

1955

Pacific States Cast Iron Pipe Company and Alvin T. Locke v. Harsh Utah Corporation et al : Brief of Respondent

Utah Supreme Court

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No. 8336

**IN THE SUPREME COURT
of the
STATE OF UTAH**

**PACIFIC STATES CAST IRON PIPE
COMPANY, et al.**

Plaintiffs,

and

ALVIN T. LOCKE,

*Intervening Plaintiff and
Respondent,*

vs.

**HARSH UTAH CORPORATION, a cor-
poration, HARSH INVESTMENT COR-
PORATION, a corporation, and HAROLD
J. SCHNITZER, an individual.**

Defendants and Appellants.

Respondents Brief

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Plaintiffs,

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vs.

HARSH UTAH CORPORATION, a corporation, HARSH INVESTMENT CORPORATION, a corporation, and HAROLD J. SCHNITZER, an individual.

Defendants and Appellants.

Respondents Brief

PRELIMINARY STATEMENT

In this action the plaintiff Locke sought to foreclose a mechanic's lien for monies due him as construction superintendent on a Wherry Housing Project located at Hill Field Air Force Base. He sought to recover a bonus due under a contract between the parties for the bidding and construction of said Wherry Housing Project. The contract provided that the defendant Schnitzer, for financing the project, should first receive, out of the profits of the construction of the project, an amount equal

to 10% of the parties' bid for the project, and that of the remaining profits, the plaintiff should have 50% as a bonus for his services. Locke sought one-half of all the profits and to eliminate Schnitzer's preference of 10% upon the grounds that Schnitzer had failed in his obligation to finance the project. The Court granted plaintiff judgment for one-half of the profits, after deducting Schnitzer's 10% and Schnitzer and the other defendants appealed. Locke cross appeals, contending that the Court should have eliminated Schnitzer's preferred 10% and also contending that the court should have allowed a larger profit arising out of additional work and services performed under the construction contract pursuant to "change orders" executed between Harsh Utah Corporation as the owner corporation and Harsh Investment Corporation as the contracting corporation.

Inasmuch as respondent-intervening plaintiff, Alvin T. Locke, controverts the appellants' statement of facts in certain particulars, he feels obligated to set forth below specific reasons requiring him to refute the statement of facts of appellants.

Appellants, in their statement of facts, from Page 2 through Page 41 of their brief, make many broad and sweeping statements completely unsupported by, and contrary to, the evidence and record.

Appellants engage in speculation and theory throughout their entire brief with absolutely no reference to the records in many respects, as required by rule. It is submitted that appellants cannot support their theory by the actual record.

During the trial of the action, appellants' apparent defense to the claims of respondent was a campaign to discredit the character and reputation of respondent, and inasmuch as this attack completely failed, appellants now, before this Court, make an attempt at a new defense, based upon theory, and completely unsupported by the evidence and record.

Respondent, in his reply brief, will not attempt to answer appellants' arguments based upon matters not within, and completely foreign to, the record of the trial Court below, such as the Peat, Marwick, Mitchell & Co. report which is not a part of the trial record in any way whatsoever. Respondent will, consistently and unequivocally, in this brief make only such statements of fact and present only such argument as can and will be supported by the record, with complete and accurate reference to the record in each instance.

During the course of this trial two different reporters were used. The transcript, therefore, is as follows: That portion of the trial reported by Cecil E. Tucker is in Volume I (R. 283), Pages 1 through 599 and Volume II (R. 284), Pages 600 through 1165 and will be referred to as (T.(*page number*) throughout respondent's brief. The remaining record, being the transcript reported by J. L. May (R. 285), Pages 1 through 250, will be referred to throughout respondents brief as (T. *page number-M*), indicating in each instance May's transcript, No. 285 of the Record.

Respondent further observes and directs this Court's attention to the fact that apparently in transmitting the official record to this Court, the Court below forwarded

all exhibits pertaining to trials by various plaintiffs against the appellants and that many of them were not referred to or used in the trial between respondent and appellants.

Respondent has further observed that the official record of the proceedings, when received by respondent, was marked with pencil marks in a good many instances and various pages thereof had been folded and marked with paper clips. Respondent desires to point out that respondent's attorneys have, in no way, marked or placed any paper clips or other foreign substances upon the official record of the Court below.

STATEMENT OF FACTS IN RE BACKGROUND AND PRELIMINARY AGREEMENTS BETWEEN THE PARTIES

Respondent Locke met appellant Schnitzer on June 21st, 1951, at Portland, Oregon, (T. 26-M; 854-855), not "shortly before June of 1951", as asserted by appellants on Page 3 of their brief. Previous to this meeting Locke had been engaged in the construction business as a general construction superintendent on large housing projects. Schnitzer had recently sold an interest in a family business and was looking for an opportunity to invest his capital.

The parties, Locke and Schnitzer, entered into their first agreement, Ex. 156, on the day of their first meeting, June 21st, 1951 (T. 26-M; 854-855). This agreement is set forth on Page 1 of the appendix to appellants' brief. By the terms of this agreement, Locke was to furnish to Schnitzer certain technical information regarding the bidding and the acquisition of a Wherry

Housing Project at Deseret Chemical Depot in Utah. For this assistance Schnitzer was to pay Locke \$50,000.00 out of profits. The parties were not successful bidders on this project and no monies were paid to Locke under this agreement.

Between June 21st, 1951 and July 24th, 1951, both Locke and Schnitzer made further investigation pertaining to the Wherry Housing Project at Deseret Chemical Depot in Utah. In Salt Lake City on July 24th, 1951, Schnitzer and Locke entered into their second agreement, Ex. 157, which is set forth on Page 3 of the appendix to appellants' brief. This agreement was a joint venture pertaining to the construction and ownership of the Wherry Housing Project at the Deseret Chemical Depot. By the terms of this agreement, Schnitzer was guaranteed a return of \$150,000.00 from profits and all remaining profits were to be divided equally between the parties. The \$150,000.00 was 10% of the amount of the proposed bid of \$1,500,000.00 on this project. (T. 861) The parties were not the successful bidders on this project.

Between July 24th, 1951 and August 29th, 1951, Locke and Schnitzer procured plans and specifications for three additional Wherry Housing Projects located at Davis-Monthan Air Force Base in Arizona, Hill Field Air Force Base in Utah and Great Falls Air Force Base at Great Falls, Montana. They subsequently submitted bids on all three projects, pursuant to an "Invitation for Proposal", Ex. 228. This exhibit pertained to Hill Field Air Force Base Housing Project and similar invitations were issued pertaining to the Great Falls, Montana, Air

Force Base Housing Project and Davis-Monthan Air Force Base Housing Project.

On August 29th, 1951, Schnitzer and Locke at Portland, Oregon, entered into their third agreement, Ex. 158, set forth on Page 5 of the appendix to appellants' brief. This agreement pertained to the bidding of the above mentioned three projects and provided that Schnitzer was to furnish the necessary capital and Locke was to provide his services to supervise the construction of said projects. This agreement further provided for a guaranteed return to Schnitzer of a sum equal to 10% of the total monies received from the Government for such construction. It further provided for a division of profits equally between Locke and Schnitzer. This agreement, like the second agreement, was a joint venture agreement between Locke and Schnitzer to construct and to own the leasehold improvements on the Wherry Housing Projects therein mentioned. Essentially, Schnitzer's obligation was to provide the necessary capital and Locke's obligation was to supply the construction knowledge and ability in the capacity of construction superintendent to supervise the building of said projects.

IN RE REQUIREMENTS PERTAINING TO WHERRY HOUSING PROJECTS.

It is important at this point to examine the record to determine what knowledge the parties had pertaining to a Wherry Housing Project and the obligations of the parties interested in said Wherry Housing Projects as well as the benefits acquired incident to the ownership and construction of said projects. The Invitation for

Proposal, Ex. 228, under date of August 2nd, 1951, and the Administrative Rules and Regulations for Military Housing Insurance under Title VIII of the National Housing Act, Ex. 3, clearly set forth the program. These documents themselves clearly refute appellant's contention that the only funds available for the construction of the Wherry Housing Project were the proceeds of the mortgage, and further clearly refute appellants' contention pertaining to the financial obligations of Schnitzer and Harsh Utah Corporation as the owner-managing corporation. For sake of clarity, the following is a summarization of the various provisions of the Wherry Housing program.

1. A Wherry Housing Project is provided for by a program under the Wherry Act whereby military housing units are built on Government-owned military bases by private corporations. The F. H. A. rules and regulations, Ex. 3, provide the control for the financing and construction pertaining to the projects.

(a) Pursuant to the Invitation for Proposal, Ex. 228, bids are submitted by a sponsor to own a leasehold interest granted by the Government and to build thereon the housing facilities contemplated. The Lease, Ex. 251 provides for a land rental annually of \$100.00 per year for 75 years.

(b) A successful, qualified sponsor, submitting the low bid, must then enter into certain negotiations, preparatory to construction. The Invitation for Proposal, Ex. 228, among other things, provides, Paragraph 6. thereof, as follows:

“Sponsors are advised that the approved rental

schedule will be based upon a 'net return', not exceeding $61\frac{1}{2}\%$ of the sponsor's estimated replacement cost or the F. H. A. estimate of replacement, whichever is the lower"

The Invitation for Proposal further provides, Paragraph 7 thereof, as follows:

"Sponsors are advised that the maximum approved amount of insurable mortgage will in no event exceed 90% of the sponsor's total estimated replacement cost stipulated in said proposal."

This terminology in the above mentioned exhibit made it clear to both Locke and Schnitzer at an early date that additional funds over and above the mortgage would be required. This is unquestionably the reason for the provision in the agreement between the parties providing for a 10% return of the amount of the bid to Schnitzer. Before any division of profit, Schnitzer was required to furnish all additional funds required over the mortgage proceeds to assure successful completion of the projects and to establish the equity of ownership.

(c) The initial Invitation for Proposal above referred to also clearly sets forth other requirements pertaining to mortgage financing. The Application for Mortgage Insurance, Ex. 187, and the Land Lease, Ex. 251, in addition thereto set forth the maximum allowable insurance mortgage in the amount of \$2,904,000.00 and the F. H. A. total replacement cost of \$3,226,737.00.

(d) At the time the bid was submitted the sponsor was required to submit an Application for Mortgage Insurance, Ex. 187. The application clearly provided that the sponsor must submit financial schedules show-

ing the sources of the equity that the sponsor would be required to have in said projects (the above mentioned 10%). Ex. 187 shows that this equity would be furnished by advances from Schnitzer totalling \$500,000.00. The document was signed by Harold J. Schnitzer on August 28th, 1951.

2. Under the Wherry Housing Act, a successful bidder must complete the requirements of the Commissioner of F. H. A. under the rules and regulations, Ex. 3, and, among other things, complete the following:

(a) Form an F. H. A. owning corporation to act in the capacity of lessee under the Lease, Mortgagor under the Mortgage and owner under the Construction Contract — "Lump Sum".

(b) The owning corporation must then enter into a construction contract for the construction of the project. The construction company must complete the project within a period of 24 months; Ex. 61.

(c) Upon completion of the project and acceptance by the F. H. A., the Mortgage, Ex. 63, is then transferred from a private lending institution, Irving Trust Company, to the Federal National Mortgage Insurance Association. The owning corporation is then in active management and control of the project, collecting all of the rental proceeds from said project and has a period of 33 1/3 years to retire the existing mortgage on its property. The rules and regulations of the Bureau of Internal Revenue, provide that the owning corporation is allowed to totally depreciate the project for income tax purposes over the same period of the loan, that is,

over 33 1/3 years, and this depreciation schedule results, insofar as income taxes are concerned, in tax-free income to said owning corporation. The evidence will disclose that, insofar as the Hill Field Air Force Base is concerned, the minimum tax-free income received by the owning corporation is in excess of \$30,000.00 per year (T. 1135) and a greater amount pertaining to the Great Falls, Montana, Air Force Base Housing Project and the Barstow, California, Marine Corps Housing Project, for a total annual income to the corporations controlled by appellant Schnitzer of approximately \$100,000.00 per year (T. 1007-1010, 1134-1136).

IN RE FINAL AGREEMENTS BETWEEN THE PARTIES

Subsequent to August 29th, 1951, Schnitzer and Locke submitted bids for the above mentioned three Wherry Housing Projects, to-wit: Hill Field Air Force Base Housing Project, Great Falls Air Force Base Housing Project and Davis-Monthan Air Force Base Housing Project. However, due to the widespread locations of the projects, they only accepted two of the contracts, to-wit, those pertaining to Hill Field Air Force Base Housing Project and Great Falls, Montana, Air Force Base Housing Project.

Between August 29th, 1951, and October 4th, 1951, Schnitzer and Locke entered into another written agreement and during the course of the trial, respondent demanded that appellants produce this agreement. They did not do so. (T. 981, 31M, 177M) The testimony pertaining to the terms and conditions of this agreement is

to the effect that Locke's ownership interest was reduced from 50% to 10%. (T. 31M-32M, 41M, 177M). The final agreement entered into between the parties, which is the subject matter of the litigation herein, was executed on October 4th, 1951, Ex. 162, and is set forth beginning on Page 7 of the appendix to appellants' brief. By the terms and conditions of this agreement, any ownership interest theretofore held by Locke in the above mentioned projects was eliminated. This was caused by representations made to Locke by Schnitzer to the effect that inasmuch as they were undertaking more than one Wherry Housing Project that it would be necessary for Schnitzer to dispose of stock interest in the ownership corporations in order to complete his part of the agreement to provide the necessary financing of said projects. (T. 32M-33M, 41M, 77-79) Because of these representations, Locke was induced to give up his ownership interest theretofore held under the terms and conditions of the previous agreements, Exs. 157, and 158. However, after Schnitzer successfully prevailed upon Locke to part with his ownership interest, he did not, at any time, dispose of any of the stock of the ownership corporations and did not perform the obligations required of him to provide necessary financing for said projects, as will be set forth in greater detail subsequently in this brief.

The agreement of October 4th, 1951, Ex. 162, also included as a party the Harsh Investment Corporation. This was a corporation owned by Schnitzer prior to his becoming acquainted with Locke and the record will show, contrary to the contentions of appellants on Page 3 of their brief, who claimed that this corporation was

not then in existence, that this corporation was, in fact, incorporated by Harold J. Schnitzer in the State of Oregon on March 30th, 1950 (T. 1), Ex. 160. The bids heretofore referred to had been submitted by Locke and Schnitzer before October 4th, indicating that the sponsor would be Harsh Investment Corporation and the builder the Schnitzer Construction Co. (T. 80-81, 786) However, the Schnitzer Construction Co. was never used by the parties. The agreement of October 4th, 1951, provided for a salary to Locke in the amount of \$1,000.00 per month and in addition thereto provided "from the net profits earned by Harsh in connection with the construction of the aforesaid projects there shall first be retained by Harsh a sum of money equal to 10% of the total amount of the bids made by Harsh and accepted by the Government on the aforesaid projects and from the remaining net profits earned by Harsh as aforesaid there shall be paid to Locke 50% thereof by way of bonus." The agreement further provided that in the event the projects were built by any company other than a company in which Schnitzer had an interest that Locke was to receive as a bonus a minimum of \$15,000.00 per project and a maximum of \$25,000.00 per project. However, although negotiations were carried on with the Vitt Construction Co. and the Utah Construction Co. to act as the builder and contractor for the entire projects (T. 785 Ex. 227), these negotiations were never completed and subsequently Schnitzer caused the Harsh Construction Co. to be incorporated to act as the construction corporation in Montana and California (T. 119, 120) and designated the Harsh Investment Corporation to be the contractor of the Hill Field Air Force Base Housing

Project (T. 119,120).

IN RE ACTIVITIES OF THE PARTIES PURSUANT TO THE AGREEMENT OF OCTOBER 4th, 1951.

Subsequent to October 4th, 1951, and pursuant to the rules and regulations for Wherry Housing, the Certification of Need for Military Housing was issued by the Secretary of the Air Force on November 14th, 1951, Ex. 227. This document designated Harsh Investment Corporation as sponsor and the builder as Herbert Vitt. However, subsequently an amended Certification of Need for Military Housing was issued and the sponsor was changed to Harsh Utah Corporation, and the builder was designated as Harsh Investment Corporation. Under the direction of the Secretary of the Air Force and the F. H. A., certain requirements had to be met and negotiations in this regard were carried on by both Locke and Schnitzer in the intervening period between October 4th, 1951 and July 21st, 1952, which was the date referred to as the final closing of all of the requirements under the Administrative Rules and Regulations hereinabove referred to. Both Schnitzer and Locke, on behalf of Harsh Utah Corporation, began negotiations with a private lending institution, the Irving Trust Co., to obtain a construction loan pursuant to the Application for Mortgage Insurance, Ex. 187, hereinabove referred to. On May 29th, 1952, the F. H. A. issued its Commitment for Mortgage Insurance, Ex. 186, to the Harsh Utah Corporation as sponsor and mortgagor and to the Irving Trust Co. as mortgagee, setting forth therein the terms and conditions of the F.H.A. Mortgage Insurance, Ex. 186. By the terms and conditions of said exhibit,

it is provided as follows in Section (h) (2) thereof, Page 2:

“Funds, (if any) required over and above mortgage proceeds for completion of the project \$727,742.00 . . . The said fund may be reduced by so much of said Builder’s and Architect’s fees, up to a maximum of \$146,522.00, as the closing documents show are not to be paid for in cash”.

In this instance, this amount was the contractor’s fee which was waived by Harsh Investment Corporation thereby reducing the amount of funds required to be placed in Harsh Utah Corporation by Schnitzer (T. 336; 1155).

On July 9th, 1952, the F. H. A. issued its Financial Requirements for Closing pertaining to the Hill Field Air Force Base Housing Project, Ex. 188. By the terms and conditions of this document, and in particular Item 20 thereof, it shows “cash to be deposited in an escrow by mortgagor to complete above requirements, \$585,-442.00.” This amount is in addition to Item 27 on said exhibit, “Total cash allocated to construction, \$2,995,-205.00”. This document was issued by F.H.A. pursuant to the rules and regulations, Ex. 3, and preliminary to the execution of the Building and Loan Agreement, Ex. 64, and the Mortgage, Ex. 63, which were executed on the 21st day of July, 1952, also in accordance with the rules and regulations, Ex. 3.

By the terms and conditions of the Building and Loan Agreement, Ex. 64, and in particular Paragraph 5 thereof, Page 2, it is provided as follows:

“The Borrower agrees that any sum or sums re-

quired for the construction of the project over and above the proceeds of the loan and deposited with the Lender for that purpose shall be advanced by the Lender to the Borrower prior to the advance of any proceeds of the loan; and the Borrower covenants that *it will receive all advances hereunder as a trust fund* to be applied first for the purpose of paying for the cost of improvements before using any part of the total of the same for any other purpose, but nothing herein shall impose upon the Lender any obligation to see to the proper application of such advances by the Borrower." (Italics supplied.)

The above referred to exhibits, the Financial Requirements for Closing, Ex. 188, and the Building and Loan Agreement, Ex. 64, clearly set forth that the cash requirements over and above the proceeds of the mortgage that must be furnished by Schnitzer under the terms and conditions of the agreement of October 4th, 1951, with Locke are in the total amount of \$651,690.00. This documentary evidence clearly refutes appellants' contention throughout their brief that the only proceeds intended to be available for the construction of the Hill Field Air Force Base Housing Project were the proceeds of the mortgage. This is further established by the rules and regulations, Ex. 3, which, in Section V, Sub-paragraph 2., Page 7 provide as follows:

"The mortgagor must establish in a manner satisfactory to the Commissioner that, in addition to the proceeds of the insured mortgage, the mortgagor has funds sufficient to assure completion of construction of the project. The Commissioner may require such funds, if any, to be deposited with and held by the mortgagee in a

special account or with an acceptable trustee or escrow agent under an appropriate agreement approved by the Commissioner which will require such funds to be expended for work and material on the physical improvements prior to the advance of any mortgage money.”

