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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

Record No. 740615

AMERICAN INDUSTRIAL CORPORATION,
Appellant,

v.

FIRST & MERCHANTS NATIONAL BANK,
Appellee.

APPENDIX

Alfred J. Owings, Esq.
Greer P. Jackson, Jr., Esq.
Spinella, Spinella & Owings
5421 Patterson Avenue
Richmond, Virginia 23226

Counsel for Appellant

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MOTION FOR JUDGMENT

TO THE HONORABLE JUDGES OF THE AFORESAID COURT:

Plaintiff respectfully moves the Court for judgment against the defendants, jointly and severally, in the amount of SIXTEEN THOUSAND ONE HUNDRED NINETY-NINE DOLLARS AND NINETY CENTS ($16,199.90) together with interest by virtue of the following:

(1) That the defendant, Industrial Automation, Inc., contracted to purchase certain equipment and accessories, briefly described as a "general purpose hoist" from the plaintiff for the sum of Fifteen Thousand Three Hundred Fifty Dollars ($15,350.00), and by its written acceptance of said contract dated May 1, 1972, agreed to pay ninety percent (90%) of the aforesaid contract price, or Thirteen Thousand Eight Hundred Fifteen Dollars ($13,815.00) within thirty (30) days of the date of the delivery of the equipment.

(2) That said equipment was delivered pursuant to the terms of the contract and that the plaintiff accordingly invoiced the defendant, Industrial Automation, Inc., on December 6, 1972, for the sum of Thirteen Thousand Eight Hundred Fifteen Dollars ($13,815.00).

(3) That the defendant, Industrial Automation, Inc., did not pay the ninety percent (90%) invoiced amount within thirty (30) days, as agreed, and that the plaintiff notified the defendant, Industrial Automation, Inc., that a monthly service charge of one percent (1%) would be incurred on the outstanding balance, which charge totals Eight Hundred Forty-Nine Dollars and Ninety Cents ($849.90) through June 6, 1973.

(4) That the equipment supplied by the plaintiff is ultimately for use on a contract between the United States Coast Guard and the defendant, Industrial Automation, Inc.; that the United States Coast Guard has recently accepted said equipment; and that pursuant to the terms of the contract between the plaintiff and the defendant, Industrial Automation, Inc., the remaining contract balance of One Thousand Five Hundred Thirty-Five Dollars ($1,535.00), or ten percent (10%), is now due and payable by the defendant, Industrial Automation, Inc., to the plaintiff.

(5) That one of the material terms of the contractual agreement between the plaintiff and the

defendant, Industrial Automation, Inc., was that the defendant, First & Merchants National Bank, would furnish the plaintiff with a letter of credit, or commitment, guaranteeing payment to the plaintiff under the terms of the contract aforementioned.

(6) That the defendant, First & Merchants National Bank, did furnish such a commitment to the plaintiff, as requested, and that the plaintiff, relying on this commitment, proceeded to have said "general purpose hoist" specially constructed for the particular use intended by this contract.

(7) That the plaintiff has called upon the defendant, First & Merchants National Bank, to honor its commitment aforesaid, which it has refused to do.

WHEREFORE, plaintiff demands judgment against the defendants, jointly and severally, for the sum of SIXTEEN THOUSAND ONE HUNDRED NINETY-NINE DOLLARS AND NINETY CENTS ($16,199.90) together with the applicable service charge through date of judgment and legal interest thereafter until paid and its costs in this behalf expended.

AMERICAN INDUSTRIAL CORPORATION

By: /s/ Alfred J. Owings
Of Counsel

DATE FILED: June 14, 1973

GROUNDS OF DEFENSE OF
FIRST & MERCHANTS NATIONAL BANK

The defendant, First & Merchants National Bank, states for its grounds of defense to plaintiff's Motion for Judgment, the following:

1. It does not have sufficient knowledge to either admit or deny the allegations contained in Paragraphs 1, 2, 3, 4 and 5 of the Motion for Judgment.

2. It denies the allegations contained in Paragraph 6 of the Motion for Judgment insofar as they state that First & Merchants National Bank furnished any commitment or letter of credit to plaintiff guaranteeing payment to plaintiff under the terms of the alleged contract between plaintiff and defendant Industrial Automation, Inc. As to any other allegations contained in Paragraph 6 of the Motion for Judgment, First & Merchants National Bank is without sufficient knowledge to either admit or deny them.

3. As to the allegations contained in Paragraph 7 of the Motion for Judgment, it admits that plaintiff has called upon it to honor an alleged commitment to plaintiff, and that it has refused to make any payment to plaintiff.

WHEREFORE, First & Merchants National Bank prays that the Motion for Judgment against it be dismissed.

FIRST & MERCHANTS NATIONAL BANK

By /s/ Bradfute W. Davenport, Jr.
Of Counsel

DATE FILED: July 5, 1973

INTERROGATORIES TO PLAINTIFF
AMERICAN INDUSTRIAL CORPORATION

TO: Alfred J. Owings, Esquire
Spinella, Spinella & Owings
5421 Patterson Avenue
P. O. Box 8596
Richmond, Virginia 23226

Defendant First & Merchants National Bank requests that plaintiff American Industrial Corporation answer the following interrogatories under oath in accordance with Rule 4:8 of the Supreme Court of Virginia.

INTERROGATORY NO. 1

State when and by whom the letter of credit, or commitment, guaranteeing payment to the plaintiff, as alleged in Paragraphs 5 and 6 of the Motion for Judgment, was furnished. State fully and in detail the terms and substance of such letter of credit or commitment, whether it was evidenced by a writing, and, if so, where such writing is presently located and the custodian thereof.

INTERROGATORY NO. 2

State the date of each instance when plaintiff has called upon First & Merchants National Bank to honor its commitment, as alleged in Paragraph 7 of the Motion for Judgment. Identify the representative(s) of First & Merchants National Bank upon whom plaintiff called to so honor its commitment. State fully and in detail the terms and substance of each such call, and whether such calls were evidenced by any writings.

FIRST & MERCHANTS NATIONAL BANK

By /s/ Bradfute W. Davenport, Jr.
By Counsel

DATE FILED: July 19, 1973

ANSWERS TO INTERROGATORIES

This day comes the plaintiff, by counsel, and as its Answers to the Interrogatories propounded to it by the defendant, First & Merchants National Bank, answers as follows:

INTERROGATORY NO. 1

By letter of May 1, 1972, David R. Holton of First and Merchants National Bank confirmed its commitment to

lend the defendant, Industrial Automation, Inc., a sum of money not to exceed Fifteen Thousand Three Hundred Fifty Dollars ($15,350.00). By correspondence dated May 17, 1972, David R. Holton of First and Merchants National Bank extended its commitment to lend Industrial Automation, Inc., the aforementioned sum of money through October 31, 1972. By correspondence dated May 19, 1972, David R. Holton of First and Merchants National Bank confirmed its agreement to make "any funds" advanced to Industrial Automation, Inc., payable to the plaintiff in the form of a cashier's check.

Said correspondence is currently in the possession of Alfred J. Owings, attorney for the plaintiff.

INTERROGATORY NO. 2

Telephone call from plaintiff during week of May 17, 1973, to Richard Worthington of First and Merchants National Bank requesting payment followed by letter to him of same date. Correspondence to Coleman McGehee of May 30, 1973. Correspondence dated June 13, 1973, to Randolph W. McElroy.

AMERICAN INDUSTRIAL CORPORATION

By: /s/ Alfred J. Owings
Counsel

DATE FILED: August 10, 1973

I N T E R R O G A T O R I E S

To: Bradfute W. Davenport, Jr., Esquire
Mays, Valentine, Davenport & Moore
1200 Ross Building
P. O. Box 1122
Richmond, Virginia 23208

Plaintiff, American Industrial Corporation, requests that defendant, First & Merchants National Bank, answer the following Interrogatories under oath, in accordance with Rule 4:8 of the Supreme Court of Virginia.

INSTRUCTIONS

A -- Where the identification of a person is required, such indentification should be sufficient to notice the deposition of such person and to serve such person with process to require his attendance at a place of examination and must include:

(1) Name;

(2) Present or last known home address;

(3) Present or last known business address;

(4) Title of occupation;

(5) Employer.

B -- The term "document" means any written, recorded or graphic material, howsoever produced or reproduced, containing any discussion, notation or

conclusion concerning the subject matter in question.

C -- Where the identification of a document is required, such identification shall be sufficient for characterization of such document in a subpoena duces tecum and must include:

(1) The date of the document;

(2) The name, address and position of the author;

(3) The name, address and position of the recipient;

(4) The names, addresses and positions of all persons who received copies or persons to whom copies were circulated or listed as being circulated;

(5) A general description of the subject matter and content (in lieu of such description, a copy may be attached);

(6) The name and address of the present custodian(s) of a copy or copies;

(7) A description of the circumstances under which it was sent or received;

(8) The location from which it was sent and where it was received.

D -- For each document which plaintiff will contend is privileged or otherwise excludable from discovery, the basis for such claim or privilege or other grounds for exclusion should be stated.

E -- The term "person" as used herein shall mean person, firm or corporation.

F -- As used herein the singular of any word or phrase includes the plural.

INTERROGATORIES

(1) State whether or not Industrial Automation, Inc., ever secured loans or credit from First & Merchants National Bank.

(2) If so, state fully and in detail:

(a) The exact dates;

(b) The exact terms;

(c) Name of individual who applied for such loans or credit;

(d) Name of individual who approved such loans or credit;

(e) Total indebtedness of Industrial Automation, Inc., to First & Merchants National Bank as of April 15, 1972;

(f) Total indebtedness to First & Merchants National Bank as of October 7, 1972;

(g) Total indebtedness to First & Merchants National Bank as of May 17, 1973;

(h) Total indebtedness to First & Merchants National Bank as of September 20, 1973.

(3) State whether or not First & Merchants National Bank ever received any assignment of funds from

Industrial Automation, Inc.

(4) If so, state fully and in detail:

(a) Dates of such assignments;

(b) Exact terms of the substance of such assignments;

(c) Reasons therefor;

(d) Name of individual(s) who made the assignments on behalf of Industrial Automation, Inc.;

(e) Name of individual(s) who received such assignments on behalf of First & Merchants National Bank;

(f) Total amount realized to date by virtue of such assignments to First & Merchants National Bank.

(5) Identify and produce any and all documents, correspondence or communication between Industrial Automation, Inc., and the First & Merchants National Bank relating in anyway to a letter of credit, commitment or guarantee to American Industrial Corporation for the purchase of a hoist by Industrial Automation, Inc., from American Industrial Corporation.

(6) State whether or not Mr. David R. Holton was ever employed by the defendant, First & Merchants National Bank.

(7) If so, state:

(a) Exact date of employment;

(b) Capacity in which hired;

(c) Nature and scope of his employment in May of 1972;

(d) Duties assigned in course of employment in May of 1972;

(e) Current nature of his employment if still employed;

(f) Appropriate addresses as indicated in the instructions.

(8) If different from number (6) above, state whether Mr. David R. Holton was an officer of subject corporation.

(9) If so, state:

(a) Exact dates he was an officer;

(b) Title of office;

(c) Duties involved and nature of office.

(10) Has First & Merchants National Bank ever refused to ratify or affirm any acts of Mr. David R. Holton purportedly made in the performance of his duties?

(11) If so, state:

(a) Time and date;

(b) Time and date he became aware of said act(s);

(c) Nature thereof;

(d) Consequences thereof;

(e) Reasons for refusal to ratify or affirm;

(f) Reasons given by Mr. Holton for performance.

(12) State whether the defendant, First & Merchants National Bank, denies that Mr. David R. Holton was authorized to guarantee payment of plaintiff's contract with Industrial Automation, Inc.; and, if so, state why it is denied that he was so authorized.

(13) State the basis of the statement made in paragraph two of defendant's Grounds of Defense that "It denies the allegations contained in Paragraph 6 of the Motion for Judgment insofar as they state that First & Merchants National Bank furnished any commitment or letter of credit to plaintiff guaranteeing payment to plaintiff . . .".

(14) Separately and for each of the foregoing Interrogatories, identify:

(a) Each person who in any way contributed or assisted in the preparation of the answers to these interrogatories;

(b) The contribution or assistance of each person identified in the answer to subparagraph (a) above;

(c) Each person having direct knowledge of a portion of any portion of the facts on which the answer to the interrogatories was based;

(d) Which fact or facts the person identified in the answer to subparagraph (c) above had knowledge;

(e) Each report or other document on which the answers to a particular interrogatory is based.

AMERICAN INDUSTRIAL CORPORATION

By: /s/ Alfred J. Owings
Of Counsel

DATE FILED: November 9, 1973

ANSWERS OF FIRST & MERCHANTS NATIONAL BANK TO INTERROGATORIES PROPOUNDED BY AMERICAN INDUSTRIAL CORPORATION

TO: Alfred J. Owings
Spinella, Spinella & Owings
5421 Patterson Avenue
P. O. Box 8596
Richmond, Virginia 23226
Counsel for Plaintiff

Except for those interrogatories objected to, First & Merchants National Bank (the Bank) states the following for its Answers to Interrogatories propounded to it by American Industrial Corporation (AIC). The numbers of the Answers correspond to the numbers of the Interrogatories.

1. Yes.

2. (a) and (b) Loans were advanced to IA on the following dates, in the following amounts:

Date	Amount
June 13, 1972	$10,000
July 27, 1972	5,000
September 14, 1972	10,000
October 17, 1972	10,000
November 3, 1972	10,000
November 27, 1972	17,500
January 4, 1973	12,500
February 6, 1973	7,500
May 10, 1973	11,000
June 6, 1973	4,400

Each loan was made on a demand basis and was evidenced by a standard First & Merchants National Bank demand note, a copy of which is attached hereto for informational purposes.

In addition to the above loans, the Bank also stated its intention to extend additional credit to Industrial Automation exclusively for the purchase from AIC of a hoist crane. The terms of this proposed extension of credit (hereinafter referred to as "proposed credit") are

reflected in the attached letters of May 1, 1973, May 17, 1973, and May 19, 1973 from David R. Holton to AIC.

(c) The loan advance of June 13, 1972, was applied for by Mr. Joe Hardin and Mr. Husey I. Martin. All other loans and the proposed credit were applied for by Mr. Husey I. Martin.

(d) The loans dated June 13, 1972, July 27, 1972, September 14, 1972, and October 17, 1972, and the proposed credit were all approved by Mr. David R. Holton. The loans dated November 3, 1972, November 27, 1972, January 4, 1973, February 6, 1973, May 10, 1973, and June 6, 1973, were approved by Mr. Richard B. Worthington.

(e) None.

(f) $20,000.00.

(g) $40,037.42.

(h) $41,937.42.

5. There were and are no such documents, correspondence, or other written communications.

6. Yes.

7. (a) November 17, 1969, to present.

(b) Management trainee.

(c) Commercial lending officer.

(d) Making commercial loans.

(e) Federal funds trader.

(f) Business address: First & Merchants National Bank, 827 East Main Street, Richmond, Virginia. Home Address: 104 West Franklin Street, Richmond, Virginia.

8. No.

9. Not applicable.

10. No.

11. Not applicable.

12. First & Merchants National Bank denies that David R. Holton was authorized to guarantee payment of plaintiff's contract with Industrial Automation, Inc., because national banks are prohibited by law from guaranteeing the debts of a third person.

13. The basis for the statement referred to is the following:

(a) That the only commitment ever made by First & Merchants National Bank relating to the pending lawsuit was an agreement with Industrial Automation, Inc., to lend Industrial Automation, Inc., on demand, an amount up to but not to exceed $15,350. to be used

exclusively for the purchase of a hoist from American Industrial Corporation and to deliver any funds advanced to Industrial Automation pursuant to said agreement in the form of a cashier's check made payable to American Industrial Corporation; that said agreement, by its express terms, expired on October 31, 1972; that said hoist was not delivered and that no demand for such monies for such purpose was ever made on First & Merchants National Bank by Industrial Automation, Inc., prior to October 31, 1972, and therefore that said agreement expired on October 31, 1972;

(b) that the only commitment ever made by First & Merchants National Bank to American Industrial Corporation was to deliver the proceeds of any loan to Industrial Automation, Inc. for the purposes stated in (a) above to Industrial Automation, Inc., in the form of a cashier's check payable to American Industrial Corporation;

(c) that, as a matter of law, no letter of credit was ever furnished to American Industrial Corporation by First & Merchants National Bank; and

(d) that, as a matter of law, no guarantee of payment was ever made to American Industrial Corporation

by First & Merchants National Bank.

