from the general contractor enough to pay the subcontractor, provided the owner is indebted to the general contractor at the time notice is given, or may thereafter become indebted to him by virtue of the contract".

Also, in *Knight* v. *Ferrante* 202 Va. 243 (1960) the Court said that in effect that once a subcontractor perfects his lien and gives notice to the owners in the manner required by Code Section 43-7, the subcontractor thereby obtains a lien on the property independent of the lien of the general contractor, the only limitation being that the amount of the subcontractor's lien shall not exceed the amount in which the owners were indebted to the general contractor at the time the notice was given. The Court said at Page 249, "Thus, except as to the limitation on the funds to which the subcontractors may look for payment of their claims, they do not claim through the general contractor, but independently of him."

The Court continued at Page 250, "The failure of the gen-

eral contractor to complete the building did not necessarily defeat the liens of the subcontractors. Section 43-16 contemplates that this may happen. It provides that, "If the owner is compelled to complete his building, or any part thereof undertaken by a general contractor in consequence of the failure or refusal of the general contractor to do so, the amount expended by the owner for such completion shall have priority over all mechanics' liens which have been or may be placed on such building. Hence, the liens of the subcontractors are left unimpaired, but are subject to the amount expended by the owners for the completion of the building."

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Your Commissioner quotes 36 *American Jurisprudence* Mechanic's Liens, Section 4 which states "The purpose of mechanic's lien statutes is to permit a lien upon premises where benefit has been received by the owner and where the value or condition of the property has been increased or improved by reason of the furnishing of labor and materials. The principle upon which the mechanic's lien rests is that of unjust enrichment. It is the equity arising from an assumed enhancement in value resulting from work or materials expended upon the property without payment therefor which is laid hold of to protect workmen and others who are specially deserving, who would ordinarily fail to provide by agreement for their own protection or who would also be unable to do so." (cases cited)

Now as to whether the Owners were indebted to the general contractor, which is a requirement under Code Section 43-7 in order for McCann to recover. The question is "Which general contractor is contemplated by Code Section 43-7, Danter or Atlantic?"

In the first place, the words "general contractor" are not qualified. The language is not "general contractor with whom the subcontractor made his contract", "original general contractor", "former general contractor" or "present general contractor". In the absence of any such qualification, your Commissioner gives the words their ordinary meaning and finds that the "general contractor" in Code Section 43-7 means person who was constructing the building at the time the memorandum of mechanic's lien was filed, and not a person who had done previous work on the building.

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Therefore, your Commissioner finds that the owners were indebted to Atlantic when McCann's memorandum was filed (the bond has been substituted for the indebtedness) and

McCann has a valid claim against the bond for money due for the steel furnished.

III. REASONABLE VALUE.

As to the amount to which McCann is due from the Owners (now the bond), Atlantic contends that McCann is limited to the reasonable value of the steel furnished, or $41,808.00 (Respondent's Exhibit #6).

Your Commissioner finds that a subcontractor, unlike a general, is limited to the reasonable market value of materials furnished. 36 *American Jurisprudence* Mechanic's Liens, Section 164 states that "Although it has been said that the amount that may be recovered under a lien is measured by the amount found to be due on the claimant's contract with the original contractor, the general rule seems to be that a subcontractor cannot assert a lien against the property for a greater amount than the reasonable market value of the labor or materials he furnished toward the erection of the building or improvement." (cases cited)

There has been testimony by Atlantic's Witness Payne, an estimator, that the reasonable value for this job was $41,808.00 while McCann contends that the price of $48,536.00 is fair and reasonable and that this amount of steel was used in the building.

The Supreme Court of Appeals has repeatedly said that where questions purely of fact are referred to a commissioner to be reported upon, the findings of the commis-
page 93 } sioner, while not as conclusive as the verdict of a jury, will be given great weight. Therefore, your Commissioner will set out in detail his considerations in arriving at a reasonable value.

The variance appears as follows:

	McCann	*Atlantic*
A. Sructural Steel Framing	$14,536.00	$10,083.00
B. Steel Joists	19,550.00	18,713.00
C. Roof Deck	13,840.00	12,262.00
D. Miscellaneous	610.00	750.00
	$48,536.00	$41,808.00

The above figures were taken from Complainant's (McCann) Exhibit #4 and from Respondent's (Atlantic) Exhibit #6.

It should be noted that McCann's price for the Joists and

Roof Deck were quoted F. O. B. Trucks and the structural and miscellaneous steel was F. O. B. rail cars. Atlantic's price was F. O. B. trucks for the entire shipment. However, there was an additional $836.00 charge in McCann's price (Complainant's Exhibit #2) for delivering structural steel by truck instead of rail. Thus it appears that the variance is in the price of the steel alone.

The resulting difference in the two prices is $6,727.00 and the largest variance is in the structural steel framing ($4,452.00), which category includes the canopy framing and columns.

Atlantic's main (and essentially only) complaint (Tr. 174, 175) is that Schedule 40 Pipe was specified for exterior columns and Schedule 80 (a heavier duty pipe) was used. This is denied by McCann (Tr. 184).

It would appear to your Commissioner that if the wrong items were being supplied, Atlantic could have complained at the time of delivery or at least at the time the items were being placed in the structure. Atlantic knew of page 94 } McCann's existence (Complainant's Exhibit #5 #6) and it is felt that the issue is raised at too late a date to merit any consideration.

A portion of the structural steel framing discrepancy is obviously caused by Atlantic's basis of 40 tons while McCann used 46 tons (Tr. 184, 190) or 48 tons (Tr. 177).

It appears to your Commissioner that Atlantic is being inconsistent in its approach. If they were claiming breach of contract a variance in what was ordered and what was delivered would be material. But in ascertaining reasonable value we are concerned with what was delivered and used in the building not what was ordered. Your Commissioner feels that McCann has sustained their contentions that they delivered $48,536.00 worth of steel and that such steel was used in the building. There is no evidence that 48 tons were not delivered.

Your Commissioner has considered what items are to be included in a fixation of a reasonable value. In 25 ALR 2d 1358 citing *Timber Structures, Inc.* v. *C. W. S. Grinding & Machine Works* 191 Or. 231 (1951), it is stated that it is proper to consider such cost items including wages, value of the use of machinery, the power to operate such machinery, the plant in which it is housed, engineering and other incidental expense and an *aliquot* proportion of the contractor's overhead, with a proper allowance for profits.

It appears to your Commissioner that the items might vary

from place to place and just because McCann's costs may be higher than another's, McCann's claim should not be reduced as long as the two amounts are somewhat similar. If ten estimates were made on the job, there would be ten different prices.

The decision of your Commissioner that the reasonable market value of the steel is $48,536.00 is not to be
page 95 } interpreted to mean that had McCann's contract been for $100,000.00 then that amount would have been the reasonable value. The variance between the two amounts is not great enough to categorically say that the lower amount should be accepted. There are too many variables that go into a job of this magnitude to say that the higher figure is not the reasonable value.

Therefore, your Commissioner finds the reasonable market value to be $48,536.00 and, that subject to a later discussion of the back charges, this is the amount of recovery to be allowed McCann.

IV. BACK CHARGES

The remaining major question concerns back charges claimed as a set-off by Atlantic against McCann in the amount of $4107.97. These back charges will be considered in two categories, misfabrications and shortages.

A. MISFABRICATIONS.

Directing the Court to Respondent's Exhibit #5, the following sheets reflect the claimed misfabrications:

Date	*Cost*	*20% Charge*	*Total*
9- 9-65	$192.12	$ 38.42	$230.55
9-28-65	67.12	13.42	80.54
8-30-65	117.46	23.49	140.95
8-27-65	134.24	26.85	161.09
7-23-65	25.17	5.03	30.20
9-10-65	166.94	33.39	201.33
9-30-65	50.34	10.07	60.41
	$753.39	$150.67	$905.07

Your Commissioner finds that the $753.39 charged by Frank Burkholder Sons, Inc. is a valid back charge against McCann.

page 96 } It is true no notice was given to McCann as to

these misfabrications. Your Commissioner feels that no notice would be required in this instance. The steel furnished should fit the buildings provided the footings, etc. were properly constructed.

The uncontradicted testimony of T. F. Burkholder (Tr.167) is that the above charges were misfabrications after examining the steel and the drawings.

Even if McCann had notice of these deficiencies, there is no evidence that the corrections could have been done for a lesser amount.

Mr. Burkholder stated (Tr. 155) that the 20% charge was not his charge and was added by someone else. It was testified to (Tr. 137) that Atlantic added 20% for profit on each back charge. Your Commissioner feels that this is not a proper charge against McCann and finds that McCann should not be liable for these amounts.

B. SHORTAGES.

The following sheets (Respondent's Exhibit #5) indicate certain shortages:

Date	*Cost*	*20% Charge*	*Total*
7-30-65	$ 377.44	$ 75.49	$ 452.93
7-25-65	203.01	40.60	243.61
8-3-65	1044.32	208.86	1253.18
8-3-65	1044.32	208.86	1253.18
	$2669.09	$ 533.81	$3202.90

For the reasons heretofore stated, the 20% should not be allowed as a back charge in any case.

Your Commissioner feels that the question of shortages is somewhat different than the question of misfabrications. Atlantic claims there was insufficient steel to complete the building. It must be remembered that there was no page 97 } contract between McCann and Atlantic whereby McCann was to furnish *all* the steel. McCann is seeking compensation for the amount of steel actually furnished and used in the building. It was Danter who contracted with Atlantic and agreed to furnish the steel or said that McCann agreed to furnish Danter with the steel.

Atlantic has not shown your Commissioner that the amount claimed by McCann is for steel that was not delivered. In suits for the enforcement of mechanic's liens the burden of proof is with the claimant to show that the material was ac-

tually used in the building. McCann has borne this burden and there is no evidence to show that material shipped was less than the amount being claimed by McCann.

Referring specifically to the 200 pieces of steel allegedly short on August 3, 1965, (last 2 sheets of Respondent's Exhibit #5) your Commissioner would point out to the Court that this steel was "1½ 22 gauge painted roof decks" steel. The work sheet of McCann indicated that there was approximately 61,133 square feet of metal roof deck. A square of roof deck consists of 100 square feet and McCann was to deliver 612 squares. This compares closely with the independent estimator's statement (Tr. 178) that 610 squares would be sufficient to cover the area.

A review of Complainant's Exhibit #6 shows 45 bundles of steel roof deck being delivered and received (signed by L. Hyatt, general foreman, for Atlantic - Tr. 121 -). A detailed examination of bundles shows 252 pieces of steel 24′ 2″ x 24″ or a total of 12,172 square feet for the 9 bundles which is 22,293 pounds. There were 5 shipments of 9 bundles each which would indicate roughly that 60,860 square feet (5 x 12,172) were shipped. The "9 bundle load" compared above was of a similar weight (22,293 pounds)
page 98 } to the others (22,948; 22,328; 22,293; 21,630 pounds).

Your Commissioner finds as a matter of fact that there was a true shortage in the steel necessary to complete the building and it may be that Danter has a claim against McCann for the shortage, but this is not the issue between McCann and Atlantic.

In summary, McCann has stated that $48,536.00 is due them for the steel ordered, delivered (Tr. 32, 33) and used in the building. For Atlantic to reduce this amount on a claim for a shortage it would be necessary for them to show that McCann did not ship part of which they claim to have shipped.

V. INTEREST ON McCANN'S CLAIM

Virginia Code Section 8-223 states that in any suit in equity, a decree or judgment *may* be rendered for interest on the principal sum recovered, and the allowance of interest is in the sound discretion of the trial Court. *Wolford* v. *Williams* 195 Va. 489 (1953).

Your Commissioner recommends that interest be allowed McCann on its claim from October 22, 1965 (date of filing

of lien) and cites *Standard Lumber Co.* v. *Fields,* 175 ALR 309, 328 as authority.

VI. SUMMARY

Your Commissioner finds liability for the hereinafter set forth amount against Danter by virtue of McCann's contract with Danter. There has been no evidence introduced by Danter to refute any contentions by McCann.

But for the bond, your Commissioner finds a binding lien against the subject property and finds that the bond so filed shall be subject to the final judgment of the Court.

In conclusion, should the Court adopt this report, the decree would recite that McCann is entitled to re-
page 99 } cover the sum of $47,782.61 ($48,536.00 less back charges of $753.39) with interest from October 22, 1965. The heretofore mentioned bond shall be subject to this judgment. Your Commissioner also finds that McCann should recover and have judgment against Danter for the same amount.

No judgment is to be awarded against the owner.

Respectfully Submitted:

Leland L. Baker, Jr.
Commissioner in Chancery

July 7, 1967.

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* * * * *

EXCEPTIONS TO COMMISSIONER'S REPORT

Atlantic States Construction Company, Inc. and The A. S. C. Company of Virginia, Inc. except to the Report of Leland L. Baker, Jr., Commissioner, and state that it is contrary to the law and evidence and ought not be sustained; and as grounds therefor and in support thereof they say as follows:

1. The report of the Commissioner is in error wherein it sets forth, on pages 5 and 6, that "Danter was a general contractor when McCann became a subcontractor".

2. The Commissioner erroneously failed to find and report that McCann Steel Co. Inc. was a subcontractor of a subcontractor.

3. The Commissioner erred in said report wherein he found and reported on pages 8 and 9 of said report that at the time McCann filed its Memorandum owner was indebted to the general contractor thus giving McCann a valid claim against the bond.

4. The Commissioner erred wherein he found and reported that McCann is entitled to a lien against the property (thus the bond) which is the subject matter of this suit.

5. The Commissioner erred wherein he reported at page 12 of said report that the reasonable value of the steel provided by McCann was $48,536.00.

page 101 } 6. The Commissioner erred wherein on page 12 of said report, he found and reported that Atlantic was entitled to only $753.39 as a back charge instead of $905.07.

7. The Commissioner erred wherein, on page 15 of said report he found and reported that Atlantic was not entitled to a credit of $3,202.90 for shortages in the steel provided by McCann.

8. The Commissioner erred wherein on page 15 of said report, he found that McCann is entitled to interest on its claim.

Atlantic States Construction Company, Inc. and The A. S. C. Company of Virginia, Inc. except to any and all parts of said report which find and report that McCann is entitled to a lien against the property (thus the bond) which is the subject matter of this suit, where it finds and reports that Atlantic States Construction Company, Inc. and The A. S. C. Company of Virginia are not entitled to back charges for misfabrication in the amount of $905.07, and shortages in the amount of $3,202.90; and wherein it holds and reports that McCann is entitled to interest on its claim; and reserve to themselves exception as to all other parts of said report finding and holding against them.

ATLANTIC STATES CONSTRUCTION COMPANY, INC.

THE A. S. C. COMPANY OF VIRGINIA, INC.