Also on July 21st, 1952, appellant Schnitzer, on behalf of Harsh Utah Corporation, as owner, and the Harsh Investment Corporation, as contractor, executed the Construction Contract—“Lump Sum”, Ex. 61. By the terms and conditions of this agreement Harsh Utah Corporation as owner was to pay to Harsh Investment Corporation as contractor the sum of \$2,995,205.00 for the construction of the Hill Field Air Force Base Housing Project.

By the terms of said Ex. 61, the Plans and Specifications, Ex. 1, are incorporated therein. The Plans and Specifications provide how certain “change order extras” between the owner and the contractor are to be obtained. This will be discussed in more detail subsequently in this brief. Appellants contend, on Pages 15, 16 and 17, of their brief, that the amount contained in the Construction Contract—“Lump Sum” was dictated by the rules and regulations of F. H. A. This is contrary to the evidence submitted by respondent and is absolutely contrary to the testimony of appellants’ own witness, Walter E. Hutchinson, who stated under cross examination that the F.H.A. did not dictate in any manner the amount of the Construction Contract—“Lump Sum”. This was further corroborated by the testimony of W. Harold Warwick, Chief Mortgage Examiner for F.H.A. The testimony pertaining to this fact is set

forth on Pages 5-7; 22 of the appendix to this brief.

Subsequent to October 4th, 1951, Locke fulfilled his duties and obligations under the terms and conditions of the agreement of October 4th, 1951, and in the capacity of general construction superintendent successfully completed the construction of the Hill Field Air Force Base Housing Project and the Great Falls, Montana, Air Force Base Housing Project.

Pursuant to the terms and conditions of the agreement of October 4th, 1951, between the parties, Harold J. Schnitzer did provide certain funds necessary under the above referred to rules and regulations and other documents for the financing of the Hill Field Air Force Base Housing Project. However, in violation of the provisions of the Building and Loan Agreement, Ex. 64, the F.H.A. rules and regulations, Ex. 3 and in violation of the agreement of October 4th, 1951, with Locke, these funds were withdrawn within a short period of time. Schnitzer's activities in this regard are set forth in the next sub-division of this brief.

IN RE SCHNITZER'S FAILURE TO FINANCE THE PROJECT

On July 21st, 1952, Schnitzer did cause to be deposited certain funds in escrow totalling \$611,200.00 (T. 140; 143-146; 163-168) Under the terms and conditions of the Commitment for Mortgage Insurance and the Building and Loan Agreement, these funds were to remain on deposit as trust funds for the payment of subcontractors and materialmen and for payment of the Construction Contract—"Lump Sum" hereinabove referred to. The testimony during the course of trial of-

ferred by W. Harold Warwick of F.H.A. and substantiated by appellants' own witness, Walter E. Hutchinson, was to the effect that the above mentioned amount was an escrow fund deposited with the Irving Trust Co. as mortgagee and was paid out pursuant to requisitions of funds to pay for certain project costs and installments on the Construction Contract—"Lump Sum". (T. 829-833, 1117-1121) See appendix Pages 11-15; 16-21. Contrary to the representations made by Schnitzer to Locke that he would have to dispose of shares of stock in the owning corporation to raise the necessary funds, Schnitzer did not hypothecate any of said stock to procure these funds but borrowed a total of \$200,000.00 from his father-in-law, the sum of \$300,000.00 from the First National Bank of Portland and in violation of the trust fund provision pertaining to the Montana Project, transferred \$97,000.00 from Harsh Construction Company in Montana, which was in violation of his agreement with Locke pertaining to the Montana project. In addition to these funds, he did transfer \$14,200.00 from his own personal bank account to Harsh Utah Corporation. The above indicates the sources of funds used by Schnitzer to create the escrow fund with Irving Trust Co. hereinabove referred to.

Under the terms and conditions of the F.H.A. rules and regulations, the Building and Loan Agreement, and the Application for Mortgage Insurance hereinabove set forth, and his agreement with Locke, Schnitzer could not legally use any of the above mentioned funds for his own use and benefit. These funds were committed to establish his 10% equity in said project and to provide Harsh Utah Corporation with sufficient funds with which to

pay the obligations of Harsh Utah Corporation as will be discussed in detail hereinafter in this brief, and to pay to Harsh Investment Corporation the amount of the "Construction Contract—Lump Sum" plus extras.

Under the above mentioned rules and regulations and by the terms of the Commitment for Mortgage Insurance and the Mortgage itself, as well as the Building and Loan Agreement, Irving Trust Co., as mortgagee, made advancements throughout the building of the Hill Field Air Force Base Housing Project in accordance with certain requisitions submitted by the contractor during the course of construction. Attached to each of said requisitions, which were initiated by Harsh Investment Corporation as contractor, requesting funds from Harsh Utah Corporation as owner-mortgagor, was a certification for purposes of obtaining mortgage insurance from the F.H.A. on the mortgage proceeds advanced, that the funds advanced by the Irving Trust Co. were for the purposes of paying for the expenses of sub-contractors and materialmen as well as for the the expenses of Harsh Investment Corporation as builder. The documents executed in order to obtain these funds are a part of the record and are Ex. 141. They certify that all of the funds therein requested were disbursed for the construction of the Hill Field Air Force Base Housing Project.

In violation of the F.H.A. rules and regulations, the Mortgage, the Commitment for Mortgage Insurance, the Building and Loan Agreement and contrary to the certification made to F.H.A. for insurance on mortgage advances and the requisitions of funds from Irving

Trust Co., Ex. 141, hereinabove referred to, and in violation of the agreement of October 4th, 1951 with Locke, appellant Schnitzer wrongfully and illegally withdrew funds between November 5th, 1952 and March 24th, 1953, from both Harsh Investment Corporation and Harsh Utah Corporation in the total amount of \$631,000.00 (T. 1094, 1095). These withdrawals are \$19,800.00 in excess of any funds provided by Schnitzer pertaining to the Hill Field Air Force Base Housing Project. The testimony during the course of the trial by W. Harold Warwick, *Pages 13 to 15 of the appendix*; by William Ellis; *Pages 38 and 39 of the appendix*; and by Walter E. Hutchinson, Secretary of Harsh Utah Corporation, *Pages 16 to 21 of the appendix*, was to the effect that because of the withdrawal of these funds it was impossible for Harsh Utah Corporation as owner to have sufficient funds to pay for the necessary expense of the project and to pay to Harsh Investment Corporation the amount of the Construction Contract — "Lump Sum". Respondent submits that this is in direct violation of the terms and conditions contemplated by the parties when they executed their agreement of October 4th, 1951.

Schnitzer was not entitled to withdraw any funds until the completion of the project and it had been accepted by the Government, and a declaration of the profits made between the parties. This would have been, at the earliest, in July of 1954, or, to accept the date argued by appellants in their brief, January of 1955, when the project was finally completed and accepted.

The unlawful manipulation of funds by Schnitzer

hereinabove referred to, his illegal withdrawal of \$631,000.00 from Harsh Utah Corporation and Harsh Investment Corporation and the activities of Schnitzer and Hutchinson in preparing false and fraudulent corporate resolutions during the course of the trial in the Court below in an attempt to mislead the trial Court and defraud Locke will be set forth in detail in respondent's brief on cross appeal.

IN RE TRIAL COURT'S DECISION

The trial Court properly distinguished between construction costs and project costs. Appellants, throughout their brief, attempt to show that Schnitzer, Harsh Utah Corporation and Harsh Investment Corporation are to be considered as a single unit and attempt further to show that the only proceeds available for the construction of Hill Field Air Force Base Housing Project were the receipts of the mortgage. In accordance with the preponderance of the evidence, which was established even by appellants' own witnesses, the trial court properly distinguished between expenses that were to be paid by Harsh Utah Corporation as owner, including the amount of the Construction Contract—"Lump Sum" and the expenses to be paid by Harsh Investment Corporation as contractor. (*See Appendix, Pages 4 to 7.*)

The trial Court properly found that in computing the bonus to which Locke would be entitled under the terms and conditions of the contract of October 4th, 1951, that the income was as follows:

1. The amount of the Construction Contract —"Lump Sum", \$2,995,205.00.
2. The amount of the change order extras in

the sum of \$178,672.00. However, pertaining to this figure, the Court selected the amount in accordance with the evidence by which the mortgage would be increased rather than the sum of \$333,952.55 representing the total amount pursuant to the actual agreements between Harsh Utah Corporation as owner and Harsh Investment Corporation as builder. This is the subject matter of Point I of respondent's brief on cross appeal.

3. The net amount of the rental income received during the construction period of twenty-four months in the amount of \$165,886.49.

The trial Court properly determined the amount of the construction costs pertaining to the Hill Field Air Force Base Housing Project as follows:

1. Direct construction costs, \$2,656,457.21.

2. Indirect construction costs, to wit, general overhead, \$45,631.34. This amount was the actual amount of overhead pertaining to Harsh Construction Co. in Montana which involved the construction of 400 units against 350 in Utah and the expenditure of considerably more money. According to the testimony, Harsh Construction Co. was not engaged in any other business while Harsh Investment Corporation, during the course of construction, was engaged in a considerable number of activities and expended \$1,040,000.00 on items not pertaining to the construction of Hill Field (T. 450, 475, 1093) and according to the testimony of William Ellis, controller for Harsh Investment Corporation, no allocation of overhead expenses was made on the books of Harsh Investment Corporation (T. 1043-1044).

3. The sum of \$69,557.31 which sum is the ad-

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3. The sum of \$69,557.31 which sum is the ad-

ditional amount of judgments rendered by the trial Court below in favor of sub-contractors and materialmen that was not computed in the direct construction costs of \$2,656,457.21.

The trial Court properly eliminated in computing construction costs under the terms and conditions of the agreement of October 4th, 1951, the sum of \$95,547.30, which was the amount of the profit of the Pacific Coast Equipment Co., another corporation totally owned and controlled by Schnitzer, in making purchases of material and supplies pertaining to the Hill Field Air Force Base Housing Project.

The trial Court properly eliminated a salary to Harold J. Schnitzer in the amount of \$26,250.00 paid to him by Harsh Investment Corporation during the construction of the Hill Field Air Force Base Housing Project. The agreement of October 4th, 1951, did not provide for inter-company profits for the benefit of Schnitzer or a salary for Schnitzer.

The trial Court, in computing the judgment in favor of Locke did not include as a cost of construction interest awarded to sub-contractors and materialmen, or the sum of \$25,000.00 damages allowed to Moulding Brothers as a result of Schnitzer's unlawful refusal to pay them through which they suffered damage to their credit to the extent of \$25,000.00.

During the course of the trial, issues were presented to the Court and tried pursuant to certain claims of Locke pertaining to the California project. The trial Court properly found that Locke was entitled to receive the sum of \$8,678.00 on his claim.

The trial Court properly found in its Finding, No. 25 (R. 102) that the total amount of income to Harsh Investment Corporation was at least the sum of \$3,339,863.49 (respondent still contends that this should be a greater sum, as will be discussed in his brief on cross appeal).

The trial Court further properly found that the construction costs were in the amount of \$2,771,685.86, leaving a total of construction profits to be divided pursuant to the judgment of the trial Court in the amount of \$568,177.63. The trial Court then allowed Schnitzer and/or Harsh to retain 10% of the amount of the bid from the above mentioned profits which was the sum of \$276,700.00, leaving a sum to be divided between Locke and Schnitzer of \$291,477.63 or a sum in favor of Locke of \$145,738.81 plus interest of \$10,201.71 to the 31st day of December, 1954, and in addition thereto, the sum of \$8,678.00 plus interest of \$534.21 pertaining to the California project, for a total gross judgment in favor of Locke of \$165,161.73. The trial Court allowed as total set-offs in favor of Schnitzer the sum of \$16,878.97, leaving a net judgment in favor of Locke in the amount of \$148,282.76 which was subsequently adjusted by the trial Court in accordance with its amendment to the judgment, R182 and 183, to allow for certain judgment in favor of painters to the net figure of \$147,905.00.

Respondent contends that in the computation of the above mentioned judgment, the Court should have included the contract price between Harsh Utah Corporation and Harsh Investment Corporation pertaining to

taining to the trial between respondent and appellants was terminated on June 24th, 1954, is highly improper and irregular.

Contrary to the statements made by appellants in their brief that the trial Court was not aware of the amounts due sub-contractors and materialmen, respondent submits that the Record will show that the trial Court did, on February 8th, 1955, make the following Order: "Plaintiff Locke asked that the judgment in favor of Alvin T. Locke be amended by interlineation by deducting one-half of the amount paid to the painters, or in the sum of \$377.76, leaving a judgment of \$147,905.00 for Locke. Granted." This order was entered by the trial Court and was well known to appellants' counsel and an amended judgment entered pursuant thereto to completely adjust each and every item in accordance with the Court's decision. (R. 182 and 183)

IN RE WIRING OF SCHNITZER'S HOTEL ROOM

Inasmuch as appellants have devoted a sub-section in their Statement of Facts to the above entitled subject and have seen fit to insert it in their brief, respondent desires to make a few remarks pertaining thereto.

The trial Court found that "Locke had completely and fully fulfilled all of the duties and obligations as a general construction superintendent as required under the terms and conditions of the agreement of October 4th, 1951," Finding No. 12, R. 96. During the course of the trial and by the pleadings of appellants, they presented no legitimate defense to Locke's cause of action but attempted, as a means of defense and counterclaim, to maliciously attack Locke with claims of em-

bezzlement and fraudulent conduct which appellants could not and did not support at any time during the trial. The Court's Findings, Pages 105 and 106 of the Record, read as follows:

"The Court finds that Locke did not misappropriate or convert to his own use or otherwise misapply any of the monies or property so claimed by defendants as aforesaid to have been misappropriated or converted by him."

This finding clearly establishes Locke's innocence in this regard and shows the malicious attack of appellants during the course of the trial.

The series of cases in litigation pertaining to the claims of respondent Locke, other sub-contractors and materialmen, started on trial before the Honorable Charles G. Cowley on May 18th, 1954. Respondent's attorney, John M. Sherman, was present in the Court room during this testimony and respondent Locke was also present during a large portion of the trial between May 18th, 1954 and June 8th, 1954, the date respondent's case commenced. During this intervening time, respondent was present when considerable false testimony was given by appellant Schnitzer and Robert Kahn, assistant to Schnitzer, during the Moulding case. Respondent was, at this time, well aware of the mental attitude of appellant Schnitzer toward respondent which is set forth on Pages 247-M-249-M of the transcript and which is summarized as follows on Page 249-M, where the following questions were asked by respondent's attorney of Schnitzer:

"Q. Is it also a fact on that occasion between

Mr. Rawlings office and the Hotel Utah, you said Sherman, you and Locke will both rot in jail before you ever get a dime out of me on this law suit?

A. I certainly did make that statement.

Q. You do remember that?

A. I called you a blackmailer and said before Locke was finished there would be criminal charges and if you were a criminal lawyer you had better brush up in the law. I am not ashamed. You have made all types of threats unethical, in my opinion, on all occasions. I have heard nothing but filthy lies from him the past two days."

The conversation hereinabove recited, the Record will disclose, took place on April 13th, 1954, and prior to the trial of the case. As a result thereof, respondent and his attorney, John M. Sherman, knew that appellant Schnitzer would go to any extreme, even perjury, to defeat Locke's claims, and therefore engaged the services of Donald H. Terry, on vacation from the Pasadena Police Department, to conduct an investigation so that the true facts and circumstances pertaining to the activities of appellant Schnitzer could be disclosed to the trial Court.

Donald H. Terry's testimony regarding his investigation is a part of this record, Pages 656 through 721 and resulted in a disclosure to the trial Court that certain testimony pertaining to the preparation of official minutes and resolutions contained on Pages 17 of Ex. 161 were false and fraudulent and the preparation of Ex. 177, portions of which were dated January 15th. 1952

and other portions June 15th, 1953, were, in fact, prepared during the course of trial between respondent and appellants. As a result of respondent's investigation, appellant Harold J. Schnitzer and one of his witnesses, an attorney from Portland, Oregon, Walter E. Hutchinson, both confessed to submitting false testimony during the course of this trial. Respondent submits that the extreme measures taken by respondent's attorney were necessary so that the true facts and circumstances could be determined and the perjured and false testimony revealed to the trial Court.

Schnitzer was so determined to defraud Locke out of his bonus and so determined to discredit Locke in the eyes of the trial Court by false claims of embezzlement, that Schnitzer himself was willing to run the risk of criminal prosecution to defeat the legitimate claims of Locke.

With this background of falsified records and perjured testimony by Schnitzer, Respondent is concerned that no argument based on the Peat, Marwick, Mitchell & Co. audit which is in turn based on records in Schnitzer's possession and control, should be permitted to cloud a clear view of the facts proved to and found by the trial Court.

STATEMENT OF POINTS ON APPEAL POINT I.

THE TRIAL COURT PROPERLY CONSTRUED THE AGREEMENT OF OCTOBER 4th, 1951.

A. The preponderance of the evidence shows a distinction between project costs and construction costs.

B. The conduct of the parties before litigation shows a distinction between construction costs and project costs.

C. The pleadings of Locke are all proper.

POINT II.

LEGAL PRINCIPLES SUPPORT THE TRIAL COURT IN ITS REJECTION OF NON-CONSTRUCTION COSTS.

POINT III.

A PROPER AND ACCURATE ACCOUNTING SHOWS LOCKE IS ENTITLED TO A BONUS.

A. The Findings of Fact of the trial Court in re the total receipts are conclusively supported by the evidence.

B. The Findings of Fact of the trial Court in re expenditures are conclusively supported by the evidence.

POINT IV.

THE TRIAL COURT PROPERLY CONSTRUED THE F.H.A. RULES AND REGULATIONS.

POINT V.

THE FINDINGS OF FACT SUBSTANTIATE ADDITIONAL FUNDS DUE LOCKE PERTAINING TO THE CALIFORNIA PROJECT.

POINT VI.

SET-OFFS DUE BY RESPONDENT LOCKE TO APPELLANTS SCHNITZER AND HARSH INVESTMENT CORPORATION WERE PROPERLY DETERMINED.

ARGUMENT

POINT I.

THE TRIAL COURT PROPERLY CONSTRUED THE AGREEMENT OF OCTOBER 4th, 1951.

By reason of the fact that appellants deal in speculation and theory throughout their argument, respondent feels that both time and space can be saved by first pointing out the errors in appellants' theory and argument before outlining the evidence that will substantiate respondent's judgment.

Appellants, in Point I, attempt to set forth that the trial Court misconstrued the agreement of October 4th, 1951, and deal with this subject from Pages 42 through 57 of their brief. In accusing the trial Court of misconstruing the agreement in question, appellants set forth a fantastic theory by which it would be necessary to completely disregard the express terms of the October 4th contract as well as certain contracts between Harsh Utah Corporation and Harsh Investment Corporation, to completely disregard F.H.A. rules and regulations, the Mortgage, the Lease and other documents.

At the outset it is seen that under the terms of the contract of October 4, 1951, drawn by Schnitzer and his attorneys, Locke's bonus is based on the profits earned "in connection with the *construction*" of the projects. The word used is "construction". The parties did not, although they might have if they had so intended, use the phrase "in connection with the bidding, planning, financing, ownership, operation and construction."

Any attempt to expand the meaning of the word construction to embrace the meaning of the entire phrase

above suggested is manifestly absurd and contrary to the stated intent of the parties.

As the word they used was "construction", it seems clear that the parties must have intended that in computing the profits and the bonus only construction costs and construction income were to be considered, unless otherwise specifically agreed. There were two exceptions: Schnitzer's "finance fee" of 10% of the bid, and rentals received during the construction period as a result of speeding up construction to completion before the end of the 24 months period.

The costs of bidding are obviously unrelated to construction; several bids were made on projects never constructed by the parties.

The planning of the project by architects and engineers is still not "construction," even though it may be a necessary pre-requisite thereto, as was the cost of negotiating a lease for the site and the payment of rental thereon.