14. The persons who contributed or assisted in the preparation of Answers to Interrogatories 1, 2, 5, 6, 7, 8, 9, 10, and 11 are David R. Holton and R. B. Worthington, both of whom have knowledge of the facts stated therein. The Answers to Interrogatories 12 and 13 were prepared with the assistance of counsel.

FIRST & MERCHANTS NATIONAL BANK

By /s/ F. Claiborne Johnston, Jr.
Of Counsel

DATE FILED: December 11, 1973

Date _____, 19____ $ _____

_____ after date, for value rec

the undersigned, jointly and severally, promise to pay to the order of FIRST & MERCHANTS NATIONAL BANK at any of its offices in the State of Vi

_____ D

As collateral security for the payment of this note and any other liabilities, including future advances, contingent or otherwise (including overdrafts), makers, guarantors, endorsers and any other parties to this note (hereinafter collectively called "parties"), and each of them, to the holder of this note, no or to become due or that may be hereafter contracted, the following collateral has been deposited with and is hereby pledged to the holder of this note:

(1) _____

☐ Collateral Registered in Name of Maker(s) ☐ Collateral Registered in Name of _____

(2) All collateral now or hereafter in the possession of Bank and/or referred to in any other security agreements, to which the maker(s) and Bank are partie

(3) Any other collateral now or hereafter pledged, hypothecated, mortgaged with or to Bank, or for which Bank is granted a security interest in, for this other indebtedness of the maker(s)

together with all rights to which the owner of the collateral is now or may hereafter become entitled by virtue of owning such collateral, including, but not ed to, all cash dividends, stock dividends, or other distributions, and all rights to subscribe for securities incident to, declared, or granted in connection with collateral, all of which will be delivered to the Bank with full authority to sell, transfer, or rehypothecate.

The holder shall have, but shall not be limited to, the following rights, each of which may be exercised at any time: to pledge or transfer this note and th lateral, and any pledgee or transferee shall have all the rights of the holder and the holder shall be thereafter relieved from any liability with respect to an lateral so pledged or transferred; to transfer the whole or any part of the collateral into the name of itself or its nominee; to vote the collateral; to noti obligors on any collateral before or after default hereunder to make payment to the holder of any amounts due thereon; and on payments of all amounts du under, to return to the undersigned an equal amount of collateral instead of the collateral deposited.

The holder shall exercise reasonable care in the custody and preservation of the collateral, and it shall be deemed to have exercised reasonable care if it such action as the makers shall reasonably request in writing. No failure to do any act not requested by the makers shall be deemed a failure to exercise r eble care, and no failure to comply with any request of the makers shall of itself be deemed a failure to exercise reasonable care. The makers agree to t necessary steps to preserve rights against prior parties to instruments or chattel paper constituting the collateral.

In the event there shall be a decline in the market value of the collateral or if the holder shall in good faith deem itself insecure, the makers agree upon de to make such reduction of principal or deposit such additional collateral as shall be satisfactory to the holder.

Upon the failure of the makers so to reduce the principal or deposit such additional collateral or upon the happening of any of the following events, the h at its option, may declare this note (and any other obligations of any of the parties, owed to the holder) due and payable: default by any party under th or under any other obligation owed to the holder; death, dissolution, or insolvency of any party; application for the appointment of a receiver for any filing of a petition in bankruptcy by or against any party; failure on the part of the makers to do all things necessary to preserve and maintain the value a lectibility of the collateral including, but not limited to, the payment of taxes and premiums on policies of insurance on the due date without benefit of the period; or determination by the holder that a material adverse change in the financial condition of any party has occurred since the date of this note.

Upon default or at any time thereafter, the holder shall have all the rights and remedies of a secured party under the Uniform Commercial Code, includi rights to deduct all expenses and attorney's fees incurred in collecting any liability of any party to this note. All rights and remedies, including those provi this note and in any applicable security agreement, shall be cumulative. Upon default the holder may sell, lease or otherwise dispose of all or any part of th lateral upon any exchange, or at public or private sale, at any time or times and without advertisement or demand upon or notice to any party, all of w waived, except such notice as by statute cannot be waived. Any notice to the makers when placed in the mail addressed to, or left upon the premises of the m at the address specified below, or at such other address as may from time to time be shown on the holder's records, at least five days prior to such action constitute reasonable notice. Upon any default the holder also shall have the right, immediately and without further action by it, to set off against this not all other liabilities of any party owed to the holder, all money owed by the holder in any capacity to any party, whether or not due; and the holder shall be d to have exercised such right of set-off and to have made a charge against any such money immediately upon the occurrence of a default hereunder even t such charge is subsequently made or entered on the books of the holder. All parties agree to remain liable to the holder for any deficiency. Any collatera any surplus after sale, may be returned to any of the parties, but, if after sale of the collateral, any obligation or liability of any party to the holder is conti or not due, the holder may retain such proceeds as additional security for such obligation or liability.

The holder may continue to hold any collateral after the payment of this note if at the time of payment and discharge hereof any of the parties to thi shall be then directly or contingently liable to the holder, and the holder may thereafter exercise all rights with respect to such collateral granted herei though this note shall have been surrendered at the payment date.

After maturity, this note shall bear interest at the maximum contract rate permitted by law, or at the rate provided for herein, whichever shall be g

All parties hereby: waive presentment, demand, protest and notice of dishonor, and agree that extension or extensions of the time of payment of this not be made before, at, or after maturity, and for periods in excess of the original term of this note by agreement with any one or more of the parties without to and without releasing the liability of any other party to this note; waive the benefit of all homestead and similar exemptions as to this debt and any right they may have to require the holder to proceed against any person or against any collateral; agree to pay all expenses incurred in collecting this note, inc twenty-five per cent attorney's fees, if after default this note be placed in the hands of an attorney for collection, or if the holder finds it desirable to secu services or advice of an attorney with regard to collection; and consent that any or all of the collateral may be exchanged, surrendered, released, compro and that the terms of this note may be extended or compromised at any time without notice to the parties.

Any failure by the holder to exercise any right hereunder shall not be construed as a waiver of the right to exercise the same or any other rights at an

Witness the following signatures and seals.

_____ _____ (S

(Social Security or Tax I.D. Number)

Due _____ _____ (S

Address _____

08-0016 Rev 10/72

PLEASE PRINT

FOR BANK USE ONLY

Name _____ / Note Number _____ FRB Code _____

Officer's Initials, _____ Secured _____ Social Security or Tax I.D. Number

Responsibility Code _____ Unsecured _____ Region / Branch _____ Minimum _____ % Maximum _____

Interest Rate _____ % Partially Secured _____ Major Note Type _____ Minor Note Type _____

_____ 360/365(1) _____ 365/365(

Int. Base

_____ 360/360(2) _____ 365/360(

Grade

Tied To Prime? _____ No _____ Yes — _____ % Factor Over Prime

Draft: _____ Account Number _____ DDA _____ Saving _____ Tru

Discounted: Days ____, $ _____

Maximum Renewals Allowed _____

Investigation Fees $ _____

Repayment: Amount (Bill Codes 2, 3, 4) $ _____

Credit Life ____ Yes Regulation U Note _____ Yes

Schedule (Bill Code/Day Payment Due)

Premium $ _____ Renewal _____

Billing Codes

0-No Bill
1-Int. Only
2-Fixed Prin.
3-Fixed Payment Prin. & Int.
4-Fixed Prin. Plus Int.
9-Total Payoff

Jan.	Feb.	Mar.	Apr.	May	Jun.

Jul.	Aug.	Sep.	Oct.	Nov.	Dec.

MAJOR NOTE TYPE		MINOR NOTE TYPE	
1 Demand	5 Farm Home	0 Business	4 Brokers
2 Discount	6 Municipal	1 Personal	5 Employee
4 Time/Term	7 Money MKT	2 Car Leasing	6 Directors
		3 Construction	7 Foreign

May 1, 1972

American Industrial Corporation
P.O. Box 4267
Virginia Beach, Virginia 23454

Dear Sirs:

This letter will serve to confirm our agreement to lend Industrial Automation, Inc., P.O. Box 7586, Richmond, Virginia, an amount up to but not to exceed $15,350. The proceeds are to be used exclusively for the purchase of the hoist being sold by you to Industrial Automation, Inc. This commitment will expire on July 31, 1972.

Yours truly,

David R. Holton

DRH/tg

May 17, 1972

Mr. E. L. Fall, Jr.
American Industrial Corporation
P.O. Box 4267
Virginia Beach, Virginia 23454

Dear Mr. Fall:

Please refer to my letter of May 1. This letter will serve to extend our commitment confirmed in that letter through October 31, 1972.

I hope this will settle the matter between you and Industrial Automation, Inc.

Yours truly,

David R. Holton

DRH/ja

May 19, 1973

Mr. E. L. Fall
American Industrial Corporation
P.O. Box 4267
Virginia Beach, Virginia 23454

Dear Mr. Fall:

To confirm our agreement over the telephone yesterday, any funds advanced to Industrial Automation, Inc. will be in the form of a Cashier's Check payable to your firm. I hope this will suffice for your credit requirements.

Yours truly,

David R. Holton

DRH/ja

QUOTATION & CONTRACT OF SALE — SIGN AND RETURN ONE COPY

AMERICAN INDUSTRIAL CORPORATION

Systems and Machinery

VIRGINIA BEACH, VA. 23454 • P. O. BOX 4267 • 703/425-1818
Free incoming Virginia WATS 1-800-582-6850
RICHMOND, VA. 23225 • P. O. BOX 9035 • WATS 1-800-582-6850
ROANOKE, VA. 24019 • P. O. BOX 7456 • WATS 1-800-582-6850
RALEIGH, N. C. 27609 • P. O. BOX 18007 • 919/828-8682
CHARLOTTE, N. C. 28208 • 9019 Singing Pine Road • 704/394-1539

BUYER: Industrial Automation
P. O. Box 7586
Richmond, Virginia 23231

Attn: Mr. Hugh Martin

DATE: April 18, 1972
TERMS: See below.
FOB POINT: Factory
ESTIMATED SHIPMENT: 3-4 months after print approval.
ESTIMATED WEIGHT:
BUYER'S NUMBER:

The Seller proposes to furnish to the Buyer the following subject to General Terms and Conditions on the reverse side.

ONE General Purpose Hoist as described in U.S. Coast Guard Specification No. 6943, Paragraph 3.1.(1) and (2) on Pages 3-2, 3-3 and 3-4 of the Specifications complete with all accessories including controls and cable reels.

PRICE	$15,000.00
FREIGHT	350.00
TOTAL	$15,350.00

Structural steel, including the 6 x 16.4 pound beams, are not included. Freight is to an East Coast port, but does not include transportation from the port to the light station. Qualified service personnel are available at $150 per day plus travel and living expenses. This hoist is like two other units which we have furnished and were acceptable to the Coast Guard on two other light stations.

American Industrial Corporation will accept the purchase order from Industrial Automation for the total price shown above under the following terms:

TERMS: Industrial Automation will have their bank send a letter of credit with the order. It is understood that this letter will be a guarantee by the bank that $15,350 is set aside in a special account payable to AIC upon delivery of quoted equipment to an East Coast port. Bank will further guarantee money will be sent to AIC within ten (10) days after delivery and will so perform this duty of sending money.

E L Fall

E. L. "EDDIE" FALL, JR., Sales Engineer

ELFjr:ar

BUYERS' ACCEPTANCE Date _____

By _____

Proceed with [ ] PRODUCTION & SHIPMENT

Proceed with [ ] SUBMITTALS FOR APPROVAL

Ship to Address: [ ] PPD [ ] Collect

VIA

24

peter kwick

GENERAL TERMS AND CONDITIONS OF SALE

The following terms and conditions shall be a part of any sale entered into between the Buyer and American Industrial Corporation.

1. PRICES AND TERMS OF PAYMENT

(A) All quotations are for immediate acceptance and subject to change without notice.

(B) No taxes are included unless specifically itemized.

(C) Invoice prices will be those in effect at time order is released for immediate production and shipment.

(D) Partial billings shall apply to work done or material shipped when applicable.

(E) Acceptance of orders is subject to approval by our credit department. Past due accounts are subject to a one percent (1%) monthly service charge plus cost of collection, including attorney's fees, if incurred.

(F) Standard terms are net cash delivered to us within 30 days from date of invoice. Any cash discounts for prompt payment must be shown on quotation.

2. SHIPMENT AND TRANSPORTATION CHARGES

(A) All shipping dates are approximate. While effort is made to maintain schedules, we will not be liable for damage on account of delay.

(B) Shipments are FOB shipping point. We will cooperate with customer where claims are involved but will not liable for loss of or damage to products.

(C) Shipments will be made collect unless indicated otherwise. Prepaid shipping charges will be invoiced to customer.

3. WARRANTY

(A) Products manufactured by American Industrial Corporation are warranted for a period of one year from date of shipment against defective material and workmanship. Warranty is limited to repair or replacement of defective parts FOB factory.

(B) Products sold by American Industrial Corporation but not manufactured by American Industrial Corporation are warranted only to the extent of their respective manufacturer.

(C) We will not be liable for loss or damage, whether direct or consequential, arising from the sale or use of or inability to use our products for any purpose.

4. RETURNED GOODS AND CANCELLATION

(A) No goods shall be returned to the factory without written permission and proper identification.

(B) Suspensions and cancellation of orders may be made only upon written approval and on terms that will indemnify us against loss.

5. GENERAL

(A) These terms and conditions are subject to change without notice only by an officer of American Industrial Corporation.

(B) Terms inconsistent with those stated herein which may appear on Buyer's formal order will not be binding on the seller.

(C) Conditions not specifically stated herein shall be governed by established trade customs.

April 25, 1972

Industrial Automation
P. O. Box 7566
Richmond, Virginia 23231

Attn: Mr. Hugh Martin

Subj: Bridge Crane - Frying Pan Lightship

Dear Mr. Martin:

This letter is to confirm our discussion at Joe Harden's home on April 23, 1972. We agreed to accept an order from Industrial Automation for $15,350 with a letter of credit from First & Merchants Bank. It is understood that this letter of credit is a guarantee by First & Merchants Bank that AIC will be paid $15,350 under the following conditions:

1. 90% of $15,350 will be paid within thirty (30) days of the date of delivery. If Industrial Automation pays AIC within thirty (30) days of the date of shipment, a 1% discount will be allowed by AIC.

2. Industrial Automation will pay AIC the remaining 10% within ten (10) working days after acceptance by the Coast Guard.

3. AIC will witness any tests at dockside by Industrial Automation provided that Industrial Automation gives sufficient notification of two (2) days.

If you have any questions, please call. We look forward to receiving your order.

Yours very truly,

AMERICAN INDUSTRIAL CORPORATION

E. L. "EDDIE" FALL, JR., Sales Engineer

ELFJr:ar

INDUSTRIAL AUTOMATION INC.

Purchase Order #2004

EFFECTIVE SOLUTIONS
TO DIFFICULT PROBLEMS

P.O. BOX 7586
RICHMOND, VIRGINIA 23231

May 1, 1972

AMERICAN INDUSTRIAL CORP.
RECEIVED
MAY 3 1972
By

American Industrial Corporation
P. O. Box 4287
Virginia Beach, Virginia 23454

Att: Mr. E. L. Fall, Jr.