By Harry B. F. Franklin
Of Counsel

Filed 7-14-67

Chas. H. Berry, Clerk
By Ellen G. Mills, Deputy

* * * * *

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* * * * *

MEMORANDUM

This is a suit instituted by McCann Steel Company, Inc. to enforce a mechanic's lien for material furnished in the construction of certain building on property owned by Samuel J. Rosenfield, Allan Bateman and David R. Lawson operating as Park and Shop in Fredericksburg, Virginia.

By contract of April 16, 1965, Danter Associates, Inc. entered into a construction contract with the owners of Park and Shop to construct the Montgomery Ward Building and three small shops for $450,000.00.

Danter then submitted the plans and specifications of the proposed construction to McCann Steel, Inc. for a price proposal to furnish the steel for the construction and received a price of $47,585.00, May 25, 1965, which proposal was accepted by Danter.

The contract of April 16, 1965 between Danter and Park and Shop owners required a performance bond of Danter which could not be given. There upon Danter approached Atlantic States, Inc. With a proposal that the latter company take over the construction of the building. Atlantic States believing that the project had been under bid declined unless Danter deposited with it $30,000.00 which Danter first agreed to do and later agreed to furnish the steel in lieu of the $30,000.00 and by agreement the contract of April 16, 1965 was cancelled and a contract identical in terms, conditions and price was entered into by Atlantic States, Inc. and Park and Shop owners on May 31, 1965.

page 106 } Shortly thereafter, Danter instructed McCann Steel to deliver the steel. McCann Steel was never notified that Danter had in fact transferred the contract to Atlantic States either by Danter or Atlantic States and did not learn of the transfer until all the steel was delivered. By telegram of August 24, 1965 September 13, 1965 and by letters of October 5, 1965 and June 3, 1965; Danter represented it self as the contractor and during this period Atlantic States was receiving and accepting the steel and using it in its construction.

There can be no question the evidence presents a shocking

scheme of actual fraud on the part of Danter. Does the evidence absolve Atlantic States from participation in and benefiting from this scheme? I think not. Atlantic States was convinced that Danter's bid was not sufficient to cover the cost. It knew that Danter was unable to obtain surety on *it's* performance bond. It demanded that Danter put up $30,000.00 as prerequisite to its taking over the contract. It certainly had reason to believe that Danter could not raise this amount. Yet with these facts it permitted Danter to furnish steel for this project of a value of $48,536.00 in lieu of a $30,000.00 deposit. Atlantic States is a construction company and is presumed to know the practices of the construction field. To have believed that Danter had purchased and paid $48,000.00 for steel for a project before it had perfected its construction contract would be incredulous.

Code Section 43-19 was enacted to protect subcontracts from assignments. This section is broad both in its scope and application. It especially protects against assignment by a general contractor his contract or any part thereof.

See *Electric Transmission Co. of Va.* v. *Penngton Gap Bank,* 137 Va. 107, 119 S. E. 99; *DeWitt* v. *Coffey,* 150 Va. 365, 148 S. E. 710; Anderson vs. White 183 Va. 302, 32 S. E. (2d) 72.

page 107 } I am of the opinion that, (1) The agreement between Danter and Atlantic States constituted and *assigment* of the contract of April 16, 1965, and falls within the application of Section 43-19 of the Code of Virginia, (2) That from this assignment both Danter and Atlantic States benefited at the expense of McCann Steel, an innocent party.

To deny the right of McCann Steel under the facts of this case would merely aid these who are unscrupulous in their dealings to *vade* that very protection which Section 43-19 of the Code of Virginia is designed to give to subcontractors.

Mr. Baker, The Commissioner in this suit, has prepared and filed an excellent report.

The report shows great study of the facts presented and the law applicable to those facts and with the addition of the additional reasons his report will be approved and confirmed and all exception thereto for both plaintiff and defendant will be over ruled.

A decree over ruling the exception to the commissioner's report and affirming the report will be tended.

S. Bernard Coleman, Judge
Feb. 22, 1968

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* * * * *

DECREE

This cause came on this day to be again heard on the papers formerly read and herein filed and on report of Leland L. Baker, Jr., Commissioner in Chancery, herein filed July 7th, 1967 showing unto the Court that all necessary and proper parties are before the Court in this cause, that the Complainant is not entitled to judgment against the Respondents Atlantic States Construction Company, Inc., the A. S. C. Company of Virginia, Inc., the Respondents Rosenfeld, Bratman and Lawson, the Respondents Philips and Kendrick, Trustees, or the Respondents Security Bank as a result of any contractual relationship between the Complainant and said Respondents; that the Complainant is entitled to judgment against the Respondent Danter Associates, Inc. in the sum of $47,782.61 with interest thereon from October 22nd, 1965; that the Complainant perfected and is the holder and beneficiary of a valid and subsisting mechanic's lien against the real estate which is the subject of this suit in the sum of $47,782.61 with interest thereon from October 22nd, 1965, subject however to the provisions of Order herein entered January 28th, 1966, permitting certain of the Respondents to file a bond herein in accordance with the provisions of Section 43-70 of the Code of Virginia (1950) as amended, in the penalty of $97,072.00, conditioned for the payment of such judgment as might be rendered by this Court upon its hearing of this case upon its merits, and substituting said bond for said real estate in this suit and direct-
page 109 } ing that said real estate thereby released from said lien; and that the Complainant is entitled to judgment against said bond and against Atlantic States Construction Company, the principal, and the Home Indemnity Company, surety thereof, in the sum of $47,782.61, with interest thereon from October 22nd, 1965; and upon exception to said report filed by Complainant and by the Respondent, Atlantic States Construction Company, Inc.; and was argued by counsel;

On consideration whereof, it appearing unto the Court that the Commissioner has filed an able and comprehensive report which is true and correct in all its findings as to law and fact, and that said report, along with the additional

findings and opinions of the Court set forth herein, fully and correctly dispose of and decide the issues of this case, and that the exceptions thereto should be overruled and the report confirmed, the Court doth so adjudge, order and decree and doth adopt the findings of said report as its own;

And it further appearing unto the Court that the Respondent Danter Associates, Inc. has engaged in a course of conduct amounting to actual fraud, and that judgment should be entered in favor of the Complainant against the Respondent Danter Associates, Inc. in the sum of $47,782.61 with interest thereon from October 22nd, 1965, the Court doth so decide, and doth so adjudge, order and decree;

On further consideration whereof, it appearing unto the Court, for reasons set forth in the Commissioner's Report, and upon the further ground that the dealings between the Respondent Danter Associates, Inc. and the Respondent Atlantic States Construction Company, Inc. were such as amounted to an assignment of the construction contract within the terms of Section 43-19 of the Code of Virginia (1950) as amended, and as such was subject to the rights of the Complainant as a materialman. That the Complainant

page 110 } has properly perfected its mechanic's lien against the real estate which is the subject of this suit and is entitled to the benefit thereof in the sum of $47,782.61 with interest thereon from October 22nd, 1965; that by Order herein entered January 28th, 1966, the Respondent Atlantic States Construction Company as principal with the Home Indemnity Company as its surety was permitted to file herein a bond in accordance with the provisions of Section 43-70 of the Code of Virginia (1950) as amended, in the penalty of $97,072.00, conditioned as required by law for the payment of such judgment as might be rendered by this Court upon its hearing of this case on its merits, and that upon the filing of said bond, in accordance with said statute, the subject real estate was exonerated from the Complainant's mechanic's lien herein filed; and that the Complainant is entitled to, and is the holder and beneficiary of, a valid and subsisting lien against said bond in the sum of $47,782.61 with interest thereon from October 22nd, 1965, and that judgment should be entered in its favor against said bond in such amount, the Court doth so decide, and doth adjudge, order and decree that judgment be, and it hereby is, rendered in favor of the Complainant McCann Steel Company, Inc. against the Respondent Atlantic States Construction Company, Inc. and the Home Indemnity Company in the sum of $47,782.61 with interest thereon from October 22nd, 1965;

It is further adjudged, ordered and decreed that Leland L. Baker, Jr., Commissioner in Chancery, be, and he hereby is, allowed a fee of $1,000.00, plus reimbursement of expenses of $3.75, which fee and reimbursement, together with the other costs of this proceeding, including the Complainant's costs herein and the cost of depositions, shall be paid out of the proceeds of said bond, and it is further adjudged, ordered and decreed that judgment be, and it hereby is, rendered against the Respondent Atlantic States Construction Company, Inc. and the Home Indemnity Company therefore.

page 111 } ENTER THIS:

S. Bernard Coleman, Judge
March 20, 1968

We ask for this:
Willis, Garnett Braxton, p. q.
1013 Princess Anne Street
Fredericksburg, Virginia 22401

By J. M. H. Willis, Jr.

SEEN:
ASHBY & ROBERTS
P. O. Box 358
Fredericksburg, Virginia
Russell D. Roberts
Counsel for Samuel J. Rosenfeld, et als

FRANKLIN & RAWLINGS
321 William Street
Fredericksburg, Virginia

SEEN; Objected and Excepted To:
Harry B. F. Franklin
Counsel for Atlantic States Construction Co., et als

Seen and excepted to:
Benjamin H. Woodbridge, counsel
for Danter Associates, Inc.

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* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

TO: Mr. Charles H. Berry,
Clerk of the Circuit Court of the City of Fredericksburg, Virginia

Notice is hereby given that Atlantic States Construction Company and A. S. C. Company of Virginia, Incorporated appeal from a final judgment rendered by this Court on the 20th day of March, 1968, and announce their intention of applying for a Writ of Error and *Supersedeas* to the Supreme Court of Appeals of Virginia.

ASSIGNMENTS OF ERROR

Atlantic States Construction Company and A. S. C. Company of Virginia, Incorporated, are referred to throughout as Atlantic and any reference to Atlantic includes both. McCann Steel Company, Incorporated is referred to throughout as McCann, and Danter Associates is referred to throughout as Danter. Rosenfeld, Bratman and Lawson are referred to throughout jointly as Owners.

1. The Trial Court erred in overruling the appellants' exceptions to the report of the Commissioner in Chancery and erred in sustaining the Commissioner's report.

2. The Trial Court erred in holding that the contract of April 16, 1965, between Danter and Owners was assigned by Danter to Atlantic within the meaning of Section 43-19 of the Code of Virginia. The evidence shows that it was not an assignment but was a novation.

page 113 } 3. The Trial Court erred in holding that an assignment existed from which Atlantic benefited at the expense of McCann, an innocent party.

4. The Trial Court erred in finding that McCann was never notified that Danter had in fact transferred the contract to Atlantic either by Danter or Atlantic and did not learn of the transfer until all steel was delivered. There was no evidence presented to show that McCann ever knew or thought Danter had a contract to construct the building in question but there is positive undisputed testimony from McCann's own employee that before any steel was delivered

Danter told McCann that Atlantic was going to construct the building.

5. The Trial Court erred in finding that Atlantic participated in and benefited from Danter's fraudulent scheme. The Master Commissioner did not find or report this and there is no evidence to support it.

6. The Trial Court erred in finding that Danter had represented itself as the contractor during the period that Atlantic was receiving and accepting and using the steel furnished by McCann.

7. The Trial Court erred in sustaining the report of the Master Commissioner wherein the Commissioner found and reported that at the time McCann became a subcontractor, Danter was the General Contractor. There is no evidence to support this finding but to the contrary, the uncontradicted evidence is to the effect that at the time McCann entered into the contract with Danter, Atlantic was the General Contractor.

8. The Trial Court erred in sustaining the report of the Master Commissioner in Chancery wherein the Commissioner found and reported that Danter was the General Contractor. There is no evidence to support this finding. The uncontradicted testimony was that Danter never became the General Contractor because one of the conditions of the
page 114 } proposed contract with Owners was that a bond must be posted which Danter did not do. The uncontradicted testimony and other evidence showed that long before Danter entered into any contract with McCann to furnish the steel for the building in question, Atlantic had become and was the General Contractor.

9. The Trial Court erred in sustaining the report of the Commissioner in Chancery wherein the Commissioner failed to find and report that under the provisions of Sections 43-7 and 43-9 of the Code of Virginia, McCann a sub-subcontractor could not perfect its lien for any amount because at the time of the filing of its lien and giving notice to Owners and the General Contractor, Atlantic, Atlantic was not indebted to Danter, the subcontractor through whom McCann was claiming.

10. The Trial Court erred in sustaining the report of the Commissioner in Chancery wherein the Commissioner found and reported that both Danter and Atlantic were General Contractors when McCann filed its lien. There was no evidence whatever to support this finding and the uncontradicted evidence was that only Atlantic had a contract with Owners.

11. The Trial Court erred in sustaining the report of the Commissioner in Chancery wherein the Commissioner reported that if McCann was entitled to a lien on the property in question, its lien should not be reduced by the sum of $2,669.00 which was the amount that Atlantic had to pay to buy steel to complete the job. McCann had proposed to furnish all of the steel for $48,536.00. Atlantic has shown that it had to purchase additional steel at a cost of $2,669.00, and McCann's lien, if it is entitled to one, should be reduced by that amount.

12. The Trial Court erred in sustaining the report of the Commissioner in Chancery wherein the Commissioner failed to find and report that McCann could perfect its lien only for the fair market value of the steel that was used in the building and for failing to find and report that the fair market value of that steel was only $41,808.00. The only disinterested witness to testify clearly established that the latter figure was the fair market value of the steel so used.

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13. The Trial Court erred in sustaining the report of the Commissioner in Chancery wherein the Commissioner found and reported that Atlantic was not entitled to a credit for its 20% overhead and profit charges on the steel it had to purchase and the steel it had to have re-fabricated. The Commissioner found and reported, and this was sustained by the Court, that Atlantic was entitled to a credit for the steel which it was required to refabricate. The 20% overhead charge was reasonable to cover its own time and effort spent in correcting the shortages and deficiencies in the steel shipped by McCann.

14. The Trial Court erred in sustaining the Commissioner's Report wherein the Commissioner found and reported that Atlantic should be required to pay interest to McCann on the sum of $48,536.00. The Commissioner found and reported that Atlantic did not have any contract with McCann and was not indebted to McCann in any amount. This was sustained by the Court. The amount of the claim of McCann to a lien is contested. While McCann would be entitled to interest from Danter under its contract with Danter, it is not a proper charge against the property.

15. The Trial Court erred in holding, by sustaining the report of the Commissioner in Chancery, that McCann was entitled to a lien on the property, and therefore on the bond, when the evidence shows that at the time McCann attempted to perfect its lien, the subcontractor with whom it had its con-

tract, Danter, was not owed any money by the General Contractor, Atlantic and therefore under the provisions of Section 43-9 of the Code of Virginia, McCann could not perfect its lien for any amount.

page 116 } Given under our hands this 22nd day of April, 1968.