Clearly the costs of financing, such as interest charges, are not "construction," and the parties never intended they should be considered as construction costs, for the parties provided a special "finance fee", or "finance service charge" to reward Schnitzer separately for undertaking the obligation to finance the project. This shows that the parties must have contemplated that "construction" should not embrace financing; otherwise it would have been unnecessary to provide specially that the finance fee should be charged against construction profits before computing the bonus. To argue, as does appellant, that he was entitled both to his finance fee

and to all costs of financing by way of interest, etc., is obviously so unreasonable that neither party would have contemplated it in reaching their agreement.

Elimination of Locke's interest in the ownership and operation of the project was one of the clear purposes and intents of the October 4th contract. By that contract they intended to and did separate ownership from construction and it must be presumed that Schnitzer intended to assume the customary burdens of ownership along with the privileges that went with it. That this is true is made quite manifest by the fact that he caused the "lump sum" construction contract to be executed by which the duties incident to construction are clearly outlined and separated from those of ownership. If it had been intended that interest charges, architect's fees and other expenses of ownership were to be borne by the construction contractor, that contract would have so provided.

Respondent Locke, by the terms of the October 4th, 1951, agreement, gave up a valuable ownership interest in the Hill Field Air Force Base Housing Project and Great Falls, Montana, Air Force Base Housing Project, which have a valuation of approximately \$7,000,000.00. The tax-free income to Locke for his ownership interests would have been in excess of \$30,000.00 per year. After having given up these valuable assets, it is certainly not logical to believe, as appellants contend, that Locke intended to disregard the Construction Contract—"Lump Sum" and the other formal documents executed by appellants in the computation of the bonus due him under the October 4th, 1951 agreement.

Throughout appellant's brief, they attempt to argue that appellant Schnitzer, Harsh Utah Corporation and Harsh Investment Corporation should be considered as a single unit and further argue the intent of the parties was to consider appellants as a single unit. However, this fantastic theory is exposed as false and without foundation, even by the testimony of appellant Schnitzer himself when he testified, Pages 53 and 54 of the transcript, as to the relationship between corporations, as follows:

"Q. Now, Mr. Schnitzer, in transacting business of Harsh Utah Corporation and Harsh Investment Corporation, you have transacted business for both corporations, as president, have you not?

A. I have.

Q. And in your capacity as president of both corporations, you have directed the business affairs and activities of both corporations. Isn't that correct?

A. I have actively directed the business affairs of both corporations.

Q. And you have also acted in the same capacity as president and directed the activities of Pacific Coast Equipment Company in exactly the same way, have you not?

A. That's correct.

Q. And is it not your custom, or was it not or has it not been in the past your custom and practice, to conduct the activities of each one of these corporations in a separate and distinct manner and directed their activities as an individual corporation as a separate entity in each

particular instance?

A. They were managed and directed by myself, each individually in a separate manner, each corporation stood on its own feet as a separate and distinct corporation. Their relations between one another were separate and formal.

Q. Then you did, according to your testimony, cause separate books and records of transactions of each individual corporation to be maintained separately and individually. Is that correct?

A. The books of the various corporations are maintained separately and individually.

Q. And if a transaction was entered into between one corporation and the other corporation, that transaction was reduced to writing and an agreement between the two corporations, was it?

A. In many cases, depending upon the gravity of the situation, a formal agreement between the two corporations was prepared."

A. THE PREPONDERANCE OF THE EVIDENCE SHOWS A DISTINCTION BETWEEN PROJECT COSTS AND CONSTRUCTION COSTS.

Respondent submits that the above set forth testimony of appellant Schnitzer himself clearly indicates that Schnitzer, himself, did not regard Harsh Utah Corporation and Harsh Investment Corporation as a single unit, but dealt with each corporation as a distinct and separate entity and executed contracts between the corporations in a formal manner as set forth in the above testimony. This clearly substantiates the trial Court's decision in giving full force and effect to the Construct-

ion Contract—"Lump Sum", and other formal documents executed between the corporations.

The evidence, both oral and documentary, supports the Court's decision and finding as to a distinction between the construction costs and project costs.

Harsh Utah Corporation as the owner-manager of the Hill Field Air Force Base Housing Project was obligated to pay certain costs and expenses of the owner over and above the amount of \$2,995,205.00 which was the amount of the Construction Contract — "Lump Sum" due and payable to Harsh Investment Corporation.

The Court found, in Section 17 of the Findings, R. 98, that Harsh Utah Corporation was obligated to pay the following expenses over and above the amount of the Construction Contract — "Lump Sum" and that the following items should not be considered as construction costs under the agreement of October 4th, 1951 between appellants and respondent Locke:

- "(a) F.H.A. examination and inspection
- (b) Loan fees
- (c) Mortgage placement fee
- (d) Architect's compensation
- (e) F.H.A. mortgage insurance premiums
- (f) Interest on mortgage advances;
- (g) Recording fees, title examinations
and/or insurance and legal fees".

The testimony supporting the above stated facts on behalf of respondent is as follows:

1. Milton D. Goldberg, a Certified Public Accountant, made an audit of the books and records of Harsh Investment Corporation and Harsh Utah Corporation,

Ex. 201, and testified that the books and records of Harsh Utah Corporation reflected the payment of certain costs of the owner corporation as set forth above (T. 573-577). Mr. Goldberg also testified that originally the books and records of various Harsh companies, to wit Harsh Montana Corporation and Harsh Construction Co. were properly set up from an accounting standpoint to reflect the income to the construction company as an Account Receivable in the amount of the Construction Contract — “Lump Sum”. These books and records were later changed to eliminate any Account Receivable item under the direction of appellant Schnitzer. (T. 549-551). *See Appendix, Pages 1 to 3.*

2. Walter E. Hutchinson, a witness produced by appellants and who was also secretary of Harsh Utah Corporation, testified that each of the above mentioned items were expenses properly chargeable to Harsh Utah Corporation; that in addition to these charges Harsh Utah Corporation was also obligated to pay to Harsh Investment Corporation the amount of the Construction Contract — “Lump Sum”. This testimony by Walter E. Hutchinson, who was a witness produced by appellants as the F.H.A. expert and the witness who acted in the capacity of one of the attorneys for appellants, clearly establishes that there is a distinction between project costs to be borne by the owner-manager corporation and construction costs to be paid by the construction company. This testimony is set forth in the *appendix in respondent's brief at Pages 4 to 7.*

3. William Ellis, the controller for Harsh Utah Corporation and Harsh Investment Corporation, testi-

fied that the above mentioned items were paid by Harsh Utah Corporation and were carried on the books of that corporation as a proper expense to Harsh Utah Corporation. (T. 1080-1081). Mr. Ellis further testified that the books and records of Harsh Investment Corporation did not reflect an Account Receivable Item as would be customary in order to prepare a profit and loss statement (T. 1085-1087); *See Appendix Pages 8 to 10*; that the transfer of funds from Harsh Utah Corporation to Harsh Investment Corporation was, from time to time, in the amount designated by appellant Schnitzer. Respondent submits that the books were not kept in accordance with acceptable accounting principles and not in accordance with the contracts as relied upon by Locke. (T. 534-535, 1087).

4. W. Harold Warick, Chief Mortgage Examiner for F.H.A. testified that the items set forth above were proper costs of the owner-manager corporation, Harsh Utah Corporation (T. 1113-1116), and that in addition to those items Harsh Utah Corporation was obligated to pay to Harsh Investment Corporation the amount of the Construction Contract — “Lump Sum” (T. 1117-1121, 1151), *see Appendix, pages 11 to 15*, and further testified, contrary to appellants’ contention, that the F.H.A. in no way dictated or designated the amount of the Construction Contract — “Lump Sum”. (T. 1115-1116).

5. Respondent’s position is further substantiated in this regard by the following documentary exhibits:

(a) Ex. 188, Financial Requirements for Closing, a document executed by Harsh Utah Corporation, sets

forth the following items:

"8. Interest during construction	\$105,462
10. Insurance during construction	4,425
11. FHA Mortgage Insurance Premium	13,184
12. FHA Examination fee	7,910
13. FHA Inspection fee	13,184
14. Financing Expense	39,552
15. Title and Recording Expenses	2,000
21. Legal and organization expense	5,000"

All of said items are in addition to Item 25 of said exhibit: "cash required by construction contract \$2,995,205.00."

(b) The Building and Loan Agreement, Ex. 64, Paragraph 7 on Page 2, reiterates the same items as set forth above as being an obligation by borrower, Harsh Utah Corporation. These items were in addition to the items covered by the Construction Contract—"Lump Sum" referred to in Paragraph 6, Page 2 of the Building and Loan Agreement.

(c) Construction Contract—"Lump Sum", Ex. 61, which provides that Harsh Utah Corporation pay to Harsh Investment Corporation for actual construction of the Hill Field Air Force Base Housing Project the sum of \$2,995,205.00 and this figure does not include the items set forth above which were to be paid as direct costs of Harsh Utah Corporation, the owner-manager corporation.

In sub-paragraph (a) of Point I, appellants attempt to argue that the terms of the agreement show an intention to consider all costs and the appellants proceed from Pages 44 through 48 to add to and interpolate into

this agreement their own theory which is completely and totally unsupported by the evidence. Appellants set forth that the first paragraph of the agreement of October 4th, 1951 envisioned Harsh Investment Corporation being both the owner-manager corporation and the contractor. This interpretation is completely impossible under the law. It is true that the original bid was submitted by Harsh Investment Corporation (T. 80-81) and as testified to by both appellant Schnitzer and respondent Locke (T. 786) at the time the original bid was submitted Harsh Investment Corporation was to occupy the position of sponsor and manager and the proposed construction company was to be the Schnitzer Construction Co. (T. 81). This clearly establishes the fact that both parties knew it was necessary to have two different corporations, one to own and manage and the other to be the contractor.

Subsequent to the bid it was determined that the owner-manager corporation had to be a Utah corporation pertaining to the Hill Field project and a Montana corporation pertaining to the Great Falls Montana project. Therefore, appellant Schnitzer caused Harsh Montana Corporation to be formed to own the Montana project and Harsh Utah Corporation to be formed to own the Hill Field Air Force Base Project. (T. 119). Appellants would have this Court believe that these facts were known only to respondent Locke and not Schnitzer.

It is exceedingly clear from the evidence, testimony and the contents of Ex. 228, Invitation for Proposal, that the requirements of separate corporations, one to

own the project and one to build the project, were known to both parties prior to entering into the October 4th, 1951 agreement.

At the time of entering into the contract of October 4th, 1951, it was also very clear by the terms of the agreement that the construction of the project might be accomplished by contracting with a totally different construction company in which neither Schnitzer nor respondent Locke had an interest. Efforts were made to do this with the Utah Construction Company and the Vitt Construction Company (T. 785) Ex. 227. The contract specifically provided, in that event, that Locke would receive a minimum of \$15,000.00 per project bonus and a maximum of \$25,000.00 per project. However, pertaining to the Hill Field Air Force Base Project, subsequent to October 4th, 1951, it was decided that Harsh Utah Corporation would be the owner and therefore Harsh Utah Corporation was incorporated in December of 1951 and, in lieu of incorporating the Schnitzer Construction Co. to be the contractor, Harsh Investment Corporation was designated to be the contractor (T. 34, 80-81, 786). The evidence further discloses that Harsh Investment Corporation was also the sponsor for the Montana and California projects. However, Harsh Montana Corporation was incorporated in Montana to be the owner corporation. Harsh Construction Co. was incorporated in Oregon to be the contractor for both the Montana and California projects and Harsh California Corporation was incorporated in California to be the owner of the California project (T. 10, 119-120).

On Page 47 of appellants' brief they assert the

argument that because Locke was to receive his bonus "immediately upon completion of the construction of the projects awarded to Harsh and receipt by Harsh of profits earned" that this language would preclude Locke from participating in rental income. However, appellants completely disregard the language of the contract between Harsh Utah Corporation and Harsh Investment Corporation with respect to the time within which the project was to be built which was a period of twenty-four months, Ex. 61, during which period rental income was received. They completely disregard the fact that by the terms and conditions of the Construction Contract—"Lump Sum", Harsh Utah Corporation was to pay to Harsh Investment Corporation within this twenty-four month period the sum of \$2,995,205.00 plus any amounts incurred for changes (T. 829). There is nothing in this language that can be construed that Harsh Investment Corporation actually intended to receive the money directly from the Government unless Harsh Investment Corporation was eventually to be the owner-manager corporation instead of Harsh Utah Corporation.

On Page 48 of appellants' brief, they attempt to argue that appellant Harold J. Schnitzer and appellant Harsh Investment Corporation should be considered as one entity and argue that it would be absurd to allow one party to a joint venture agreement to be required to pay funds from which another party to the joint venture agreement would benefit. However, appellants completely ignore the fact that Schnitzer was to receive 10% of the amount of the bid because he was required to provide the necessary capital, which respondent submits

he failed to do, as will be discussed in respondent's brief on cross-appeal. Appellants further ignore the fact that Harold J. Schnitzer, through Harsh Utah Corporation and Harsh Montana Corporation and Harsh California Corporation acquired property valued at approximately \$10,000,000.00 which was built through the construction ability and knowledge of respondent Locke and now attempt to argue that it is absurd that Locke should receive a bonus as a result of his efforts through which, according to the testimony, Schnitzer will receive a \$100,000.00 per year tax-free income from his three projects. (T. 1007-1010, 1134-1136).

Speaking of absurdities, which appellants seem to indulge in freely, perhaps appellants can explain why Schnitzer did not insert in any agreement, nor write a letter to Locke, that he did not intend to be bound by the terms and conditions of the Construction Contract—"Lump Sum", the terms and conditions of the Mortgage, the terms and conditions of the Lease, the terms and conditions of the Commitment for Mortgage Insurance or the terms and conditions of the F.H.A. regulations insofar as his agreement with Locke was concerned. Or would this be too flagrant an admission on the part of appellant Schnitzer that he had been guilty of further defrauding the United States Government?

B. THE CONDUCT OF THE PARTIES BEFORE LITIGATION SHOWS A DISTINCTION BETWEEN CONSTRUCTION COSTS AND PROJECT COSTS.

Appellants indulge in theory and speculation regarding the conduct of the parties before litigation in arguing that their conduct indicated an intent to con-

sider all costs. Respondent submits that the intent of the parties can better be determined by the various contracts and agreements entered into and the various documents executed by appellant Schnitzer on behalf of Harsh Utah Corporation and Harsh Investment Corporation as well as the F.H.A. rules and regulations, Ex. 3. The Financial Requirements for Closing, Ex. 188, clearly sets forth items to be paid by Harsh Utah Corporation totalling \$585,442.00 separate and apart from the amount of the Construction Contract—"Lump Sum" of \$2,995,205.00.

The Building and Loan Agreement, Ex. 64, clearly sets forth the items and distinguishes between construction costs and project costs, and the Construction Contract—"Lump Sum", Ex. 61, makes a clear and definite distinction between construction costs and project costs and clearly indicates that the amount of the Construction Contract—"Lump Sum" was for construction only and did not include the additional obligations of Harsh Utah Corporation as owner.

Contrary to the contentions of appellants, as will be discussed below, the above mentioned documents and agreements, many of which were executed by appellant Schnitzer, clearly and definitely establish the intent and conduct of the parties and distinguish between construction costs and project costs.

In sub-paragraph (b) of Point I, appellants argue that the conduct of the parties was a consideration of all costs. Respondent admits that it was, on occasions, necessary to determine all of the project costs. However, the testimony is emphatically clear that there is

a distinction between project costs, which were paid for by Harsh Utah Corporation, including the Construction Contract—"Lump Sum", and construction costs which were to be paid for by the contractor, Harsh Investment Corporation. These facts were clearly and emphatically admitted by Walter E. Hutchinson, an officer of Harsh Utah Corporation and one of the attorneys representing appellants, prior to the date of the trial. Mr. Hutchinson's testimony on this fact is set forth in the *Appendix at Pages 4 to 7*.

It is true that Locke made certain mathematical computations pertaining to project costs and profits. Appellants refer to certain of these exhibits, *all of which were prepared prior to the October 4th, 1951 agreement* at a time when Locke was a joint venture owner and *entitled to profits from ownership as well as construction* (T. 191-M - 195-M.) In this context they are no proof at all as to the intent under the agreement executed later. Appellants further recite one instance subsequent to the October 4th, 1951 agreement, which was Ex. 223, pertaining to the Rapid City, South Dakota project. Respondent directs this Court's attention to the testimony of appellant Schnitzer wherein he admits that *this project was not bid under an agreement with respondent Locke or under the terms and conditions of the October 4th, 1951 agreement*. (T. 986). Other exhibits, such as Exs. 222, 239, 241 and 226, were all prepared prior to the October 4, 1951 agreement. In this section, appellants apparently grasp at straws to determine what the mental attitudes of the parties were at the time of executing the agreement of October 4th,

change orders in the sum of \$333,952.55 instead of the \$178,672.00, which is Point I contained in respondents' brief on cross appeal. Respondent further contends that the trial Court should not have allowed Schnitzer to retain \$276,700.00 out of the profits of said contract because of Schnitzer's total failure to finance under the provisions of the October 4th, 1951, agreement. The discussion of this matter is further contained in Point II, respondents' brief on cross appeal.

During the course of the trial, Locke admitted being indebted to Schnitzer in the amount of \$11,712.98 and admitted that in addition thereto, he was indebted to Schnitzer in the sum of \$1,655.93. During the course of the trial, there was disputed testimony concerning the purchase of a truck load of lumber and the trial Court found that Locke should reimburse Schnitzer \$1,200.00 for this item. In addition to that, the Court awarded to Schnitzer the sum of \$1,000.00 as and for attorney's fees pertaining to the above mentioned promissory note.

IN RE FURTHER PROCEEDINGS IN THE TRIAL
COURT BOTH BEFORE AND AFTER FORMAL
FINDINGS OF FACT AND CONCLUSIONS
OF LAW.

Appellants submitted objections and arguments to the proposed Findings of Fact. Appellants also attempted to introduce additional evidence, one of which was a proposed accounting submitted by Card Greaves, CPA, which was rejected by the trial Court on the basis that all of the information was before the Court during the course of trial. This exhibit was Ex. 446. Now, in appellants' brief they attempt to submit additional matters,

which respondent submits is improper, before this Court in the form of the Peat, Marwick, Mitchell & Co. report attached to the appendix of the brief of appellants, Pages 19 through 35. This is similar to Ex. 446, the Card Greaves Report hereinabove referred to, which is also referred to by appellants in their brief but which was rejected by the trial Court.

During the course of the trial, William Ellis, the controller of Harsh Investment Corporation, testified on several occasions. All of the books and records were before the trial Court during the entire trial. In the event that appellants desired to submit any additional accounting evidence, they could have done so, and on Page 446 of the transcript, Mr. King, appellants' counsel, makes the following reply when asked by the Court if Mr. Greaves would be a witness during the trial: "Greaves will not be here if Goldberg testifies properly". Therefore, it can only be assumed that appellants did not desire to call Mr. Greaves as he did not appear to be a witness and admit that Mr. Goldberg testified properly. Respondent submits that all of the books and records of the various Harsh companies have been under the control of appellants since the date the trial closed and respondent has had no opportunity to know how or in what manner any entries were made in said books or for what reason and further, because Mr. Ellis testified during the course of the trial that the books contained all of the costs pertaining to the Hill Field Air Force Base Housing Project except the judgments rendered by the trial Court, that to now attempt to insert a report prepared under date of September 15th, 1955, as an appendix to their brief, when all of the testimony per-

1951. There is absolutely nothing in the Record to support their theory and argument and yet they completely ignore and disregard the physical acts and conduct of Harold J. Schnitzer in the execution of written documents on behalf of both corporations, the acknowledgment of F.H.A. rules and regulations that both corporations must be kept separate, apart, and distinct from each other, and formal documents as well as testimony of Schnitzer set forth above.