Dear Sir:

RE: Bridge Crane - Frying Pan Lightship

SUBJECT: Quotation of April 18, 1972 and letter of April 25, 1972

This is to confirm our telephone order of April 28, 1972 for one general purpose hoist as described in your quote of April 18th, for the sum of fifteen thousand, three hundred and fifty dollars ($15,350.00), F.O.B. Dockside, Norfolk, Virginia. This hoist will be the same as those two previously supplied by American Industrial Corporation for Tidewater Construction Company or similiar Coast Guard projects in 1971. A copy of general specifications are enclosed. U. S. Coast Guard specification no. 6943 shall be made an attachment to this contract and pertinent sections strictly adhered to.

Conditions governing this purchase order are:

1. 90% of $15,350 will be paid within thirty (30) days of the date of delivery. If Industrial Automation pays AIC within thirty (30) days of the date of shipment, a 1% discount will be allowed by AIC.

2. Industrial Automation will pay AIC the remaining 10% within ten (10) working days after acceptance by the Coast Guard.

3. AIC will witness any tests at dockside by Industrial Automation provided that Industrial Automation gives sufficient notification of two (2) days.

A letter of credit from our bank will follow, as agreed.

Very truly yours,

H. I. Martin
INDUSTRIAL AUTOMATION, INC.

HIM/jls

Encl.

May 1, 1972

AMERICAN INDUSTRIAL CORP.

RECEIVED

MAY 3 1972

By

American Industrial Corporation
P.O. Box 4267
Virginia Beach, Virginia 23454

Dear Sirs:

This letter will serve to confirm our agreement to lend Industrial Automation, Inc., P.O. Box 7586, Richmond, Virginia, an amount up to but not to exceed $15,350. The proceeds are to be used exclusively for the purchase of the hoist being sold by you to Industrial Automation, Inc. This commitment will expire on July 31, 1972.

Yours truly,

David R. Holton

David R. Holton

May 16, 1972

First & Merchants National Bank
Mr. David R. Holton
9th and Main Streets
Richmond, Virginia 23261

Subject: Industrial Automation, Incorporated
P. O. Box 7586
Richmond, Virginia 23231

Dear Mr. Holton:

We received your letter of May 1, 1972, confirming your agreement to lend Industrial Automation an amount up to, but not to exceed $15,350. We said that this was for the exclusive use for purchase of the hoist being sold by American Industrial Corporation to Industrial Automation. Commitment of this letter was to expire on July 31, 1972.

Mr. Hubert Norton of Industrial Automation has been advised several times that the delivery on this unit would run possibly twelve weeks. As I have told him, it has come true. We have received a confirmation delivery date from the manufacturers and it will be in the area of 9/15/72. I have written Mr. Hubert Norton that we will put this order on hold if he does not have a letter in our hands by May 19, 1972, stating that this commitment has been extended to November 1, 1972. I would suggest that you obtain a copy of Industrial Automations Purchase Order #2004 to American Industrial Corporation covering this bridge crane. The sum of $15,350 will not be paid in a lump sum. It will be strung out until they complete the job.

If you have any questions on this matter, I would appreciate a phone call. This is a sizable sum of money to have some questions over and I would like to clear it up now before the manufacturers get into full scale production on the units.

Our original agreement with Mr. Norton was covered in my letter to him on April 25, 1972. F & M's letter of credit was to be your guarantee that AIC will be paid $15,350 under the conditions specified on Hubert Norton's order write-up. If you have any questions on this Sir, I would suggest that we get together with Mr. Norton. You can reach me by calling our toll free WATS line 1/800/582-6850 or possibly at my home here in Richmond at 272-4056. I hope this will clear matters up and we may proceed on the order as originally planned.

Very truly yours,

AMERICAN INDUSTRIAL CORPORATION

E. L. "EDDIE" FALL, JR., Sales Engineer

ELF/sg
cc: Mr. Hubert Norton

F&M

THE MERCHANTS NATIONAL BANK
Main and Main Streets
Richmond, Virginia 23219
Telephone 703 771 8100

May 17, 1972

AMERICAN INDUSTRIAL CORP.
RECEIVED
MAY 18 1972
By

Mr. E. L. Fall, Jr.
American Industrial Corporation
P.O. Box 4267
Virginia Beach, Virginia 23454

Dear Mr. Fall:

Please refer to my letter of May 1. This letter will serve to extend our commitment confirmed in that letter through October 31, 1972.

I hope this will settle the matter between you and Industrial Automation, Inc.

Yours truly,

David R. Holton

DRH/ja

F&M

T & MERCHANTS NATIONAL BANK
and Main Streets
Richmond, Virginia 23261
Telephone 703 771-2000

May 19, 1972

AMERICAN INDUSTRIAL CORP.
RECEIVED
MAY 22 1972
By_____

Mr. E. L. Fall
American Industrial Corporation
P.O. Box 4267
Virginia Beach, Virginia 23454

Dear Mr. Fall:

To confirm our agreement over the telephone yesterday, any funds advanced to Industrial Automation, Inc. will be in the form of a Cashier's Check payable to your firm. I hope this will suffice for your credit requirements.

Yours truly,

David R. Holton

David R. Holton

DRH/ja

cc: E LF

February 14, 1973

Industrial Automation
P. O. Box 7586
Richmond, Virginia 23231

Attn: Mr. H. I. Martin

Subject: Frying Pan Light Ship Bridge Crane

Dear Sir:

We have shipped the crane and associated hardware to your plant on Eline Road and invoiced you on December 6, 1972. For our agreement, we offered you a one percent discount if paid by January 6, 1973. It is now February 14, 1973 and we have seen nothing in the form of a check. With all of the concessions that I did allow you and with all the arrangements we made with the First and Merchants Bank, I would certainly feel that this money should have paid to us by now.

I am sending a copy of this letter to Mr. David Holton at First and Merchants Bank so that he may be advised that we have not received the money that was so called set aside for the purpose of paying for this crane.

Please look into this and give it your prompt attention. This a sizeable sum of money to have tied up over this long of a period of time. If we have not received a check in the mail by February 25, 1973, we will be forced to charge you a service charge. Money does not come free as Mr. Holton will testify.

If you have any questions on this, please feel free to call us on our toll free WATS line, 1/800/582-6850. We have certainly enjoyed working with you and do not want the working agreement now to become sticky with lack of payment.

Very truly yours,

AMERICAN INDUSTRIAL CORPORATION

E. L. FALL, JR., Industrial Sales Manager

ELF/sg

cc Mr. David R. Holton

March 15, 1973

Industrial Automation
P. O. Box 7586
Richmond, Virginia 23231

Attn: Mr. H. I. Martin

Subject: INVOICE 7126/OVERDUE

Dear Sir:

The overdue status of your account has been called to my attention; your account is now over ninety days old. Enclosed is our Statement including Service Charges. We would appreciate your check to cover this past due invoice or at least an acknowledgment as to your reason for non-payment.

Surely you can appreciate the cost of money is as great as material; we are expected to pay our supplier within thirty days and cannot afford the luxury of allowing our obligations to become delinquent.

Very truly yours,

AMERICAN INDUSTRIAL CORPORATION

P. R. SULLIVAN, Manager
Accounting Department

PRS:pcs

Encl

cc: Mr. David R. Holton

FINAL ORDER - CASE NO. 1063

This day came the plaintiff by its duly authorized representative and by counsel, and the defendant, First & Merchants National Bank, by their duly authorized representative and by counsel, and the said defendant having heretofore filed its grounds of defense herein, issue is joined.

Whereupon came a jury, to-wit: Margaret J. Cochrone, Randolph D. Darden, Michael H. Ford, Mary A. Graham, Ann T. Hill, Mrs. Isabel C. Souder, John F. Strothmeyer and David E. Zimmermann, who were sworn to well and truly try the issue joined and a true verdict give according to the evidence.

The evidence of the plaintiff having been heard, the said defendant by counsel moved to strike the evidence of the plaintiff on grounds stated in the record, which motion was granted, to which ruling the plaintiff by counsel objected and excepted.

It is therefore adjudged and ordered that the plaintiff take nothing and that summary judgment be entered in favor of the defendant, First & Merchants National Bank.

A Copy Teste:

Margaret B. Baker

Clerk

Entered March 1, 1974

NOTICE OF APPEAL

AND

ASSIGNMENTS OF ERROR

Pursuant to Rule 5:6, Notice is hereby given that the plaintiff, AMERICAN INDUSTRIAL CORPORATION, appeals from the judgment and order of this Court entered in this case on March 1, 1974, in favor of the defendant, FIRST AND MERCHANTS NATIONAL BANK, and sets forth the following Assignments of Error:

(1) The Court erred in sustaining, over the objection and exception of the plaintiff, the motion of the defendant, FIRST AND MERCHANTS NATIONAL BANK, to strike the evidence of the plaintiff at the conclusion of the presentation of the plaintiff's evidence.

(2) The Court erred in sustaining, over the objection and exception of the plaintiff, the motion of the defendant, FIRST AND MERCHANTS NATIONAL BANK, to limit the introduction of evidence by the plaintiff with respect to its dealings with INDUSTRIAL AUTOMATION, INC.

(3) A transcript of the evidence is to be filed hereafter.

AMERICAN INDUSTRIAL CORPORATION

By: _____
Of Counsel

Date Filed: March 29, 1974

representative of the bank.

THE COURT: All right.

NOTE: The witnesses were admonished by the Court and excluded from the courtroom.

NOTE: The Court advised the jury of the trial procedure, after which opening statements were made by counsel, which were reported but not included in this transcript.

NOTE: Recess was held from 10:55 a. m. until 11:30 a. m., after which the proceedings continued before the Court and jury.

MR. OWINGS: Your Honor, I call Mr. Fall to the stand, please.

EDWARD L. FALL, JR., being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. OWINGS:

Q Mr. Fall, will you state your name and address, please.

A Edward L. Fall, Jr. I live at 913 Prince Philip Drive, Virginia Beach, Virginia.

Q How old are you, Mr. Fall?

A 36.

1 Q What is your occupation?

2 A I am a sales manager industrial-wise for the

3 American Industrial Corporation.

4 Q How long have you been employed by American

5 Industrial Corporation?

6 A Approximately six years.

7 Q Now, at the time of this transaction that we

8 are talking about here today, what position did you occupy

9 then?

10 A I was the Richmond area sales engineer.

11 Q What were your duties and responsibilities as

12 sales engineer?

13 A Basically, to promote and sell the lines of

14 the principals that we represented in the three-state area that

15 American Industrial covers. I had the responsibility for the

16 geographic area surrounding Richmond.

17 Q Mr. Fall, what kind of background do you have

18 for this particular job?

19 A I am a civil engineer by education with a

20 master's in business. And, basically, the six years I have

21 been in sales has been the only sales I have been in. I was

22 previously with DuPont. I was not in a sales position with

23 them.

24 Q Were you in an engineering position?

1 A Right.

2 Q Now, did you have an occasion to handle the

3 sale with Industrial Automation in 1972?

4 A Yes.

5 Q Will you tell the jury and the Court how you

6 became involved?

7 A The way our firm is set up, each individual

8 salesman handles the area that he is responsible for. This

9 contract was originally let by the Coast Guard in the Norfolk

10 District, which they bid in that area, meaning the home office

11 at Virginia Beach bid. We normally will bid the contractors

12 who are bidding this as a general contractor. There were, if

13 I remember correctly, two bidders. One was Tidewater

14 Construction Company who had previously done the two jobs. The

15 other one was Industrial Automation.

16 When the bids were advertised it turned out

17 that Industrial Automation was some $20,000.00 below Tidewater

18 Construction. This struck us as being rather strange, and we

19 sent them a quotation, as we did one to Tidewater Construction.

20 They were in Richmond, so they fell into my category. That is

21 when I picked up calling on Industrial Automation.

22 Q Did you have some negotiations with

23 Industrial Automation and ultimately send them a quotation and

24 contract of sale dated April 19, 1972?

1 A Let me see it. This is a copy of our
2 standard quotation form, which this is a copy of the quotation
3 that we did send Industrial Automation, attention Mr. Hugh
4 Martin.
5 Q Who is Mr. Hugh Martin?
6 A He is the president, as I understand it, of
7 Industrial Automation.
8 Q Do you know where the original of that
9 agreement is?
10 A Somewhere in his files. He got the original
11 and the first copy of every quote.
12 Q Is that a photocopy of the copy in your file?
13 A Right.
14 Q Would you generally tell the jury what it
15 says?
16 MR. COGAR: I object to that, Your Honor.
17 BY MR. OWINGS: (Continued)
18 Q Well, read it.
19 THE COURT: Excuse me one minute. Do you
20 intend to make it an exhibit?
21 MR. OWINGS: Yes, I do.
22 THE COURT: Why don't you offer it at this
23 time?
24 MR. OWINGS: Your Honor, I offer this in

1 evidence as Plaintiff's Exhibit Number 1 or Number A,
2 whichever the Court desires.
3 MR. COGAR: We object to its introduction,
4 if Your Honor please. And I would like to be heard
5 on that, if I may, since I think this is one of the
6 whole issues in this case. I did not know whether
7 you wanted me to do that in or out of the presence of
8 the jury.
9 THE COURT: I think, perhaps, it would be
10 best to do this out of the presence of the jury.
11 Would you ladies and gentlemen of the jury
12 mind stepping out of the jury box?
13 NOTE: The jury retired to the jury room.
14
15 JURY OUT
16 THE COURT: All right.
17 MR. COGAR: As Your Honor knows from reading
18 of the motion for judgement, the plaintiff initially
19 instituted suit against two defendants. The First &
20 Merchants National Bank was one named defendant, and
21 the other was Industrial Automation, Inc.
22 Industrial Automation, Inc. was sued on its
23 contract to purchase, and judgement has been entered
24 against them in a hearing which I believe was held

1 JURY OUT

2 last October.

3 The basis of the liability imposed in that
4 suit was an underlying agreement to which the First &
5 Merchants National Bank was not a party. It was an
6 agreement between the plaintiff and Industrial
7 Automation. We had nothing to do with it. There is
8 no allegation in this motion for judgement that we had
9 anything to do with it, and there is no document the
10 plaintiff can produce that will show that we were a
11 party to it. That is the gravamen of this motion for
12 judgement.

13 The plaintiff does not reach us until
14 paragraph 6 of the motion for judgement. The full
15 meaning of paragraph 6 can only be understood by read-
16 ing paragraph 5, which is really directed toward the
17 defendant, Industrial Automation.

18 And I read paragraph 5: "That one of the
19 material terms of the contractual agreement between
20 the plaintiff and the defendant, Industrial Automation,
21 Inc.," not First & Merchants but between the plaintiff
22 and the defendant, Industrial Automation, Inc., "was
23 that the defendant, First & Merchants National Bank,
24 would furnish the plaintiff with a letter of credit

1 JURY OUT

2 or commitment guaranteeing payment to the plaintiff
3 under the terms of the contract aforementioned."
4 This isn't asserted against us. It is a
5 recitation of an understanding between the plaintiff
6 and the other defendant in this case.
7 He comes to us in paragraph 6. That is, "The
8 defendant, First & Merchants National Bank, did
9 furnish such a commitment."
10 Now, "such a commitment." We have got to
11 know what such a commitment is. We look back to
12 paragraph 6, and that is a commitment guaranteeing
13 payment to the plaintiff. That the defendant, First
14 & Merchants, did furnish a guarantee to the plaintiff.
15 That is how it has got to be read; that the plaintiff
16 relying on this commitment, or what he now says is a
17 guarantee, proceeded to have the said general-purpose
18 hoist specifically constructed for the particular use
19 intended by this contract.
20 If Your Honor please, a guarantee to answer
21 for the debt of another, the obligation of another,
22 under the statute of frauds must be in writing.
23 For the plaintiff to recover under assertions
24 of guarantee as here claimed against us, it must be

1 JURY OUT

2 based solely upon our writings. Nobody else can
3 guarantee for us. Only we can guarantee. Only a
4 guarantee in writing to answer for the debt of another
5 over our signature can impose liability upon us.
6 The underlying transaction to which we were
7 not a party cannot form a guarantee for which we are
8 not responsible, and, therefore, this first document,
9 amongst a series of documents which were interchanged
10 between the plaintiff and Industrial Automation, has
11 nothing to do with the ultimate liability that the
12 plaintiff would seek to impose on us.
13 Used in the narrowest and most precise sense
14 of the word, the only material documents are documents
15 in writing by us which guarantee to answer for the
16 debt of another. And an underlying contract to which
17 we are not a party cannot be found to form any basis
18 for cause of action resting on an asserted guarantee.
19 Therefore, we object to the document and all
20 like documents.
21 THE COURT: All right. Mr. Owings.
22 MR. OWINGS: Your Honor, I am not completely
23 positive of what he is getting at, but I assume that
24 what Mr. Cogar is saying is that, ergo, the letters of

JURY OUT

May 1, 1972, May 17, 1972, and May 19, 1972, from David R. Holton are the only written documents that we can produce in evidence today because they are the only writings furnished by First & Merchants National Bank.