ATLANTIC STATES CONSTRUCTION COMPANY

A.S.C. COMPANY OF VIRGINIA, INCORPORATED

By Harry B. F. Franklin
Of Counsel

* * * * *

Filed April 23, 1968

Chas. H. Berry, Clerk
By Janet B. Herron, Deputy

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page 1 }

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DEPOSITIONS BEFORE COMMISSIONER BAKER

The depositions of J. B. Wilson and others, taken on March 30, 1967, beginning at 9:30 o'clock A.M., pursuant to Decree of Reference entered herein on January 23, 1967, before Commissioner Leland L. Baker, Jr., said depositions being taken in the Courtroom of the Circuit Court of the City of Fredericksburg pursuant to the rules of the Court, and pursuant to Notice to the parties which is filed herein.

COUNSEL FOR THE COMPLAINANT:

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page 2 } COUNSEL FOR DANTER:

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By: Benjamin H. Woodbridge, Jr., Esquire.

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By: Russell D. Roberts, Esquire.

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Mr. Willis:

* * * * *

The records will show that that property is owned by respondents Samuel J. Rosenfeld, Allan Bratman and David R. Lawson.

In your file you will see that the work on that building was completed between November 1, 1965, and March 23,
page 5 } 1966.

In their Answer to interrogatories propounded to them the owners say that work was substantially completed March 23, 1966, but that Montgomery Ward people took possession of the store on October 20, 1965.

In their response, in its response to interrogatories, the respondent Atlantic States Construction Company, which was the general contractor who did the work, says that the building was completed about November 1, 1965, and that it delivered possession to the owners on November 10, 1965.

There is some contradiction there, but within the framework of those Answers is the time of the completion.

The records will show the memorandum of mechanics lien was filed October 22, 1965, and is recorded in Deed Book 129, Page 680, in the Clerk's Office.

Your file, and the records in the Clerk's Office will also show notice served on the owners Rosenfeld, November 16, 1965; Bratman, November 1, 1965, and Lawson, November 10, 1965.

And those notices are recorded in Deed Book 130 page 6 } in the Clerk's Office at Pages 98, 96 and 101, respectively.

Notice was served on Atlantic States Construction Company November 10, 1965. That notice is recorded in Deed Book 130 at Page 100.

The Court file will show that Danter Associates, Incorporated, one of the respondents, was employed by the owners and general contractor on this job and was succeeded in that capacity by the respondent Atlantic States Construction Company, which trades in Virginia under the name of A S C Company of Virginia, Incorporated, and it has been named in this suit in its individual capacity and under its assumed name.

That information appears from Answers to interrogatories filed by the owners Rosenfeld, Bratman and Lawson, and by the Answer and grounds of defense filed by Atlantic States Construction Company.

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J. B. WILSON, a witness of lawful age, called on behalf of the complainant, first being duly sworn by the Commissioner, testified as follows:

DIRECT EXAMINATION

By Mr. Willis:

Q. You are J. B. Wilson?

A. Yes.

* * * * *

Q. What is your occupation?

A. Estimator.

Q. For whom?

A. McCann Steel Company.

page 11 } Q. When you say you are an estimator, what do you mean by that? What was your duty in that capacity?

A. I prepare bids on various projects on the work that we do, steel.

Q. On what basis do you prepare bids?

A. Well, usually from an architect or engineer's drawing.

Q. You take those drawings and prepare bids for steel?

A. Yes.

Q. Would the steel be used according to those drawings?

A. Yes.

Q. How long have you been employed in that capacity, in that type of work?

A. 25, 26 years.

Q. You say you are currently employed by McCann Steel in Nashville, Tennessee?

A. Yes.

Q. How long have you been employed by McCann Steel?

A. 25 or 26 years.

Q. Has that employment been constant during that period of time?

A. Except for a short stay in the Army.

page 12 } Q. When was that?

A. 1943.

Q. World War II?

A. Yes.

Q. Mr. Wilson, did you in the Spring of 1965 negotiate with Mr. Parker of the respondent Danter Associates, Incorporated, for the steel to go into the Montgomery Ward building in the Park & Shop Center here in Fredericksburg?

A. Yes, I did.

Q. In what capacity was Mr. Parker and Danter Associates negotiating with you?

A. In what capacity were both Mr. Parker and Danter?

Q. What was their interest in the building?

A. Well, Mr. Parker led me to believe that they were constructing the building. They were designing it.

Q. They were the general contractors for the building?

A. Yes.

Q. He wanted to know from you the bid for the steel to go in that building, is that correct?

A. He wanted to get a price on the steel, and wanted to know how soon we could get it.

Q. Were you to erect the steel or merely to fur-
page 13 } nish it?

A. No, we were to quote it FOB cars, job site.

Q. Nearest the job site?

A. Near siding, here in Fredericksburg.

Q. Railroad cars?

A. Yes.

* * * * *

Q. Tell the Commissioner now when you began negotiating with Mr. Parker, just what course it took, and the conversations you had and how this deal came along.

A. Well, this particular deal was different than what our everyday course of business is.

Mr. Parker called and said he had a list of materials for a building that they were designing and wanted a price and approximate delivery date.

He gave me the quantity required in the building over the telephone, and then at some time after that I worked up a cost and submitted it to him and his firm.

Q. About when was that?

A. The early part of the Spring.

J. B. Wilson

Q. Do you know whether it was March or April?

A. I do not remember.

Q. Did you send him a proposal of the material

page 14 } he listed to you?

A. I called him and gave him the price, and then I sent him a confirmed proposal that listed the exact quantities that he had given me over the phone.

Q. What happened after that?

A. Well, he said it sounded real good. They were in the process of finishing their design, and that if and when this thing developed, they would be in a big hurry for the material, and he would let us know as soon as they had their plans completed about ordering the material.

And sometime after that, a short period of time, he did notify us to proceed with the job.

Q. Did you take any steps toward proceeding to obtain materials?

A. Yes. He called Mr. McCann and gave him a purchase order for the materials.

Q. Is that 5310-1?

A. I believe it is. That was our purchase order for the material, that purchase order was based on the quantity that I quoted that he had given me over the telephone.

Q. Now then, in early May did Parker get in touch with you?

A. Well, he got in touch with me right after he called

Charles McCann and gave me confirmed lengths

page 15 } on all of the main structural members in order

that we could place our mill orders for the structural steel.

Also we placed an order with our joist supplier for a proper number of long span joists that they told us were in the building.

Also placed an order with Wheeling for 570 squares of roof deck.

Q. All this relates to the materials that he had described to you over the telephone, is that correct?

A. Well now, this material that I have just mentioned was given, the quantities were given me over the phone. The lengths of the beams and the lengths of the columns and joists and so forth.

Q. Did Parker in early May furnish you with plans for the building?

A. Sometime after I had ordered that material we received the first plans.

Q. In early May did Mr. Parker send you plans for the building, architect's plans for the building?

A. Yes. They sent us their design drawings.

* * * * *

page 16 }

* * * * *

Q. Do you have the plans that they sent you on what you went ahead with your further bidding?

A. Yes.

Q. Would you show the Commissioner the plans, the architect's drawings that you are referring to?

* * * * *

page 17 }

* * * * *

Q. How do you use this plan?

A. Well, we had placed as I said orders for this raw material at the various mills and then when we got these plans we then prepare our shop tables that will accurately fabricate this material in our shop, holes in the beams and so forth.

page 18 } Q. Does this plan show what dimensions and types of materials are needed, and the number of each kind? Can you repeat that off of this plan?

A. Yes. This plan is supposed to have all of the steel members necessary for the construction of this roof system, and that is primarily, the roof system we are talking about, it has some canopies, and lintels over some windows. But first it is just a roof frame.

Q. Is there anything else here that deals with steel?

A. What do you mean?

Q. Anything else in these plans?

A. Yes. We used this plan as a whole.

Q. Tell the Commissioner what you used.

A. These first two sheets are the site plan and plot plan.

J. B. Wilson

The Commissioner: I would like to show that as Page A and A-1.

A. And then Pages A-2 through A-5 are architectural prints. They show the floor plan and various details of this building.

We take all of these prints including the architectural and structural drawings to help us utilize, use them all to prepare shop drawings, because we have to make the steel shown on this sheet S-2 fit this building, that is what we are supposed to do.

page 19 } The steel has, of course, specific function, and we make it do what it is required to be used for in all of these drawings.

* * * * *

Q. Did you prepare shop drawings based on these plans?

A. Yes.

* * * * *

page 20 }

* * * * *

Q. Does the shop drawing show the specifications and number of each item that is required to execute the

page 21 } architect's drawings?

A. Yes, it has, I assume you mean, the quantity. The count of the various items.

Q. Quantities and specifications of the various items?

A. Yes. It has material size, description of the items, and of course the count.

Q. Does it have such things as lengths, widths, and sizes and quality?

A. All of the dimensions of this building are shown on this plan as far as the plan of the building are concerned, to locate the columns and the steel itself, and this is submitted to engineers for their approval.

Q. Were those shop drawings submitted to anybody for approval?

A. Yes.

Q. To whom were they submitted for approval?

A. Danter.

Q. Did Danter approve them?

A. These particular drawings Mr. Carl Smith approved them.

Q. Who is Mr. Carl Smith?

A. He is a project manager.

Q. He was the project manager for this building?

A. Yes, sir.

page 22 } Q. Where is his approval noted on the drawings? Show that to the Commissioner.

A. Yes (Pointing on paper writing).

The Commissioner: This is noted on Drawing E-1, that would be E-1, E-2, and E-3.

Q. Do you have a document known as a take off, based on these plans and your shop drawings.

A. Yes, I have two. I have my original and the one that I made from these drawings.

Q. Do you have a take off made from these drawings?

A. Yes.

Q. Will you produce that?

A. Yes (Producing).

Q. Show it to the Commissioner.

A. Yes

Q. First of all, what is a take off?

A. I do not know exactly the terminology. That is what we call it.

Q. I am using your term.

A. It is a quantity survey.

Q. In lay terms, could it be defined as a list of the materials and the specifications required to execute these drawings?

A. Not the specifications, but a list of the mate-

page 23 } rials.

Q. Does it have lengths, widths, and types?

A. Length, quantity, and in structural steel it has the weights, which is primarily the way structural steel is traded.

Q. How does that take off relate to your shop drawings? Which did you make first?

A. (Pause) On this particular job about the same time.

Q. Does the take off and the shop drawings, do they show the same materials?

A. Yes.

J. B. Wilson

Q. The same quantities and type of materials?

A. I hope they do.

Q. In this case do they show the same material?

A. Yes.

Q. In the take off, do you compute your price for the materials to be furnished as shown in the take off and on the shop drawings?

A. (Pause) I compute my price from—

Q. I mean what you were offering to sell it for, your bid, your proposal.

A. I compute that from my take off, and from the architect's or engineer's drawings.

page 24 } Q. What was the price that you came up with for the materials to be furnished in accordance with your take off based on these architect's drawings?

A. On these drawings here the bid that I submitted was $47,585.00.

Q. Did you submit to Danter these show drawings supporting that bid?

A. Yes, at some time or other.

Q. Did Danter make any changes in the shop drawings?

A. Yes.

Q. What changes did he make, if any?

A. Well, on this sheet E-1 dimension in the upper right-hand corner, which I think is for these three little stores, the width of the building was changed from 54 feet to 60 feet, I believe it is, which increased the length of the joists in that area, and also changed the size of them, and they may have changed some other. Yes, they did.

Q. Did they make some minor changes in the dimensions?

A. Minor.

Q. Which generally speaking enlarged the building slightly.

A. This one enlarged it, yes, considerably.

page 25 } Q. Now, let's back up a bit. Do you have your proposal of May 25, 1965, not your take off, your formal proposal?

A. May 25? Yes.

Q. Is this a copy of it (Indicating paper writing)?

A. Yes, that is a copy of it.

Q. That is dated May 25, 1965?

A. Yes.

Q. What is the total there?

A. $47,585.00.

Q. And is that the proposal that you made to Danter reflected in your shop drawings and based on this take off?

A. Yes.

Q. And that item misses A through M the materials that you proposed to furnish for that price?

A. That is correct.

Q. (Showing paper writing to counsel). Mr. Wilson, on Page 2 of this proposal there are two columns, one headed "This Proposal", the one to the right of it headed "Original Proposal 32665".

Now, that column headed "Original Proposal 32665", does that relate to your bids for the items given you by Mr. Parker over the telephone?

A. Yes, sir. Those quantities refer to the origi-
page 26 } nal quotation.

Q. When you got the plans those quantities were not sufficient?

A. That is right, the telephone quantities were not sufficient to do the job.

Mr. Willis: Mr. Commissioner, I tender the proposal of May 25, 1965 as Complainant Exhibit 1.

Note: This proposal form of May 25, 1965, is marked and filed as Complainant Exhibit 1.

Q. Mr. Wilson, just before we left the other Courtroom to come over where we are now, you pointed out that the items called for, which were the subject of your March 26 proposal, were not adequate for the building as shown in the plans which were submitted to you by Danter.

Explain what was the inadequacy.

A. Well, the list Mr. Parker gave me over the telephone as I stated earlier was primary, supposed to be to primary structures of the joists and deck for the roof structure to get it underway, and he told me to make an allowance for so many pounds of miscellaneous steel that could take care of some of the canopy flange that they didn't have worked out at that time.

That is what they estimated it would take.

Q. What I am asking you is, were the materials
page 27 } that he called for sufficient to cover this area?

J. B. Wilson

A. No.

Q. About to what extent were they short?

A. Just what I had on that proposal.

Q. Were they short as much as the whole bay?

A. It appeared it was short a bay of joists, and there was an allowance made for the miscellaneous items.

Q. So that list of materials was just completely inadequate for this job?

A. That is right. It was not enough material.

Q. That is why you had to make your revised proposal based on these plans?

A. That is right.

Q. This proposal which has been admitted as an exhibit, is that with some minor changes the proposal on which you contracted for furnishing the steel, was it based on that?

A. Yes, sir, that is basically the contract.

Q. What were the minor variations? What were the variations that resulted in the final figure?

Were they related in any way to the changes Danter made on your shop drawings?

A. Well, the changes they were making in the width of these three stores here—I assume that is the three stores—

Q. Show the Commissioner on your shop drawings there.

page 28

A. This here added several dollars to the price, because size of this unit was increased from 54 to 60 feet.

Q. I hand you a proposal dated July 15. Does that reflect the May 15 proposal and the changes that were made?

A. Yes. This price increase of a thousand and five dollars was for increasing the size of these joists in this area that was changed.

Q. Was there any other price increase?

A. Yes.

Q. What was that?

A. We made them a proposal increase in cost for delivering this material, the structural steel from our shop to the site by truck.

Q. Instead of shipping by rail to the nearest siding?

A. Yes, sir.

Q. What was that?

A. $836.00.

Q. What did that make the total proposal?

A. $49,426.00.

* * * * *

page 29 }

* * * * *

Mr. Commissioner, I tender the proposal of January 15 as Complainant Exhibit 2.