C. THE PLEADINGS OF LOCKE ARE ALL PROPER.

Sub-paragraph (c) of appellants' Point I attempts to assert that the pleadings show a theory considering all costs and argue on this point on Pages 54 through 57. Respondent submits that the pleadings themselves clearly assert a cause of action by respondent Locke against Harold J. Schnitzer individually, Harsh Investment Corporation and Harsh Utah Corporation and it is true that Locke has repeatedly made claims of all appellants. However, there is nothing in the pleadings or in the record that substantiates appellants' contention that all of the appellants were to be considered in any different capacity than the Record itself discloses them to actually be. Appellants assert that all appellants must be considered together as one unit in order for Locke to receive any sum whatsoever as a bonus from the profits. This fact is absolutely untrue and is not substantiated in any way by the evidence. The accounting will specifically show the amount Harsh Utah Corporation was obligated to pay to Harsh Investment Corporation to construct the project. It will specifically show the amount that Harsh Utah Corporation was

to pay to Harsh Investment Corporation for extras and will specifically show the amount of rental income received during the construction period and from said funds the amount which Locke should receive for a bonus. These items will be discussed in more detail later in this brief and in respondent's brief on cross appeal.

The fact that repeated references were made to Harsh Utah Corporation, Harsh Investment Corporation and Harold J. Schnitzer throughout respondent Locke's complaint was necessitated by the fact that Locke had absolutely no knowledge as to where the money had gone that was received from the Irving Trust Co. and the funds required by the Government to be placed in escrow. The evidence will clearly show that these funds were indiscriminately and improperly withdrawn by Harold J. Schnitzer in violation of the contracts and agreements and in order to properly trace these funds from various corporations to the other and eventually into the pocket of Harold J. Schnitzer, it was necessary to use the terminology used by respondent Locke in his complaint in intervention.

Insofar as Locke is concerned, the evidence and testimony is complete that he considered the various corporations distinct and separate entities and that he relied upon the Construction Contract—"Lump Sum" and other formal documents executed (T. 184-M, 784-786, 794-796). *See appendix Pages 40, 41.* Respondent submits that the Court properly distinguished between construction costs and project costs and the amounts to be paid by Harsh Utah Corporation and Harsh Investment Corporation.

CONCLUSION

It is exceedingly clear from the evidence hereinabove set forth, both from oral testimony and from documentary evidence introduced, that there was a distinct division between the obligations of Harsh Utah Corporation and Harsh Investment Corporation, which unequivocally supports the lower Court's Findings of Fact and in particular Finding No. 17, R. 98, which is as follows:

"In computing the profits to be divided pursuant to the contract, Exhibit "A" [the agreement of October 4th, 1951] distinction must be made between construction costs and project costs. Project costs include certain expenses of Harsh Utah Corporation as the owner-management corporation, consisting of the following items:

- (a) F.H.A. examination and inspection;
- (b) Loan fees;
- (c) Mortgage placement fee;
- (d) Architect's compensation;
- (e) F.H.A. mortgage insurance premiums;
- (f) Interest on mortgage advances;
- (g) Recording fees, title examinations and/or insurance and legal fees,

said items being in the total amount of One Hundred Fifty-seven Thousand Four Hundred Forty Two and 76/100 dollars (\$157,442.76). This expense is not a cost of construction and is not chargeable as an expense of Harsh Investment Corporation in computing the construction profit to be divided between the parties to the contract Exhibit "A". [The October 4th, 1951 agreement.]

Respondent further submits that the testimony and documents hereinabove referred to supports respondent's position and the audit of Milton D. Goldberg, Ex. 201, in eliminating these expenses of Harsh Utah Corporation as not properly being chargeable to the construction contract under the terms of the agreement of October 4th, 1951 between the parties.

POINT II.

LEGAL PRINCIPLES SUPPORT THE TRIAL COURT IN ITS REJECTION OF NON-CONSTRUCTION COSTS.

Respondent has no argument with the legal principles declared in cases cited in appellants' brief pertaining to legal principles, Point II. However, respondent does not agree in any manner with the argument of appellants attempting to apply those principles in ascertaining the intent of the parties at the time of entering into the agreement of October 4th, 1951. The actual intent of the parties can best be determined by their previous agreements and conduct. By the terms of Exs. 157 and 158, Locke had a joint venture interest in the construction and the ownership of certain Wherry Housing Projects. He was induced by appellant Schnitzer's false and fraudulent representations to part with this ownership interest so that Schnitzer could finance the project by selling stock in the ownership corporation, which Schnitzer did not do (T. 32-M, 33-M, 41-M; 77-79). Under the agreement of October 4th, 1951, Locke was divested of his ownership interest in the Wherry Housing Projects at Great Falls, Montana and the Hill Field Air Force Base, having a replacement value of

some \$7,000,000.00. Locke's income as a one-half owner of these projects would have been in excess of \$30,000.00 per year over the period of the lease, 75 years. (T. 1007-1010; 1134-1136). With a background of these very apparent facts, it is impossible to understand appellants' contentions as to the theoretical intentions of the parties.

To follow appellants' theory it would be necessary to contend, ridiculously, that the United States Government, through F.H.A., was to provide all of the funds necessary to build the Hill Field Air Force Base Housing Project and then allow Harold J. Schnitzer to own it and collect rents for his own benefit for a period of 75 years and yet never to have invested any funds whatsoever in said project. For appellants to argue that the only funds available were mortgage funds is in complete violation of the F.H.A. rules and regulations as contained in Ex. 3, the Commitment for Mortgage Insurance, Ex. 186, the Mortgage, Ex. 63 and the Construction Contract—"Lump Sum", Ex. 61, and the agreement of October 4th, 1951 with Locke.

Respondent submits that in the initial instance, in order to have a profit, in connection with the "construction" of the project, under any conceivable definition of the word, there must first be income and secondly, expenses, in connection with such construction, and how and in what manner appellants can continually attempt to establish an argument showing the intention of the parties that the mortgage proceeds were to be considered as construction income, when in every conceivable definition and from the evidence, both oral and documentary, the mortgage proceeds are definitely offset by the

equal mortgage liability, is impossible to understand.

The uncontroverted evidence submitted during the course of the trial is, both from the testimony of Mr. Goldberg, (T. 571-572), see *Appendix Page 42*, and Mr. Ellis, (T. 1085-1086), to the effect that mortgage proceeds are *not* income, and the receipt thereof creates a liability on the mortgage note.

To argue that respondent Locke, at any time, intended to bind himself to the theory set forth in appellants' brief is without merit or justification in any manner whatsoever. There is absolutely no conceivable method in the world of providing any income for the construction under the terms and conditions of the agreement of October 4, 1951 between the parties or in any other manner whatsoever unless the amount of the Construction Contract—"Lump Sum" plus the change order extras are to be considered the established income of the construction company. The evidence clearly and unequivocally establishes this to be a fact and this to be the true intent of the parties (T. 781, 990-992). The evidence further discloses that the original books were set up on proper accounting principles showing the contract amount as an account receivable to the construction company and were subsequently altered under the direction of Harold J. Schnitzer. (T. 550-551, 534-535).

By using the phrase "profits earned . . . *in connection with the construction*" of the project, the parties made manifest their intention to separate *construction profits* from overall *project profits*, and *construction costs* from *project costs*.

The situation and background of the parties, con-

sidered in the light of the authorities cited by appellant, fortifies rather than weakens the conclusion of the trial court that the contract of the parties intended to and did require a distinction between construction costs and project costs.

The facts (1) that Locke was the *construction* expert, (2) that Locke by the contract surrendered all ownership in and control over the project, as distinguished from construction, (3) that Schnitzer was to be paid a special fee of \$276,700 for financing the project, and hence was expected to bear all the costs of financing, (4) the knowledge possessed by all parties that an owner-manager corporation separate from the constructing corporation would, under F.H.A. rules, have to be organized, (5) the acts of Schnitzer in setting up a "lump-sum *construction* contract between his corporations, without requiring therein the contractor to pay non-construction project costs, and (6) in originally causing the lump-sum contract price to be set up on Harsh books as an account receivable, all argue that, except as specifically provided on the fiance fee, only construction costs were intended to be considered.

The conclusion reached by the trial court is obviously sound in fact and law, and should be affirmed on this point.

POINT III

A PROPER AND ACCURATE ACCOUNTING SHOWS LOCKE IS ENTITLED TO A BONUS

A. THE FINDINGS OF FACT OF THE TRIAL COURT IN RE THE TOTAL RECEIPTS

ARE CONCLUSIVELY SUPPORTED BY THE EVIDENCE.

The trial Court properly and accurately determined the amount of income with the exception of the amount of change order extras (see Point I, respondent's brief on cross appeal). The following is a summary of the testimony and evidence pertaining to the income during the construction period:

1. The Construction Contract—"Lump Sum" between Harsh Utah Corporation and Harsh Investment Corporation in the amount of \$2,995,205.00, Ex. 61. This is the figure used by Mr. Goldberg in his audit, Ex. 201, as part of the gross income to Harsh Investment Corporation. (T. 571-572). See *appendix, Page 42*. Mr. Goldberg testified that he obtained this figure from the contract which was presented to him after some little argument by appellant Schnitzer. (T. 533-535).

(a) During the trial Ex. 182 was introduced which was an affidavit submitted by Harold J. Schnitzer claiming that there was a loss on the Montana and Utah Projects. In support thereof, Mr. Schnitzer attached Exs. A and B representing that these were audits made by Card Greaves, a Certified Public Accountant of Portland, Oregon, employed as the accountant and auditor for the Harsh Companies. Mr. Goldberg testified pertaining to the Card Greaves reports, that they were not, under acceptable accounting procedures, in any way a profit and loss statement; that the Card Greaves reports attached to Ex. 182 were only itemizations of costs. Mr. Goldberg further testified that in conversations with Mr. Greaves in Portland, Oregon, at the time he was making the audit, Mr. Greaves acknowledged that the

reports attached to Ex. 182 did not purport to be profit and loss statements. Mr. Greaves further acknowledged that he had never, at any time, had access to the contracts between the owning corporations and the contracting corporations to determine what the amount of the income to the construction company should have been. Mr. Goldberg's testimony pertaining to Ex. 182 and his conversations with Mr. Greaves is contained at T. 465-473; 588-591. His testimony under cross examination by Mr. King pertaining to the fact that Mr. Greaves did not represent his reports to be profit and loss statements and that he had not had access to the amount of the income to the contracting corporations is set forth in the *appendix at Page 43*.

(b) The testimony of Walter E. Hutchinson, the F.H.A. attorney for appellant Schnitzer and Secretary of Harsh Utah Corporation, was that this was a contract entered into between the owner-manager corporation, Harsh Utah Corporation, and the contractor, Harsh Investment Corporation, (T. 829), and that the F.H.A. in no way dictated the amount of this contract. Mr. Hutchinson's testimony in this respect is set forth in the *appendix at Pages 5 to 7*.

(c) Respondent directs this Court's attention to Article III of Construction Contract—"Lump Sum", Ex. 61, which reads as follows:

"Article III — The Contract Sum. The owner shall pay the contractor for the performance of the contract, subject to additions and deductions provided herein, on account of construction, the sum of \$2,995,205.00 cash".

This terminology clearly supports respondent's position that this amount was to be paid for construction only.

(d) W. Harold Warwick, Chief Mortgage Examiner for F.H.A., testified that the F.H.A. did not in any way dictate to either the owner-manager corporation or the contracting corporation the amount of the Construction Contract—"Lump Sum" (T. 1116). Appellants throughout their entire brief contend that the only funds available for the construction of the project were receipts from mortgage funds. This theory is completely erroneous, and the testimony of Mr. Warwick, in this respect, setting forth that at the time the original project was started the total funds available for the entire project, is as follows:

"A total of the mortgage loan, \$2,636,800.00, plus \$651,690.00, or a total of \$3,288,490.00"

which Mr. King himself computed as set forth on Page 1115 of the transcript. This figure did not include the change order extras which were subsequently testified to by Mr. Warwick and which will be set forth hereinafter in this brief.

2. Change Order extras were additional contracts between Harsh Utah Corporation as the owner and Harsh Investment Corporation as contractor for the performance of additional work over and above the original plans and specifications pertaining to Hill Field Air Force Base Housing Project, Ex. 1.

(a) By the terms and conditions of the Construction Contract—"Lump Sum," Ex. 61, the contractor is entitled to extras for change orders in accordance with the

specifications, Ex. 1. Article XV of said specifications, Ex. 1, reads as follows:

“Article XV. Changes in Work Owner, without invalidating the contract, may order extra work, or make changes by altering, adding to or deducting from the work, the contract sum being adjusted accordingly the value of any such extra work or change shall be determined in one or more of the following ways:

- (a) By estimate and acceptance in a lump sum
- (b) By unit price named in the contract or subsequently agreed upon
- (c) By cost and percentage or by cost and a fixed fee”.

The testimony is to the effect that the procedure followed by Harsh Utah Corporation as owner and Harsh Investment Corporation as contractor was in accordance with Sub-section (a) above, by estimate and acceptance in a lump sum. (T. 829). *See Appendix Page 16.*

(b) Respondent directs this Court’s attention to the language of the change orders which are Exs. 164 and 196 and are further identified as F.H.A. Form No. 2437, which is as follows:

“Contractor, Mortgagor and mortgagee indicate by signing this request: It is the expressed intention to execute the changes described herein; it is understood that F.H.A. acceptance will be determined without regard to cost and in no way implies acceptance of or concurrence with mortgagor’s statement of cost; it is understood that when F.H.A. has estimated and summarized the

costs of all accepted changes and the net effect thereof is a decrease in the total construction cost, the insurable mortgage amount may be similarly decreased, but *if the net effect is an increase above the mortgage amount the additional costs will be defrayed by the mortgagor*".

Respondent submits that this is a binding contract between the mortgagor, Harsh Utah Corporation, and the contractor, Harsh Investment Corporation, each and every change order being signed by both corporations.

(c) The testimony of Arthur Izakson, of the F.H.A., is to the effect that the only function of F.H.A. in regard to change orders is not pertaining to the dollar amount between owner and contractor but pertains only to approval of the change to be made insofar as F.H.A. is concerned, and to act in an advisory capacity insofar as the mortgagee is concerned to determine the insurable value of any increase in the mortgage. (T. 279-282, 435-437). *Appendix* 30-32.

(d) The testimony of W. Harold Warwick is to the effect that if there was no other written agreement between Harsh Utah Corporation and Harsh Investment Corporation, the language of the change orders themselves as mortgagor and mortgagee would be a binding contract between the two. (T. 1123-1125). *Appen.* 27-29.

(e) Appellant Harold J. Scitzer admits in his testimony that Harsh Investment Corporation was entitled to receive additional funds from Harsh Utah Corporation but during his testimony limits the amount of these funds to the amount of the mortgage increase rather than the amount of the actual change orders

executed between Harsh Utah Corporation as owner and Harsh Investment Corporation as contractor (T. 100-101).

Respondent's position in this matter will be discussed in more detail in his brief on cross appeal, Point I thereof.

(f) Respondent Locke's testimony, which is clearly supported by the above set forth testimony and record, clearly establishes that change order extras were income to the contractor, Harsh Investment Corporation. (T. 795-796).

(g) The trial Court, in determining the amount of change order extras in its Finding of Fact, established the amount of the additional income to Harsh Investment Corporation in the sum of \$178,672.00, R. 99, Paragraph 20, Sub-paragraph (b). This figure was taken directly from the testimony during the time of trial, that Harsh Utah Corporation, as mortgagor, would receive this amount in increased mortgage funds. Respondent's position, as will be set forth in his brief on cross appeal, is that it should have been the sum of \$333,952.55 in accordance with the change orders submitted between Harsh Utah Corporation and Harsh Investment Corporation, irrespective of the amount by which the mortgage would be increased.

(h) Arthur Izakson, inspector for the F.H.A., testified that pertaining to change orders No. 1 through No. 79, exclusive of No. 77, that the F.H.A. had approved a mortgage increase in the amount of \$169,576.00 (T. 302-303) and further testified that, pursuant to stipulation

and testimony, the recommendation for mortgage increase pertaining to change order No. 77, was in the amount of \$9,096.00 (T. 435). These two amounts total the amount used by the trial Court of \$178,672.00. This is the only amount before the trial Court pertaining to the mortgage increase approved by F.H.A. Mr. Izakson also testified that the amount that Harsh Utah Corporation, as owner, represented that it would pay to Harsh Investment Corporation, as contractor, for these change orders was in the total amount of \$333,952.55 (T. 298-303; 434-435). *See appendix, Pages 30 to 32.*

(i) Respondent desires to direct the Court's attention to the Goldberg audit, Ex. 201, in which the figure of \$169,000.00 was used, the testimony in this regard being that this figure was supplied to Mr. Goldberg by appellant Schnitzer at the time the audit was made in Portland, Oregon, and without regard to any judicial determination of the contractual effect of said change orders. (T. 535-537).

3. The net amount of rental income received from the lease of Hill Field Air Force Base Housing Project during the construction period was in the amount of \$165,986.49, R. 99.

(a) Harsh Investment Corporation as the contractor had a period of twenty-four months within which to construct the project which period ran from the month of July, 1952, the date of executing the mortgage and Construction Contract — "Lump Sum", through the month of June, 1954 (T. 114, 115). This period of time is further substantiated by the following documents and exhibits: The Mortgage, Ex. 63, the Construction Con-

tract—"Lump Sum", Ex. 61, and the Commitment for Mortgage Insurance, Ex. 186.

(b) Respondent *Locke testified that there was an agreement between himself and appellant Schnitzer to the effect that the income from rentals during the above mentioned twenty-four month period of construction would be included in computing Locke's interest under the contract of October 4th, 1951 (T. 42-M - 45-M, 797).*

(c) During the course of trial certain documentary evidence was introduced to support respondent's position that the rental income during the construction period should be taken into consideration in computing the amount of bonus due Locke. Appellant Schnitzer testified that the relationship between the owner-manager corporations in Montana, Utah and California, and the Construction Companies being Marsh Construction Co. in Montana and California and Harsh Investment Corporation in Utah, was the same (T. 119, 120). The evidence will further show that appellant Harold J. Schnitzer admitted that rental income during the above mentioned construction period was taken into consideration in making the original bid and that this income during the construction period had been calculated to defray certain costs. Documents submitted by respondent to substantiate this fact during the course of the trial were certain letters written by the various Harsh companies and signed by Harold J. Schnitzer, Exs. 181, 184, 185, 231 and 233.

(d) Respondent Locke testified that during the course of construction a considerable amount of overtime was spent by Harsh Investment Corporation in an effort to obtain early occupancy by tenants of Hill Field

Air Force Base Housing Project so that the rental income could start at the earliest possible moment. (T. 795). See *Appendix* 40-41. The expenditure of this overtime was also verified by appellant Schnitzer (T. 916, 996).

(e) The amount of the rental income as set forth by the trial Court in its findings, R. 99, 100 and 101, is supported by the record as follows: The gross rental income for the period of July 1st, 1953 to March 31st, 1954 is in the amount of \$163,235.83, Ex. 203. The rental income from the period of April 1st, 1954 to June 30th, 1954 is in the amount of \$84,795.81 which figure is taken from the exhibit admitted into evidence by stipulation and submitted by appellant, Harsh Utah Corporation, Ex. 442, making a total gross income of \$248,031.64. The operating expenses for the above mentioned period are shown on Pages 100 and 101 of the Record and are taken from Exs. 203 and 442. However, the trial Court properly deducted certain amounts, such as management fees paid directly to appellant, Harold J. Schnitzer, and pro-rated insurance premiums, allowing a total, net operating expense for the construction period of \$82,045.15, which amount deducted from the total income set forth above properly establishes the net rental income for the construction period in the amount of \$165,986.49. The Court properly disallowed interest on mortgage advancements as not being a proper deduction under the terms and conditions of the October 4th, 1951 agreement.

Appellants, in Point III of their brief, sub-paragraph (a) thereof, contend that the total receipts of the project were improperly and inaccurately calculated.