If Your Honor please, I alluded to a letter in my opening statement dated May 16, 1972, which was directed by Mr. Fall to Mr. Holton at First & Merchants National Bank, in which he reiterates just about all the terms set out in this order quotation dated April 18, 1972, which I was seeking to introduce at this time as an exhibit. And in this letter of May 16, we refer to the order write-up which was submitted to Industrial Automation.

We asked Mr. Holton to look at that, and we also asked Mr. Holton to look at our letter to Industrial Automation of April 25, which specifies in detail what American Industrial Corporation wanted. That is a letter of credit guaranteeing payment of $15,350.00.

I would have no dispute with Mr. Cogar that there has to be in writing under the statute of frauds setting out the existence of a guarantee, but the fact

1 JURY OUT

2 is we have got all these writings. They must be
3 considered together. They all encompass part of this
4 guarantee. And the fact is that the letter of May 19,
5 1972, makes reference to a telephone conversation
6 between Mr. Holton and Mr. Fall, and incorporates that
7 as part of the guarantee, Your Honor. I, therefore,
8 submit that all of this is proper for consideration in
9 establishing the existence of this contract between
10 First & Merchants and American Industrial Corporation.
11 THE COURT: Let me see, please, if you intend
12 to offer it, you made reference to it in your statement,
13 the letter of May 16.
14 Mr. Cogar, you, undoubtedly, have copies of
15 the May 16, 1972 letter that has been referred to.
16 MR. COGAR: Yes, sir. I am looking at it
17 right now, Your Honor. I would like to speak to that,
18 if I may.
19 THE COURT: I want to hear from you.
20 MR. COGAR: As an aside, and this does not
21 really get to the real thrust of what I have to say
22 about the letter, but just for the purposes of
23 consideration of the present exhibit, if Your Honor
24 please, that is a quotation dated April 18, 1972,

1 JURY OUT

2 which is being offered in evidence. In this letter of
3 May 16, down in the last paragraph, it says, "F&M's
4 letter of credit was to be your guarantee that AIC
5 will be paid -- no, excuse me. I will go to the first
6 sentence of the last paragraph.
7 "Our original agreement with Mr. Norton was
8 covered in my letter to him on April 25, 1972."
9 There was a letter of April 25, 1972, which
10 they referred to as the original agreement. Now, they
11 seek to put in evidence a quotation of April 19. But I
12 really think that has nothing to do with the underlying
13 merits of what I am saying.
14 There are two transactions here, Judge. One
15 is the transaction between the plaintiff in this case
16 and their customer. There was a contract of sale for
17 a hoist. On the basis of that transaction, the
18 plaintiff has recovered judgement. He sued on that
19 contract.
20 Now, he invokes a second obligation. It is
21 not the obligation between himself and his customer.
22 He has recovered on that. He says there is another
23 obligation imposed on that, collateral to it, related
24 to it, and that was our guarantee that if his customer

JURY OUT

1 did not perform his contract of sale that he could
2 then turn to us and collect on our guarantee to pay
3 if his customer didn't pay.
4 If you look at the May 16 letter, what he
5 does, he shows his concern that he does not have the
6 writings which he would like to have from us.
7 Anyone, any day can address a letter to any
8 bank asking for any number of things, any sort of
9 assurances. He says here that they want and have got
10 to have an extension of time of the commitment,
11 acknowledging our prior letter in which we said we had
12 a commitment to make a loan to be used exclusively for
13 the purpose of this hoist in the amount of $15,350.00.
14 That commitment expired July 31. He says in this
15 letter this does not give me sufficient time to get it
16 delivered; I have got to have an extension of time.
17 He mentions November 1.
18 And he also refers to the underlying
19 correspondence in which his customer said he was going
20 to get for him a guarantee from us.
21 The only thing he can sue us on is what the
22 customer did get from us, and his customer got us to
23 write a letter in which we said we had made a commit-
24 ment to lend the money, expiring July 31. They come

1 JURY OUT

2 back. They want that extended. We wrote a one-sentence
3 letter in which we responded to one request in this
4 letter. We extended the time.
5 So that is the second document that flowed
6 from us to them. And then he wanted later a letter
7 from us saying that the check would be made payable to
8 him, and we gave him that letter.
9 Those are the three written documents.
10 Now, whatever form of requests may have been
11 made of us can in no way alter the written guarantee
12 that we gave him. I can conceive of a host of forms
13 of requests that can be made of a bank, but when push
14 comes to shove, he who says he has a guarantee must
15 lay upon the table those writings which constitute the
16 guarantee. Writings signed by us. And he cannot lift
17 himself by his boot straps by saying, well, I want more
18 than what you gave me. You didn't give me all I
19 wanted. You can only recover on the basis of what you
20 get.
21 And he has acknowledged in his opening
22 statement that he got three writings from us. That is
23 all he can recover on.
24 NOTE: Colloquy was held between Court and

1 JURY OUT

2 counsel, which was reported but not included in this
3 transcript, except the following:
4 THE COURT: All right. I believe under the
5 circumstances the Court is going to overrule your
6 objection at this time, however, for the time being I
7 think the Court will maintain the exhibits up here so
8 that they will not be observed by the jury at this
9 stage in the event the Court wishes to reverse its
10 ruling with regard to the admissibility.
11 MR. COGAR: If Your Honor please, Mr. Owings
12 has stated the other instruments that he intends to
13 introduce by this and perhaps by other witnesses, and
14 rather than to consume the Court's time and the jury's
15 time could it be understood that I have a continuing
16 objection to any documents other than the three letters
17 issued by our bank, for the reasons previously stated.
18 And I won't have to interrupt him.
19 THE COURT: All right.
20 MR. OWINGS: Your Honor, I would just like to
21 remark again that if we leave out any of the instru-
22 ments that Mr. Cogar wants us to leave out at this
23 point, then, as a matter of law, they are in violation
24 of their letter of May 19, 1972, because they stated

1 JURY OUT

2 they would not advance any funds, and they admitted in
3 the interrogatories that they did. So they are in
4 violation of that agreement right there, and this was
5 committed before October 31, 1972. As a matter of
6 fact, it was committed, first of all, in June right
7 after the letter was received from First & Merchants,
8 and we are entitled to payment just simply as a matter
9 of law.

10 MR. COGAR: Judge, I believe Mr. Owings has
11 unwittingly usurped the function of the Court to
12 interpret the documents. This may be what he would
13 argue for, but I believe ultimately it is for the
14 Court to say what the documents mean.

15 THE COURT: The record will show the
16 defendant excepts to the Court's ruling in that the
17 Court overruled the objection as to admissibility of
18 what was tendered as Plaintiff's Exhibit Number 1, and
19 that the defendant's objection will continue to the
20 matters stated throughout the record without the
21 formality of an objection.

22 Under the Court's ruling, it is making the
23 same ruling as to each objection by overruling the
24 objection, to which the defendant makes the same

1 JURY OUT

2 exception. It is understood that certainly for the
3 time being, at least, that the Court feels that in the
4 event it should reverse its ruling to these particular
5 exhibits coming in until we get to these letters of
6 May 1, and so forth, that you all are talking about,
7 and that there will be other documents prior to that
8 letter coming in, that they should not be submitted to
9 the jury at this particular point. With that under-
10 standing, counsel, I assume we can return the jury.
11 MR. COGAR: Yes, Your Honor.
12 MR. OWINGS: If Your Honor please, if I may,
13 do I understand your ruling is that as far as this
14 document of April 18 is concerned, I am not to direct
15 Mr. Fall to spell out what the contents of it are?
16 THE COURT: In the first place, I don't see
17 where he, himself, is going to spell it out in his
18 interpretation of it. In other words, if it is a
19 written document, it would speak for itself. I do not
20 want him to explain it because that isn't the proper
21 way to do it. That is not the best evidence.
22 And, secondly, I don't want him to go into
23 detail of it, nor read it in front of the jury at this
24 time.

1 JURY OUT

2 I may permit it later but not at this time.

3 MR. OWINGS: Your Honor, what would be the

4 Court's ruling with respect to Industrial Automation's

5 purchase order which was submitted?

6 THE COURT: Same ruling as I am now making.

7 MR. OWINGS: If Your Honor pleases, if that

8 is the case, then how in the world is the jury going

9 to consider these various documents?

10 THE COURT: We will come to that later. It

11 is a question of whether or not they will.

12 I am overruling the objection with the

13 reservation and the right to reverse myself and

14 sustain the objection.

15 MR. OWINGS: Yes, sir.

16 THE COURT: Fortunately, I may be doing two

17 things. I may be trying to preserve the record and

18 yet get in a posture to move ahead.

19 Bring the jury in.

20 NOTE: At 12:00 noon, the jury returned to

21 the courtroom.

22 NOTE: The witness resumed the witness stand

23 and the proceedings continued before the Court and

24 jury as follows:

1 BY MR. OWINGS: (Continued)

2 Q Mr. Fall, I had submitted to you a document

3 dated April 18, 1972. What was that document?

4 A That was the quotation which we submitted to

5 Industrial Automation for the general-purpose hoist to be used

6 on the Frying Pan Light House pier, the specifications issued

7 by the U. S. Coast Guard.

8 MR. OWINGS: Your Honor, I would move to

9 introduce that into evidence as Plaintiff's Exhibit

10 Number A.

11 THE COURT: Let's call it 1.

12 MR. OWINGS: All right.

13 NOTE: The above quotation was marked

14 Plaintiff's Exhibit Number 1.

15 BY MR. OWINGS: (Continued)

16 Q Mr. Fall, what was the next transaction that

17 occurred, or next --

18 A After submitting this quotation we had a

19 meeting in Joe Harden's home in Sandston, Virginia.

20 He is a principal in Industrial Automation.

21 He subsequently left them.

22 Mr. Martin was there. Joe Harden was there.

23 I was there. And David Wilcox was there. And I think their

24 wives were there. And me.

1 We negotiated this, and they were fully
2 informed at that time that in no way would we accept an order
3 from them --
4 MR. COGAR: If Your Honor please, that wasn't
5 the question. I would ask the Court to instruct the
6 witness to answer the question.
7 THE COURT: If you will, confine yourself to
8 answering the precise question or we could get into
9 problems of admissibility or a mistrial.
10 THE WITNESS: I don't understand if I do or
11 do not. You asked me what went on. I am trying to
12 explain what did go on.
13 THE COURT: Mr. Owings, you narrow your
14 question, and you answer the precise question. You
15 are getting off into left field. We are going to have
16 a motion for a mistrial and we are all going home.
17 See what I mean? I have to act just as a referee at
18 a basketball game. So if you get off base, I am going
19 to have to call you for it. The referee has the right
20 to penalize.
21 Now, direct your questions precisely. And
22 you answer it precisely.
23 BY MR. OWINGS: (Continued)
24 Q As a result of that conference in Mr. Harden's

1 home, did you direct some correspondence to Industrial
2 Automation?
3 A Yes.
4 Q Did that correspondence set out what was
5 discussed at Joe Harden's home?
6 A Right.
7 Q What is the date of that correspondence?
8 A April 28 -- 25, 1972.
9 MR. OWINGS: Your Honor, I would move to
10 introduce this into evidence as Plaintiff's Exhibit
11 Number 2.
12 THE COURT: Admitted as Plaintiff's Exhibit
13 Number 2.
14 NOTE: Letter dated April 25, 1972, addressed
15 to Industrial Automation, signed E. L. (Eddie) Fall,
16 Jr., was marked Plaintiff's Exhibit Number 2.
17 BY MR. OWINGS: (Continued)
18 Q Now, Mr. Fall, following your correspondence
19 to Industrial Automation on April 25, did you receive a purchase
20 order from Industrial Automation dated May 1?
21 A Yes.
22 Q Is that a photocopy of that purchase order?
23 A Yes.
24 MR. OWINGS: Your Honor, I would move to

1 introduce this into evidence as Plaintiff's Exhibit
2 Number 3.
3 THE COURT: Plaintiff's Exhibit Number 3.
4 NOTE: The above purchase order number 2004
5 was marked Plaintiff's Exhibit Number 3.
6 BY MR. OWINGS: (Continued)
7 Q Now, will you tell the Court what happened
8 after you got this purchase order dated May 1, 1972, from
9 Industrial Automation? What was the next document you received?
10 A We received a letter from First & Merchants
11 Bank signed by Mr. Holton.
12 Q Is that letter a photocopy of that?
13 A Yes.
14 Q What is the date of it?
15 A May 1, 1972.
16 Q What does that letter say?
17 A Want me to read it?
18 Q Yes.
19 A (Reading letter)
20 This letter will serve to confirm our
21 agreement to lend Industrial Automation, Inc.,
22 P. O. Box 7586, Richmond, Virginia, an amount
23 up to but not to exceed $15,350.00. The
24 proceeds are to be used exclusively for the

1 purchase of the hoist being sold by you to
2 Industrial Automation, Inc. This commitment
3 will expire on July 31, 1972.
4 Signed by Mr. Holton, David R.
5 Q Is that on First & Merchants stationery?
6 A It's got F&M at the top.
7 MR. OWINGS: Your Honor, I would move to
8 introduce that into evidence as Plaintiff's Exhibit
9 Number 4.
10 THE COURT: Plaintiff's Exhibit Number 4.
11 NOTE: The above letter was so marked.
12 BY MR. OWINGS: (Continued)
13 Q Is that letter addressed to you?
14 A No.
15 Q Upon receipt of that letter what did you do?
16 A I subsequently called back to Mr. Martin and
17 also wrote a letter explaining --
18 Q Who is Mr. Martin?
19 A Mr. Martin is president of Industrial
20 Automation.
21 Q So you called him. Then did you call --
22 A I subsequently wrote Mr. Holton a letter.
23 Q Mr. Holton of First & Merchants? Is that a
24 photocopy of the letter that you wrote to Mr. Holton?

1 A Right.

2 Q Would you read that letter to the Court?

3 A This letter is dated May 16. It is to Mr.

4 Holton, Ninth and Main Streets, Richmond, Virginia. Subject:

5 Industrial Automation.

6 Dear Mr. Holton: We received your letter

7 of May 1, 1972, confirming your agreement to

8 lend Industrial Automation an amount up to,

9 but not to exceed, $15,350.00. We said that

10 this was for the exclusive use for purchase

11 of the hoist being sold by American Industrial

12 Corporation to Industrial Automation. Commit-

13 ment of this letter was to expire on July 31,

14 1972.