NOTE: This proposal above referred to is marked and filed as *Complainant Exhibit 2.*

Q. Mr. Wilson, when Danter returned your shop drawings to you, was it accompanied by any writing or memo?
A. Yes, it was a letter from Carl Smith.
Q. Do you have this letter?
A. Yes. (Looking in file). I thought I had it
page 30 } on top here. (Looking in file). But I don't seem to have it on top. Here it is (Producing paper writing).
Q. What is the date on that letter?
A. June 3.
Q. When did you receive it?
A. 1965.
Q. When did you receive it?
A. June 9, 1965.
Q. Is there a footnote on that letter?
A. Yes, there is.
Q. Read that to the Commissioner, please?
A. "These drawings were held and revised to include last changes on three stores so all steel can now go." This is initialed "CMS".
Q. Who signed the letter?
A. Carl Smith.

Mr. Willis: Mr. Commissioner, I tender this letter described by the witness as Complainant Exhibit 3.

NOTE: This paper writing is now marked and filed as *Complainant Exhibit 3.*

Q. Mr. Wilson, you allowed a credit of $890.00 against this total amount of $49,426.00.

J. B. Wilson

What was that credit for?

A. It was for some items that we did not fur-
page 31 } nish, miscellaneous.

Q. Do you remember what those items were?

A. It was a stair and some handrails. I do not remember what else.

Q. Why didn't you furnish those?

A. Because we needed field dimensions and we never received them.

They were in a hurry for the materials, so it was mutually agreed we would not furnish them. They would purchase it here.

Q. They got it locally so as to get it quicker?

A. I think so.

Q. A mutual agreement between your company and whom?

A. Between our company and somebody at the job.

Q. Somebody from which company?

A. I assume it must have been Atlantic States, but I do not know.

Q. Somebody on the job?

A. Yes.

* * * * *

page 32 } Q. Do you know what company agreed with your company for this deletion to be made and this credit?

A. Well, I know that Mr. Smith was in on the conversations, and I do not know the man's name, but whoever was acting as superintendent of the project talked with our people about it.

Q. Now, I hand you three invoices. Would you look at those?

A. (Looking). Yes.

Q. Are those the invoices that you submitted for the materials furnished in accordance with your proposal?

A. Yes.

NOTE: Showing to counsel.

Mr. Willis: Mr. Commissioner, I will put a paper clip on these three invoices and submit them as a single exhibit.

I think it is number four. You will note they tally the amount claimed in this suit.

NOTE: These documents clipped together are now marked and filed as *Complainant Exhibit 4.*

Q. Mr. Wilson, were the materials set forth in your proposal of May 25 and July 15, admitted here as Exhibits 1 and 2, were they shipped to the job, those materials shipped to the job?

A. With the exception of those items we gave
page 33 } credit for, yes.

Q. Tell the Commissioner when and by what means they were shipped to the job, and exhibit any shipping tickets or supportive documents that you have.

A. The joists for this project were purchased from and shipped by American Longspans Company, and I have here copies of their shipping tickets that were signed and received here at the project.

Q. Who signed them?

A. It looks like the man's name is Gray Wasc, but I am not for sure. Maybe you can read it better than I can (Handing paper writing to counsel).

Q. Go ahead.

A. That takes care of the joists. The metal roof deck was purchased from Wheeling Corrugating Company and they shipped the material direct from their mill to the job, and we have their signed hauling tickets signed by—it is the same man, whoever he is, Wasc, you see. That takes care of the deck shipments.

Q. Mr. Wilson, go ahead with your recital of the goods delivered.

A. For the structural steel items we fabricated in our shop we have our own hauling tickets that we send with each load, and they were signed by some fellow named Henderson,
and they itemize structural steel shapes.
page 34 } This is all of the shipments from our plant.
(Handing to Mr. Willis paper writing).

* * * * *

Mr. Willis: Mr. Commissioner, I will tender the
page 37 } shipping tickets of American Longspans as Complainant Exhibit 5, and shipping ticket of Wheeling Corrugating and Hauling Company as number 6.

J. B. Wilson

The Commissioner: These will be entered as Complainant Exhibits 5 and 6 subject to Mr. Woodbridge's objection.

NOTE: These two documents are now marked and filed as *Complainant Exhibits 5 and 6,* respectively.

Mr. Willis: And shipping tickets of McCann Steel Company as No. 7.

The Commissioner: This is not objected to?

Mr. Woodbridge: No.

The Commissioner: So ordered.

NOTE: Shipping tickets of McCann Steel now marked and filed as *Complainant Exhibit 7.*

Q. Mr. Wilson, have you compared the shipping tickets with the shop drawings, with the items shown on the shipping with the item shown on the shop drawings?

A. Yes.

Q. How do they compare?

A. Well, they compare perfectly.

Q. What do you mean by that?

A. Well, the roof joists are like pieces to a puzzle. They are either there or they are not. The building page 38 } are there and the joists are there, but the quantities check on the drawings with the tickets, with their drawings, and the quantities of the roof deck shipped check exactly to the square footage of the building.

Q. Shipping ticket shows the same amount of materials as shown in the shop drawings?

A. Yes.

Q. Mr. Wilson, at the beginning of your testimony you said that you have been employed in connection with preparing bids on jobs such as this one for many years.

How does the price quoted by McCann Steel for these materials stack up with the general value in the industry?

A. My opinion is that the prices quoted for this job are cheaper than the going price was at the time. The reason being that we needed work.

Q. Would you say the prices were reasonable and competitive?

A. Well now, I would say they were a little bit too cheap.

* * * * *

page 39 }

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CROSS EXAMINATION

By Mr. Woodbridge:

Q. Mr. Wilson, the letter dated June 3, 1965, from Carl M. Smith, that is the letter that has been admitted in evidence. Is this the only writing that you received from Danter with relation to the shipment of the steel?

A. No.

Q. Was it this letter that stimulated you or your company to ship the steel?

A. No, that letter was transmitted along with the structural framing, joists and roof deck drawings that came with their approval.

page 40 } Q. Did your company consider this letter an acceptance of the proposal that you had made?

A. No, sir. All we accepted was that letter as the approval of our drawings. The dimensions and so forth. And of course to proceed with the fabrication according to the dimensions shown on the drawings and the changes that were made.

Q. Do you have a written acceptance of the final proposal you made?

A. No, sir.

Q. What other writings did you receive from Danter that would imply the acceptance of the proposals you made other than the letter of June 3?

Q. Well, I have a letter from Danter advising us that Danter would pay, it was to be invoiced to Danter. The materials.

Q. Where is that letter?

A. It is in the file somewhere.

Q. Has that letter been admitted in evidence?

A. No.

Q. When was that letter received? I would like to see that letter.

A. All right (Looking in file). It will take a moment to find it.

NOTE: Witness making a search.

page 41 } A. (Continued) Here it is. This was received June 23 (Handing to Mr. Woodbridge).

J. B. Wilson

Q. Well, this letter refers to an original purchase order. What does that have reference to? What is the original purchase order that that letter refers to?

A. As I stated earlier, Mr. Parker gave us the purchase order for the material.

Q. Is there a writing that constitutes an original purchase order?

A. No, sir.

Q. What firm acknowledged receipt of the shipments of steel that were ultimately made to the job?

A. Atlantic States.

Q. I assume that those are the invoices that have been already admitted into the evidence, is that correct?

A. Yes, sir.

Q. At any rate, the only two writings that you have that constitute acknowledgement of the receipt of your proposals and acceptance of your proposals is the letter you referred to there that you have in your possession, and this letter of June 3, 1965, is that correct?

A. No, I have a letter from Mr. Parker requesting a breakdown of the costs.

Q. When was that letter received?

page 42 } A. I do not remember.

Q. Was that letter received prior to the shipment of steel?

A. Oh, yes.

Q. Prior to the shipment of steel?

A. I believe it is so.

Q. Where was your office located when you had these initial negotiations with Mr. Parker?

A. Where was our office located?

Q. Yes.

A. In Nashville.

Q. Nashville, Tennessee?

A. Yes, sir.

Q. Do you know where Mr. Parker called from when he discussed this with you initially?

A. Do I know where he called from? No, I do not.

Q. You do not know where Mr. Parker was located when he called you and talked to you about this initially?

A. He told me he was in St. Louis.

* * * * *

J. B. Wilson

CROSS EXAMINATION

By Mr. Franklin:

Q. Mr. Wilson, are you an officer of McCann?

page 43 } A. Yes, sir.

Q. Did anybody else in the company have anything to do with the negotiations with Danter which ultimately led to this contract, or was it entirely within your province?

A. It was all with one exception, Charles McCann did receive the call from Mr. Parker advising us to go ahead with the job, giving us the purchase order.

Q. Mr. Wilson, on March 26, 1965, you made a proposal on this job which was addressed to Indaw Engineering Company?

A. Yes, sir.

Q. What was the reason for that being addressed to Indaw?

A. I couldn't tell you the reason.

Q. Was there any connection between Indaw and Danter, or Atlantic States Construction?

A. Well, I only know what Mr. Parker told me. Therefore, I do not know for sure if it would be correct or not.

Q. Well, was this proposal responsive to the field call from Mr. Parker.

A. Yes, sir.

Q. Between March 26, 1965, and July, *approximaterly* July 25, you had several communications from Mr. Parker and with Mr. Parker either by telephone or by let-

page 44 } ter, did you not?

A. Yes, sir.

Q. And it ultimately ended up with this final proposal which you referred to dated May 15, 1965, which was Complainant Exhibit 2.

Now, you have in response to a question by Mr. Woodbridge, you have shown a letter there which you got from Danter dated June 23?

A. Yes, sir.

Q. May I see that, please?

A. Yes, sir.

Q. Mr. Wilson, will you read that letter, and including the date into the record?

A. The date is June 23, 1965, and it was received June 28, 1965.

J. B. Wilson

It is from Danter Associates addressed to McCann Steel Company. The subject is Fredericksburg, Shopping Center. Gentlemen: Please be advised that the billing for the steel on the subject project as requested by our original purchase order shall be made directly to and paid by this office. This project is being constructed by Atlantic States Construction, which is a division of McDonough Construction Company, signed by Robert L. Daniels.

Q. Mr. Wilson, in your Answers to the interrogatories propounded of your company, particularly Answer
page 45 } No. 1, Page 2, you stated, and I quote: "Mr. Wilson took these items into account and prepared and submitted a proposal dated July 15, 1965 totaling $49,-426.00. This proposal was accepted by the respondent Danter Associates, Incorporated."

On what do you base that statement that this proposal was accepted by Danter? On what document or telephone call or other communication did you base this statement in the interrogatories?

A. I do not know. I suppose it was an implied acceptance, didn't reject it.

Q. Were you relying on that letter of June 23 that you have just read?

A. Relying on it for what?

Q. To imply an acceptance of the proposal?

A. No. If you look at those, each one of those proposals I made it was always requesting to confirm the purchase orders, of course, and as long as I was still waiting on them and changes were being made I assumed it would be forthcoming.

Q. Each of these proposals has a place at the bottom which says "Accepted as contract"?

A. Yes, sir.

Q. Have any of those been accepted in writing by Danter?

A. No, sir.

page 46 } Q. In the interrogatory you say this proposal was accepted, or are now saying, you assumed it was accepted, was because it wasn't rejected.

A. They never indicated they were going to sign our proposal. They issued their purchase order verbally.

Q. You say sir the complainant was instructed to ship the materials, which it did. Was that in a written instruction, to ship the materials, or was it an oral instruction?

A. Oral.

Q. That then took place after July 15, is that correct?

A. I couldn't be sure of that date.

Q. You stated in the interrogatories that you prepared and submitted a proposal dated July 15. So it couldn't have been accepted until after July?

A. That July 15 proposal was an amended proposal, that just was an amended proposal. That July 15 was a change order.

Q. But up to that time you weren't permitted to ship this material at the price quoted, were you?

A. You say I was not permitted to?

Q. You were not committed to, were you, because it had never been accepted, up until that time, isn't that correct?

A. As far as I am concerned, it was accepted.

page 47 } He said he wanted to buy it. I said I will sell it.

Q. Did you at any time ask Danter or any of its officers to give you a written acceptance of this proposal?

A. Yes, sir. On each of the proposals I made I think I asked for it, that I was wanting it, that you have copies of there.

Q. Did you write to them any special letters asking for a written acceptance of your proposal?

A. No.

Q. You never received any?

A. No.

Q. Written acceptance?

A. No, sir.

Q. Other than the letter of June 23?

A. As far as I know.

Q. Mr. Wilson, early in the testimony this morning you stated Danter led you to believe that it was the general contractor?

A. Yes, sir.

Q. But on June 23, 1965, before you had shipped any materials he told you that he wasn't the general contractor, didn't he?

A. No, it doesn't say that.

page 48 } Q. He told you Atlantic States Construction Company was constructing the building, didn't he?

A. He said they were building it. He didn't say they were the contractor.

Q. Did you ever check with the owners of the property to see who was the general contractor?

J. B. Wilson

A. No, sir, don't normally do that.

Q. You just relied then on the person you are dealing with to be reliable, and to pay you when the invoices are sent, is that right?

A. 99 percent of the time, yes, sir.

Q. Had you done business with Danter before?

A. No, sir, not directly.

Q. Have you done business with them since then?

A. No, sir.

Q. Didn't you do a job in Nashville in which Danter was involved?

A. No, sir, in west Tennessee.

Q. West Tennessee?

A. Yes, sir.

Q. Then you have done some business with Danter?

A. I said not directly.

Q. Not directly?

A. The same type of situation, as far as I know now. It was through one of our good customers, a general

page 49 } contractor.

Q. You were willing then to make a contract with Danter, with whom you had never done business, to ship materials to the job on which you had never checked with the owners to find out who the general contractor was?

A. Well, at the time it seemed all right. He had a multi-million dollar project there in western Tennessee. Looked sound enough.

Q. Now, Mr. Wilson, referring to Page S-3 of the plans.

A. Yes (Looking).

Q. Referring particularly to the columns for the support of the canopies. Are they shown on here?

A. Here is one here, yes, sir.

Q. What size column is that shown to be?

A. Shown four inch, outline for four by four square tube column.

Q. Where does it say that?

A. Right here (Pointing).

Q. Your drawings, your Page D-2. What did you provide?

A. I do not know (Looking). Four inch extra heavy pipe, it seems there.

Q. Well now, isn't that a lot more expensive than what was called for in the architect's plans?

page 50 } A. I would have to guess. I couldn't answer you for sure.

Q. Isn't it your business to know? Don't you know whether this type of column is more expensive than the type called for in the plans?