Under this section appellants argue that Schnitzer, as president of Harsh Utah Corporation, signed the Construction Contract—"Lump Sum" to pay to Harsh Investment Corporation the sum of \$2,995,205.00 and that Harsh Utah Corporation obtained a contract from the Government to act as owner-manager of this project and to receive all of the rental income therefrom, but that Harold J. Schnitzer, as president of Harsh Utah Corporation, did not intend to carry out the terms and conditions of these agreements which were the fundamental basis and inducement for the United States Government to designate and accept Harsh Utah Corporation as the owner-manager of the Hill Field Air Force Base Housing Project.

In this section, appellants again completely ignore the testimony of their own witnesses, which was supported by the testimony of W. Harold Warwick, pertaining to the determination of the Construction Contract — "Lump Sum". Respondent submits that this testimony clearly confirms the judgment of the trial Court in differentiating between project costs and construction costs and in establishing the Construction Contract — "Lump Sum" to be a portion of the income to the construction company. The testimony regarding these facts is set forth in the *appendix to respondent's brief at Page 4 to 7; 22.*

On Page 73 of their brief, appellants argue that the amount of the original bid submitted was less than the amount of the Construction Contract — "Lump Sum" and again argue as to the total amount of the proceeds received, referring to Ex. 443 which exhibit was not ad-

mitted in evidence by the Court. Appellants apparently ignore the requirements of the Commitment for Mortgage Insurance pertaining to the bid which required considerable extra cash over and above the amount of the bid and in excess of the amount of the mortgage as a condition of awarding the project itself to the Harsh Utah Corporation. The testimony emphatically states that the amount of the Construction Contract — “Lump Sum” was determined after considering all of the factors and was not dictated to by F.H.A. but in the event that the Construction Contract — “Lump Sum” was lowered the effect would be that Schnitzer would have to invest more money in Harsh Utah Corporation which apparently he did not desire to do (T. 341-342, 1115-1116, 1123-1124). *See Appendix P. 4-7; 22; 27-29.*

At the bottom of Page 73 and the top of Page 74 of their brief, appellants further make reference to Ex. 443 which was not admitted into evidence and is not a part of the Record of the trial Court.

On Page 74, appellants further set forth portions of the October 4th, 1951 agreement between respondent and appellants. However, respondent submits that these provisions did not come into effect in the construction of the Hill Field Air Force Base Housing Project and were to only be considered between the parties in the event that some third party, such as Utah Construction Company, performed the entire construction contract. (T. 185).

It is submitted that the accountings admitted by the Court below were entirely proper and supported by the evidence with the exception of change order extras

as will be discussed in respondent's brief on cross appeal.

Appellants argue that certain interest payments, totalling \$105,845.39, were bonafide construction expenses of Harsh Utah Corporation during the construction period. This is not a true and correct statement of fact and is not supported by the books and records of Harsh Utah Corporation itself. Appellant Schnitzer testified on Page 124 of the transcript, as follows:

By Mr. Sherman:

"Q. Interest and depreciation, those items having been eliminated from the books and records of Harsh Utah Corporation, as they stood on March 31, 1954?

A. I do not think the Harsh Utah Corporation books have ever shown interest payments."

The trial Court properly found, under the terms of the contract of October 4th, 1951 that the net rental income should be added to the income of Harsh Investment Corporation to offset substantial payments of over time expended for the purpose of obtaining early rental income. In considering the amount of net rental income so far as the agreement of October 4th, 1951 is concerned, the Court properly eliminated interest and depreciation. Appellant Schnitzer testified during the course of the trial that the net rental income received during the 24-months' construction period was calculated as income in submitting the original bid . (T. 120, 121).

Again, in the conclusion on the arguments pertaining to receipts, appellants attempt to include all corporations and Harold J. Schnitzer as a single unit and

completely disregard the contractual obligations entered into by said corporations and by Harold J. Schnitzer individually.

In this connection it should be observed that under familiar equitable principles the corporate fiction or entity will be disregarded whenever necessary to prevent the perpetration of a fraud, but will never be disregarded where to do so would aid a cheat to defraud his intended victim. Hence the trial court very properly refused to allow Schnitzer to drain off the construction profits through the medium of his *alter ego*, Pacific Coast Equipment Co., but insisted that the construction profit be computed on the basis of the construction contract between Harsh Investment Corporation and Harsh Utah Corporation as separate entities with separate functions.

Western Securities Co. v. Spiro, 62 Utah 623,
221 Pac. 856;

Geary v. Cain
79 Utah 268, 9 Pac. 2d 396;

Salina Canyon Coal Co. v. Klemm
76 Utah 372, 290 Pac. 161
(Syllabus No. 24)

CONCLUSION

Respondent respectfully submits that the trial Court properly determined that the Construction Contract — “Lump Sum” was, as established by the eviednce and record, a proper income item to Harsh Investment Corporation as the contractor. This fact was established under cross examination of appellants’ own witnesses, to wit, their controller, William Ellis, the secretary of

the Harsh Utah Corporation and its F.H.A. attorney Walter E. Hutchinson, by the testimony of W. Harold Warwick, the F.H.A. authority, and by a preponderance of all other testimony on this subject together with the documentary evidence supporting same

The trial Court determined that the amount of change order extras to be in the amount of the mortgage increase of \$178,672.00, as supported by the record. However, respondent still contends that the trial Court should have computed the amount, not on the basis of increase in mortgage, but on the basis of the change orders executed between the owner and the contractor, in the sum of \$333,952.55 as will be set forth in respondent's brief on cross appeal.

The trial Court properly determined, from a preponderance of evidence, the correct amount of rental income to be considered under the terms and conditions of the October 4th, 1951 agreement in the total amount of \$165,986.49. This amount is supported by the great weight of testimony and documentary evidence and there is absolutely no evidence of any merit whatsoever in the record of the trial Court that this figure should not properly be included under the terms and conditions of the agreement of October 4th, 1951 between the respondent and appellants.

B. THE FINDINGS OF FACT OF THE TRIAL COURT IN RE EXPENDITURES ARE CONCLUSIVELY SUPPORTED BY THE EVIDENCE.

The trial Court in its Findings of Fact and Conclusions of Law properly and accurately determined the amount of expenses.

1. The Trial Court, in accordance with the testimony and evidence offered during the course of the trial, properly and accurately determined the amount of construction costs in three categories:

- (a) Direct construction costs
- (b) Indirect construction costs
- (c) An adjustment in accordance with the amount of judgments rendered by the trial Court to other litigants in this action.

2. The direct construction costs were determined by the trial Court to be in the amount of \$2,656,457.21. This is the amount testified to by Milton D. Goldberg, Certified Public Accountant, who audited the books and records of Harsh Utah Corporation and Harsh Investment Corporation pertaining to the Hill Field Air Force Base Housing Project and is contained on the last page of Ex. 201.

(a) The direct construction costs above mentioned eliminated inter-company profits between Pacific Coast Equipment Co. owned, operated and controlled by appellant Schnitzer, on merchandise purchased by Pacific Coast Equipment Co. and sold to Harsh Investment Corporation. The terms and conditions of the October 4th, 1951 contract between respondent and appellants did not provide for any inter-company profits in favor of appellant Schnitzer or any of his corporations. This point is apparently conceded by appellants since they made certain inter-company adjustments between Pacific Coast Equipment Co. and Harsh Investment Corporation by preparing an agreement to do same during the course of the trial and dating it back. Said agreement

is Ex. 177. The controller for the Harsh companies, William Ellis, testified that the adjustment pertaining to Ex. 177 only left sufficient profit in the Pacific Coast Equipment Co. to pay the salary of Harold J. Schnitzer. (T. 1099-1101). Respondent submits that the entire transactions between Pacific Coast Equipment Co. and Harsh Investment Corporation pertaining to Hill Field Air Force Base Housing Project should be eliminated and that Harold J. Schnitzer should not be permitted to receive funds as a salary, either from Harsh Investment and/or Pacific Coast Equipment Co., under the terms and conditions of the October 4th, 1951 agreement.

(b) The elimination in Ex. 201 of the items to be charged and paid by Harsh Utah Corporation has been discussed by respondent under Point II of this brief and will not be discussed further here.

(c) The testimony of William Ellis, the controller of Harsh Investment Corporation was to the effect that the Card Greaves report submitted by appellants as Ex. 182 and the Goldberg audit, Ex. 201 were, in his opinion as controller for the Harsh companies, in substantial agreement insofar as construction costs were concerned (T. 1039).

3. The trial Court, by its Findings of Fact, R. 101, determined that the amount of the indirect construction costs, which was general overhead, of Harsh Investment Corporation should be in the amount of \$45,631.34.

(a) This amount is fair and reasonable between the parties inasmuch as it was the amount of general overhead pertaining to the Great Falls Montana Air Force Base Housing Project, which involved a larger number

of units, to wit, 400 units, and the expenditure of large sums of money than did the 350 units at Hill Field Air Force Base Housing Project.

(b) The evidence and record clearly discloses, as does the testimony of appellants' witness, William Ellis that Harsh Investment Corporation, during the period of time that it was engaged in the construction of Hill Field Air Force Base Housing Project, was also engaged in other business activities (T. 450, 475, 1093). Ellis further testified that there had been no direct allocation of overhead expense between these various business enterprises (T. 1043, 1044). Ellis further testified that during the course of construction of Hill Field Air Force Base Housing Project, Harsh Investment Corporation expended the sum of \$1,040,505.00 on business activities other than Hill Field Air Force Base Housing Project (T. 475).

(c) Respondent submits that appellants should have or could have segregated overhead expenses pertaining to Hill Field Air Force Base Housing Project but did not, at any time, attempt to do so. The books and records were under the control of appellants at all times. It would be inequitable and unfair to charge the full amount of overhead on the books and records of Harsh Investment Corporation in an accounting pertaining to respondent Locke's interest in the contract of October 4th, 1951, and thus penalize Locke for Schnitzer's failure to keep proper books and make proper apportionments.

4. The trial Court, in determining the additional amount of construction costs, pursuant to the judgments rendered in the litigation before the trial Court, properly

and accurately computed the amount as \$69,597.31.

(a) According to the testimony of Milton D. Goldberg, which was corroborated by William Ellis, the sum of \$176,781.27 was carried on the books and records of Harsh Investment Corporation at the time of the Goldberg audit and was included in the total sum of direct construction costs of \$2,656,457.21.

(b) In computing the additional amounts awarded by the trial Court, the total judgments computed by the trial Court, exclusive of penalties and interest, were as follows:

Gresham Roofing Co.....	\$ 16,807.72
Pacific States Cast Iron Pipe Co.....	35,296.90
Vitt Construction	129,191.22
Moulding Brothers	36,083.34
Waterfall Construction Co.	22,500.00
Utah Fire Clay Co.	6,499.40

being a total of\$246,378.58

From this amount was deducted the amount of \$176,781.27, which established that the additional amount of construction costs, taking into consideration the judgments awarded by the Court below, was in the amount of \$69,597.31 over and above direct construction costs previously computed, which was the figure used by the trial Court, R. 101 and 102.

(c) The trial Court properly eliminated interest and costs and the sum of \$25,000.00 damages allowed to Moulding Brothers for damages to their credit upon the basis that these items were items not directly involved in construction costs but were caused by appel-

lants' failure to pay sub-contractors the amounts due and owing to them at the time they were due and owing.

(d) In addition to the above, adjustment was subsequently made on February 8th, 1955 at the request of respondent, taking into consideration the payment of funds to certain painters, not calculated by the trial Court or respondent at the time of the signing of the Findings of Fact and Conclusions of Law. Said amount paid to Haycock, et al, was in the amount of \$755.52; one-half of that sum, to wit, \$377.76 was deducted from the judgment rendered by the trial Court, as is disclosed on Pages 182 and 183 of the Record, "Amendment to Judgment".

(e) Respondent further submits that the Record discloses that appellants effected substantial discounts in settlements of judgments with certain litigants and respondent has not been credited for any portion thereof.

(f) Respondent submits that the trial Court properly determined the total income to Harsh Investment Corporation, as set forth in its Findings at R. 192, to be at least in the amount of \$3,339,963.43 and further properly determined the total amount of construction costs to be in the amount of \$2,771,685.86, leaving a total construction profit to be divided pursuant to the judgment of the trial Court, in the amount of \$568,177.63.

Respondent still contends an additional amount of income should be computed under the terms and conditions of the contract of October 4th, 1951, concerning change order extras as will be set forth in respondent's brief on cross appeal.

Appellants argue in sub-paragraph (b) of their Point III regarding the calculation of total expenditures. In this brief, respondent has set forth by direct quotations from, and reference to, the Record the testimony substantiating the expenditures on the project and again, here, reiterates that appellants' reference to the Peat, Marwick, Mitchell & Co. report in the appendix of appellants' brief is improper and includes many items not within the Record of this Court and therefore could not properly be considered as a proper argument pertaining to this appeal.

Respondent again respectfully submits that appellants had their own controller, William Ellis, in Court during the major portion of the trial between appellants and respondent and to now attempt to improperly introduce arguments and testimony pertaining to adjusting entries subsequent to the taking of testimony in this case is not proper. Respondent submits that the trial Court did properly take into consideration all items of construction costs, including the awarding of judgments to other sub-contractors and litigants before the trial Court.

CONCLUSION

Respondent submits that the above set forth costs as determined by the trial Court were proper in each and every respect and were substantiated by the evidence, both oral and documentary. Respondent further submits that any attempt by appellants to vary the actual facts before the Court and contained in the Record by submitting, as they did in their argument, certain adjustments through the Peat, Marwick, Mitchell & Co.

report, does not conform to the evidence and facts before the trial Court. It does not conform in any way to the testimony submitted by appellants themselves by and through their controller, William Ellis, who was present during the entire trial between respondent and appellants. It is not supported by the actual books and records of Harsh Utah Corporation and Harsh Investment Corporation which were also before the trial Court and examined by Ellis repeatedly during the course of the trial.

POINT IV

THE TRIAL COURT PROPERLY CONSTRUED F.H.A. RULES AND REGULATIONS

Respondent has clearly set forth in his Statement of Facts, Pages 6 to 10, the matters pertaining to F.H.A. rules and regulations and the Wherry Housing Act. To repeat said matters here would take up additional and unnecessary space. Therefore, respondent makes reference to the matters contained in his Statement of Facts and the documentary evidence therein set forth supporting his position. In addition thereto, respondent directs this Court's attention to the following:

Appellants' argument in re the misinterpretation of the trial Court pertaining to disposition of escrow funds and the matters therein contained deals directly with whether or not appellant Harold J. Schnitzer should be entitled to 10% of the amount of the bid and this matter, together with the matter of Schnitzer's failure to provide financing, sub-paragraph (b) of appellants' Point IV, will be discussed in detail as a sub-division

of respondent's brief on cross appeal and respondent desires to refer to said section herein by reference in order to avoid repetition and use of space in this trial brief.

Pertaining to said escrow fund, appellants, on Pages 89 and 90 of their brief, set forth that these funds must be paid out by the escrow agent, Irving Trust Co., before any amount of the Mortgage is advanced for the construction of the housing project. However, appellants fail to point out the other provisions and requirements of Ex. 3, F.H.A. rules and regulations, the provisions and requirements of the Commitment for Mortgage Insurance, the provisions and requirements of the Mortgage, which documents designated these funds as *trust funds* to be spent *on the construction of the project itself* and *not to be returned to Harold J. Schnitzer individually*. These matters will be discussed in respondent's brief on cross appeal.

On Page 92 of their brief, appellants argue that Locke knew of the financial requirements pertaining to the construction of the various projects. It is true that Locke knew the financial requirements as set forth by various documents required by F.H.A. Locke knew that under the various regulations and the terms and conditions of the contract of October 4th, 1951, that Schnitzer was required to make the escrow deposits pertaining to the Montana and Utah Projects. During the entire building of the Hill Air Force Base Housing Project, Locke was engaged in the activities of a general construction superintendent and was relying upon Schnitzer to properly finance the project. Locke had

absolutely no knowledge until during the course of this trial in the Court below how and in what manner Schnitzer had wrongfully and illegally withdrawn funds from Harsh Investment Corporation and Harsh Utah Corporation and transferred funds from Harsh Construction Company in Montana, which eventually went into the pocket of Harold J. Schnitzer, in violation of the agreement of October 4th, 1951 between the parties.

On Page 93 of their brief, appellants make reference to the testimony of William Ellis concerning Ex. 195. In this connection, respondent desires to refer to Mr. Ellis' testimony under cross examination wherein he admitted that Ex. 195 disclosed an expenditure by Harsh Investment Corporation of the sum of \$1,040,505.00 on matters pertaining to projects other than Hill Field Air Force Base Housing Project and also admitted that this Ex. 195 disclosed that Harsh Investment Corporation did not properly receive the required funds from Harsh Utah Corporation through Irving Trust Co. (T. 475, 1079, 1082-1083, 1088) and further testified that, *because Harold J. Schnitzer had siphoned off funds for his own personal use, there were insufficient funds with which to pay Harsh Investment Corporation the amount of the Construction Contract—"Lump Sum".* (T. 1095). In appellants' arguments that the project was completely financed they completely ignore and disregard the obligation of Harsh Utah Corporation in its various contracts with Harsh Investment Corporation.

POINT V.

THE FINDINGS OF FACT SUBSTANTIATE ADDITIONAL FUNDS DUE LOCKE PERTAINING TO THE CALIFORNIA PROJECT

During the course of the trial evidence, both oral and documentary, was introduced pertaining to claims by respondent Locke for sums due and owing to him under an agreement with appellant Schnitzer pertaining to the Barstow, California, Marine Corps Housing Project.

1. The sum of \$1500.00 for salary due and owing to Locke, Ex. 217 (T. 236).

2. The sum of \$5000.00 for bonus due and payable for services rendered on said Barstow Project, Ex. 217, (T. 956).

3. The sum of \$2,178.00 for expenses due and owing to Locke, Ex. 217 (T. 145-M, 237).

All of the above mentioned indebtednesses were raised by the issues before the Court and tried by the Court by the consent of the parties and without objections by appellants. The trial Court properly found that the sum of \$8,678.00 was due and owing to respondent Locke, R. 103, 104.

POINT VI.

SET-OFFS DUE BY RESPONDENT LOCKE TO APPELLANTS SCHNITZER AND HARSH INVEST- MENT CORPORATION WERE PROPERLY DETERMINED.

During the course of the trial, appellants attempted

to establish that Locke had embezzled and misappropriated certain funds belonging to appellants. This was not supported by the evidence or the facts in any manner whatsoever, as discussed heretofore in this brief. However, during the course of the trial Locke admitted that he was indebted to appellants Schnitzer and Harsh Investment Corporation for certain items, as follows:

1. Promissory note executed by Locke in the amount of \$11,712.98, together with the sum of \$1,000.00 for attorney's fees, as allowed by the trial Court, R. 104.

2. The sum of \$2,885.93 for certain advances made by appellant Schnitzer and/or Harsh Investment Corporation, all of which were admitted by Locke with the exception of \$1200.00 for the purchase of a truck load of lumber, R. 105.

CONCLUSION

Respondent submits that all of the findings of the trial Court are supported by a great preponderance of the evidence. Respondent further submits that the trial Court had an opportunity, during the course of the trial, to view and observe the conduct and attitude of the witnesses before the trial Court and to determine the truth and veracity of the testimony given by said witnesses. Due to the fact that appellant Harold J. Schnitzer admitted during the course of trial that he did, in certain instances, commit perjury and due to the fact that perjury was likewise admitted by Walter E. Hutchinson, one of the attorneys for appellants, it is only reasonable that the trial Court should believe the testimony submitted for and on behalf of respondent or

points where it might be in variance with, or different from, the testimony submitted for and on behalf of appellants. The trial Court, in this matter, should be the exclusive and only judge as to the character and credibility to be given the testimony before that Court.

Respondent has, during the course of this brief, completely supported all of the statements made in this brief by references to the transcript and record, both as to oral and documentary evidence submitted, although the record is filled with a considerable amount of irrelevant and immaterial matter, due to the leniency of the Court below in giving appellants every opportunity to substantiate their claims of fraud and misrepresentation. Nevertheless, the clear, positive evidence supporting respondent's position is contained in the record, as compared to the complete lack of evidence and testimony to support the theories of appellants.