15 Mr. Hubert -- there was a misspelling

16 here -- Norton -- it should have been Martin

17 -- of Industrial Automation, has been advised

18 several times that the delivery on this unit

19 would run possibly twelve weeks. As I have

20 told him, it has come true. We have received

21 a confirmation delivery date from the manu-

22 facturers and it will be in the area of

23 9/15/72. I have written Mr. Hubert Norton

24 that we will put this order on hold if he

1 does not have a letter in our hands by May
2 19, 1972, stating that this commitment has
3 been extended to November 1, 1972. I would
4 suggest that you obtain a copy of Industrial
5 Automation's Purchase Order Number 2004 to
6 American Industrial Corporation covering this
7 bridge crane. Which is the hoist. The sum
8 of $15,350.00 will not be paid in a lump sum.
9 It will be strung out until they complete the
10 job.
11 If you have any questions on this matter,
12 I would appreciate a phone call. This is a
13 sizable sum of money to have some questions
14 over and I would like to clear it up now
15 before the manufacturers get into full-scale
16 production on the units.
17 Our original agreement with Mr. Norton
18 was covered in my letter to him on April 25,
19 1972. F&M's letter of credit was to be your
20 guarantee that AIC will be paid $15,350.00
21 under the conditions specified on Hubert
22 Norton's order write-up. If you have any
23 questions on this, sir, I would suggest that
24 we get together with Mr. Norton. You can

1 reach me by calling our toll free WATS line...
2 or possibly at my home here in Richmond....
3 I hope this will clear matters up and we may
4 proceed on the order as originally planned.
5 And I signed it and sent a copy to Mr. Hubert
6 Norton. It should have been Martin.
7 MR. OWINGS: I would like to introduce that
8 as Plaintiff's Exhibit Number 5.
9 NOTE: The above letter was so marked.
10 BY MR. OWINGS: (Continued)
11 Q Now, Mr. Fall, why did you write this letter
12 of May 16, 1972, to Mr. Holton?
13 MR. COGAR: If Your Honor please, I object
14 to that as to what the mental reservations or intent of
15 the witness was. The letter, the fact that he wrote,
16 is not disputed, and the letter speaks for itself.
17 THE COURT: I sustain the objection.
18 MR. OWINGS: All right.
19 BY MR. OWINGS: (Continued)
20 Q Mr. Fall, what happened after you received
21 this letter of May 16, or after you mailed out that letter of
22 May 16, 1972, to First & Merchants?
23 A I received another letter from First &
24 Merchants.

1 Q Is that letter dated May 17, 1972?
2 A Yes.
3 Q Is that a photocopy of the original?
4 A Right.
5 Q Will you read that letter to the jury?
6 A It is addressed to me and it is from Mr.
7 Holton.
8 Dear Mr. Fall: Please refer to my letter
9 of May 1. This letter will serve to extend
10 our commitment confirmed in that letter
11 through October 31, 1972.
12 I hope this will settle the matter
13 between you and Industrial Automation, Inc.
14 It is signed by Mr. Holton.
15 MR. OWINGS: Your Honor, I would move to
16 introduce that into evidence as Plaintiff's Exhibit
17 Number 6.
18 NOTE: The above letter was so marked.
19 BY MR. OWINGS: (Continued)
20 Q What did you do after you received this?
21 A I called Mr. Holton.
22 Q What did you tell him on the phone?
23 A I explained to him that it would be impossible
24 for us to continue with this contract unless we received some

1 guarantee of moneys that would be available to Industrial
2 Automation through their bank.
3 Q What did he say?
4 A Said that they would -- they were working
5 with Industrial Automation and they would send me a letter
6 stating so. And I further told him that I didn't think they
7 had the money to do the job and I wanted some way of tying them
8 up to make sure they did not go off on some other tangent and
9 weaken themselves.
10 Q So, what happened after your telephone
11 conversation?
12 A I got another letter.
13 Q Is that the letter dated May 19, 1972?
14 A Yes.
15 Q Would you read this to the jury, please?
16 A (Reading letter of May 19, 1972)
17 To confirm our agreement over the
18 telephone yesterday, any funds advanced to
19 Industrial Automation, Inc., will be in the
20 form of a cashier's check payable to your
21 firm. I hope this will suffice for your
22 credit requirements.
23
24 Signed by Mr. Holton.

1 MR. OWINGS: I move for its introduction.
2 THE COURT: Plaintiff's Exhibit Number 7
3 MR. OWINGS: Yes, sir.
4 NOTE: The above letter was so marked.
5 BY MR. OWINGS: (Continued)
6 Q Mr. Fall, what happened after you received
7 this letter?
8 MR. COGAR: With respect to what?
9 BY MR. OWINGS: (Continued)
10 Q What happened in the course of the
11 transaction, the events? What was the next event that took
12 place?
13 A We released the manufacturers to begin
14 fabrication of the equipment.
15 Q And were you ever notified that the equipment
16 was ready? Did there come a time that you were notified that
17 the hoist was ready?
18 A The equipment was manufactured at two
19 different places, being assembled in Philadelphia.
20 On approximately September 15, we received an
21 invoice from the Harnischfeger Corporation stating that they
22 had delivered the hoist, which is a lifting mechanism, to the
23 Philadelphia Tramrail Company in Philadelphia, and we received
24 an invoice from them and notification of shipment. And the

1 shipping papers with Associated shows which truck it went on
2 and the freight bill that Associated gave us gives the certifi-
3 cation that it had been shipped.
4 Q What did you do after you received this
5 invoice?
6 A We notified, number one, Philadelphia
7 Tramrail that we had been put on notice that they had received
8 the hoist and we wanted to know their anticipated shipment date.
9 We then wrote to Industrial Automation asking them for a firm
10 ship to point.
11 Q When did you write to Industrial Automation
12 asking them for a ship to point? Do you have a copy of that
13 letter?
14 A In my file.
15 Q Would you open your file?
16 A I think it was the 19th of September.
17 (Perusing file) September 19. I wrote Mr. Martin at his
18 address here in Richmond. Do you want me to read it?
19 Q Yes.
20 A (Reading letter)
21 We are nearing the date of shipment on
22 the crane and hoist. I need your delivery
23 point as soon as possible. As you know, we
24 have not received from you a point of delivery

1 since you gave us the order for which we very
2 much thank you.
3 I hope to hear from you in the very near
4 future.
5 Sincerely yours.
6
7 Signed by myself.
8 Q What did you do after that? Did you receive
9 a shipment point?
10 A It was sometime thereafter that we got one
11 on in October. We did not receive a ship to point from
12 Industrial Automation until they called us on the phone and
13 told us where to ship it. That was October 30.
14 Q Did you call them several times in the
15 interim?
16 A I had called them twice. I don't know if I
17 can say this or not. They are a very hard firm to get hold of
18 when they don't want to be found. And we did try several times.
19 We left messages at their office on West -- I believe it is out
20 on Patterson Avenue -- that we wanted to know where to ship it.
21 And I told the girl who answered the phone out there for them
22 that I was going to ship it to their office on Darbytown Road
23 if I didn't get a ship to point.
24 Q Do you remember approximately when you told

1 them that?

2 A 10/17.

3 Q October 17. And you ultimately received a

4 ship to point on October 30, is that correct?

5 A Right.

6 Q What did you do when you received that ship

7 to point?

8 A We immediately called Philadelphia Tramrail

9 and told them where to ship it. And we called the other

10 supplier who was supplying the rail and told them where to ship

11 it. And the following day the equipment was shipped.

12 We also followed this up with a note to the

13 two manufacturers where the equipment was.

14 Q What date was it actually shipped? Do you

15 know?

16 A November 1.

17 Q What date was it received by Industrial

18 Automation?

19 A November 3.

20 Q Do you have shipping documents in your file?

21 A Yes.

22 Q Did you receive payment from Industrial

23 Automation after they received the goods?

24 A No.

1 Q So what did you do?

2 A We subsequently had sent them invoices and
3 general-follow-ups, and I went to see them and helped them on
4 some problems they were having with putting the equipment
5 together, and asked them for the money. And got further and
6 further -- oftentimes contractors do have trouble getting money
7 on long-term contracts, and we were willing to work with them
8 as much as we could. And around sometime I think, oh, February
9 or March, it appeared that we were just not going to get our
10 money at all.

11 Q When did you first invoice them? Do you
12 remember that?

13 A December 6.

14 Q How much did you invoice them for at that
15 time?

16 A Ninety percent of the contract, which was the
17 agreed-upon amount per the purchase order and my quotation.

18 Q How much was that?

19 A 13-8-1-5. $13,815.00.

20 Q And you invoiced them on December 6?

21 A (Indicating in the affirmative).

22 Q Did you ultimately contact the bank? When
23 was the first time you contacted First & Merchants and let them
24 know that the amount was not paid?

1 A Let me look for the date.

2 Q Mr. Fall, I am going to hand you a document.

3 NOTE: Counsel observed the document.

4 BY MR. OWINGS: (Continued)

5 Q Is that letter dated February 14, 1973?

6 A Yes. That is a letter that I wrote to Mr.

7 Martin at Industrial Automation and sent a copy to Mr. Holton

8 at the bank.

9 MR. OWINGS: Judge, I move to introduce that

10 as Plaintiff's Exhibit Number 8, I believe it is.

11 THE COURT: That would be correct.

12 NOTE: The above letter was so marked.

13 BY MR. OWINGS: (Continued)

14 Q Did you again notify Industrial Automation

15 in writing about the past due account and carbon copy Mr.

16 Holton at the bank?

17 A I did not personally write the letter. The

18 bookkeeper at my instructions did so.

19 Q What was the date of that letter?

20 A Let me get it. March 15, 1973.

21 MR. OWINGS: Your Honor, I move to introduce

22 that as Plaintiff's Exhibit Number 9.

23 NOTE: The above letter was so marked.

24 BY MR. OWINGS: (Continued)

1 Q Then did you subsequently direct a letter to
2 the bank? I believe this one would be to Mr. Worthington.
3 A Right. On May 17, I believe, Mr. Worthington
4 had taken over the job that Mr. Holton had had when we first
5 got into this, and we wrote a letter to Mr. Worthington at the
6 bank explaining our position and our disappointments, and what
7 have you. Our treasurer wrote this letter, Mr. Raymond Dubois.
8 Q Did you make a demand in that letter for
9 payment by First & Merchants?
10 A Yes, I did. As a matter of fact, this letter
11 so stated that I would be by there.
12 I went by the Ninth Street office and talked
13 to Mr. Worthington and talked with a few other people there,
14 and their position at that time was what it is today.
15 Q What date was this letter?
16 A May 17.
17 Q 1972?
18 A '73.
19 Q 1973. Excuse me.
20 MR. COGAR: What was the date again?
21 THE WITNESS: May 17.
22 THE COURT: Is that to be offered or not?
23 MR. OWINGS: Your Honor, I don't have a copy
24 of it. I would like to offer it into evidence.

1 THE WITNESS: Do you want it?

2 MR. OWINGS: Yes.

3 THE COURT: I tell you what to do,

4 gentlemen. Why don't you make a photocopy of it

5 during the luncheon recess? It will be Exhibit Number

6 10, which I will indicate. I want the only copy to

7 be marked as an exhibit to be in the file, not lying

8 around on counsel's desk.

9 BY MR. OWINGS: (Continued)

10 Q Were you subsequently advised that the Coast

11 Guard approved the job?

12 A Yes. We contacted the Coast Guard and asked

13 them about the possibility of obtaining the money from them,

14 and they informed us that the job had been completed and the

15 money was being forwarded to the bank. I don't know the

16 correct terminology used, but I think the bank had put a lien

17 on it. It had gotten first claim on the money from this due to

18 the moneys owed them by Industrial Automation. We wrote the

19 contracting officer a letter.

20 Q Do you know when it was that you were advised

21 that the contract was accepted?

22 A May 23. In that time period around May 23,

23 1973.

24 MR. OWINGS: I have no further questions,

1 Your Honor.

2 THE COURT: Mr. Cogar, let me interrupt you
3 one minute, please. I don't know the length of your
4 intended cross examination. I want you to take all
5 the time that you want but it does suggest the question
6 of if it is going to be rather short that we have a
7 recess or if it is going to be extensive it may be
8 desirable to have a luncheon recess.

9 MR. COGAR: If Your Honor please, I don't
10 propose to be unduly long. This gentleman has been
11 referring to a file, and the first thing that I was
12 going to do was request that I would like to inspect
13 it. So if we could recess for lunch now, if that would
14 suit the jury and Your Honor, I would like to do it.

15 THE COURT: I think probably that would be
16 the better way, particularly if you want to look at
17 the file, which you have a right to do.

18 Members of the jury, we will take a luncheon
19 recess.

20 NOTE: The Court admonished the jury.

21 MR. COGAR: If Your Honor please, I understood
22 that I would be able to see the file.

23 THE WITNESS: Your Honor, it is a company
24 file.

THE COURT: Mr. Fall, will you turn the file over to him, please?

THE WITNESS: May I remove some stuff from it?

THE COURT: No, you may not.

MR. COGAR: I want all of it.

THE COURT: The whole thing.

NOTE: Recess was held from 12:30 p. m. until 1:00 p. m., after which Court and counsel retired to chambers.

IN CHAMBERS

THE COURT: All right.

MR. COGAR: I have a very brief matter here. I was just talking with Mr. Owings. In the course of testimony by Mr. Fall, Mr. Owings was apparently attempting to make the point that the job on which this hoist was used had been accepted by the Coast Guard, which we will stipulate and agree to.

In making that point, the witness said that he had been told that moneys had been paid to First & Merchants, and I want to move to strike that as hearsay. I didn't even hear it at the time, and I would move to strike it as hearsay, because I don't want to have to bring down three more witnesses to go

1 IN CHAMBERS

2 into something which I think is unrelated and which I
3 think Mr. Owings thinks is unrelated.
4 THE COURT: All right. So the motion is
5 sustained by virtue of the statement being based on
6 hearsay.
7 It is not as clear to me as it might be.
8 Maybe you all can clarify it in the stipulation as to
9 what is actually being excluded.
10 MR. OWINGS: Your Honor, maybe I can clarify
11 that. The question to Mr. Fall was whether or not he
12 had been notified that the contract had been finally
13 accepted by the Coast Guard in accordance with the
14 agreement that Industrial Automation and American
15 Industrial Corporation had entered into, and that the
16 ten percent, the final ten percent, became due, and
17 Mr. Fall responded in the affirmative and stated that
18 he was notified that the contract was accepted on or
19 about May 23, 1973.
20 And as to anything else that Mr. Fall said,
21 Your Honor, I don't think it is necessary for the
22 purposes of this trial.
23 MR. COGAR: The part that specifically
24 related to moneys that the Coast Guard had paid to

1 IN CHAMBERS

2 First & Merchants was the part I objected to, and I
3 understand that Jerry has no objection to that being
4 stricken.

5 MR. OWINGS: No, sir.

6 THE COURT: All right. I would think,
7 gentlemen, that it may or may not be desirable at
8 sometime later before the jury gets consideration of
9 the case that something be told the jury about this,
10 but, as of now I don't see any particular need for it
11 unless you all desire.

12 MR. COGAR: I am still hoping on hope that
13 they are not going to get it.

14 THE COURT: That may or may not be, Mr. Cogar.
15 The only thing I can say is if we get to that point
16 then it may be desirable to make some direction to the
17 jury about the fact that this should be disregarded
18 and stricken.

19 MR. COGAR: Yes, sir. I think that they may
20 mistakenly draw some inference that would draw them
21 off the scent if they get the case.

22 MR. OWINGS: Judge, I would like to state one
23 other thing for the record. With the Court's initial
24 ruling regarding the testimony of Mr. Fall, we didn't

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go into a great detail. For example, the conversations and what have you. We talked about the letter of May 16, 1972. I believe that was read in evidence, Your Honor. And we didn't go into why my client had written a letter. And, also, with respect to the other letters earlier. Also, they were admitted in evidence. Well, they were brought into evidence as exhibits, but were not allowed to be considered by the jury. And from that standpoint, Judge, I think it would seem to me, in reality, that the Court has sustained Mr. Cogar's motion and taken it under advisement from my standpoint, and I would note my exception to the Court doing that.

THE COURT: All right.

MR. OWINGS: Maybe you need a little clarification. When the Court took the position that it did on objection by counsel for the defendant relative to Exhibit Number 1, it is already reflected by the record, then counsel for the defendant, in effect, stated that he desired to have his objection to be continuing rather than interrupting each time.

So I would think that it might be desirable at this time to clarify which exhibits the defendant's

IN CHAMBERS

objection runs to.