A. Well, it is not as clear as you make it sound. It depends on the quantity of it, and so forth. Probably the cost of the tube and the pipe is not too much difference. I

Q. It is a lot heavier, is it not?

A. Yes.

Q. The four inch extra heavy pipe would be heavier?

A. Yes, sir.

Q. The weight of the material in this particular business is the principal thing on which price is based, is it not?

A. Not in tubing and pipe. Tubing and pipe are priced as a rule by per linear foot.

Q. Why did you specify this difference in your plans than was called for by the architect?

A. Are you sure it is?

Q. Is it not?

A. Well, I wouldn't say so. That is the purpose of making shop drawings, to get exactly what they require.

page 51 } Q. Don't the plans call for what you just read off?

A. Well now, we were looking at a typical detail section on Section S-3. It says typical detail at canopy. There are three different canopies. Which one do you refer to, three or four.

Q. Well now—

A. Several. It is a large canopy and a small canopy—

Q. Is this referring to a large canopy or a small one?

A. I have no idea.

Q. Can you tell us by looking at the plans?

A. Yes. It will take a while. It has been so long ago, the details of the job such as that I do not remember offhand, but I can find out in a few minutes.

There is also a five inch pipe here, too. It goes in the canopy somewhere.

Q. Mr. Wilson—

A. Yes, sir.

Q. —I show you here a letter, copy of a letter.

A. Uh, huh.

Q. Dated June 4, 1965, from your company over your signature addressed to Mr. Parker.

Will you take a look at that?

page 52 } A. Yes (Looking at paper writing). I did that.

Q. You signed the original of that letter, did you not?

A. Yes, sir.

Mr. Woodbridge: May I see it?

Mr. Franklin: Yes. (Handing paper writing to Mr. Woodbridge, and it later being shown to counsel for the complainant).

Mr. Franklin: I would like to introduce that.

The Commissioner: This letter dated June 4, 1965, from McCann Steel will be entered as Respondent Exhibit 2.

NOTE: Marked and filed as *Respondent Exhibit 2.*

Q. In this letter you stated that we have clipped off our cost records. However, if you require a unit price we will be happy to submit.

Does that mean that at the time this letter was written you were still negotiating with Danter on these prices?

A. (Pause) No, I do not know if that is correct. In negotiating with the price he asked me for a breakdown.

Q. You refer us here to a letter of May 28, 1965, requesting an itemized list.

page 53 } A. It took me that long to get around to submitting that thing to him.

Q. Do you have that letter?

A. What letter? The one from him requesting?

Q. Yes.

A. I think so.

Q. Would you find it?

A. I will try (Looking in file). Here it is.

Q. Mr. Wilson, I am showing you here now this letter which you have just given to me from Indaw Engineering Company dated May 28, 1965.

Will you read that letter into the record, please?

A. It is addressed to McCann Steel Company, attention J. B. Wilson.

Dear Sir: "I would appreciate it very much if at your earliest convenience you would furnish me an itemized list of all steel that you have taken off and listed under items A through M on your proposal, dated May 25, 1965, in the amount of $47,585.00. Thank you very much for your consideration in this matter." Signed, "Charles B. Parker".

Mr. Woodbridge: I would like the letter to read it and see the letterhead.

A. Indaw Engineering, Architect Engineering, 818 Olive Street, St. Louis, Missouri.

page 54 } Q. You replied to that letter on June 4?

A. Yes, sir.

Q. That reply was addressed to Indaw Engineering Company?

A. Yes, sir.

Q. So as of that date, June 4, you still apparently did not know who you were dealing with, which company?

A. What do you mean by that?

Q. Your reply was to Indaw Engineering Company. Were they the ones you were going to provide the steel for, or was it Danter, Daniels?

A. Well, it was to be billed to Danter, and Indaw is their engineering firm who was designing the building.

Q. But until you got that letter of June 23, you weren't positive, were you? Didn't the letter of June 23 give you definite instructions on how to bill it?

A. No, sir, gave us a purchase order, our order was written up to Danter and Associates back 4-26, when I wrote them up. Invoice to Danter. When Mr. Parker called giving us authority to proceed with it he told us how to bill it, who to bill it to.

Q. But you refer to your purchase order, but you don't have any signed purchase orders, do you?

page 55 } A. No, we have his word.

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page 56 }

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Q. —prior to this trial there were certain interrogatories presented to your company, I presume, by your counsel, and they were answered.

Are you familiar with those interrogatories?

A. No, sir.

Q. Were you aware of the fact they had been asked?

A. I am sure, yes, sir.

Q. Who in your company provided the answers for those interrogatories?

A. Mr. Nash did, I think.

J. B. Wilson

Q. In your dealings with this entire transaction you at no time were looking to Atlantic States Construction Company or the A S C Company of Virginia for payment of these materials, were you?

A. No. I expected Danter to pay it, being the general contractor on the job and having the job, I expected them to pay it.

Q. Now, you say the general contractor on the job. Did you ever go to the job?

A. No, sir.

Q. Did you have any information of any kind to indicate that Danter was at any time ever on this job?

A. (Pause).

page 57 } Q. Or on the job site?

A. Carl Smith was Danter's representative there.

Mr. Woodbridge: I object to that testimony, Mr. Commissioner.

The Commissioner: It is so noted.

Q. Carl Smith had an office in Washington, didn't he?

A. Everytime I talked to him he implied that he was there at the site.

Q. But—

A. Looking after Danter's interest.

Q. But you have no factual information to indicate that he was there other than what you are just assuming, have you?

A. I have a letter from him signed as project manager.

Q. Any of it mailed from Fredericksburg?

A. I didn't bother to look to see where they were mailed from.

Q. You never received any order of any kind whatsoever from Atlantic States Construction or A S C Company of Virginia?

A. I didn't know Atlantic States was on the site until the material was being delivered, or getting ready to be. That is my personal knowledge.

page 58 } Q. You had that letter of June 23?

A. Along about that time the material was ready to go.

Q. You had that letter of June 23 advising you that Atlantic States was constructing the building and to ship the materials to them, didn't you?

A. Yes, sir, I have the letter here.

Q. But now you have just said you didn't know that Atlantic States had anything to do with it.

A. Prior to that time.

Q. After you found out that Atlantic States Construction Company was constructing the building, did you ever receive any orders for any materials of any kind from Atlantic States Construction Company?

A. Not to my knowledge.

Q. And you never sent them any bill of any kind whatsoever, did you?

A. I do not do any billing.

Q. You have no knowledge of any such billing being done?

A. I have no knowledge of it.

Q. Do you have the invoices there with you?

A. Yes, sir.

Q. Do you have any invoices addressed to Atlantic States Construction Company or the A S C Company of

page 59 } Virginia?

A. I do not think so.

Q. What was your answer?

A. I do not think so.

Q. Now, in your business as an estimator or in your business with McCann Steel Company, you attempt to get this material fabricated so that when it goes right on the site it can be set right up, don't you?

A. Yes, sir.

Q. And it is possible that there could be some slight variations that would have to be corrected, isn't that customarily true?

A. Yes.

Q. What would be a reasonable variation in dollars and cents? How much should the general contractor have to spend, for example, in this particular case, how much should the general contractor have spent to correct these minor deficiencies?

A. Well, he has to expect a reasonable amount of misfit, and it is customary I think in structural steel about five percent of your holes are allowed not to register without any mention of back-charging and so forth.

Q. When you say, for instance when you have a $47,000.00 or $48,000.00 contract, one percent of the cost of the materials would be reasonable for having them corrected?

page 60 } In other words, if he had to spend four or five hundred dollars to have these minor deficiencies corrected, would that be reasonable, or would that be excessive?

A. I could not answer that question because 95 percent of our work we don't have any back-charges, or even more. Maybe 99 percent.

Q. So you are not familiar with what is customary in this particular work?

A. Yes, I am.

Q. In dollars and cents?

A. Yes, sir.

Q. For adjustments?

A. Yes, I am.

Q. What is customary in dollars and cents for adjustments on a job of this type?

A. There is no set rule or standard for any amount of money that you expect to have to pay somebody to correct shop errors or misfabrication.

It is either correct or it is not, and it could be either maybe it would cost fifty cents to fix it or twenty thousand dollars. It depends.

There is no way to answer your question. There were no back-charges on this job for misfits.

Q. If it cost twenty thousand dollars it would be obviously an error in fabrication to begin with, would it page 61 } not?

A. Not necessarily. The footings could be off.

Q. I see.

A. The building could not be square. A lot of things could be wrong other than with the steel.

Q. You said there were no back-charges for refabrication on this job?

A. Not that were invoiced.

Q. Did you ever receive any word, correspondence or communication from Danter that any of the materials were defective?

A. Not a word that I know of.

Q. In short supply, or—

A. No, sir.

Q. I do not know whether you have copies of these or not, so I will make them available to you.

Why are some of these invoices made in the name of, or care

of, Danter Associates and some of them made out to Atlantic States Construction Company?

A. Well (Looking at papers)—

Q. And when I say "invoices", I am talking about the bills of lading or the shipping invoices.

A. The date on this.

Q. When you say "this", what are you referring to?

A. Bill of lading.

page 62 } Q. That is Complainant Exhibit 7?

A. Is that what it is?

Q. Yes.

A. 6-8-65. That would be after we had learned that Atlantic States was on the job, of course. (Looking in files).

The reason that—well, as an example, this invoice from Wheeling was consigned to McCann Steel Company, care of the shopping center, Danter and Associates, Fredericksburg, and so forth.

The purchase order issued for these materials was back in March and April of 1965, when the only people I knew associated with this thing was Danter and Associates. Our purchase orders were issued a long time prior to June of 1965.

As I stated earlier, I joists and roof deck orders were placed just as soon as Mr. Parker gave us the purchase order.

We had a guaranteed delivery date of June 15, 1965. That was the purpose of rushing this thing up.

Q. Where did you have that in writing, or did you have it in writing?

A. That is another part of a telephone conversation.

Q. Mr. Wilson, how could you have placed the

page 63 } orders for these materials before you had reached an agreement with Danter as to price and as to what was to be furnished, because considerably after the date that you have just said you placed the orders for these you were still amending your agreement and sent revised agreements out.

As a matter of fact, on May 25 seems to be the principal revision. Had you already ordered these before that.

A. Yes, so to speak. With the roof deck, I placed an order for approximately so many squares of roof deck, and we would supply the detailed cutting information as of a later date. But we had placed an order for that many squares of

deck so that it would be available when we needed it, or when we could submit to them the detailed cutting lengths, but the orders were placed a long time prior to cutting lengths.

Q. What would you have done if Mr. Parker had come back and said he acknowledged receipt of your proposal of May 25, and it wasn't acceptable?

A. (Pause) I didn't have to think about that. I never had anybody to do that before.

Q. In other words, are you basing these orders based on your anticipated agreement that you expected to be able to—

A. No, sir, I had an agreement. I wouldn't have
page 64 } spent all this money without an agreement.

Q. Then the only agreement you had with them was the one of March 26 to do the whole thing for $36,510.00, wasn't it, at that time?

A. That was per his telephone list.

Q. But based on that?

A. That was his quantity description, not mine.

Q. Based on that, though, you went ahead and ordered these materials?

A. I certainly did.

Q. So at that time you thought you had a binding contract with him to provide the materials.

A. I did have.

Q. At that price?

A. I did have. I did have to supply that material listed for that price, no more.

Q. You never had any written acceptance of any of this, did you?

A. No, sir.

Q. Mr. Wilson—

A. Yes, sir.

Q. —I am now showing you copy of the Answers to the interrogatories as made by somebody in your company. I will ask you to read the answer to the first para-
page 65 } graph of number one there.

A. Starts with—is that where you are speaking of? Starts with "that"?

Q. Yes.

A. "That the contract between the complainant and Danter Associates, Incorporated, for providing the steel itself in the construction of the building, which is the subject matter of this suit, was negotiated and entered into by both oral and

written communications consisting of telephone calls and written correspondence, shop drawings, and estimates.

It goes into making of the contract and the materials and conditions thereof are set forth as follows—is that what you wish?

Q. Yes. Mr. Wilson, I am going to hand you the questions which were asked of your company, and I am going to ask you to read the answers which were given, and then I am going to ask you after you have done that whether you believe the answers as given are correct or incorrect?

A. Yes. (Reading paper writing to himself).

Q. When you have completed question number one and the answer to it, let me know, and I will ask you on that particular question whether you think the answer is or is not correct.

A. All right (Reading to himself). What is it
page 66 } you want me to do about number one?

Q. Is the answer given by your company correct, as far as you know?

A. It appears so, yes.

Q. Now read number two.

A. (Reading to himself). I didn't read all of number one, I thought I had, but I did not. Let me make sure I read all of it. (reading to himself). I didn't know it was two pages. I read number two.

Q. Does the answer to that appear to be correct?

A. It does.

Q. You said you had not read all of one?

A. I went back and finished it.

Q. And that is correct?

A. Yes, sir.

Q. Will you do the same thing for number three?

A. Yes (Reading to himself). That is substantially correct, number three.

Q. Will you read number four?

A. Yes (Reading to himself). That seems to be correct.

Q. Mr. Wilson—

A. Yes, sir.

Q. —have you at anytime seen any written contract between Danter and Associates, or the Danter Com-
page 67 } pany, or whoever it was you were dealing with on the one part and the owners of the property, Rosenfeld and all, on the other hand, for the construction of this building?

A. No, sir.

Q. You simply took the word of Danter that it had contracts for the construction of this building, is that what you are telling us?

A. Yes, sir.

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By Mr. *Woodrridge*:

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page 68 }

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Q. Can you tell from those invoices when the major bulk of the steel furnished was shipped and received?

A. Yes, I can tell you that (Looking in file). The joists and deck and all was shipped it seems around July 12, 13 and 14, somewhere in that vicinity.

Our structural steel from our place was sent (Looking in file) they were somewhere, some of the load, July, they were consigned to Atlantic States Construction Company.

Q. Did Atlantic States acknowledge receipt of those shipments?

A. Yes, Mr. Hinson.

Q. Do any of those invoices indicate Danter Associates acknowledged receipt of any shipment of any steel?

A. All of these invoices, bills of lading from American Longspans were accepted in Danter's name. They were consigned to Danter, by whoever was at the job.

I cannot make out his name on here. It is Hyatt, or something like that, but they were consigned to Danter

page 69 } and Associates, for—

Q. Of course, you do not know of the existence of any contract between Danter Associates or Atlantic States Construction and these other suppliers?

A. Do I know of any contract? No, I do not see one.

Q. These suppliers delivered these materials at your request, request of McCann Steel?

A. I purchased them, yes, sir.

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Q. (By Mr. Woodbridge, continued) You were going to reply to my question as to why no attempt had been made to secure the written acceptance of the buyer.

A. As I stated, Mr. Parker gave us a purchase order, verbal order, told us who to charge the material to, how to ship it, and so forth.