The position of respondent was, in every respect, during the course of the trial, substantiated by the testimony of independent witnesses and documentary proof as against the position of appellants who, at no time during the course of the trial, produced any testimony whatsoever from a single disinterested and/or independent witness to substantiate their claims and their position. The only defense offered by appellants during the course of the trial was a malicious attempt to mislead the Court by the introduction of false testimony and documents, together with a malicious attempt to confuse the true issues before the Court by allegations of misappropriation of funds and misconduct on the part of Locke that was not, in any way whatsoever, substantiated

by the evidence, as is properly reflected in the Findings of Fact and Conclusions of Law of the Court below.

RESPONDENT'S BRIEF ON CROSS APPEAL STATEMENT OF FACTS ON CROSS APPEAL

During the construction of Hill Field Air Force Base Housing Project, certain contracts were entered into between Harsh Utah Corporation and Harsh Investment Corporation for change order extras, Exs. 164 and 196. The contract amount of the approved change orders between Harsh Utah Corporation and Harsh Investment Corporation was in the amount of \$333,952.55. In determining the amount of the additional income to Harsh Investment Corporation the trial Court determined the amount of additional income to Harsh Investment Corporation to be the amount testified to during the course of the trial as \$178,672.00 which was the amount of additional mortgage proceeds to be received by Harsh Utah Corporation. Respondent submits that by the great weight of authority and the testimony offered during the course of the trial the additional mortgage benefits received by Harsh Utah Corporation did not, in any way, control the amount of the contract between Harsh Utah Corporation and Harsh Investment Corporation.

The trial Court should have determined the increase to which Harsh Investment Corporation was entitled, over and above the amount of the Construction Contract—"Lump Sum", to be the sum of \$333,952.55, which was the amount contained on the face of the change orders and under the terms and conditions of the Construction Contract—"Lump Sum" and Article 15 of the specifi-

cations that should have been added on to the Construction Contract—"Lump Sum" of \$2,995,205.00 in computing the bonus due Locke under the terms and conditions of the contract of October 4th, 1951.

Under the terms and conditions of the October 4th, 1951 agreement between Locke and Schnitzer, Schnitzer and/or Harsh was to retain a sum of money equal to 10% of the amount of the bid made by Harsh and accepted by the Government which, pertaining to the Hill Field Air Force Base Housing Project, would be the sum of \$276,700.00. This provision in the contract between the parties was placed in the contract to compensate Schnitzer for providing the needed capital for the construction of said project and to provide a means of returning to him the sum of \$276,700.00. On July 21st, 1952, Schnitzer did provide, from funds borrowed from his father-in-law and the First National Bank of Portland, Oregon, the sum of \$611,200.00. By the terms and conditions of the F.H.A. rules and regulations, Ex. 3, the Financial Requirements for Closing, Ex. 188, the Commitment for Mortgage Insurance, Ex. 186, and by a great preponderance of the testimony during the course of the trial, even from appellants' own witness, Walter E. Hutchinson, secretary of Harsh Utah Corporation, these funds were to remain on deposit during the entire construction period to insure that sufficient funds would be available to completely finance the construction of the Hill Field Air Force Base Housing Project. A certain portion of said funds was also required, under the F.H.A. rules and regulations, to establish the equity of Harsh Utah Corporation over and above the amount

of the mortgage proceeds. The resolution of Harsh Utah Corporation passed by the Board of Directors on July 21st, 1952 at the time said deposit was made with the mortgagee, provides as follows:

“RESOLVED: That since Harsh Utah Corporation has received the benefits accruing from the advances of \$624,994.00 to the corporation that the offer of Mr. Schnitzer *to forego demand for reimbursement* of said sum on the understanding that the corporation would accept such sum as contributed surplus is hereby accepted. The books of the corporation shall be set up in a manner to reflect the fact that Mr. Schnitzer has contributed the sum of \$624,994.00 as contributed surplus”. Page 13, Ex. 161.

Contrary to the terms of this resolution, Schnitzer did not forego demand for reimbursement and contrary to the F.H.A. rules and regulations, the Commitment for Mortgage Insurance, the Building and Loan Agreement and the Mortgage, *as well as in violation of the agreement of October 4th, 1951*, Schnitzer withdrew a total of \$631,000.00 from Harsh Utah Corporation and Harsh Investment Corporation between November 5th, 1952 and March 24th, 1953. T. 1094-1095; 143-146; 163-168). The funds withdrawn by Schnitzer were \$19,800.00 in excess of any funds originally provided by Schnitzer.

Prior to the execution of the agreement of October 4th, 1951, Schnitzer induced Locke to give up his 50% joint venture in the ownership of the Wherry Housing Projects as set forth in respondent's brief in order to enable Schnitzer to raise additional funds with which to finance said projects by selling stock in the owner-

ship corporations. After the agreement of October 4th, 1951 was signed by Locke, Schnitzer did not sell any of the stock but retained all of said stock himself and in violation of the agreement of October 4th, 1951, did not leave the funds on deposit as contemplated by the parties.

STATEMENT OF POINTS ON CROSS APPEAL

POINT I.

THE AMOUNT OF THE CHANGE ORDER EXTRAS SHOULD HAVE BEEN IN THE SUM OF \$333,952.55 INSTEAD OF \$178,672.00.

POINT II.

THE TRIAL COURT SHOULD NOT HAVE ALLOWED APPELLANTS TO RECEIVE 10% OF THE AMOUNT OF THE BID, TO WIT, \$276,700.00 BEFORE DETERMINING THE AMOUNT OF BONUS RESPONDENT LOCKE WAS ENTITLED TO.

ARGUMENT

POINT I.

THE AMOUNT OF THE CHANGE ORDER EXTRAS SHOULD HAVE BEEN IN THE SUM OF \$333,952.55 INSTEAD OF \$178,672.00.

The change orders were supplemental contracts between Harsh Utah Corporation and Harsh Investment Corporation as builder. According to the terms and conditions of the Construction Contract—"Lump Sum", Ex. 61, contractor is entitled to extras for change orders in accordance with the specifications, Ex. 1.

Article XV of the specifications reads, in part, as follows:

"Art. XV—Changes in the Work: The owner,

without invalidating the contract, may order extra work, or make changes by altering, adding to or deducting from the work, *the contract sum being adjusted accordingly . . .* the value of any such extra work on changes shall be determined in one or more of the following ways:

- (a) By estimate and acceptance in a lump sum;
- (b) By unit prices named in the contract or subsequently agreed upon;
- (c) By cost and percentage or by cost and fixed fee”.

During the course of construction Harsh Utah Corporation and Harsh Investment Corporation executed change orders 1 through 79 pertaining to the construction of the Hill Field Air Force Base Housing Project, Exs. 164 and 196. These change orders were signed by both Harsh Utah Corporation as owner and mortgagor and by Harsh Investment Corporation as contractor. The procedure followed was, as set forth in (a) above, by estimate and acceptance in a lump sum (T. 347-350, 1123-1125). See also *appendix, Pages 23 to 29.*

Respondent submits that the terminology of the change orders themselves constitute binding contracts between the two corporations. The terminology on the face of each change order, Exs. 164 and 196, is as follows:

“Contractor, mortgagor and mortgagee indicate by signing this request that: It is the expressed intention to execute the changes described herein; it is understood that FHA acceptance will be determined without regard to cost *and in no way implies acceptance of or compliance with mortgagor’s statement of cost*; it is also understood that when F.H.A. has estimated and summarized the costs of all accepted changes and the

net effect thereof is a decrease in the total construction cost, the insurable amount may be similarly decreased but if the net effect is an increase above the mortgage amount *the additional costs will be defrayed by the mortgagor.*"

The procedure followed pertaining to these change orders was as follows: The change orders were instituted by the mortgagor, the owner, Harsh Utah Corporation, setting forth the desired changes requested and the amount of money that the mortgagor would pay to the contractor, Harsh Investment Corporation, to execute these changes. The change orders were then submitted to F.H.A. for two purposes: First, to obtain the approval of the Inspection Division of F.H.A. to change the plans and specifications to incorporate the changes requested irrespective of any monetary consideration thereof. Secondly, for F.H.A. to then make an appraisal for the purposes of submitting figures to the mortgagee, Irving Trust Co., stating, in effect, that in the event that the change orders outlined on the request were performed that the insurable mortgage on the Hill Field Air Force Base Housing Project could be increased by so many dollars. *See appendix, Pages 23 to 29.*

Many of the change orders submitted by Harsh Utah Corporation and Harsh Investment Corporation were approved by the F.H.A. and incorporated in a change in the original plans and specifications for the construction of Hill Field Air Force Base Housing Project. The total monetary value submitted on the approved changes by Harsh Utah Corporation indicated that the increased costs of Harsh Investment Corporation as

the builder in executing these change orders would be in the amount of \$333,952.55 (T. 298-303, 434-435). See *appendix, Pages 30 to 32*. Under the terms and conditions of the change orders themselves—"IF THE NET EFFECT IS AN INCREASE ABOVE THE MORTGAGE AMOUNT THE ADDITIONAL COSTS WILL BE DEFRAID BY THE MORTGAGOR", respondent submits that Harsh Utah Corporation would be obligated to pay to Harsh Investment Corporation the sum of \$333,952.55.

Harsh Utah Corporation did receive an increase in its F.H.A. insured mortgage, according to the testimony at the time of trial, in the sum of \$178,672.00 which the trial Court computed in its Findings of Fact as an increase in the construction contract. However, respondent submits that by the terms and conditions of the Construction Contract—"Lump Sum", and the specifications, the amount of the increase that should have been computed that Harsh Utah Corporation was to pay to Harsh Investment Corporation was in the amount of \$333,952.55, in computing the bonus due Locke pursuant to the agreement of October 4th, 1951.

It is utterly *absurd* to suppose that in executing the agreement of October 4th the parties intended that the "Lump Sum" construction contractor would be required to do any "extra" work at the owner's request for only 90% of cost (the mortgage figure) if F.H.A. approved, and for *nothing* if F. H. A. disapproved the change for mortgage purposes.

Such an arrangement would have empowered Schnitzer to double the size of the project without any

increase in the contract price as a "change order" and thus insure that no construction profit would be realized.

They must have intended the usual and customary arrangements between owner and builder whereby construction "contract sum" would be adjusted according to the increase in *work performed*. And that was what the construction contract, executed by Schnitzer himself, did provide.

The amount of income for change order extras should have been \$333,952.55, the contract price therefor.

POINT II.

THE TRIAL COURT SHOULD NOT HAVE ALLOWED APPELLANTS TO RECEIVE 10% OF THE AMOUNT OF THE BID.

Appellants should not have received 10% of the amount of the bid inasmuch as there was a total failure of consideration, and that special "finance fee" was never earned. Under the terms and conditions of the October 4th, 1951 agreement, Harsh was to retain a sum of money equal to 10% of the total amount of the bid made by Harsh and accepted by the Government. There apparently is no dispute that this provision was placed in the contract as compensation to Harsh and/or Schnitzer in exchange for the obligation of Schnitzer to provide certain capital required for the construction of the Hill Field Air Force Base Housing Project. See appellant's brief, p. 65, where it is declared (correctly) that the parties knew that all money and credit would have to be furnished by Schnitzer personally. The testimony of both Schnitzer and Locke was that whereas Locke had a 50% joint venture ownership interest

in contracts executed prior to the October 4th, 1951 agreement, Exs. 157 and 158, Locke gave up his ownership interest because of representations made by Harold J. Schnitzer that he would be required to dispose of capital stock of the ownership corporation in order to finance more than one project. (T. 32M, 33M, 41M, 77-79).

Contrary to Schnitzer's representations to Locke that he had to dispose of stock in the corporation, Schnitzer did not dispose of any of the stock nor did he invest any of his own funds whatsoever for a stock interest in any of the three Wherry Housing Projects. Walter E. Hutchinson, Secretary of Harsh Utah Corporation testified (T. 824) that Schnitzer had not paid 5c for a stock interest in any of his corporations pertaining to the owning and construction of the Wherry Housing Projects. Respondent submits that from the testimony of appellant Schnitzer himself, he expected a return of the funds deposited in escrow by himself for the benefit of Harsh Utah Corporation through the provisions in the October 4th, 1951 agreement returning to Schnitzer and/or Harsh 10% of the bid. This intent is expressed in his testimony (T. 861) as follows: "And I determined at that time that the amount which I felt was the minimum sum which would be necessary for me to undertake this type of operation with Mr. Locke entire project of the first profits. The first \$150,000.00 would have to be turned to me before our 10% of our would be a return to me first from all profits of the bid would first have to be returned to me before a division between myself and Mr. Locke". It is submitted that this language clearly indicates the method and

manner the funds were to be returned to Schnitzer that he had advanced. However, the testimony clearly shows, as set forth herein, that he not only received a return of all of the funds advanced by himself within a short period of time but, in fact, received some \$19,800.00 in excess thereof.

Under the F.H.A. rules and regulations, Schnitzer was required to furnish certain funds to Harsh Utah Corporation to provide an escrow amount to insure the adequate financing and completion of the Hill Field Air Force Base Housing Project, Exs. 3 and 188. According to the terms and conditions of the Building and Loan Agreement, Ex. 64, these funds were to be treated as *trust funds* and were to be used for payment of expenses over and above the mortgage in the construction of Hill Field Air Force Base Housing Project. Inasmuch as these requirements were set forth in Ex. 3 it is apparent that both Locke and Schnitzer knew of these requirements prior to the October 4th, 1951 agreement and the provision in that agreement allowing Harsh to retain 10% of the total amount of the bid before computing the bonus to which Locke would be entitled, was unquestionably the means by which Schnitzer was to be compensated for providing the capital necessary, which should have been retained in the project at Hill Field in the total amount of \$620,000.00 and a similar amount pertaining to the Great Falls Montana Air Force Base Housing Project.

Pertaining to the Hill Field Air Force Base Housing Project, Schnitzer did provide a total of \$611,200.00 for a short period of time. The sources of these funds, ac-

ording to the testimony, are as follows:

\$14,200.00 from his own personal account.

\$97,000.00 borrowed from Harsh Construction Company, which funds were likewise trust funds pertaining to the Great Falls Air Force Base Housing Project.

\$100,000.00 borrowed from Jennings Furniture Company, a company owned by his father-in-law.

\$100,000.00 borrowed from Metropolitan Stores, likewise owned by his father-in-law.

\$300,000.00 borrowed from the First National Bank of Portland, Oregon.

These funds were obtained in July of 1952 (T. 140-142).

On July 21st, 1952, Harsh Utah Corporation held a meeting of its Board of Directors in Salt Lake City, Utah. This was the date that the "formal closing" of all F.H.A. requirements and the formal execution of certain documents pertaining to Hill Field Air Force Base Housing Project took place. In order to meet these requirements the Board of Directors of Harsh Utah Corporation submitted the following Minutes and Resolution pertaining to the above mentioned funds supplied by Harold J. Schnitzer, Ex. 161 at Page 13:

MINUTES OF SPECIAL MEETING OF DIRECTORS OF

HARSH UTAH CORPORATION

A special meeting of the Board of Directors of the Harsh Utah Corporation was held at Judge Building, Salt Lake City, Utah, on July 21st, 1952, at 4:00 P. M. The meeting was called to order by the President, Mr. Harold J. Schnitzer, and Minutes of such meeting were reported by the Secretary, Mr. Walter E. Hutchinson.

The President stated that all directors had in writ-

ing waived notice of such meeting and directed that such waiver be attached to the Minutes of the meeting.

Mr. Schnitzer then stated that the purpose of the meeting was to discuss the compliance of FHA financial requirements for closing of loan previously authorized by the Board of Directors. He reported that he had advanced in behalf of the Corporation in connection with the housing project undertaken the amount of the FHA application and commitment fee; that he had deposited \$25,000.00 with the U. S. Air Force as a security deposit to assure that construction of the project would commence.

Mr. Schnitzer then stated that prior to the closing of the loan it was necessary that the Corporation deposit with the Irving Trust Company the sum of \$39,552.00 as working capital to assure that there would be funds to pay certain pre-opening expenses, the purpose of such deposit being to take care of expenses in those cases where the rental income was not sufficient to pay such expenses, and it was further required at the time of closing that the Corporation deposit with Irving Trust Company the difference between the cost of the project, as estimated by the FHA, and the amount of the mortgage loan, which difference was in the sum of \$585,442.00.

Mr. Schnitzer then stated that since the Corporation was required to raise the amounts stated prior to closing and as he was the owner of the outstanding stock of the Corporation except for the qualifying shares as required under the laws of Utah, he had, in order to assure the completion of the project and the success of the Corporation, advanced such sum to the Corporation on the understanding that such sums would be accepted by the Corporation as an additional contribution to surplus, notwithstanding the fact that in his opinion the

construction of the project could be accomplished for a sum less than that estimated by the FHA.

After some discussion, the directors, being of the unanimous opinion that such an arrangement would meet the requirements of the FHA and be of benefit to the Corporation, presented the following resolution:

RESOLVED: That since Harsh Utah Corporation has received the benefits accruing from the advance of \$624,994.00 to the corporation that the offer of *Mr. Schnitzer to forego demand for reimbursement* of said sum on the understanding that the corporation would accept such sum as contributed surplus is hereby accepted. The books of the corporation shall be set up in such manner as to reflect the fact that Mr. Schnitzer has contributed the sum of \$624,994.00 as contributed surplus.

HAROLD J. SCHNITZER

WALTER E. HUTCHINSON

President

Secretary

It should be noted that this meeting was held and this resolution adopted at the same time that the funds were contributed to the surplus of Harsh Utah Corporation.

It is also pertinent to note that when Schnitzer withdrew this contributed surplus, as hereinafter more particularly set out, he not only violated his contract with Locke, and the F.H.A. regulations, but he also violated the laws of Utah. Under the Utah Code it was and is unlawful to pay any corporate dividend except out of the "surplus *profits* arising from the business of the corporation," or to withdraw or pay to any stock-

holder any part of the assets of the corporation except as provided by statutory law.

Sections 16-2-15 and 76-13-4, subsections (1) and (2), U.C.A. 1953;

Pace v. Pace Bros. Co. 91 Utah 149, 63 P 2d 590.

Attention is directed to the obvious language of the above set forth resolution, "*the offer of Mr. Schnitzer to forego demand for reimbursement of said sum*" (\$624,994.00). It is very apparent that Schnitzer knew from the language of the above set forth resolution that he could not lawfully, under the provisions of his agreement with Locke, withdraw any of said funds for his own personal use and benefit.

During the course of the trial in the Court below, when respondent pressed Schnitzer and Ellis, over violent objections from Schnitzer's counsel, to account for said funds, it was disclosed that between November 5th, 1952 and March 24th, 1953, Schnitzer had withdrawn from Harsh Utah Corporation and Harsh Investment Corporation a total of \$631,000.00. (T. 163-168), as follows:

November 5th, 1952, \$4,000.00 from Harsh Investment Corporation.

November 15th, 1952, \$250,000.00 from Harsh Utah Corporation.

November 17th, 1952, \$3,000.00 from Harsh Investment Corporation.

November 24th, 1952, \$50,000.00 from Harsh Utah Corporation.

February 25th, 1953, \$220,000.00 from Harsh Utah Corporation.

March 24th, 1953, \$104,000.00 from Harsh Utah Corporation.

Total, \$631,000.00. (T. 163-168)

This fact was not known to Locke until this testimony was elicited during the course of the trial.

Schnitzer knew that by withdrawing these funds he was in direct violation of his agreement with Locke and when it appeared, early in the trial, that this fact was going to be brought before the Court below, he hurriedly, with the assistance of Walter E. Hutchinson, one of his attorneys from Portland, Oregon, prepared a false and fraudulent purported corporate resolution in an attempt to veil his unlawful withdrawals with corporate authority. In introducing the purported minutes and resolution authorizing the withdrawal, both Schnitzer and Hutchinson testified that the minutes and resolution were prepared in Portland, Oregon, on or about April 1st, 1953 in the office of Walter E. Hutchinson. When presented to the trial Court the purported minutes and resolution were neatly enclosed within the Minute Book of Harsh Utah Corporation, Ex. 161, at Page 17. The testimony from Hutchinson and Schnitzer pertaining to this document was presented to the trial Court on June 10th, 1954.