According to my notes, Exhibit 1 was this April 18 quotation. Exhibit 2 was a letter apparently written by the witness to defendant number one. Then Plaintiff's Exhibit Number 3 dated May 1, a photocopy of the purchase order, or something, from defendant number one, to which I understand the defendant's continuing objection exists.

But then you get to Exhibit 4, which is the May 1 letter from First & Merchants, and what it said about it expiring July 31. Then we get to May 16 letter, Exhibit 5. Exhibit Number 6, is the letter from First & Merchants saying the commitment would be extended through October 31. Then their letter of May 19, 1972.

MR. COGAR: There is no objection, Judge, to any letter written to us or by us.

THE COURT: All right. That helps.

MR. OWINGS: My point, Judge, would be that the May 16 letter incorporates by reference the purchase order of May 1, and the letter of May 25.

MR. COGAR: That will be something I will argue at the time, Judge.

1 IN CHAMBERS

2 THE COURT: All right. Are you ready,
3 gentlemen?
4 NOTE: At 1:15 p. m., court reconvened, the
5 members of the jury resumed their seats in the jury
6 box, and the proceedings continued as follows:
7 IN COURTROOM
8 THE COURT: Members of the jury, it is ten
9 minutes past the time we agreed on before the luncheon
10 recess. While you were out I took up matters with
11 counsel, then within the last ten minutes I took up
12 matters with counsel, which I think in the long run
13 may well save time rather than lose it, even though
14 you may not think so.
15 All right. Cross examine the witness, Mr.
16 Cogar.
17
18 CROSS EXAMINATION
19 BY MR. COGAR:
20 Q Mr. Fall, prior to receiving the First &
21 Merchants letter of May 1, 1972, concerning the loan commitment
22 to Industrial Automation, had you, or to your knowledge had
23 anyone, any representative of the plaintiff, had any
24 conversations or correspondence with any representative of First

1 & Merchants concerning this loan commitment?

2 A No.

3 Q The letter of May 1, 1972, over the signature

4 of Mr. Holton, is addressed to American Industrial Corporation.

5 Did you read the letter?

6 A Yes.

7 Q Have you ever had occasion to seek a loan

8 commitment from any lending institution?

9 A Yes.

10 Q For example, in the buying of a house have

11 you gone down and said if I buy this house will you lend me the

12 money? And you made application for it?

13 A Sort of like that, yes.

14 Q Then you are familiar with transactions

15 whereby lending institutions agree subject to certain

16 conditions to make loans?

17 A I would say in my -- in my instance, yes.

18 When I was involved in it, yes.

19 Q You are aware of a prevailing practice among

20 lending institutions in certain instances to put an expiration

21 date on that commitment to lend, are you not?

22 A Right.

23 Q After receiving the May 1, 1972 letter, I

24 find nothing further in the file until your letter of May 16,

1 1972. Nor do I recall any testimony of yours concerning this
2 subject matter between May 1 and your writing your letter to
3 First & Merchants National Bank on May 16.
4 A Right.
5 Q Were there any conversations with the bank
6 or any other correspondence with them between May 1 and May 16?
7 A No.
8 Q In your letter of May 16, 1972, you say in
9 the first sentence:
10 We received your letter of May 1, 1972,
11 confirming your agreement to lend Industrial
12 Automation an amount up to, but not to exceed,
13 $15,350.00.
14
15 Then you say this:
16 We said that this was for the exclusive
17 use for purchase of a hoist being sold by
18 American Industrial Corporation to Industrial
19 Automation.
20
21 What do you mean by "we"?
22 A If I wrote a letter under my title name, I
23 think I would be talking about American Industrial. If I said
24 "we,"

1 Q Then you understood as of May 16 that the
2 bank had agreed to lend, according to their letter, $15,350.00
3 to you to be used exclusively for the purchase of the hoist?
4 A Right.
5 Q And you say in your letter of May 16:
6 Commitment of this letter was to expire
7 on July 31, 1972.
8
9 A Right. That was reference to his letter.
10 Q There was nothing between May 1 and your
11 letter of May 16 to cause you to have any concern with the May
12 1 letter until you realized that the delivery of this hoist may
13 be beyond the expiration date of July 31, is that correct?
14 A No. As sure as there is a tomorrow or there
15 was a yesterday, there is no way humanly possible that that
16 hoist could have been delivered by July 31, when he ordered it
17 on May 1, or if he had ordered it April 1.
18 Q So is this what prompted you to write this
19 letter, to let the bank know that this delivery was likely to
20 come after the commitment had run out?
21 A No. What prompted me to write that letter
22 was the fact that in conversations with Mr. Martin, Hubert
23 Martin, and David Wilcox, I explained to them that I could not
24 accept their order without the bank backing them and giving me

1 some assurance that there would be funds available to us when
2 we did ship, and I repeat ship, the hoist.
3 Q You repeat ship the hoist.
4 A Right. Because the hoist became the property
5 of Industrial Automation when it was on the trucker's truck.
6 Not when it arrived at this plant, but when it was on his truck.
7 Q Let me read this paragraph to you, paragraph
8 2 of your letter of May 16, 1972. Mr. Hubert Norton, which
9 you meant Martin.
10 A Right.
11 Q I will read Norton as Martin in the letter.
12 Mr. Hubert Martin of Industrial
13 Automation has been advised several times
14 that the delivery on this unit would run
15 possibly twelve weeks.
16
17 A (Indicating in the affirmative).
18 Q When you wrote that sentence were you
19 concerned about delivery or shipment?
20 A You are talking about a period of three days.
21 One day. If you get a carrier you are talking about a period
22 of a week between the time of shipping and the time of delivery.
23 Q Do you know the difference between shipment
24 and delivery?

1 A Yes. When it leaves from the factory and
2 when it hits the road.
3 Q Do you know what is meant by "delivery," as
4 you used the word in this letter?
5 A Well, are you going to term delivery as a
6 delivery truck riding down the street?
7 Q In your lexicon, what does "delivery" mean?
8 A When it is on the road coming this way.
9 Q So if it is shipped from Hong Kong by slow
10 freight taking eight months, it is being delivered each day?
11 A It is being delivered, right.
12 Q When is delivery?
13 A When is delivery?
14 Q (Indicating in the affirmative).
15 A From the contents of that letter?
16 Q When is shipment as opposed to delivery?
17 A Shipment is the time that if you take -- are
18 we playing with words? Are we playing with what actually
19 happened? Shipment would be in terms, I would think in any
20 terms, of when it left the guy's loading dock.
21 Q When it comes down the road over the days, it
22 is being shipped, isn't it?
23 A It is being delivered. It has already been
24 shipped.

1 Q The second sentence is, "As I have told him,
2 it has come true. We have received a confirmation delivery
3 date..."
4 A Right.
5 Q A confirmation delivery date.
6 A Right.
7 Q Did you intend by that phrase to mean a date
8 certain upon which the equipment would arrive at a point
9 certain?
10 A I meant that it would be delivered. It would
11 be on delivery. In other words, it would be on the truck coming
12 this way.
13 Q You say a confirmation delivery date --
14 A Right.
15 Q -- is the date that it would be received?
16 A It is no human alive who can make a statement
17 saying that he can confirm that a truck is going to actually
18 drive from Philadelphia to Richmond and get here in 8.2 hours
19 or 9.3 hours, what have you, so there is no way that anybody
20 who is familiar with the movement of material on the highway
21 would ever assume that. When I tell you a firm delivery date,
22 what I am telling you is from the point of order that we will
23 legally commit ourselves to the Harnischfeger Corporation to
24 furnish a hoist. They say from the point of that date they will

1 ship it out or deliver it at that time. That is the day they
2 will put it on the truck and have it delivered. When it gets
3 here it is in the control of the receiver. If it needs tracing
4 or following up, it is the receiver's responsibility; not the
5 guy shipping. He has no legal obligation, in my terms of
6 limited knowledge of law.
7 Q Now, you have twice said something about when
8 it is in the hands of the receiver it becomes his property.
9 A Not when it is on the truck. Let's cite an
10 example. If you bought something from Philadelphia and it came
11 in and was damaged, it is up to you to sue the trucker for the
12 damage; it is not up to the sender. It is the receiver who
13 has to sue for the damages. In legal terms, the trucker never
14 owns it. Ownership transfers from the time it is shipped to the
15 time that it is received.
16 MR. OWINGS: Your Honor, it would appear to
17 me that the trial process would be facilitated somewhat
18 if we talk about delivery terms such as FOB.
19 MR. COGAR: Unfortunately, those words do not
20 appear in here so I can't talk about them.
21 MR. OWINGS: Yes, they do. Well, they appear
22 on other agreements or other exhibits, and that is what
23 this contract is all about. It is about the April 18
24 thing that you objected to, and now you are talking

1 about delivery.

2 MR. COGAR: Could we have the exhibit,

3 please, Your Honor?

4 BY MR. COGAR: (Continued)

5 Q I would like for you to have a copy of this

6 May 16 letter in your hand, if you would, please. I will try

7 to speed this up a little bit.

8 I read your second paragraph to ask the bank

9 to extend its commitment to November 1, 1972.

10 Is that what you were asking them in the

11 letter?

12 A Where are you reading from?

13 Q "I have written Mr. Hubert Norton that we

14 will put this order on hold if he does not have a letter in our

15 hands by May 19, 1972, stating that this commitment has been

16 extended to November 1, 1972."

17 A Right.

18 Q And this commitment that you were talking

19 about is the commitment that was contained in the letter of

20 May 1 from the bank, is that correct?

21 A No.

22 Q What commitment are you talking about?

23 A The commitment that is in Exhibit Number 1,

24 and in my letter dated, I think it is April 25. This is April

18. April 25 is the letter where I reiterated the terms that we would use. And in those terms was the fact that we did need some guarantee of payment.

Q Mr. Fall, what does the last sentence in your first paragraph of your letter say?

A I am referring to Mr. Holton. "We have received your letter..."

Q What day?

A May 1.

Q Then what does the last sentence in the paragraph say?

A "Commitment of this letter was to expire on July 31, 1972."

Q So the commitment that you were talking about in this letter is the commitment contained in Mr. Holton's letter of May 1?

A Oh, no. "I have written Mr. Hubert Norton that we will put this order on hold if he does not have a letter in our hands by May 19, 1972, stating that this commitment has been extended to November 1."

Q You have in the first sentence said --

A I am only referring to Mr. Holton's letter in the first sentence. I am only reiterating, repeating, what he said in his letter.

1 Q Aren't you still talking about his letter in
2 the second paragraph?
3 A No. Leave the paragraph. Where do I say
4 anything about his letter of May 1?
5 Q "I have written Mr. Hubert Norton that we will
6 put this order on hold if he does not have a letter in our
7 hands by May 19, 1972, stating that this commitment has been
8 extended to November 1, 1972." The only previous reference to
9 commitment in this letter is where you refer to the letter of
10 May 1, 1972, which is the bank's letter, and say, "Commitment
11 of this letter was to expire on July 31, 1972."
12 Now, is that or is that not a commitment to
13 which you refer?
14 A No.
15 Q Did you make any other requests of the bank
16 in this letter?
17 A If I may indulge the Court.
18 Q Just answer my question.
19 A Did I have any other requests --
20 Q Did you make any other requests in this
21 letter that you wrote the bank?
22 A I didn't write any more letters to the bank.
23 Q In this letter dated May 16, have you made
24 any requests to them?

1 A About what?

2 Q Anything.

3 A I complained to Mr. Holton.

4 Q I am asking you did you make any requests of

5 them?

6 A To do what?

7 Q Anything.

8 A Yes.

9 Q What?

10 A I suggested to him to get a copy of Industrial

11 Automation's letter, or purchase order.

12 Q Now, did you make any other requests of

13 them?

14 A Yes.

15 Q What?

16 A If he had any questions to call me.

17 Q Did you make any other requests of him?

18 A I would say this is a request, if you want

19 me to read it.

20 Q All right.

21 A "Our original agreement with Mr. Norton was

22 covered in my letter to him on April 25, 1972. F&M's letter of

23 credit was to be your guarantee that AIC will be paid $15,350.00

24 under the conditions specified on Hubert Norton's order write-up."

1 Now, if I got a letter like that from an
2 individual that was asking me to guarantee him payment of
3 moneys, I would certainly -- I am requesting him to, I am not
4 asking him to with a direct request, but I am stating to him
5 what I want. And I gave him the letter to refer to, and I
6 would have thought the bank would have had a copy of it since
7 they were going to lend the money on it. Unless they were just
8 going to finally loan money on something that they didn't know
9 what in the world they were going to lend money on.
10 Q On May 17, you received a letter from Mr.
11 Holton, did you not?
12 A Right. That is one of the exhibits.
13 Q That is Plaintiff's Exhibit Number 6. Now,
14 you have written your letter of May 16, in which you refer to
15 a commitment and that you need a commitment extension.
16 A Right.
17 Q Mr. Holton writes you and he says: "Dear
18 Mr. Fall, please refer to my letter of May 1."
19 Did you have any question about what he was
20 referring to?
21 A I can read, you know.
22 Q When you received the letter did you have
23 any question about it?
24 A Other than the fact that I called him. I had

1 that question.

2 Q Did you understand what he meant when he said

3 please refer to my letter of May 1? Did you know what letter

4 that he was referring to? Did you know at the time?

5 A I have a copy of it, yes.

6 Q There was only one letter of May 1?

7 A Right.

8 Q "This letter will serve to extend our

9 commitment confirmed in that letter through October 31, 1972."

10 A Right.

11 Q So did you understand that by this letter the

12 commitment of May 1 had been extended to October 31?

13 A Only in time. Only in time. But I think if

14 you will read the next letter that he wrote you will see that

15 subsequent to our telephone conversation after receiving this

16 letter you can see that I asked to basically almost tie

17 Industrial Automation up in knots.

18 Q Now, you never got any other letter or

19 commitment from First & Merchants respecting the expiration of

20 the date of the commitment?

21 A No.

22 Q That was the final say from the bank on

23 expiration date?

24 Q Does the letter of the 18th or 19th say

anything about time?

A Not as I read it.

A So far as the time sequence is concerned, this is the date that I understood at that time.

Q So is it fair to say that having now read the May 1 and May 17 letters, you knew that the bank was, so to speak, on the line to lend him $15,350.00; that those proceeds were to be used to pay you for the purchase of the hoist?

A Right.

Q That is what they were earmarked for?

A That is the way the letter was written, which was unsatisfactory to me.

Q Now, your counsel in his opening statement -- you were present when he made it.

A Yes.

Q He indicated that there was a concern about the financial stability of Industrial Automation, and I am not quoting him directly, but I think the sense of it is the same, that you wanted these moneys to come into your hands and not have the risk that they would get into Industrial Automation's hands and be diverted from you. Is that a fair summary of the concern that you had?

A Partially.

1 Q So you called Mr. Holton and when you called
2 him on the 18th, it would appear from these letters you had in
3 hand the May 17 letter you had received.
4 A And the May 1, and all the rest of the files.
5 Q For my purposes, you had the May 1 letter
6 and you had the May 17 letter?
7 A (Indicating in the affirmative).
8 Q Did you say anything to Mr. Holton about the
9 May 17 letter extending the commitment?
10 A Yes.
11 Q Did you take exception to the fact that it
12 was only to October 31?
13 A No.
14 Q But you told Mr. Holton that you wanted these
15 funds paid on a check with your firm's name on it and not the
16 intended borrower, is that correct?
17 A I told Mr. Holton and I explained to him, I
18 think, it is hard to remember now from two years ago, but I
19 explained --
20 Q Tell me only what you do remember.
21 A I know exactly in context, I remember telling
22 him that I had told him we didn't think this company was capable
23 of doing the job, and unless they stood fully behind them I
24 didn't think they would ever complete the job. And I wanted

1 some assurance, some guarantee, something that tells me that
2 First & Merchants was going to pay American Industrial even if
3 Industrial Automation couldn't pay us, and I wanted them to
4 basically -- I didn't want them to be issuing them money to go
5 off on a different tangent, as is exactly what happened to them,
6 and basically divest themselves of all the funds they would
7 possibly have had from the contracts they were trying to perform.
8 I wanted the bank to guarantee that if I went on the obligation,
9 when I obligated my company for the said amount of money that
10 we had to pay the Harnischfeger Corporation, Philadelphia
11 Tramrail Company, and Aeromotive Rail for the equipment that
12 we bought from them on our purchase order based upon good faith,
13 that Industrial Automation would pay us back by the bank. And
14 I would have never issued those orders if I had not received
15 the May 19 letter which told me that they would get no funds
16 and that no funds would go to Industrial Automation that did
17 not have my name on it or American Industrial's name on it. To
18 me, I had them so tied up there would be no way humanly possible
19 they could expend moneys without us having to know about it.
20 Now, if you will allow me to continue, sir.
21 The Frying Pan Light ship would not have a hoist on it today if
22 that was not my understanding when I got that letter, put out
23 there by the Tidewater Construction.
24 Q You wanted a guarantee that if --

1 A I didn't want it --

2 Q -- this hoist was shipped--

3 A I got a guarantee, if they would read the

4 terms of the contract.