Q. Well now, in conversations that you elude to with Mr. Parker, did that conversation take place prior to March 26, 1965?

A. You mean concerning the purchase order?

Q. Yes.

A. (Pause) I will have to see the date of the memo.

Q. This is proposal date, March 26.

A. You say did I have conversations with Parker prior to this?

Q. Yes.

A. Many conversations, yes, sir.

Q. To establish that a contract existed between you and Mr. Danter, you are relying principally on oral
page 71 } communications you have had with a Mr. Parker, is that correct?

A. (Pause) No, not altogether. Several times during this period of time because of the job mentioned in west Tennessee, I was talking with Mr. Daniels, and Mr. Parker and Mr. Cooter with the local—everybody in that office.

Q. My question is this: That you are relying on oral communications with representatives of Danter to establish the fact that a contract existed between McCann Steel and Danter Associates, is that correct?

A. (Pause).

Q. Do you understand my question?

A. I think I do.

Q. Can you answer it?

A. Would you state it again, please?

Q. To establish that a contract existed between McCann Steel and Danter, is it true that you are relying principally on oral conversation you had with representatives of Danter?

A. Yes, sir.

Q. And it would be fair to say that the bulk of these conversations took place prior to March 25, 1965, is that correct?

J. B. Wilson

A. I wouldn't necessarily say the bulk of them, no, sir, but a lot of conversations prior to that, and, too,
page 72 } I cannot be real sure about the dates.

Q. Was the purchase order given to you by a representative of Danter?

A. Was it?

Q. Was that purchase order given to you prior to March 25, 1965?

A. (Pause). Whatever the date is on that memorandum that is when I got the purchase order.

Q. Is that the letter from—

A. From my office, a memo, when Charles McCann left me a note. I do not remember the date, (Looking in file). Here, 4-22-65, that is when I knew we had a purchase order about three o'clock in the afternoon.

Q. That was 4-22-65?

A. Yes, sir.

Q. That of course was subsequent to the proposals you submitted dated March 25, 1965?

A. I think so. It was.

Q. Then it was at that time that a contract in your opinion existed between you and McCann—

A. As soon as this call was made, we had a contract.

Q. Notwithstanding that contract, let me ask you this:

That contract would be in response to the pro-
page 73 } posal dated March 26, 1965, is that correct?

A. That is based on those quantities, yes, sir.

Q. Then what was the reason for a delivery of substantially more steel subsequent to the acceptance of that original proposal?

A. I have here a penciled memorandum from Mr. Parker giving me the count of the joists without any bridging, overall lengths, the exact length and number of pieces of beams, and the columns for the main roof system, and approximately 570 squares of deck for use to place an order for that material in that quantity.

Q. So you are relying on a subsequent revision of the original contract that existed between you and Danter to justify your claim for more money, $49,000.00 and some odd dollars.

A. Mr. Parker told me when I got these drawings—

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Q. You were talking about what Mr. Parker told you with respect to the change in the order.

A. He told me when I received the plans to go through and make a correct take off and to prepare as per the drawings, that they had finally completed.

Q. Was this after March 26, 1965, or April 22, 1965?

A. Of course it was after.

Q. Were there any changes in the specifications and quantity of steel shipped and so forth, after the letter from Mr. Daniels to you dated June 23, 1965?

A. Were there any what, sir?

Q. Any changes in the specifications of the steel to be used in the amount of steel and quantities and so forth, after Mr. Daniels' letter to you of June 23, 1965.

A. Well, sometime about that period this room was widened, you know, where we had the increase in cost, sometime about that period.

Q. As of the receipts of the letter to you from Daniels, June 23, 1965, what was your charge going to be, total charge going to be for the steel used in this construction?

A. Well, around about 5-25-65 it was going to be $47,585.00.

That would be May 25, that is the price. And then, page 75 } of course—

Q. Wasn't that the bill that the—Mr. Daniels refers to in his letter to you of June 23, 1965? Isn't that the cost that he refers to?

A. Yes, sir. And since that time he changed his plan and we had to add additional cost for making these rooms larger.

Q. How was this change authorized?

A. I made a change order and sent it to Mr. Parker.

Q. Was that ever acknowledged in writing or accepted in writing?

A. No, they just approved the shop drawings.

Q. Did they approve the shop drawings in writing?

A. Yes.

Q. Where is that?

A. Right here, Mr. Smith approved them all.

Q. These are the shop drawings we are referring to, aren't they? Have you seen these?

A. Yes, sir.

J. B. Wilson

Q. Did this letter from Mr. Smith accompany the approval of these shop drawings?

A. Yes, sir.

Q. This letter dated June 3, 1965?

page 76 } A. Yes, sir.

Q. Then it couldn't have been that this was prior to the letter you received from Daniel?

A. What? I don't get it.

Q. This letter from Smith, which accompanied his approval of the shop drawings.

A. Yes.

Q. —refers to—

A. June 6.

Q. Notation on the margin dated June 6, 1965. You said that the bill that you would submit and which was accepted by Daniels in his letter of June 23 was $47,585.00?

A. Uh, huh.

Q. Well, the changes that you are talking about which you say justified a higher charge were accepted and approved prior to June 23, 1965, were they not?

A. You have lost me on dates. The changes for this higher price couldn't have been until we found out this room was wider.

Q. You found out the room was going to be wider?

A. Yes, sir.

Q. Prior to June 23, 1965, didn't you?

A. I guess so.

Q. Then your bill or your charge which—

page 77 } A. But, to answer your question: He refers to this $47,585.00 figure as a proposal dated May 25.

That change was not made until June 6 that you have there.

Q. I thought you just testified that as of June 23, 1965, your charge for all the steel you were to ship would be $47,585.00?

A. That was one of the proposals. The later proposal was amended, one with a change order.

Q. Was there ever a time where the total charge you were to make was accepted either verbally or in writing by a representative of Danter Associates?

A. No, sir, except orally, of course. Applied, I will put it this way.

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REDIRECT EXAMINATION

By Mr. Willis:

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Q. The final modification of the shop drawings were received back by you on June 9, is that correct?

A. The letter from Mr. Smith was dated June 9.

Q. Did that accompany the shop drawings?

A. Yes, sir, but the drawings were penciled June 6.

Q. That was the final amendment to those?

page 87 } A. Yes, sir. To structural drawings.

Q. Did you take that into account upon receipt of that information, receipt of those drawings?

A. I made a change order increasing—a change order to allow for increasing of the width of the building.

Q. That was prior to Mr. Daniels' letter of June 23?

A. I would think so.

Q. In the description in the steel description, does it, when it is marked with approval of the shop drawings, does that—

A. When we get an approved drawing back it means that our interpretation of what the architect-engineer intended is correct.

Q. What is the affect of that in it, is there any custom in the industry?

A. Well, the custom is we submit drawings to the architect-engineer, he checks them over to see that we have used the size materials that he specified, and that is the importance.

But it also is just as important he check the physical dimensions that we have shown, the size of the building, and so forth.

Q. Is it unusual for you to ship steel on oral

page 88 } orders.

A. Unusual for us to ship steel on oral orders?

Russell Nash

Q. Is it unusual for McCann Steel to ship steel on oral orders?
A. No.

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page 92 }

RUSSELL NASH, a witness of lawful age, called on behalf of the complainant, first being duly sworn by the Commissioner, testified as follows:

DIRECT EXAMINATION

By Mr. Willis:
Q. State your name?
A. Russell Nash.
Q. How old are you, Mr. Nash?
A. 64.
Q. What is your occupation?
A. Secretary-Treasurer of McCann Steel.
Q. Mr. Nash, are you custodian of the financial records of McCann Steel?
A. I am.
Q. Are you familiar with the account that is in question in this suit?
A. I am.
Q. What is the amount of that account?
A. $47,536.00, I believe.
Q. $48,500—
A. $48,536.00.
Q. Which is correct, Mr. Nash?
page 93 } A. $48,536.00.
Q. Has there been anything paid on that account by anybody?
A. Not a penny.
Q. Have you had any communication with the owners of Danter Associates concerning their account?
A. I called, to Danter Associates, several times on the telephone for the Secretary-Treasurer, Mrs. Mary Lee Ansell, and always she was out. I left my number and I have a telegram here answering one of my calls that I left.
Q. What is the date of that telegram?

A. August 24, 1965.

Q. What does the telegram say?

A. All the details?

Q. Just read it.

A. "Unable to reach you by phone. We are aware of obligations on Fredericksburg. Mr. Daniels, president, out of town on vacation. Will return September 7. Immediately upon his return will get his approval on invoices and take care of matter. Danter Associates, Mary Lee Ansell."

Q. Do you have any other telegrams?

A. This one is dated September 13, 1965. "Russell Nash, McCann Steel Company. Accounting department
page 94 } is processing check on Fredericksburg account today. Check will probably be mailed tomorrow Air Mail Special Delivery." Signed, "Danter Associates".

Q. Has anybody at Danter Associates ever denied liability or responsibility for this indebtedness?

A. That is the only written correspondence that I have had from them at all.

Q. Have they ever questioned the debts in its entirety or in any part?

A. Never questioned anything about it.

The Commissioner: These telegrams dated August 24, 1965, will be entered as Complainant Exhibit 9, for the first one, and the telegram dated September 13, 1965, will be entered as Complainant Exhibit 10.

NOTE: These two telegrams are marked and filed as *Complainant Exhibits 9 and 10,* respectively.

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W. H. MILLER, a witness of lawful age, called on behalf of defendant, first being duly sworn by the Commissioner, testified as follows:

DIRECT EXAMINATION

By Mr. Franklin:

Q. Please state your name.

A. W. H. Miller.

Q. And your age?

A. 43.

page 100 } Q. Your occupation?

A. I am the executive vice-president and general manager of Atlantic States Construction Company.

Q. As an officer of Atlantic States Construction Company were you involved in a contract for the construction of the Montgomery Ward portion of the Park & Shop Shopping Center here in Fredericksburg?

A. Yes.

Q. Did your company have a contract for the construction of that building?

A. Yes, we did have.

Q. I hand you herewith a five-page document dated May 31, 1965, and ask you to identify that.

A. That is the contract.

NOTE: This paper writing shown to counsel.

Mr. Franklin: I would like to introduce this as Respondent Exhibit 3.

The Commissioner: It will be so entered.

NOTE: This paper writing is marked and filed as *Respondent Exhibit 3.*

Q. Mr. Miller, as a result of this contract did your company build the building contemplated by this contract?

A. We did.

page 101 } Q. Have you been paid?

A. We have been paid by the owners.

Q. In general terms, what did this contract call for on your part?

Mr. Willis: I object to that question. The contract speaks for itself. It is a written document.

Mr. Franklin: I agree that it does speak for itself, but I think he can testify generally about that.

A. As I interpret it it calls for the total general construction of the job.

Q. What is the date of this contract?

A. I think it is May 31, 1965.

Q. This job, in constructing this building, did you do all of the labor and provide all of the materials yourself, or did you sub-contract part of it?

A. We sub-contracted and would buy materials from other suppliers, some suppliers, some sub-contractors, buy their own materials and so forth.

I would say our labor and materials on this job that we actually furnished ourselves on our payrolls is probably 15 or 25 percent, somewhere in that neighborhood.

Q. Did you contract any portion of this job to Danter Associates?

A. Danter Associates had it, we had a con-
page 102 } tract with them to furnish the structural steel and the design and engineering.

Q. Did they furnish you with the design and engineering?

A. Yes.

Q. Did they furnish the structural steel?

A. I assume they did.

Q. Did you subsequently enter a written agreement with Danter Associates in regard to—

First of all, let me ask you this: Did you subsequently enter into a written agreement with Danter Associates in regard to indemnity in this case?

* * * * *

A. (Looking at paper writing) This is—

Q. Is that an agreement between you and Danter Associates?

A. It is an agreement he was going to furnish certain sums of money on this job, and it turned out later on he was going to furnish the steel in lieu of it.

Q. Is this an agreement which was entered
page 103 } into between you and Danter Associates?

A. Right.

Q. Covering this work which has already been done?

A. Correct.

NOTE: Paper writing now shown to counsel by Mr. Franklin.

Mr. Franklin: If Your Honor please, I will introduce this as a respondent exhibit.

* * * * *

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Q. You testified under the terms of your sub-contract with Danter that Danter was to provide the steel for this building. Did Danter provide all of the steel?

A. No. I know he didn't provide all of it.

page 105 } We had to buy some extra pieces of steel that eventually went into the building.

Q. Was the steel provided by Danter all suitable and properly fabricated?

A. No, we had some field back-charges, repairs and modifications and so forth.

Q. Do you have a list of those?

A. I have a—

Q. Do you have copies of your invoices and bills and charges for the refabrication of some of that steel and for the purchase of additional steel?

A. Yes.

Q. Do you have those with you?

A. I have those here.

Q. Let me have that.

A. Yes, sir.

Mr. Franklin: Mr. Commissioner, I would like to say that this same group of invoices is already a part of the record, and attached to the Answer to the interrogatories propounded to Atlantic States Construction Company by McCann Steel Company.

I would like to call those to the attention of the Commissioner and perhaps at this time mark them as exhibits.

We would like to have them made official ex-

page 106 } hibits in the case.

The Commissioner: is there any objection to these documents? These will be number five.

NOTE: These documents are now marked and filed as *Respondent Exhibit 5.*

Q. Mr. Miller, as an officer of Atlantic States Construction Company, are you testifying that these invoices which we

have just submitted in evidence represent the total charges which your company had to pay for refabricating some of the materials furnished, or to fulfill the orders and to fulfill all of the steel needs for the building?

A. Right. These invoices by the way are from a sub-contractor, another sub-contractor furnished by the name of Burkholder who erected our steel and did this refabricating and so forth.

He also bought the material and billed us for this. We in turn paid him for it.

Q. Have you paid for these?

A. Those I have been paid for.

Q. Do you know what the total amount of those is?

A. Somewhere around $4,700.00, I think that is correct.

Mr. Franklin: I think the record speaks for itself on that, too.

page 107

Q. Could the building have been constructed without refabricating these materials?

A. No, it could not.

Q. Could it have been constructed without purchasing the materials which these invoices represent?

A. No, it could not.

Q. Now, has your company ever received a bill or any other claim by McCann Steel Company that you were indebted to it in any way?

A. No, I do not remember any. I know the first time we heard about it was when this suit was filed, we heard from them.

Q. Do you have any knowledge of the notice being served on your company that McCann Steel Company was claiming a lien on this property?