After this document had been presented, respondent's attorney, John M. Sherman, compared this document with a document filed by Mr. King the day before, June 9th, 1954, entitled "Demand For Production of Documents", R. 31 and 32 which was obviously prepared in his office and engaged the services of J. Percy Goddard of Salt Lake City as an expert to compare said

documents. Mr. Goddard, with the assistance of a photographer, William Hollis Shipler, identified the above mentioned two documents as having been prepared on the same typewriter. (T. 213-M - 232-M, Ex. 229).

The introduction of the above mentioned expert testimony identifying the typewriter upon which the purported resolution was written and the testimony of Donald H. Terry, an investigator engaged by respondent's attorney, (T. 656-722), forced Schnitzer and Hutchinson to return to the witness stand on June 21st, 1954 and admit that they had given false, fraudulent testimony pertaining to said corporate resolution. The resolution herein referred to and the minutes pertaining thereto are set forth as follows:

MINUTES OF SPECIAL MEETING OF DIRECTORS OF HARSH UTAH CORPORATION

A special meeting of the Board of Directors of Harsh Utah Corporation was held at the offices of the corporation in Portland, Oregon, on April 1, 1953, at 3:00 o'clock P.M. The meeting was called to order by the President, Mr. Harold J. Schnitzer, and minutes of such meeting were recorded by the Secretary, Mr. Walter E. Hutchinson.

The President stated that all directors had in writing waived notice of said meeting and directed that said waiver be attached to the minutes of the meeting.

Mr. Schnitzer then stated that the purpose of the meeting was to discuss the return of \$624,994.00 which Mr. Schnitzer had contributed to the capital surplus of the corporation on July 21, 1952, in order to assist this corporation in its compliance with requirements of the

Federal Housing Administration in the closing of its insured mortgage loan.

Mr. Schnitzer then stated that in his opinion the purpose for which said contribution to the capital surplus had been made were now consummated and that it was no longer necessary that the corporation retain said contribution.

After some discussion, the directors being of the unanimous opinion that it was no longer necessary that the corporation retain said capital contribution, the corporation adopted the following resolution:

RESOLVED, that since Harsh Utah Corporation has received the benefits accruing from the advance of \$624,994.00 to the corporation and that it is no longer essential to the business of the corporation that it continue to retain said contribution, that the said *capital contribution of \$624,994.00 be returned to Mr. Schnitzer* at this time, and *that the books of the corporation be set up* in such manner as to reflect the return of said contribution to the *capital surplus of this corporation.*

HAROLD J. SCHNITZER

WALTER E. HUTCHINSON

President

Secretary

It is interesting to note the ridiculous and inconsistent means to which Schnitzer and his attorneys resorted in their attempt to defraud Locke out of his legitimate claims. This purported corporate resolution is diametrically opposed to the earlier corporate resolution of July 21st, 1952 of Harsh Utah Corporation pertaining to the deposit of said funds wherein *Schnitzer offered to forego any demand for reimbursement.*

In their anxiety to vindicate Schnitzer's illegal with-

drawal of the above mentioned \$631,000.00 Schnitzer, and Hutchinson hastily prepared a corporate resolution pertaining thereto which is without any legal force or effect whatsoever nor it is capable of intelligent interpretation. Respondent's attorneys are still unable, even as of the writing of this brief, to understand the meaning of said resolution. It provides that \$624,994.00 be returned to Schnitzer and it also provides that the books of the corporation be adjusted "to reflect the return of said contribution to capital surplus of this corporation". Even in his greatest day, Houdini would have failed in this endeavor.

It is also interesting to note that the means employed by Schnitzer and his counsel in their attempt to defraud Locke were not only inconsistent within the minutes and resolutions of Harsh Utah Corporation themselves but they are, as well, illegal, unlawful and ridiculous. Perhaps the factor that greatly assisted in this futile drama was the personnel of the Board of Directors of Harsh Utah Corporation itself, Harold J. Schnitzer, his wife, Arlene Schnitzer and his co-conspirator and co-defendant, Walter E. Hutchinson. In fairness respondents' attorneys desire to comment that in examining Ex. 161, the Minute Book of Harsh Utah Corporation the signature of Arlene Schnitzer is conspicuous by its absence from any corporate resolution or minutes therein contained and from any waiver of notice of any meeting purportedly held.

According to the testimony as finally disclosed to the trial Court, this resolution was prepared between 9:00 A. M. and 9:40 A. M. in Salt Lake City the morning

it was introduced into evidence before the trial Court, June 10th, 1954. (T. 656-722).

The above set forth purported resolution is further inconsistent in that it recites a return of funds to Schnitzer totalling \$624,994.00 whereas in truth and in fact he had already withdrawn \$631,000.00. The greater portion of this sum had been withdrawn in the month of November, 1952 and all of said withdrawals were made without the benefit of any resolution whatsoever.

It is further submitted that the source of the funds were *trust funds* under the Building and Loan Agreement to be used to pay for the costs of constructing the Hill Field Air Force Base Housing Project; that said funds were withdrawn from the Irving Trust Co. on requisitions for funds, Ex. 141, which contained on each the signature of Harold J. Schnitzer *certifying that the funds would be used for the purpose of paying for the actual expenses of construction of the project*. The only possible way that Harsh Utah Corporation could obtain F. H. A. insurance on said mortgage advances was on the basis of the certifications made in Ex. 141.

Respondent Locke had knowledge of and relied upon the requirements of the Harsh Utah Corporation resolution of July 21st, 1952, wherein "*the offer of Mr. Schnitzer to forego demand for reimbursement of said sum*" was made. Locke further knew of the terminology and requirements of the documents contained in Ex. 141, Requisition for Funds, and in good faith had expected Schnitzer to abide by the above mentioned requirements when he entered into the agreement of October 4th, 1951, the terms of which provided for a return of 10% of the

amount of the bid to Schnitzer.

The testimony and record further reveals that appellant Schnitzer did not, at any time, have any cash invested in any of the corporations pertaining to the Wherry Housing Projects and without the permanent investment of any funds, acquired an ownership interest for the duration of a 75-year lease that provides him with a tax-free income of approximately \$100,000.00 per year. (T. 90-M, 91-M).

As a direct result of the withdrawal of the above mentioned funds, Harsh Utah Corporation did not have sufficient funds with which to pay Harsh Investment Corporation the amount of the Construction Contract - "Lump Sum" or the amount of the change order extras. (T. 829, 1095, 1120-1122, 1151, 1164).

The testimony reveals that in addition to the proceeds of the mortgage the sum of \$620,000.00 capital required of Schnitzer would be the funds available for the construction of the Hill Field Air Force Base Housing Project. (T. 1115, 829-830, 987-992), see *appendix Pages 15-21, 34-37*, and there appears to be no doubt that at the time of entering into the agreement of October 4th, 1951, appellant Schnitzer knew that these funds were to be trust funds that would remain on deposit at least until the completion of the project and that a substantial portion thereof would amount to a permanent investment in exchange for acquiring the ownership interest in the leasehold improvements. Locke relied on Schnitzer to perform this part of the agreement when he relinquished his ownership interest and signed the October 4th, 1951 agreement.

The trial court after a careful consideration of the record and of the reliability of the several witnesses found as a fact that it was the intent of the parties in entering into the contract of October 4, 1951, that Schnitzer and/or Harsh would provide all necessary financing in accordance with F. H. A. regulations and the requirements of the mortgagee, but that in fact neither of them did so and that such failure was a material breach of the contract with Locke (R 96-97; Findings 13 to 15).

These and the other findings of the trial court are supported by the evidence received at the trial, and under Utah law will not be disturbed by this court unless it clearly appears that they are against the manifest weight of the evidence, which is not the case, as the findings are clearly supported by the record.

This doctrine is so firmly established by a multitude of cases that no citation should be needed. However, for the convenience of the court we append citations to a few of the decisions establishing this doctrine:

McKay v. Farr

15 Utah 261, 49 Pac. 649;

Elliott v. Whitmore

23 Utah 462, 65 Pac. 70;

Sidney Stevens Implement Company v. South
Ogden Land Building and Improvement Company

20 Utah 267, 58 Pac. 843;

Hansen vs. Mutual Finance Corporation, 84 Utah
579, 37 P 2d 782;

Wilcox v. Cloward

88 Utah 503, 56 P 2d 1;

Shaw v. Jeppson
Utah , 239 P 2d 745;

Lawlor v. Lawlor
Utah , 240 P 2d 271.

The trial court, however, further found that this breach did not damage Locke other than by increasing awards to sub-contractors for their damages and costs, which were eliminated in computing Locke's bonus, and then concluded (as a finding) that Schnitzer therefore had not lost his right to retain 10% of the amount of his bid. In reaching this conclusion the trial court misapprehended and failed to apply the legal theory on which this issue was submitted to the court, and consequently, it is submitted, fell into inadvertent error of law.

Recovery of damages for breach of contract is not respondent's theory on this issue. This issue was and is submitted on respondent's theory that Schnitzer had no right to this 10% "financing fee" *because he never earned it*—because he never performed the financing service which, under the contract, was the consideration for and the condition precedent to his right to exclude this 10% in computing Locke's share of construction profits.

It should also be noted that Locke does not seek to recover the entire amount of 10% of the bid. He seeks only to have this "financing expense" disallowed as a cost in computing his bonus, *just as a claimed expense for material or equipment which was never furnished would be disallowed as a cost* in computing the construction profit and the bonus.

To illustrate, suppose that on the accounting Schnitzer had claimed credit in the sum of \$250,000 as rental for construction equipment alleged to have been leased by him for use on the project, but the proof showed that no such equipment had ever been furnished by him or used by the contractor on the project. It is clear that such claim would have to be disallowed, and that Schnitzer would never be permitted to pay himself \$250,000 for equipment never actually furnished or used, even though he had a contract under which he might have earned that rental if he had furnished the equipment.

Similarly Schnitzer cannot be allowed to pay himself \$276,700.00 as a charge or fee for financing which he never furnished.

Let us consider once more, briefly, the background and the contract of the parties. Prior to the October 4th agreement Locke owned a joint interest in the entire project, both ownership and construction. Locke was induced to give up his ownership interest by Schnitzer's representations that Schnitzer could not perform his obligation to finance the entire project, as contemplated by the parties and required by law, unless Locke released his interest in the owning company stock so that the stock could be pledged or sold by Schnitzer. But Schnitzer agreed that Locke was to have, instead, a one-half interest, by way of bonus, in "the net profit earned by Harsh in connection with *the construction of the aforesaid projects.*" The net construction profit obviously was intended to be computed by subtracting from the gross construction income the total of the

proper allowable construction costs and expenses—but here Schnitzer and his advisors insisted on one notable addition. The contract *drawn by them* provided in effect that Schnitzer's "finance fee" of 10% of the bid (or \$276,700) should be considered and deducted as if it were a construction cost, which it was not. This, as the court properly found, *was in consideration of Schnitzer's undertaking properly to finance the entire project*, both construction and ownership. This "financing fee" was to be retained by Harsh, Schnitzer's wholly owned corporation—doubtless for the purpose of saving the increased income taxes which would have become due if this finance fee had been paid to Schnitzer personally by either the owner corporation or the contractor corporation.

It must be remembered that all these contracts were drawn by Schnitzer or his own attorneys, and so under familiar rules must be construed most strictly against him.

But, as the court found, neither Schnitzer nor any of his corporations ever performed this obligation to finance the project—he never delivered the "*quid pro quo*" for which his corporation was to be allowed to charge and retain a "financing fee" of \$276,700 against the construction profit *as if* it were a construction cost (which it was not). Having failed to pay the agreed "*quid pro quo*" for this profitable privilege, neither Schnitzer nor his corporation are entitled, in law or in equity, or in good conscience, to retain and use in this suit the right and privilege or the moneys for which the consideration has failed by reason of their own meretricious default.

The contract of October 4th is obviously divisible under the evidence, the findings of the court, and the law. The principal agreement is that Locke is to receive a monthly salary plus a bonus of 50% of the construction profits in return for his assistance in bidding the project and acting as superintendent of construction. The other, and severable agreement was that Schnitzer is to be paid a financing fee of 10% of the Government bid or \$276,700, out of the first construction profits as consideration for his financing of the entire project. But as he did not finance the project, he has not earned his financing fee, and should not be allowed to retain the same and charge it against the construction profits, any more than he should be permitted to retain purported fees for equipment rental on equipment never actually furnished.

By reason of his default the second, and severable, clause or agreement in the contract has failed and is unenforceable, leaving only the principal agreement for Locke's bonus of 50% in force and good standing before the court. The agreement for a bonus, which Locke has fully performed, can and should be enforced without reference to or consideration of the severable agreement for the retention of a financing fee which was never earned. If the unearned financing fee is disallowed, that automatically increases the agreed construction profits by the amount of the fee, and Locke was and is entitled to a judgment for one-half of the construction profits computed without first deducting that unearned finance fee. In failing to grant such judgment the trial court (through misapprehension of the theory on which the matter was finally submitted, as

respondent believes) fell into error.

That the contract was divisible on the basis above outlined seems abundantly clear from the record and the law. The fact that the balance of the contract was actually performed without Schnitzer furnishing the agreed financing is itself conclusive evidence that the contract is one which in its nature and purpose is susceptible of division and apportionment. The project could be and was built without personal financing by Schnitzer. Harsh Utah could have borrowed against its anticipated rentals in order to pay construction costs over the amount of the mortgage. Even now it appears that the balance due the contractor on the lump-sum contract and the "change order extras" will have to be paid out of these rentals. Moreover, as the court found, the parties themselves allocated the 10% as consideration for Schnitzer's financing, separate and apart from the other portion of their agreements.

Under these circumstances, it is submitted, the agreement for a finance fee to be paid to Schnitzer is severable from the principal contract under the rules announced in

17 CJS "Contracts", Sections 331 to 334, and cases cited.

Moreover, it is a familiar rule that in actions on severable contracts a partial failure of consideration is a defense *pro tanto*.

17 CJS "Contracts", Section 130, Note 49.

The same rule certainly should apply when, as here, on an accounting one party (Schnitzer) claims credit

for an item the consideration for which has failed.

Locke is also entitled to recover one-half of the amount of this forfeited "finance fee" under the equitable principles of *quasi-contracts*.

Generally a right *quasi contractu* arises out of "unjust enrichment" of one party at the expense of another:

"A person unjustly enriched at the expense of another is required to make restitution to the other."

Restatement of the Law:

Restitution, Section 1.

However, there are cases in which the right of action *ex quasi contractu* arises even though the unjust enrichment is not at the expense of the plaintiff. As the Restatement says,

"In other situations, a benefit has been received by the defendant but the plaintiff has not suffered a corresponding loss or, in some cases any loss, but nevertheless, the enrichment of the defendant would be unjust. In such cases the defendant may be under a duty to give to the plaintiff the amount by which he has been enriched. Thus where a person with knowledge of the facts wrongfully disposes of the property of another and makes a profit thereby, he is accountable for the profit and not merely for the value of the property of the other with which he wrongfully dealt (see §151)."

Restatement of the Law:

Restitution §1, comment e.

These principles are, of course, recognized in Utah.

Baugh v. Darby

112 U. 1, 184 p. 2d 335.

The basis for these rights is essentially equitable, even though the common law afforded a remedy. An excellent case outlining the basis and history of the right and the remedy was handed down by the Supreme Court of Ohio in 1938. It is

Hummel v. Hummel

14 N.E. 2d 923.

In that case a parent, who had paid all the premiums on an insurance policy on his son, recovered from his son in quasi contract all of the proceeds of cashing the policy, even though they exceeded the amount he had paid out in premiums. This case arose out of an oral agreement between them which the father could not enforce because of the statute of frauds. The Ohio Court refused to permit the son to enrich himself by refusing to recognize his obligation, even though that obligation was based only on morals and was not legally enforceable.

The case at bar is even stronger, for here there is nothing illegal or void about Schnitzer's undertaking to provide all required financing for the Housing Projects. This is an equitable case, and equity, morals, and good conscience all join in requiring that Schnitzer be not allowed to profit by his own wrong in wilfully breaching his contract and then falsifying records with the obvious purpose and intent of cheating and defrauding Locke out of his just dues. He cannot in equity be permitted to take from the common construct-

ion fund moneys he, in violation of his agreement, never earned. It is obvious from the contract and the record that Schnitzer was not intended to have this "financing fee" unless and until he had adequately and properly financed the project, and this he has never done—in-
stead he has bent every effort to cheat Locke out of his share. It would be most unjust to permit him to enrich himself with all of this "finance fee" when he has not performed the conditions which were prescribed as the consideration therefor.

The most that equity and good conscience could permit Schnitzer to retain on a quantum meruit basis in view of this failure to earn the finance fee as contemplated, would be legal interest at 6% on the amounts actually advanced during the few short months they were held by Harsh Utah Corporation and Irving Trust Company as escrow holder.

CONCLUSION

It is respectfully submitted that this Court should increase the amount of the judgment in favor of respondent by making a determination that under the terms and conditions of the agreement of October 4th, 1951, between respondent and appellants, that the change orders between Harsh Utah Corporation and Harsh Investment Corporation should be computed to be \$333,952.55. That in addition thereto, this Court should determine that appellants Schnitzer and/or Harsh should not be entitled to retain 10% of the amount of the bid as a "finance fee" because the same was not earned, and the consideration therefor has failed and was never delivered as agreed, and because

it would be inequitable and unjust to allow him to enrich himself at Locke's expense without performing his part of the bargain.

Respondent submits that this Court should amend the trial Court's decision and increase the Judgment in favor of respondent by one-half of the amounts set forth below:

One-half of \$276,700.00.....	\$138,350.00
One-half of the difference between the total valuation of the change order extras, \$333,952.55, and the F. H. A. valuation, \$178,672.00, said difference being \$155,280.55	77,640.27
	<hr/>
	\$215,990.27

which sum added to the trial Court's judgment of \$147,905.00 makes a total judgment for Locke in the amount of \$363,895.27, together with interest at the rate of 8% from the 31st day of December, 1954.

Respectfully submitted,
JOHN M. SHERMAN,
Suite 212 California Bank Building,
15 North Oakland,
Pasadena, California
YOUNG, THATCHER & GLASSMAN,
By PAUL THATCHER,
First Security Bank Building,
Ogden, Utah
Counsel for Intervening Plaintiff and
respondent.

APPENDIX

MR. GOLDBERG, A. C. P. A., TESTIFIES AS TO
BOOKS AND RECORDS OF HARSH UTAH
CORPORATION AND HARSH INVESTMENT
CORPORATION AS FOLLOWS

(T. 549-551) (T. 594)

BY MR. SHERMAN:

Q. Now, Mr. Goldberg, from your examination of the books and records of Harsh Montana, Harsh Utah, Harsh Construction, and Harsh Investment Company, do you have an opinion as to whether or not those books were kept and maintained to accurately reflect the income and cost of the construction of the Harsh Montana Great Falls Air Force Base housing project, and the Hill Field Air Force Base project here in Utah in accordance with the generally accepted methods of accounting on construction jobs?

A. I'll say that they do not clearly and truly reflect the true income and cost and expenses of the respective corporations in conformity with general accounting principles, and further I would say in conformity with the revenue laws.

Q. Now, Mr. Goldberg, do you have an opinion from your examination as to whether or not any of those corporations ever did at any time truly and accurately so reflect upon their books and records the construction income and construction cost?