5 Q Will you please let me finish my question.

6 A Yes. I didn't know you hadn't finished.

7 Q Don't interrupt me. When my lips stop

8 moving, I am finished then.

9 You wanted a guarantee that if this hoist

10 was shipped that anything short of the world coming to an end

11 that First & Merchants was going to pay for it?

12 A Right.

13 Q You got the letter of May 19, 1972, right?

14 A (Indicating in the affirmative).

15 Q Did that meet your request?

16 A It certainly did.

17 Q So far as you were concerned?

18 A It certainly did.

19 Q This letter says: "To confirm our agreement

20 over the telephone yesterday, any funds advanced to Industrial

21 Automation, Inc., will be in the form of a cashier's check

22 payable to your firm." Right?

23 A Right.

24 Q Now, suppose that from May 19, to the end of

1 the world, First & Merchants never advanced any more funds to
2 Industrial Automation. That wasn't going to pay for your crane,
3 was it?
4 A Any funds advanced to Industrial Automation?
5 Q Assuming that after this letter was written
6 no funds were ever advanced by First & Merchants to Industrial
7 Automation, you wouldn't have gotten any money, would you?
8 A I think we would have because if you go back
9 to the previous letters about all this, you know -- that you
10 have been talking about here today. The May letter. It stated
11 for the exclusive purpose of buying that hoist from us. For
12 any funds that were advanced them.
13 Q For the purchase of this hoist?
14 A I went further and asked him that any funds
15 that they got from them, any funds whatsoever that they
16 furnished to Industrial Automation would be in the form of a
17 check. All you have to do is to go and look at D&B, and you
18 can see they were a financial disaster.
19 Q I am asking you this question. You said that
20 the letter of May 19 satisfied your requests. Now, look at that
21 letter. Read it carefully.
22 A That is it on your desk.
23 Q I have it. You read it.
24 A That is the May 17 letter.

1 Q Now, if no funds after May 19 had ever been
2 paid or advanced, as the letter says, to Industrial Automation,
3 your crane couldn't have been paid for, could it?
4 A If Industrial Automation chose not to pay for
5 it. But if we go back to your May 1 letter, I think you will
6 see that they said they would lend them the money. And we not
7 only --
8 Q You feel that the letter of May 1 then bound
9 the bank to lend funds for the purchase of this hoist?
10 A For the purpose of buying this hoist.
11 Further, it isn't like you say. You have got to look at the
12 whole configuration, the whole string of events. You have got
13 to look at it from the time the job was initially bid on to the
14 time they actually got the contract. How they were going to
15 actually perform the contract and how the letters of so-called
16 credit transpired between American Industrial and Industrial
17 Automation and First & Merchants Bank.
18 Q You have taken me back to the May 1 letter in
19 which the bank said they were committed to lend $15,350.00
20 exclusively for the purchase of this crane.
21 A (Indicating in the affirmative).
22 Q You had that letter --
23 A Right.
24 Q -- in your possession. Then they come along.

1 They said any funds advanced will be made payable in a cashier's
2 check payable to you.
3 A (Indicating in the affirmative).
4 Q Any funds advanced.
5 A (Indicating in the affirmative).
6 Q So you took those two letters, read them
7 together, and you felt you were going to get your money?
8 A I took May 1, May 17 and May 19. And I
9 looked at the top of that paper. It says F&M Bank. That was
10 the man who signed it. I felt that was the bank that was
11 backing that company, and if the bank doesn't have the money,
12 whose got it?
13 Q As a combination of these three letters you
14 felt you had the assurances you needed?
15 A Right.
16 Q And I am referring to May 1, May 17 and May
17 19.
18 Did you ever subsequent to May 19, 1972,
19 receive any other writing from First & Merchants National Bank?
20 A You mean after May 19?
21 Q Right.
22 A Not to my memory. I would have to look in
23 the file right quick. But I don't think so.
24 Q Did you receive any verbal assurances of any

1 sort?

2 A (Indicating in the negative).

3 Q From First & Merchants National Bank?

4 A No.

5 Q This crane or hoist which was ordered by

6 Industrial Automation was in more than one part coming from

7 different places?

8 A (Indicating in the affirmative).

9 Q Just tell me very briefly what are the major

10 components?

11 A What are the major components?

12 Q (Indicating in the affirmative).

13 A The total heart of the system -- you know, it

14 is like a body. You know, your body won't function without a

15 heart, so let's call the hoist the heart.

16 Q Where was the hoist coming from?

17 A It was coming from Milwaukee, Wisconsin.

18 Q Did you have some other major component to be

19 attached to the hoist?

20 A The hoist was attached to a bridge crane.

21 Q Was that covered by this $15,000.00 order?

22 A This was part of it. It was Philadelphia

23 Tramrail who mounted the hoist to the bridge crane and shipped

24 it to us, or shipped it down to Hamilton Manufacturing.

1 Q Where is Hamilton Manufacturing?

2 A Ellen Road over here off the Boulevard.

3 Q Why did it go to Hamilton Manufacturing?

4 A That is where they told us to ship it.

5 Q When did you learn this crane was being

6 shipped, or that the hoist, the assembled parts, were finally

7 being shipped to Richmond to the point where Industrial

8 Automation said they wanted it shipped to?

9 A October 30, by telephone call.

10 Q Tell the jury and His Honor who told you --

11 MR. OWINGS: If Your Honor please, I believe

12 he misunderstood the question.

13 Mr. Cogar, if you would repeat the question.

14 MR. COGAR: All right.

15 BY MR. COGAR: (Continued)

16 Q When were you first advised that the crane

17 assembled was being shipped to Richmond to the purchaser?

18 A When was I first advised of it?

19 Q (Indicating in the affirmative).

20 A I think my telephone call on November 1.

21 Q Who called you?

22 A Al Gurmankin, vice-president of Philadelphia

23 Tramrail.

24 Q What were the circumstances under which you

1 received this phone call or under which you made the phone call?
2 Who initiated the phone call?
3 A We called them on October 30 and told them
4 that Industrial Automation had finally given us a ship to
5 point, and they immediately -- we also called the Aeromotive
6 Rail people. We subsequently followed up with a written notice,
7 and it appears that the crane was shipped on November 1.
8 Q What do you mean it appears that it was
9 shipped?
10 A It was received by a Mr. Schutte at the
11 Hamilton Manufacturing Company on 11/3/72. And if you can read
12 microfilm you have got better eyes than I have got. It appears
13 that it was picked up somewhere around the first. An invoice
14 that we got from Philadelphia Tramrail, you have got the file
15 there, you can find it if you want to, discloses that they did
16 ship it on the first day of November, and it was a cost of
17 $136.00 or something.
18 Q So the assembled crane was sent from where?
19 A From Philadelphia, Pennsylvania.
20 Q From Philadelphia, Pennsylvania to Richmond,
21 Virginia?
22 A (Indicating in the affirmative).
23 Q For delivery to Industrial Automation?
24 A In care of Hamilton Manufacturing Company.

1 Q In care of Hamilton Manufacturing Company
2 on November 1, 1972?
3 A (Indicating in the affirmative).
4 Q And according to your records it was received
5 by Hamilton --
6 A On November 3.
7 Q -- on November 3, 1972.
8 After November 1 or 3, 1972, when did you or
9 any other representative of American Industrial make any demand
10 for any payment upon the defendant First & Merchants National
11 Bank?
12 A Not until sometime in February or March.
13 Q If I gave you your file could you be looking
14 through there and refreshing your recollection and tell me when
15 you first made demand upon First & Merchants National Bank?
16 A (Perusing file) On March 15, David Holton
17 was notified by a letter written by Mrs. Phyllis Sullivan,
18 accounting department for us. We have a one-person accounting
19 department.
20 Q It might expedite matters if you looked at
21 your letter of February 14.
22 A On February 14, I wrote Industrial Automation
23 explaining to them that we had fulfilled our obligation and I
24 was looking for them to take care of theirs.

1 Q You are referring now to the second paragraph
2 of the letter to Industrial Automation under date of February
3 14, 1973, which I believe is Plaintiff's Exhibit 9, which reads
4 as follows: "I am sending a copy of this to Mr. David Holton
5 at First & Merchants Bank so that he may be advised that we have
6 not received the money that was so-called set aside for the
7 purpose of paying for this crane."
8 A Right.
9 Q At any time prior to October 31, 1972, did
10 you, any representative of American Industrial Corporation, any
11 representative of Industrial Automation Corporation, or any
12 person, to your knowledge, make any demand upon First & Merchants
13 National Bank to lend or advance the funds that were the subject
14 matter of this loan commitment?
15 A On December 6, when we --
16 Q I said prior to October 31, 1972.
17 A No. Not -- I can't speak for Industrial
18 Automation.
19 Q To your knowledge is all I am asking you.
20 A No.
21 Q You don't know of anyone who made any demand
22 upon First & Merchants prior to October 31, 1972, to advance
23 funds pursuant to the loan?
24 A No.

1 Q You do not know?

2 A We wouldn't ask for funds prior to the

3 actual shipment of the goods.

4 Q That is not my question. Do you know of

5 anybody who did prior to --

6 A No.

7 Q -- October 31, 1972?

8 A No.

9 MR. COGAR: I have no further questions.

10 Thank you.

11 MR. OWINGS: I have no further questions,

12 Your Honor.

13

14 BY THE COURT:

15 Q In the caption of the case brought here by

16 counsel, of course, the defendant sued is named First & Merchant

17 National Bank.

18 Do you understand it to be that a national

19 bank is controlled in any way by federal or state law, either

20 or both?

21 A No, sir.

22 THE COURT: Thank you, sir.

23

24 WITNESS STOOD ASIDE

1 MR. OWINGS: I call Mr. Holton as an adverse
2 witness.
3
4 DAVID R. HOLTON, being first duly sworn,
5 testified as follows:
6 DIRECT EXAMINATION
7 BY MR. OWINGS:
8 Q Mr. Holton, will you state your name for the
9 Court and jury, please.
10 A David R. Holton.
11 Q Mr. Holton, during the time of this
12 transaction you were employed by First & Merchants Bank, is
13 that correct?
14 A Yes.
15 Q And they are the defendants in this cause of
16 action, correct?
17 A Yes.
18 Q What was your capacity at the time?
19 A I was a commercial loan officer.
20 Q Mr. Holton, did you assist your counsel in
21 preparation of the answers to interrogatories?
22 A A portion of it.
23 Q In the answers to interrogatories which were
24 submitted to you, you were asked whether or not any funds were

1 advanced to Industrial --

2 THE COURT: Just one minute. The purpose of
3 interrogatories, whether or not this witness even
4 assisted in the preparation of a particular answer,
5 the interrogatory and answer thereto are not evidence
6 nor are to be considered in court unless they are
7 conceivably used in the way of impeachment.

8 MR. OWINGS: I can rephrase the question.

9 MR. COGAR: I was familiar with that decision,
10 Your Honor. I was waiting for him to finish his
11 question.

12 BY MR. OWINGS: (Continued)

13 Q Mr. Holton, did you approve an advance of
14 funds to Industrial Automation on June 17, 1972, in the amount
15 of $10,000.00?

16 A I know loans were made. I can't give precise
17 dates and amounts. I know that several loans were made but I
18 can't give you the exact date or month.

19 Q Do you have your file with you?

20 A No.

21 MR. COGAR: We are willing to stipulate, Mr.
22 Owings, if it will shorten your examination.

23 MR. OWINGS: Yes, sir. Your Honor, I would
24 like it stipulated then that First & Merchants advanced

1 $10,000.00 to Industrial Automation on June 13, 1972;
2 $5,000.00 on July 27, 1972; $10,000.00 on September
3 14, 1972; $10,000.00 on October 17, 1972; $10,000.00
4 on November 3, 1972; $17,500.00 on November 27, 1972;
5 $12,500.00 on January 4, 1973; $7,500.00 on February
6 6, 1973; $11,000.00 on May 10, 1973; and $4,400.00
7 on June 6, 1973.
8 MR. COGAR: I would want as a part of that
9 stipulation, Mr. Owings, that these funds which you
10 have just recited were not advanced to Industrial
11 Automation pursuant to any loan agreement commitment
12 or any other form of undertaking in any way related
13 to the contract between Industrial Automation --
14 MR. OWINGS: I think that is a matter for the
15 Court to decide. I want it stipulated that these
16 funds were advanced period.
17 MR. COGAR: I am not going to do that then.
18 MR. OWINGS: Your Honor, then I am going to
19 have to require that the bank get its records here so
20 that we can go through them.
21 THE COURT: I am not going to require the
22 bank to get its records here this late. This case has
23 been on the docket since June 14, 1973. This Court
24 conducts mandatory pre-trial conferences and sets

1 down dates by which you all can be heard. You have
2 every right under the Rules of Virginia to bring in
3 any records and any statements or anything in writing.
4 You have a right to go to any witness or the opposite
5 party and take their discovery depositions. You can
6 get anything in the world you want under the discovery
7 Rules of Virginia.
8 We are not going to wait until the middle of
9 the trial to make them produce their records. The case
10 was set on June 14, 1973. We are not going to delay
11 all of these people to get records.
12 Your request is refused.
13 MR. OWINGS: Your Honor, we have the
14 information in the interrogatories.
15 THE COURT: Well, the defense counsel
16 indicated that he is not making the stipulation.
17 BY MR. OWINGS: (Continued)
18 Q Mr. Holton, you have heard what was the
19 subject of the stipulation. Would you say that it is possible
20 that First & Merchants did advance those amounts on those dates
21 to Industrial Automation?
22 MR. COGAR: Objection.
23 MR. OWINGS: Judge, he knows. He is the one
24 who approved the loans.

1 THE WITNESS: May I make one statement?

2 MR. COGAR: No. I have an objection. His

3 question was is it possible. That does not reach the

4 dagree of probability.

5 THE COURT: That is right. I sustain the

6 objection.

7 BY MR. OWINGS: (Continued)

8 Q Well, is it probable?

9 A Is what probable?

10 THE COURT: Based on your personal partici-

11 pation in the transaction.

12 THE WITNESS: I would like to make one point.

13 As of the first of October 1972, my duties were changed,

14 and I have no personal knowledge of any loans made

15 after that date.

16 BY MR. OWINGS: (Continued)

17 Q Well, let's talk about prior to that date

18 then.

19 Is it probable you approved a loan on June

20 13, 1972, or advancement of funds to Industrial Automation in

21 the amount of $10,000.00?

22 A Yes.

23 Q Is it probable that on July 27, 1972, you

24 approved an advancement to them of $5,000.00?

1 A Yes.

2 Q Is it probable that on September 14, 1972,

3 that you approved an advancement to them of $10,000.00?