A. I do not think I ever saw the notice, no.

Q. Was it ever brought to your attention such a notice had been served on the company?

A. Yes, sir.

Q. Do you remember when this was?

A. It was sometime in October or November, just right at the time the job was being completed.

Q. At that time was Atlantic States Construction Company or the A S C Company of Virginia, Incorporated, indebted to Danter in any amount of money at the time you received a notice of this?

page 108

A. Just the reverse of that.

Q. Was Danter indebted to Atlantic States Construction Company?

A. Our books show as of June of this year they owed us $12,336.64.

Q. What do your books show they owed you in October and November and December of 1965?

A. I believe that figure is $11,853.37.

Q. Is that close to—

A. That is about November of 1965. Might be a week or so.

Q. Is that indebtedness for this particular job or some other job?

A. This particular job.

Q. Have you since that time, since receipt of this notice of this suit, has your company become indebted to Danter Associates in any amount at all?

A. No.

Q. As a result of this contract and subsequent indemnity agreement, is Danter Associates indebted to you at this time?

A. Yes, sir, they are, by that figure I gave you a minute ago.

page 109 } Q. $12,336.64?

A. Yes, sir.

Q. Mr. Miller, how long have you been in the construction business?

A. Oh, about 23 or 24 years. In that general neighborhood.

Q. In a contract of this type for the construction of a building such as the Montgomery Ward building, is it customary to get bids from your sub-contractors?

A. Yes.

Q. Competitive bids?

A. Yes.

Q. Did you in this particular case get competitive bids?

A. In the steel I did not. The rest of them I did get competitive bids, yes.

Q. Did you have any particular reason why you did not get a competitive bid on the steel in this case?

A. Well, I had a contract with a person to furnish the steel for me, there was no reason to go out and get a competitive bid on it.

Q. At the time that you made this contract with Danter Associates, were there any representations made to you by

Danter in regard to payment for this steel for
page 110 } this building.

Mr. Willis: Objection, that is hearsay. No cross bill in this suit against Danter.

The Commissioner: I will note the objection.

Q. Were any representations made to you by Danter in regard to payments for the steel?

A. Yes, there were. He said that he was going to furnish us steel outright, total job requirements of the structural steel.

Q. When you say "he", to whom are you referring?

A. Bob Daniels.

Q. Do you know of your own knowledge what his connection with Danter Associates Incorporated is?

A. I understand he is the president. He is the president of the company.

Q. Have you met and talked with him personally?

A. No, I haven't talked with him personally. Some of my other people have.

By Mr. Woodbridge:

Q. Did you say Bob Daniels?

A. Daniels, yes.

By Mr. Franklin: (Continued)

page 111 } Q. Until this suit was filed and papers served on your company, did you have any knowledge that the steel had not been paid for?

A. No.

* * * * *

CROSS EXAMINATION

By Mr. Willis:

Q. Mr. Miller, this contract that you had with Danter to furnish the steel: Do you have that with you?

A. No, I do not.

Q. Is that a written contract?

A. It is, no—to furnish the steel was a verbal contract.

Q. A verbal contract?

A. Yes.

Q. How did it run? Was it a contract to furnish the steel in the Montgomery Ward Building, or was it a contract to

furnish so many longspan joists and so many nuts and bolts and whatever else went into that?

A. It was to furnish job requirements for that Park & Shop Shopping Center.

Q. Job requirements. So that was just a general undertaking to furnish an unknown, undetermined

page 112 } quantity of steel, and that couldn't really be determined without relation to a specific set of plans, could it?

A. Would you repeat that again, please?

Q. Well now, suppose I told you, Mr. Miller, I wanted to build a Montgomery Ward Store out there at Four Mile Fork. How about furnishing the steel requirements, $45,000.00.

A. I couldn't do that.

Q. Would you make that contract?

A. No, sir.

Q. For all you know I could be calling for solid steel with a quarter of a million dollars worth in it, couldn't I?

A. On the same basis, it is not the same example.

Q. You would want to see a set of plans in order to nail your contract down to it to know exactly what you were going to furnish, and by the same token I would have to have the plans so that I could know what I was going to get, shouldn't I? Does that make sense?

A. I take contracts all the time where owners furnish certain products or sub-contracts for differently or—

Q. How much were you going to pay Danter for this steel?

page 113 } A. I wasn't going to pay him anything.

Q. Was this a Christmas present?

A. Yes.

Q. Tell us something about Danter now. This man Daniels, you say, is the president. Is he the principal owner, is he the essential owner of this Danter Associates?

A. I said a minute ago I never met him, but I understand that he is.

Q. You have had considerable dealings with him in the last few years?

A. I didn't deal with him. I dealt with—as you found out he is pretty hard to get in touch with. I dealt with one of his agents, I suppose it was.

Q. Who was it?

A. Carl Smith.

Q. Carl Smith?

A. Yes, sir.
Q. Was he an employee of Danter?
A. He was at that time.

* * * * *

Q. Well now, you have exhibited your contract
page 114 } here. Let me show you another one. Does that
look familiar to you? (Indicating a paper writing).
A. Yes. As a matter of fact—

The Commissioner: Could I just identify that, as contract dated April 16, 1965, between Rosenfeld and others and Danter Associates?
Mr. Willis: Which is filed as a part of the answers of Rosenfeld, Bratman and Lawson to interrogatories.
The Commissioner: That is correct.

Q. Isn't that the same contract you have instead of running to Atlantic States Construction Company the contract there is Danter Associates, Incorporated?
A. I would have to get mine back and compare them.
Q. It is the same general form, is it not?
A. This is a standard AIA form.
Q. Look them over.
A. (Looking at papers writing). The wording is just about the same.
Q. The difference between them is that one contract is made with your company, and the other contract is made with Danter, is that correct?
A. Well, I do not know who these people are. (Indicating).
Q. Danter Associates, Incorporated, is one of
page 115 } the signatories?
A. I imagine it is the same Bob Daniels that I have been working with.
Q. Isn't it typed here "Danter Associates, Incorporated, by Robert L. Daniels"?
A. That is what it says, right. I am not going to witness his signature.
Q. Don't both contracts cover the construction of this Montgomery Ward Store, don't they?
A. Yes.
Q. And both contracts—

W. H. Miller

A. I do not know whether this is a contract. You call it that.

Q. It is identical with the thing you have just introduced as a contract, is it not?

A. Well, I know about this one but don't know about that (Indicating).

Q. Would you please answer my question? Isn't it identical to the instrument that you just introduced as a contract?

A. Yes.

Q. And both instruments call for a gross contract price of $450,000.00?

A. Yes.

page 116 } Q. Now, Mr. Miller, did you negotiate your contract?

A. Yes.

Q. With whom did you negotiate it?

A. It was a combination, negotiated with the owners on one side and Carl Smith on the other side, working with.

Q. When you made your contract—

A. —who was with Danter at that time.

Q. When you made your contract you knew that Danter had a contract for the construction of the building, but that Danter and the owners were calling it off, didn't you?

A. I do not think he ever had a contract. I think he had an agreement if he could get a bond, he would have a contract, but I think the problem came up he couldn't furnish the bond, and their contract called for a bond.

And evidently it was no contract if he didn't furnish the bond.

Q. That is your understanding?

A. That is part of the contract here, I think, that a bond is part of this contract.

Q. Was that your understanding at the time that you entered into this contract?

A. Yes.

page 117 } Q. Did Danter, that is either Daniels or Carl Smith, come and ask you to take over this job?

A. Yes.

Q. And didn't you analyze the job and decide they had bid it too cheap?

A. Yes.

Q. And didn't you tell them I will take it over but I think you are so many thousands of dollars low, and you got to indemnify me, guarantee me that amount?

A. Well, it was similar to that. They had some sort of an agreement other than what I knew about I think with the owners.

I do not know what it was, but a tie, combination, or something like that, and everybody was anxious for us to get the job started to get it completed, and get the tenants moved in.

We told them that we didn't have enough time to get a detailed estimate to put the job out for competitive bidding and so forth.

He said you don't have to do that, I will stand behind it. So I got him to agree to—

Q. Who is "he"?

A. This is Carl Smith.

Q. Talking for Danter Associates?

A. Yes, sir.

page 118 } Q. Wasn't it essentially that you were pulling his chestnuts out of the fire and you were doing it on the condition that he back you up and cushion you to the extent of about $30,000.00 because you thought it would take that much to do the job?

A. Well, I didn't think they could do the job for $450,000.00, but I wasn't sure. I didn't really know, because at that time I hadn't estimated the job.

Q. You wanted him to put up about $30,000.00 in cash to back you up?

A. Yes, sir.

Q. Because your judgment was that $450,000.00 wasn't enough?

A. Yes, sir.

Q. Then he came up shy on cash, didn't he?

A. Well, we never got it.

Q. You never got the $30,000.00, and he came in and proposed as an alternative that he furnish the steel, isn't that right?

A. That is right.

Q. And on that basis between you and him you made this contract with Rosenfeld, Bratman and Lawson?

A. Yes, sir.

Q. And you undertook to build the building?

A. Yes.

page 119 } Q. Your contract though, outside of any collateral agreement between you and Danter, calls, as is conventional, for you as general contractor to furnish all labor and materials, doesn't it?

W. H. Miller

* * * * *

Q. I am sorry, and withdraw that question. Did you at any time give notice to McCann Steel that Atlantic States would not be, or the property would not be, responsible for the cost of the steel?

A. I do not really think I knew the McCann folks at that time. I am positive we didn't give anybody any notice.

Q. Did you at any time ask them if they had been paid by Danter?

A. No.

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page 120 }

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Q. Were you on the job site when this steel arrived, or any time after?

A. I have been to the job after it has been completed, and I was there when we started.

Q. You know the steel came from McCann Steel?

A. Well, I cannot really swear to that, no.

Q. You saw invoices?

A. Somebody said it came from Wheeling. Somebody said it came from South Carolina. So I don't really know. I don't think you can swear it came from McCann.

Q. Did you see any of the invoices where it came from?

A. Not until after this suit.

Q. You didn't at the time?

A. No.

Q. Did you have a man named McDaniels on the job?

A. Yes.

Q. What was his capacity?

A. He was the project manager. General superintendent. which means about the same thing.

Q. For Atlantic States?

A. General Superintendent.

page 121 } Q. And A S C the same?

A. Yes.

Q. Did you have a man named Hyatt?

A. Yes.

Q. What was his capacity?

A. He was the general foreman on the job.

* * * * *

Q. As to these alleged things that had to be bought, shortages?

A. Yes.

Q. You don't know, for example, that any shortage if any existed might not have been the result of theft

page 122 } from your job site, do you?

A. No. It is the same way I don't know whether they even left Nashville, for that matter.

Q. And by the same token you don't know that some of your people, or some of the sub-contractors on the job, might not have diverted some of those to others?

A. That is always possible on construction.

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page 137 }

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Q. The theory of a back-charge is to obtain compensation for something that wasn't delivered, isn't that right?

A. No, well—in effect if it is on material shortages that is right, or if it could be on labor or misinterpretation.

Q. You tacked 20 percent on everyone of these?

A. Yes, sir.

Q. 20 percent profit?

A. Yes.

page 138 }

* * * * *

Q. As a matter of fact, it is the custom of the industry when you claim a shortage or misfabrication, you let the fabricator know so he can come and take care of it himself?

A. The supplier, right.

Q. Fabricator?

A. I would say the supplier. If the bar joists would have been misfabricated, I am sure Danter would have gone to McCann first to get it erected, although they were not the fabricator of the joists.

W. H. Miller

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page 139 }

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Q. You did not give McCann Steel any notice of any deficiencies or any misfabrications until after the mention of mechanics lien had been filed and notice of it had been served on you, on Atlantic States?

A. To the best of my recollection that is correct.

* * * * *

Q. All of this business between you and Danter was on Danter's trying to get you to perform his contract for him, because he couldn't get his bond, and you never gave any of these suppliers, be they McCann, Wheeling, or American Longspans, any notice whatever that you as gen-
page 140 } eral contractor were not responsible, did you?

A. (Pause) To the best of my knowledge I did not.

Q. And you never inquired of any of them whether Danter had paid them, did you?

A. You mentioned that same thing when you started a minute ago, about a contract that Danter had.

I do not know of any contract that he had to build this center.

Q. How do you know he had underbid then $450,000.

A. Well, a lot of folks underbid and don't get a construction job.

Q. You told me he had a contract and just couldn't put up the bond that was part of the performance.

A. Is that part of the contract?

Q. You said it was.

A. Yes, I think it was.

Q. If it was part of the contract he must have had a contract, must he not have?

A. I would have thought the bond was part of the performance of it.

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page 148 }

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By Mr. Franklin:

Q. Mr. Miller, you have testified that you entered into an agreement with Danter on or about May 31, I think it was, in regard to this job.

page 149 } Now, did you enter into the agreement with Danter for providing the steel on this job before or after you signed the contract with Rosenfeld?

A. To furnish the steel afterwards.

Q. It was afterwards?

A. Right. It was probably the first or the middle of June, somewhere in there.

By The Commissioner:

Q. Was there any written agreement between your company and Danter?

A. At what time?

Q. Other than this indemnification agreement?

A. Yes, sir. But I don't have it here. I didn't bring all the records with me.

Q. What was the nature of that agreement?

A. It was an agreement that they were going to furnish complete plans and specifications and put $30,000.00 in escrow until we had time to fully estimate and price out the job, and in case the job ran over the $450,000.00 we were to assume the $30,000.00.

That was about the gist of it.

Q. What was your obligation under this agreement with Danter?

A. It was to enter into a contract for $450,-

page 150 } 000.00 with them.

Q. To your knowledge at that time what type of business was Danter in.

A. I thought that they were respectable engineering firm.

Q. But not a fabricating or steel supplier?

A. No, I really didn't know at the time.

Q. Just engineering as far as you were concerned?

A. Yes, sir.

* * * * *

page 151 } THURSTON FRANKLIN BURKHOLDER, a witness of lawful age, called on behalf of the defendant, first being duly sworn by the Commissioner, testified as follows:

DIRECT EXAMINATION

By Mr. Franklin:

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Q. Now, Mr. Burkholder, I show you here an invoice under the name of J. B. Kendall Company, charged to B & B Welding—who is that?

page 159 } A. That is my company.

Q. Can you identify this and explain what it is?

A. Yes, sir. This is bridging for the bar joists. Where the bridging was short. Just did not supply enough bridging.

Q. Did you purchase that material?

A. Yes, sir.

Q. Did you charge it to Atlantic States Construction Company?

A. Yes, sir.

Q. Used on that job. The material was not on the job?

A. I would say it wasn't on the job, it was this much short of what we needed.

Q. What was provided by the steel supplier then was short this much?

A. Yes.

Q. What is the amount of your charge on that?

A. My charge was $377.44.

Q. I show you another item under the name of J. B. Kendall, charged to B & B Welding.

Can you identify that?

A. Yes, sir. This was the same thing as the other one, the bridging.

page 160 } Q. Did you have to purchase that?

A. I had to purchase this. Now, this bridging, this particular bridging here, was not short. It was fabri-

cated wrong. In one section of the building had the longspan joists, that in turn takes X bridging. This bridging that was furnished was short. We in turn had to make new bridging.