4 A Yes.

5 MR. OWINGS: Thank you. No further questions.

6

7 CROSS EXAMINATION

8 BY MR. COGAR:

9 Q With respect to the three loans which you

10 have just testified to, Mr. Holton, were any of them in any way,

11 were those advancements in any way, related to the agreement

12 between Industrial Automation and American Industrial

13 Corporation for the purchase of a hoist which is a part of the

14 subject matter of this litigation?

15 MR. OWINGS: Objection, Your Honor. Now, Mr.

16 Cogar wants his cake and he wants to eat it, too.

17 THE COURT: Isn't it the other way around?

18 You opened the subject up. Now you don't want him to

19 cross examine on it.

20 MR. OWINGS: No, sir. It is irrelevant

21 because in the May 19, 1972 letter, David Holton says

22 that any funds--and Mr. Fall has already testified

23 that they discussed this on the telephone--that

24 absolutely any funds that were advanced to Industrial

1 Automation would be in the form of a cashier's check
2 payable to American Industrial Corporation. But, as
3 a matter of fact, that was not done, as just testified
4 to.
5 Now, Mr. Cogar has also said that the letter
6 of May 19, 1972, has got to be read just by itself.
7 If it does, then we are talking about any funds, and
8 it cannot be explained by parole evidence, Judge.
9 THE COURT: Do you wish to be heard, Mr.
10 Cogar?
11 MR. COGAR: Your Honor, I am afraid that Mr.
12 Owings has again taken the prerogative of the Court
13 to interpret what the documents mean. There is a
14 phrase in the third letter which said, "Any funds."
15 Inevitably, Your Honor will be called upon to make the
16 determination as to what that phrase means. Should
17 Your Honor determine that it means, as Mr. Owings
18 contends, any funds for anything forever and all times,
19 then we have one ball game. If it means any funds
20 which were the subject matter of this loan commitment,
21 then we have another ball game.
22 He has opened it up. He asked him if any
23 funds were made. I simply wanted the Court to have
24 the benefit of knowing whether these funds were

advanced pursuant to the hoist transaction or some unrelated transaction with which the plaintiff has nothing to do.

THE COURT: The plaintiff's objection is overruled. You may pursue it.

MR. OWINGS: I note my exception.

BY MR. COGAR: (Continued)

Q The question, Mr. Holton, you have testified to three advancements prior to October 17 through September 14, 1972.

Were those advancements in any way related to any transaction between American Industrial Corporation or Industrial Automation?

A Absolutely not.

MR. COGAR: That is all. I may call him later as my own witness.

THE COURT: Yes. You may do so. He is called now as an adverse witness.

You may step down.

WITNESS STOOD ASIDE

MR. OWINGS: I would like to call Mr. Worthington as an adverse witness.

1 RICHARD B. WORTHINGTON, II, being first duly
2 sworn, testified as follows:
3 DIRECT EXAMINATION
4 BY MR. OWINGS:
5 Q Would you state your name to the Court and to
6 the jury, please.
7 A Richard B. Worthington, II.
8 Q Did you subsequently take over the position
9 as loan officer for First & Merchants in Mr. Holton's place?
10 A Yes.
11 Q What position was that?
12 A Commercial lending officer.
13 Q Is it probable that you made, or do you
14 remember making, advances to Industrial Automation when you
15 took over?
16 A Yes, I did.
17 Q Did you begin on October 17, with an advance-
18 ment of $10,000.00?
19 A I would have to look at the file. I was, you
20 know -- not realizing I was being called, I do not recall that
21 particular advance, but it may have occurred.
22 Q Mr. Worthington, does that refresh your
23 memory?
24 A (Indicating in the negative). Not at all

1 without any file. I cannot tell if I made that particular
2 advance.
3 Q Is it probable that you did?
4 A My duties as far as -- you know, this is
5 going to sound a little odd, but my duties as far as my position
6 up on the commercial lending platform actually did not start
7 until October 31, when I took over the function. I was in
8 another department in the bank and moved back and forth between
9 those trying to finish up what I was doing and handling what I
10 had upstairs at that point in time.
11 Q Then, subsequent to October 31, there were
12 several advancements. Is it probable that you approved those?
13 A Most probable.
14 Q What were those advancements? Could you read
15 them quickly?
16 A Certainly. And dates also?
17 Q Yes, sir.
18 A November 3, 1972, $10,000.00. November 27,
19 1972, $17,500.00. January 4, 1973, $12,500.00. February 6,
20 1973, $7,500.00. May 10, 1973, $11,000.00. June 6, 1973,
21 $4,400.00.
22 MR. OWINGS: No further questions. Thank you,
23 Mr. Worthington.
24

1 CROSS EXAMINATION

2 BY MR. COGAR:

3 Q I have this question, Mr. Worthington. For
4 the amounts of money loaned or advanced to Industrial Automation
5 on the dates which have been read to you, were any of those
6 amounts advanced to Industrial Automation in any way related to
7 any undertaking—contract or obligation or debt—between
8 American Industrial Corporation and Industrial Automation?

9 A You mean the Coast Guard contract? Yes, sir.

10 Q (Indicating in the affirmative).

11 A Yes, sir.

12 Q Now, which ones are you talking about?

13 A The last two.

14 Q Will you explain that?

15 A All right.

16 MR. OWINGS: While we continue I would just
17 like to note the same objection as I had previously.

18 THE COURT: All right, sir. The same ruling.

19 MR. OWINGS: Note my exception.

20 THE WITNESS: If I may have the dates.

21 BY MR. COGAR: (Continued)

22 Q Referring to May 10, 1973.

23 A Yes. The $11,000.00 and the $4,400.00
24 advances.

1 Q So your testimony is that on May 10, 1973,
2 you advanced, First & Merchants National Bank advanced,
3 $11,000.00 to Industrial Automation and on June 6, 1973, it
4 advanced $4,400.00 to Industrial Automation.
5 For what purpose were those loans or
6 advancements made?
7 A In an attempt to assist Industrial Automation
8 in completing its Coast Guard contract.
9 Q What contract are you talking about?
10 A The Coast Guard contract to put a crane in
11 the middle of the ocean.
12 Q Were these advancements pursuant to any
13 commitment relationship to the hoist, which is the subject
14 matter of this litigation?
15 A No, sir.
16 Q Were they advancements subject to other loan
17 agreements which you had?
18 A (Indicating in the negative).
19 Q They were not?
20 A No. We didn't have any -- there was no line
21 of credit. I am not really sure I understand.
22 Q How did it come about that you gave them the
23 money?
24 A They had --

1 Q Who is "they"?

2 A Industrial Automation had completed in its
3 conjecture I would say fifty percent of their contract to put
4 the hoist up in the ocean. I could be wrong on the percentage.
5 They had only completed a part of the contract, I think it would
6 be fair to say.

7 The Coast Guard had not advanced any funds
8 to them for payment of any of the work that they had done.
9 Apparently, a lot of the work remained to be done. I was
10 contacted by the Coast Guard to find out, you know, a little
11 bit about what was going on. They agreed to send us partial
12 funds --

13 MR. OWINGS: Your Honor, this is getting into
14 hearsay, I believe.

15 THE WITNESS: It is what happened.

16 MR. OWINGS: Judge, there is a lot of hearsay
17 that we would like to bring into the case, too.

18 MR. COGAR: Just confine yourself --

19 THE COURT: I think you can sum it up -- of
20 course, you opened up the whole subject. It is a
21 reasonable explanation that he can make.

22 MR. OWINGS: Judge, I opened the subject but
23 not for hearsay.

24 THE WITNESS: I am sorry. I will try and be

1 more concise.

2 THE COURT: Rephrase the question, counsel.

3 Maybe we can start off and get to the point. The Court

4 would suggest that you rephrase the question.

5 BY MR. COGAR: (Continued)

6 Q Tell the Court under what circumstances these

7 funds were advanced? Were these funds made out on a check

8 payable to Industrial Automation?

9 A No. They were deposited in their checking

10 account for use to satisfy certain small contractors in an

11 effort to prepay them so they might complete the project.

12 Q Why was that done? Pursuant to what under-

13 standing?

14 A The understanding I had with the Coast Guard wa

15 that they would release some $16,000.00 or $17,000.00 of funds

16 up to the bank. These funds were actually used to initially

17 pay down notes to save them some money. And I turned around

18 when they needed funds and advanced to them in the form of

19 loans to complete payments on expenses that they had incurred

20 to attempt to complete the contract to the Coast Guard.

21 Q So you had a note or other notes from

22 Industrial Automation?

23 A That's correct.

24 Q And the moneys you received from the Coast

1 Guard were applied against those?

2 A That is right. Then re-lent.

3 Q Did you ever have any notes securing any

4 obligations relating to the hoist which you have heard discussed

5 here?

6 A Right.

7 Q Did you ever lend any money on account of the

8 hoist?

9 A No, sir.

10 MR. COGAR: I have no further questions.

11 THE COURT: Anything else of this witness?

12 I understand, Mr. Cogar, that you have a right

13 to recall him if you wish to as your own witness at

14 another time.

15 MR. OWINGS: I have no further questions,

16 Your Honor.

17 THE COURT: You may step down.

18 MR. OWINGS: I do have one question.

19

20 REDIRECT EXAMINATION

21 BY MR. OWINGS:

22 Q Mr. Worthington, were any of these advance-

23 ments in the form of a cashier's check payable to American

24 Industrial Corporation?

1 A Not that I recall.

2 MR. OWINGS: Thank you, sir.

3 WITNESS STOOD ASIDE

4

5 MR. OWINGS: Your Honor, that is our case.

6 THE COURT: The plaintiff rests?

7 MR. OWINGS: Yes, sir.

8 THE COURT: All right. Members of the jury,

9 I will give you a recess for a while. I want to see

10 counsel in chambers, so I think you will probably have

11 ten or fifteen minutes at this stage. So it will give

12 you a chance to report into management, or whatever

13 you need to do.

14 NOTE: At 2:17 p. m., the Court and counsel

15 retired to chambers.

16 IN CHAMBERS

17 THE COURT: Now, let me hear from defense

18 counsel.

19 MR. COGAR: If Your Honor please, the

20 defendant moves the Court to strike the plaintiff's

21 evidence for the reasons which I will attempt to

22 state briefly.

23 A whole lot of evidence has been heard today,

24 and I will just try to summarize that.

IN CHAMBERS:

THE COURT: I don't care to hear any more from you, Mr. Cogar, at this time. You covered your argument fairly well the first time. On the other hand, I am sort of concerned that here you both are maintaining that the Court has got to rule as a matter of law one way or the other. The Court concurs that I have got to do that. This is why I wondered why we have got a jury sitting out here since it cost $180.00 of the taxpayer's money to bring one, under those circumstances.

But, let me say, gentlemen, that after thorough consideration of the case, your arguments, these exhibits, and the testimony that is permissible with respect to those basic exhibits, which are Plaintiff's Exhibit 4, the letter of May 1, 1972, Plaintiff's Exhibit Number 6, which is the letter of May 17, from the defendant First & Merchants to American Industrial, and Plaintiff's Exhibit Number 7, the letter of May 19, 1972, to American Industrial, and my understanding of the law, I have no hesitation in sustaining the motion of the defendant to strike the evidence, and hereby do so and enter up summary judgement for the defendant in this case.

IN CHAMBERS

I adopt, and I will do it in reverse order, those positions taken by counsel for the defendant, which are revealed by the interrogatories, the answers to the interrogatories, and by the very caption of the case, that the defendant is a national bank.

At this juncture, and parenthetically, Mr. Cogar, I would like to make an explanation of an impression I may have given you and other counsel in the case as to the admissibility of the answers to interrogatories. There was one case that went to the Supreme Court. There has been a lot of jostling, as you know, between the Judicial Council and the recommendations of the Supreme Court on rules and that which, pursuant to the constitutional provisions and statutory provisions, the General Assemby is willing to accept, such as are adopted by the Supreme Court of Virginia.

And here is a case which may have limited itself to the question of admissibility on discovery depositions and, perhaps not exclusively interrogatories, as to what can or cannot be used as evidence in a case. But that is sort of a parenthetical explanation.

Getting back to this question of the defendant

IN CHAMBERS

being a national bank, which is basically the third ground of the defendant's argument, in addition to the authority you have already cited, the Court is aware of 3 Michie's Jurisprudence, Section 112, "Powers and Liabilities of Banks." It comes under general banking.

MR. COGAR: What page was that?

THE COURT: 3 Michie's Jurisprudence, Section 112. It comes under the general subject of banks and banking. This is under the specific subject of national banks and the powers and liabilities of national banks. It says the Federal statute prohibits a national bank from guaranteeing the payment of obligations of others. And a national bank cannot lend its credit to another by becoming surety, endorser, or guarantor. And it cites Norton Grocery Co. v. Peoples National Bank, 151 Va., 195. It also cites Farmers' Bank v. Bluefield National Bank, West Virginia, Fourth Circuit. 11 Fed. (2nd) 83, Certiorari denied 271 U. S. 669.

> An agreement of a national bank to guarantee an obligation of another person for his sole benefit, though founded upon a valuable consideration, is ultra vires and

IN CHAMBERS

does not bind the bank unless the circumstances are such as work an estoppel

Now, back to the other decision as to ultra vires and rules made by a bank who would not have authority to enter such an agreement as may be contended for here unless, of course, you get into the aspect of mismanagement and gross negligence to fraud and that kind of thing.

Now, the named bank is First & Merchants National Bank, and in the interrogatories, the answers to the questions say it is a national bank. I think that is sufficient to cover that aspect of it.

Now, when we get back to the guarantee aspect of it, I readily recognize the difference between that and surety. I think it is also important to consider not only the difference between a guarantee and a surety but also the difference between first whether there is the promise to pay that is fundamental and then if there is such a promise in writing, which if it is eliminates oral

IN CHAMBERS

evidence, as I would normally see it. That is under the statute of frauds doctrine.

Then the question is, all right, what, if anything does the writing say? If the writing meets the problems of the facts in the statute of frauds, how do you interpret that writing? And counsel for the defendant has referred to an approach on which this should be made and has cited some authority as to the approach that should be made.

Then you really get down to the question of here is a writing and if it does carry a guarantee, then, is it absolute or conditional. That sort of thing.

So when I read primarily the three basic letters that would be the only obligation of the bank, being, as I said before, Plaintiff's Exhibit Number 4 and Plaintiff's Exhibit Number 7, I don't see guarantee in it. Even if I saw a guarantee in it, I wouldn't see anything other than a conditional guarantee which had already expired.

IN CHAMBERS

Then I don't find anything at all in Mr. Fall's testimony which throws any different import on that, which is obvious in the three exhibits I have just referred to.

Admittedly, Mr. Fall may have a tendency to pretty well understand everything, but even he, according to my notes, indicated that the May 1 letter has got a limitation in it. Until July 31, my recollection is. And he got an extension on that, in the second letter, to October 31. And even before he got the letter of May 19, which is the third of the letters before the Court, I believe it would be Plaintiff's Exhibit Number 7, he phoned Holton on the 18th, the day before that letter was written, and he already had before him the letters of May 1 and May 17, and during those phone calls he took no exception at all to the date of October 30 set out in the prior letters of May 1 and May 17.

I just do not see how any reasonable construction could be made on these things other than by reading them together. There is no guarantee. To say, under the plaintiff's construction, that this letter of May 19, such as it is, gave continuous open-

IN CHAMBERS

ended draws on the First & Merchants National Bank ad infinitum is beyond all reason. And under my construction of these instruments, and the evidence, and my understanding of the law, I feel that the defendant's motion to strike the plaintiff's evidence is fully justified, and it stands.

The plaintiff's exception will be noted thereto.

Gentlemen, we will return to the courtroom and I will discharge the jury.

NOTE: Court and counsel returned to the courtroom at 3:05 p. m., and the proceedings continued before the jury as follows:

IN COURTROOM

THE COURT: Members of the jury, I am sorry to have kept you waiting again, although, I think perhaps the information I now give you will be received with more pleasure than that of waiting, from your standpoint, at least.

The Court has taken a position in this case which has ended the case so that it moves it from any further consideration by you.

Therefore, you, of course, are discharged