Q. Was that the fault of fabrication or the way the building was built?

A. It was fabrication error.

Q. I show you here another invoice next to the last one from Adams Fabricating Steel Corporation in Washington, addressed to Frank Burkholder & Sons.

Can you indentify that?

A. Let me see—

Q. Before you do that, I will show you the next two. Both from Adams, both dated the same date, both in the same amount. Can you identify those?

A. Yes, sir. This was 200 sheets of inch and a half, 22 gauge roof decking. We had to pick it up, was that much short when we got to it.

We in turn had to pick this up with our truck, and we had to make two loads because we couldn't haul but 100 sheets at a time with our truck.

Therefore, it was sent out with two different page 161 } bills.

Q. Are those two pages there duplications? Do they represent the same material?

A. No, sir, they are two different bills entirely.

Q. Did you pay those two bills?

A. Yes, sir.

Q. Have you been paid for them by Atlantic?

A. Yes, sir.

Q. Have you been paid by Atlantic States Construction Company in full for the work that you did on this job?

A. Yes, sir.

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page 162 }

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CROSS EXAMINATION

By Mr. Willis:

Q. Where did this steel come from, that you erected?

A. Where did it come from?

Thurston Franklin Burkholder

Q. Yes.

A. I couldn't tell you, sir, I do not know.

Q. You don't know what brand or fabrication of steel it was that you put up?

A. It has been quite some time. The reason I do not I just have forgotten who the fabricator was.

Q. At the time you knew?

A. At the time I knew, yes, sir.

Q. When you are putting up steel it is marked on it who the fabricator is, is it not?

A. Yes, sir, because we work from the fabrica-
page 163 } tor's shop drawings.

Q. You do what?

A. Work from the fabricator's shop drawings.

Q. You did do this?

A. Yes, sir, always do it.

Q. And did in this particular case?

A. Yes, sir.

Q. Well, would you agree that the steel came from McCann Steel and from Wheeling Corrugating Company and from American Longspans?

A. I couldn't agree to that now, because I am not too sure, but if I could see a set of drawings I could say so.

Q. Well, here is a set right here (Indicating to witness). Is that the sort of thing you worked from?

A. This is the set. This is McCann Steel, and this is a set of erection drawings.

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page 166 }

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By The Commissioner:

Q. Do you know someone by the name of E.
page 167 } Henderson that was on the job?

A. Yes, sir.

Q. Who was he?

A. He is one of my crane operators.

Q. Employed by you?

A. Yes, sir.

* * * * *

page 168 } HARRY H. PAYNE, a witness of lawful age, called on behalf of the defendant, first being duly sworn by the Commissioner, testified as follows:

DIRECT EXAMINATION

By Mr. Franklin:

Q. Please state your name, age, and address?

A. Harry H. Payne. I am 30 years of age. I live in Greenville, South Carolina.

Q. What is your principal occupation?

A. Vice-president of Plowden & Roberts, Incorporated, Columbia, South Carolina.

Q. What is the business of Plowden & Roberts?

A. Structural steel designers and suppliers.

Q. Are you in the sense that has been used here today a fabricator of steel?

A. Yes, sir.

Q. Did you at the request of Atlantic States Construction Company make an estimate of the cost of providing the steel for the Montgomery Ward Store in Frdericksburg, Virginia?

A. We did.

Q. When did you make that estimate?

page 169 } A. It was in early July, I do not have the exact date, somewhere between the first and the thirteenth.

Q. Of what year?

A. 1966.

Q. Did you at the time you made this estimate know that the building had already been built?

A. No, we did not.

Q. Were you provided a set of plans? Let me ask you this: What did they give you to use to base your estimates on?

A. Mr. Miller said that he was sending us a set of plans on a Montgomery Ward Store and would like us to furnish him with a quotation.

Q. Did he send you the plans?

A. Yes, sir, he did.

Q. I hand you here, show you herewith a big role of plans. Can you identify these?

A. Yes, sir. That is the set we were furnished to estimate the job with.

Q. Have you had an opportunity to compare them generally with the plans submitted here today?

Harry H. Payne

A. Yes, sir, I have.

Q. How do they compare?

A. They compare with the corrected set of shop drawings in relation to size of the building. Now, the set

page 170 } of architectural drawings McCann Steel Company had did not have the provision that shows on there approved shop drawings.

Q. Have you satisfied yourself, however, these are the same basic plans on which McCann—

A. These are the same jobs exactly.

Q. To make this more plain, tell the Commissioner how you go about making an estimate once you receive these plans. What are the steps that you go through?

A. The first thing we do is lay out the plans and survey them carefully so we understand the scope of the project first, and then we start through taking off all the material that would be included in the steel fabricator's contract, listing them on our estimate sheets.

Q. Did you make up those sheets in connection with this job?

A. Yes, sir, we did.

Q. Do you have those with you here today?

A. I do, sir.

Q. Based on those worksheets and on these plans, what price did you give to Atlantic States Construction Company for providing all of the steel necessary to go in this building?

A. Based on the set of drawings that we were furnished, which were the final plans, we quoted a total

page 171 } price of $41,808.00 Fob plant with truck freight allowed to the job site.

Q. At the time you made that written bid did you know that this building had already been constructed?

A. No, we did not.

Q. Did you write a letter to Atlantic States Construction Company giving them this bid?

A. Yes, sir. Our proposal had a cover letter attached.

Q. Do you have that with you?

A. Yes, I do.

Q. Do you have an office copy of it with you?

A. There is a carbon copy of the letter (Indicating). I believe you have a photocopy of it.

Q. I hand you herewith a photocopy of a letter dated July 13, 1966, with one letter-size sheet and two legal-size

sheets. Can you identify those? Are they copies of the proposal that you have just testified to?

A. Yes, sir, they are photocopies.

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page 172 }

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Q. How long have you been in the construction business?

A. I have been in the construction business

page 173 } since I got out of high school in 1954.

Q. How long have you been engaged in estimating?

A. I have been in steel estimating since 1960.

Q. Mr. Payne, you testified that you made this estimate in July, I believe you said, 1966, right?

A. Right.

Q. Would there have been any difference in your estimate between 1966 and 1965?

A. No, sir. No substantial difference.

Q. Was that to your knowledge any decrease in labor and materials from the spring of 1965 to the summer of 1966 when you made your estimate?

A. No, sir, I do not know of any substantial increase or decrease in the prices at that time.

Q. Had your company furnished any materials steel fabricating materials in Virginia in the last few years?

A. Yes, we have.

Q. In what localities?

A. We furnished the American Tobacco Company at Bermuda Hundred. National Analine Warehouse also at Bermuda Hundred. Pembroke Shopping Center, Virginia Beach, Virginia.

Little Creek Office Plaza, at Norfolk.

page 174 } Q. Approximately when were those jobs, during what years?

A. Those are the four most recent jobs. There is an additional job, the General Electric Warehouse in Richmond, which is our latest job there, We only completed that one this past fall.

Q. During—

A. These were strung out for 18 months prior to that.

Harry H. Payne

Q. Mr. Payne, from your experience as an estimator and based on these plans that you have testified to, do you think the figures which you have quoted here today is a reasonable value of the steel that was necessary for the construction of that building?

A. Although I have found one or two minor discrepancies in our estimate, I would and will now take this similar job for this figure.

Q. In going through your list, did you find any major discrepancies between the plans and the list of materials which McCann Steel Company claims to have provided?

A. Yes, I did.

Q. In what particular items?

A. Primarily in the exterior columns, although Schedule 40 Pipe was specified for all the exterior columns, shop drawings call for Schedule 80, which are extra heavy

page 175 } duty pipe.

Q. Was there any need for the extra heavy duty pipe?

A. No, not when the plans called for Schedule 40.

Q. Did the steel provided cost more than what was called for in the plans?

A. Yes, sir, they would cost more.

Q. Are any other major discrepancies in there that you know of?

A. Well, no major discrepancies. I noticed that their listing and mine, we go about it a little differently. But we arrived at most generally the same weights.

Q. Did you say the same weights?

A. Weights, and just about equal quantities in the various categories.

Some were higher, some were lower, but primarily in this canopy framing and exterior columns I noticed that their weights were running heavier than what the plans called for.

Mr. Franklin: No further questions.

CROSS EXAMINATION

By Mr. Willis:

page 176 } Q. Mr. Payne, does your company do a great deal of work with Atlantic States?

A. Yes, sir, we have had jobs in the past.

Q. Would you describe Atlantic States as a valued customer of yours?

A. We consider all of our customers valued.

Q. You describe Atlantic States as a valued customer?

A. Yes, I would.

Q. Were you paid for making this estimate?

A. No, sir, I was not.

Q. Have you been paid since for making it?

A. No, sir.

Q. Paid for coming up here to testify?

A. No, sir.

Q. It is all a matter of gratuity with you?

A. I have been asked to come up here, and my expenses are being paid, and that is all. I am receiving nothing personal.

They made no promises of anything else. Just paying my expenses.

Q. You don't expect to be paid for your services as an appraiser in coming up here and testifying as an expert witness?

A. No, sir, I don't.

page 177 } Q. You write it up to business good will?

A. I am afraid there is quite a bit we have to write off as business good will. Just like the minor discrepancies in my estimate that I said, I believe, while I found them we would take the job. That is just a part of it.

Q. You work as an estimator, and is it not true that it is the judgment of the architect or the engineer that governs what goes into a building and how those materials are used?

A. Yes, sir.

Q. And in all cases you as the estimator, your company as supplier, will defer to those standards and to those judgments?

A. Yes, sir.

Q. You said you came up with approximately the same weights as McCann.

Didn't you come up with about 40 tons of structural steel?

A. That is right.

Q. As compared with McCann's 48?

A. We have separated certain items which we don't quote the weight on. What we quote is an erection tonnage, so that the contractor can take the 40 tons, multiply it times his erection unit price and have his erection figure.

page 178 } That is a thing I noticed about the McCann's

Harry H. Payne

figures, is that even the weight of the bolts is figured into the estimate. Which is a distorted picture.

Anything that is imbedded or not required to be set by an erector, we would not include in structural steel.

Q. Let's look at your final estimate, consisting of columns, beams, anchor bolts, supplies, plates, beam and plate lintels, canopy framing, mezzanine framing, ceiling and joists beams, tubular frames, approximately 40 tons.

A. Right.

Q. You don't have your bolts set up differently.

A. But they are listed to show that we will furnish the accessories required to put it together, but they are not added into the tonnage so that the erector uses a distorted figure to arrive at—

Q. They are not set forth separate from the tonnage, either, are they?

A. No, sir. No, sir, they are listed with the entire structural steel.

Q. You have 610 squares of deck, don't you,

page 179 } steel deck?

A. Right.

Q. Whereas McCann had 612?

A. Right.

Q. A small difference, but yet there is a difference.

A. Very slight difference. That can be accounted for by some fabricators quote the net coverage required, others will quote the total amount of deck.

Q. What were you quoting?

A. Net coverage required.

Q. Were you going to sell them 610?

A. Going to sell them whatever it required to cover that Montgomery Ward Store, and if it worked out to be 605, we would be glad, if it was 615, we were just going to do the job.

Q. Is it not true, Mr. Payne, that prices for fluctuate considerably from time to time?

A. Prices of steel fluctuate, they don't fluctuate considerably.

Q. It is very difficult for you to sit here today and say what you would be willing to bid on a specific item say a month from now?

A. No, sir. I wouldn't say a month from now. But I said I would have then and I will now do a similar job for the figure I have quoted.

page 180 } Q. Is it not true that where jobs are bid com-

petitively that it is not only often but usually a wide spread in the bids from different potential suppliers?

A. I imagine this is true.

Q. And would you say that the difference between $41,-808.00 and $49,000.00 is a spread that is remarkable when compared with the spread of bidding that is very often the same, when several companies are bidding?

A. I would say it is a remarkable spread.

Q. You think it is more than an ordinary spread?

A. Definitely do.

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Q. Did you supply any plans to the architect or engineers?

A. No, sir, we did not. Just the cover letter and the proposal.

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J. B. WILSON, having been previously sworn and testified, now being recalled in rebuttal, testified further as follows:

DIRECT EXAMINATION

By Mr. Willis:

Q. Mr. Wilson, have you compared the proposal submitted by Mr. Payne with the proposal which you submitted?

A. Rather hurriedly, yes.

Q. Just in your hurried comparison, were you able to come up with any comments concerning the disparity

page 184 } of prices?

A. Well, roof deck and bar joists comprise a great portion of the job, and are virtually the same.

Of course, there is a difference in the structural steel weight and estimated weights, but—

Q. How much weight did you provide for?

J. B. Wilson

A. Our shop bills for materials that were cut weigh 46 tons, I think, within a few pounds. Little over 46 tons against his 40 tons.

Q. All right. Anything else that you can point out about that?

A. There is one thing I wish to bring out. There has been mention made of these canopy columns several times, as if it were something wrong with the weights of them.

I think the columns over on the building speak for themselves. They are square tube columns, not pipe columns.

Q. Why are they schedule 80 pipe columns instead of schedule 40?

A. They are not, they are tube, square columns.

Q. Is that called for by your shop drawings which Danter approved?

A. It is called for by our latest shop drawings by the shop details, not the lay out of this roof framing plan.

page 185 } Q. Which you prepared?

A. I beg your pardon?

Q. Which you prepared?

A. Yes.

Q. With reference to the alleged shortages in the steel roof deck: Did you have any conversation with Mr. McDaniels?

A. Yes. When they had this accident in the building and destroyed part of the steel, I do not know what it did, but Mr. McDaniels called me wanting some joists and some deck in a hurry, and I made arrangements to get him some joists and deck, that he thought were damaged badly.

And then never heard any more from him. We didn't furnish anything for the damaged portion of the building, but shortly thereafter he called me and was talking about the deck, being too much deck to start with, and then he got around to a shortage, and finally I got him to stay still long enough and got his hauling tickets, signed tickets, and the list he had made when he broke the bundles of deck, we checked each sheet over the counter of each of the sheets in each bundle, and it tallied exactly what is required in this building.

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page 186 }

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Q. Mr. Wilson, in competitive bidding among fabricators, can you give the Commissioner any idea of what the normal range is.

A. I can cite you an example. I bid a job two days ago before I came up here, to show you how bids range on structural steel.

Q. Go ahead, cite that for us.

A. Structural steel bids that were received by the owners separately, had nine bidders. Our bid was $58,800.00 and some, the low bid was $58,000.00. Other seven bids ranged up to $79,000.00, and all were reliable, competitive biddings.

Q. In other words, the range was from $58,000 to $79,000?

A. Right.

Q. Is that unusual?

A. No, sir.

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A Copy—Teste:

Howard G. Turner, Clerk.

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