A. At one time, at the beginning of the corporation, Harsh Montana, the construction corporation, Harsh Construction Company—I correct that, the books and records were kept in accordance with standard accounting principles to reflect the income and expenses, the income monthly. By that I mean each month according to the progress of the contract and the progress of the job, the amount earned according to the pay estimate

from the contractor or the owner and as approved by the FHA on their pay estimate was reflected to show the amount due, the amount retained, and the income earned for the period. This was done for several months and then discontinued, and at the end of the first period I would say at the end of the second fiscal period, I don't think the books were closed in my opinion the first year until Mr. Ellis came in, in 1952 after the close of the first fiscal year, and there was an over-lapping of two fiscal periods, reversals were made journal entries were made reversing out some of this income, and throwing a profit of one period into a substantial loss by correcting journal entries. I did not examine the tax returns; that was not my purpose, but it was seen in examining the general books and records.

Q. Do you have any notes that would establish the amount of profit eliminated on this journal entry and when the journal entry was made?

A. I have a memorandum I think this referred to '53. I'm not certain. I think the records will show, if they have them here. Journal entry '53; 10, 15, the surplus, the original surplus account was credited and a loss was substituted. I think for the amount of \$210,142.54. There were several journal entries made to effect this, and the explanation was that it was done on the advice of tax counsel. I did not investigate this any further. It was not my purpose or my jurisdiction, and I just made a comment on it.

Q. Now, Mr. Goldberg, insofar as the books and records of Harsh Investment Company were concerned, were they at any time set up even at the beginning to truly and accurately reflect the income and disbursements of that particular construction company?

A. I would say the income was not reflected correctly.

Q. It was not reflected in accordance with the generally accepted methods of accounting?

A. That's correct.

(T. 594)

BY MR. SHERMAN:

Q. Now, Mr. Goldberg, is it as Mr. King has attempted to suggest to you that the proceeds received from Irving Trust in any way, shape or form from an accounting procedure, legal procedure, or any other way, income?

A. It's definitely not income. It's a liability. It's a mortgage payable. It's definitely not income.

Q. And it's exactly in the same category in this accounting and this procedure as a mortgage that I might carry on my house.

GLLEY—2

A. Exactly.

Q. And there is no difference.

A. That's true.

ON CROSS EXAMINATION MR. WALTER HUTCHINSON, ONE OF THE ATTORNEYS FOR APPELLANTS, TESTIFIED AS FOLLOWS PERTAINING TO THE DIFFERENCE BETWEEN PROJECT COST AND CONSTRUCTION COST

(T. 339-342)

CROSS EXAMINATION

BY MR. SHERMAN:

Q. Now, there is a difference, isn't there, Mr. Hutchinson, between project cost and construction cost?

A. Yes.

Q. And what different items are taken into consideration when you are considering only construction costs? In other words, what items do you eliminate from the cost of the project to determine the construction cost?

A. Well, here the construction costs are all lumped together.

Q. Well now —.

A. (Interposing) The Wherry project here.

Q. Well, now, Mr. Hutchinson, you testified the project costs were so much, and these were, all these items were included in the cost of the project. You mean by that, I take it, that the project sitting up there cost so much money irrespective of who was to pay for it, whether it was to be the owner or contractor, isn't that correct?

A. That's right.

Q. And isn't it a fact that contract costs do not include FHA examination and inspection fees—that's not a part of construction cost as such, is it?

A. Well, it wouldn't be on the construction contract.

Q. It would not be in any circumstance. It would be an owner's obligation, isn't that true?

A. Yes, that's true.

Q. All right. And the same is true of loan fees, that's an owner's obligation and not a contractor's obligation or cost, isn't that true?

A. That's true.

Q. And legal fees, title fees, in connection with the mortgage is likewise a responsibility of the owner and not the contractor, isn't that true?

A. Yes.

Q. And architect's fees are an expense to the owner and not to the contractor, isn't that true?

A. That's right.

Q. And interest on the mortgage advances is also an obligation of the owner and not the contract, isn't that true?

A. Well, that is not always true, no. It just depends on how the contract is set up. In many instances, now, there is a setup under FHA here where they don't get insurance or advances until completion, where the contractor is to carry himself during construction on this type job.

Q. On this project, where there is progression payments made during the entire period of construction from the Irving Trust Company to the mortgagor, the interest on the mortgage advances is an obligation of the mortgagor corporation, isn't that true?

A. That's true.

Q. And the FHA mortgage insurance is also an obligation of the mortgagor and not of the contractor. Is that not true?

A. Yes.

Q. And all of those items that I have just enumerated are items on the books and records of Harsh Utah Corporation as an obligation of the Harsh Utah Corporation and were paid by Harsh Utah Corporation and not by Harsh Investment Company. Is that correct?

A. That's correct.

Q. Now, there is no rule or regulation, is there, Mr. Hutchinson, insofar as the Federal Housing Administration is concerned requiring a construction contract to be entered into between the owner and the contractor at any particular figure whatsoever?

A. There are rules this way, that if—

Q. (Interposing) The only differences, Mr. Hutchinson—

MR. KING:

(Interposing) Let him answer your question.

Q. If the figure is not satisfactory, in this instance two million nine hundred ninety-five thousand dollars—

A. (Interposing) Yes.

Q. — if it's any lower than that—

A. (Interposing) Yes.

Q. — then the mortgagor puts up the difference between that and the FHA cost of replacement, isn't that true, in additional cash?

A. If the contract had been any more, then this

sponsor would have been required to put up more money—.

Q. (Interposing) Then there is no FHA requirement that sets the figure.

A. No.

Q. It's just the difference in the amount of cash put up by the sponsor.

A. That's correct.

Q. In other words, if there had been a variation in the contract price, the only difference would have been is that Harsh Utah Corporation or Mr. Schnitzer would have taken more money out of Harsh Montana or Pacific Coast Equipment Company or borrowed more money from his father-in-law and made the difference up in cash. Isn't that true?

A. That is true.

Q. I have no further questions.

MR. ELLIS, THE COMPTROLLER FOR HARSH
COMPANIES, TESTIFIES AS FOLLOWS CON-
CERNING FUNDS AVAILABLE TO BUILD PRO-
JECT AND STATUS OF MORTGAGE

(T. 1085-1087)

BY MR. SHERMAN:

Q. Then the figure I am talking about, Mr. Ellis, would be \$3,409,971.81, would it not?

A. I believe so.

Q. Which would reflect all of the funds available through Irving Trust Company in any form at all for the total building of the project both in so far as expenses of Harsh Utah Corporation, the owner, and Harsh Investment, the contractor, are concerned. Isn't that true?

A. That would reflect the total funds from all sources.

THE COURT: \$3,409,971.81.

Q. Now, Mr. Ellis, you do not represent to this court, do you, that the original mortgage, as you have it here on exhibit 246 from an accounting standpoint is an income item, do you?

A. No, sir; I do not.

Q. And you heard Mr. Goldberg testify that a mortgage, from an accounting standpoint is strictly a liability. Is that not true?

A. That's correct, secured lien.

Q. And in order to reflect the true amount of income you would have to take the true overall picture. Isn't that true?

A. What do you mean by "true overall picture?"

Q. Let's pin it down specifically, Mr. Ellis. In order to truly reflect—if you were to do so as an accountant on accounting principles, the income in the present case to Harsh Investment Corporation, you would not be concerned necessarily with mortgage money. Isn't that correct?

A. That's correct.

Q. And you would be concerned with the amount of the contract upon which a construction company contracted to build a project, isn't that true?

A. That's true.

Q. Without concern of where the money was coming from?

A. Right.

Q. And without concern as to what expenses the owner on his own account was obligated to defray over and above the construction contract itself. Isn't that true?

A. That's correct.

Q. And the true amount of money as is testified to by Mr. Goldberg that the construction company is entitled to from the owner company is the amount of the construction contract plus the extras as set forth in the specifications covering the job. Isn't that correct?

A. As to the extras, I can't say. I don't know whether the interpretation of those changes the contract automatically or not. I do know they are entitled to the amount of the contract.

Q. Have you taken that into consideration at all, Mr. Ellis, as to what the specifications provide on that particular subject?

A. It's hard to say. I have never read that.

Q. And its covered by article 15, changes in work of the specifications. Isn't that true?

MR. KING: Well, I object to this as not the best evidence. This witness said he has never read them and doesn't claim in any way to be able to interpret them.

THE COURT: The objection is overruled.

Q. You have not set up your books and records in so far as Harsh Investment Company's income is concerned, taken into consideration the amount of the contract or the amount that the contractor may be entitled to from the owner pursuant to the terms and conditions of article 15 of the specifications, have you?

A. I have no such a thing as a contract receivable account at all.

Q. And items you have put in here, I believe you testified before from this witness stand are the items you were directed to on your books and records by Mr. Schnitzer.

A. As to income.

Q. Yes.

A. As income. I show the funds advanced over from Utah to Investment in sales advance account and close off the individual item.

Q. But you do not reflect and you have not set up on the books of Harsh Investment Company the total amount of the funds that they are entitled to in relationship to the contract and in relationship to the change orders under the specifications and particularly Article 15 of the specifications. Isn't that correct??

A. There is no such contract receivable account set up.

MR. WARICK TESTIFIES RE
ESCROW FUNDS AS FOLLOWS

(T. 1117-1121)

BY MR. SHERMAN:

Q. And what is the total amount of the cash required for carrying charges and financing?

A. The total cash for carrying charges and financing is \$185,727.00. The total cash requirement for construction fees carrying charges and financing is \$3,222,242.00. From that figure the amount of mortgage funds available are subtracted leaving a difference of \$585,442.00 which amount is deposited by the mortgagor to show that there are sufficient funds on hand to complete the project.

Q. Now, what is the FHA requirements in so far as that particular fund is concerned?

A. You mean in disbursing funds?

Q. Isn't it a fact, Mr. Warwick, that that particular amount of money is deposited by the owner, the mortgagor say in this case, with the Irving Trust Company?

A. Yes, sir.

Q. And that money is to be used along with the proceeds of the mortgage to defray the total cost of the Hill Field Air Force Base project. Is that correct?

A. Yes, sir. That money is expended prior. That money is disbursed by the mortgagee, Irving Trust in this case, prior to the disbursement of any mortgage funds.

Q. And is it not a fact, Mr. Warwick, that those funds are disbursed in accordance with the requisition of funds when the project is started?

A. Those are disbursed upon submission of, as we call it, the title of the form, an application for insurance for mortgage proceeds.

Q. And that is initiated by the contractor?

A. Yes, sir.

Q. And I believe for purposes of identification that we have it as exhibit 141 the application for insurance advances of mortgage proceeds which is the method established, is it not, Mr. Warwick, for procuring these funds from month to month as the project progresses, from the bank, the Irving Trust Company for the payment of the sub-contractors, the contractor and the materialmen.

A. It's the method of securing, of the mortgagor securing funds from the mortgagee to pay for work completed on the project and materials stored on site as determined by the contractor's requisitions and inventories submitted being reconciled with the FHA inspector's report assigned to the project.

Q. And that happens each month periodically during the time that the project is being constructed. Is that correct?

A. Normally it's once a month.

Q. And by policy the first money that is used or disbursed by Irving Trust Company toward the payment of these requisitions for material and work performed on the site, first monies that are used are these, this fund of \$585,442.00 that you have been testifying about. Is that correct?

A. That's correct. That is disbursed first.

Q. And those monies must be according to the rules and regulations of the Federal Housing Administration,

and the policy of Irving Trust Company, be completely exhausted and spent to satisfy these requisitions prior to the time that any proceeds from the mortgage itself are expended. Is that right?

A. The escrow deposit must be entirely used before any of the mortgage funds are advanced.

Q. And then as additional requisitions come in from month to month the progress payments are made until the entire project is completed.

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. And it's the policy, is it not, that certain reserves are withheld pending the final completion of the project itself?

Yes, sir.

Q. And what is that particular amount percentage-wise?

A. Ten percent of the amount shown on the contractor's requisition as approved by FHA.

Q. Now, assuming the following facts, Mr. Warwick: If the owner corporation entered into a contract with a construction company, contracting corporation, to build the Hill Field Air Force Base project in accordance with the terms and conditions of the lump sum contract for \$2,995,205.00, and assuming that the mortgage is in the amount as you have testified to here, of \$2,636,800.00, and that the escrow is in the amount of \$585,442.00; and assuming further that this escrow was established, I believe in July, July 21 of 1952 and in November of 1952 \$300,000.00 was returned to the sponsor, in February an additional \$220,000.00 was returned to the

sponsor, and in March an additional \$104,000.00 was returned to the sponsor, making a total withdrawn out of funds from Irving Trust Company Bank to the sponsor individually, Harold J. Schnitzer, of \$624,000.00, would there be sufficient funds left out of the total cash required for the completion of the project, with which to pay the contractors and with which to pay the amounts that were necessary for the completion of the project?

MR. KING: Now, just a minute, Your Honor. That question is not including the facts which are in this case. It's incomplete on a number of facts which have a material bearing on the answer to the question. I specifically have reference to the fact that both the contracting corporation and the owner management corporation are owned by the same person.

THE COURT: This man understands that.

MR. KING: That wasn't included in the question, Your Honor. It doesn't appear on this record. If this is going to be a hypothetical question, it has to include all the facts that are material here. It can't just include part of them.

THE COURT: That will be cross examination. I think the question includes the facts which are testified to.

MR. KING: There is an additional fact that is not included in it, and it is a mis-statement which is that Harold J. Schnitzer is the sponsor of this project. That is not the fact. The sponsor of this project is Harsh Investment Corporation.

Q. Well, let's say that the money then in that respect was not returned to the sponsor but \$624,000.00 was returned to Harold J. Schnitzer individually.

THE COURT: I'll overrule the objection. He may answer.

A. Based on our computation of what it would cost to complete this project, no there would not be sufficient funds.

Q. Based upon the amount of the contract between the owner and contractor which provides for payment to the contractor of \$2,995,205.00, there would not be sufficient funds to make that payment. Is that correct?

A. That's correct.

MR. WALTER HUTCHINSON ON CROSS EX-
AMINATION BY MR. SHERMAN TESTIFIED AS
TO PAYMENT OF THE CONSTRUCTION CON-
TRACT—"LUMP SUM" AND CHANGE ORDERS
AS FOLLOWS (T. 829-833)

Q. The construction contract calls for a payment from the owner to the contractor of \$2,995,205.00, doesn't it?

A. I'll have to assume your figure is correct. I don't know. I haven't looked.

Q. Let's not assume anything.

A. All right.

Q. I'm showing you what has been introduced here in evidence as exhibit number 61. That contract provides that the owner pay the contractor the sum of \$2,995,205.00, doesn't it?

A. Yes.

Q. That is the amount of money that is supposed to be paid, isn't it?

A. That's right.

Q. And in addition to that, any approved extras contracted with between the owner and the contractor that are approved for a change of the plans and specifications or a change to article 15 of the specifications are in addition to that figure, aren't they?

A. Yes.

Q. Now, the purpose, as required by FHA and Irving Trust Company, of that escrow deposit is to assure FHA and Irving Trust Company that the owners will have enough funds on deposit with which to meet the requirements to complete the entire project. Isn't that correct?

A. That together with the mortgage loan proceeds.

Q. That together with the \$2,636,000.00—some dollars were to be used collectively to build the project out here at Hill Field, weren't they?

A. That's right.

Q. And the reason for that money being required to be deposited in escrow is to assure that the sub-contractors and materialmen and the general contractor would have sufficient funds available to build the project. Isn't that true?

A. That's correct.

Q. Now, how and in what manner, Hr. Hutchinson, could anybody connected with the building of the Hill Field Air Force base project determine in November of 1952 whether or not \$300,000.00 could be plucked out of Harsh Utah Corporation and still pay all the sub-contractors, the general contractors, and the materialmen?

A. Why, I think very easily. The books of the corporation undoubtedly show it.

Q. And it's your opinion that that is true?

A. That is my opinion that's true, yes.

Q. Is it your opinion that Harsh Utah Corporation could still pay Harsh Investment Corporation, the general contractor, \$2,995,205.00 plus extras and still drag out \$624,000.00 of that escrow?

A. Yes.

Q. As a matter of fact, it's practically impossible, is it not.

A. Let's take it a step at a time. I know that at the time that withdrawal was made there was funds left together with the approved extras to pay all persons

having claims for labor and material.

Q. Including Harsh Investment Company, Mr. Hutchinson.

A. That's correct.

Q. That is your opinion?

A. Yes.

Q. Are you talking about up to November of 1952, or up to what date, Mr| Hutchinson?

A. Let's see, the project was closed in June or July; July I think. July first.

Q. The project began.

A. I think so.

Q. Began, and the mortgage was closed in the office of FHA on the 21st day of July 1952, and the mortgage was recorded on the 23rd day of July 1952, and in November of the same year \$300,000.00 was withdrawn.

A. Yes.

Q. In February of the following year \$220,000.00.

A. Let's go to that November withdrawal and think about that first. You see Mr. Schnitzer had already advanced for and on behalf of the corporation the sum of \$25,000.00 for plans, \$41,000.00 for plans.

Q. Now, Mr. Hutchinson, let me interrupt you for just a moment.

A. Yes.

Q. All of that came back out of the \$121,000.00 first, the very same day?

A. That's right part of it.

Q. That's the day the mortgage was signed. The \$121,000.00 changed hands that day.

A. Not \$121,000.00; not anywheres near.

Q. You were there, were you not?

A. I was.

Q. And it's your testimony that there was not the sum of \$121,000.00 and if the FHA reflected that sum, that that would be correct?

A. It would be.

Q. If their records show that there were disbursements paid back to Mr. Schnitzer that day totalling \$121,000.00 broken down, I believe, into different categories, but the total was that --.

A. (Interposing) I would have to take a look at the figures and see.

Q. For plans and architect fees that were paid up to that point or would have to be paid immediately, that's true, isn't it?

A. Yes.

MR. KING:

You misunderstood, Mr. Hutchinson. He said plans. That is a different matter than architect fees.

Q. Is there any difference in the charge for architect fees for one set of plans and another set of plans? Architect fees are so much.

A. There were, in addition to that \$25,000.00, deposit made with the Air Force by Mr. Schnitzer personally.

Q. For off-site improvement bonds.

A. No, for the privilege of getting the bid award here.

Q. Which was returned to him later on, wasn't it?

A. I don't know whether that was handled through this or what.

Q. The procedure is that it all comes back to him.

A. That's right, and that is when it was coming back to him.

Q. So if by drawing out this \$624,000.00 there wasn't enough money left to pay Harsh Investment Company \$2,995,205.00 to pay the material men — \$2,995,205.00 plus extras — to pay the sub-contractors, then it would be up to Harold J. Schnitzer to dig down in his pocket to pay it, wouldn't it?

A. He has given a personal guarantee to do it.

Q. He has given a personal guarantee to do that?

A. Yes.

Q. You didn't make a corporate resolution authorizing him to pull out the \$300,000.00, did you, in November of 1952?

A. No.

Q. You didn't do it in February of 1953 for \$220,000.00, did you?

A. No.

Q. You didn't do it in March for \$104,000.00, did you?

A. No.

Q. You waited until June 10, 1954 at nine o'clock in the morning to do it in Dwight King's office, didn't you?

A. No. We did it on April first 1953. The matter of \$624,000.00

Q. But never prepared in written form, for tax purposes or any other purpose, to submit to anybody in connection with an income tax return withdrawal or anything else, it was never reduced to anything more than rough notes, if those?

A. That's right.

MR. W. HAROLD WARWICK, CHIEF MORTGAGE
CREDIT EXAMINER FOR F.H.A., TESTIFIED
REGARDING CONSTRUCTION CONTRACT—
— “LUMP SUM” AS FOLLOWS
(T. 1115-1116) (T. 1164)

BY MR. SHERMAN:

Q. Now, Mr. Warwick, does the Federal Housing Administration in any way concern itself with the amount that the owner corporation contracts with a contracting corporation for the building of a particular project?

A. Only in so far as it is within a reasonable figure, within reason.

Q. Does the Federal Housing Administration in any way dictate what that particular figure has to be?

A. No, sir.

Q. What has been introduced as a photostatic copy of the lump sum contract, which is exhibit one, which I believe you have copies of there, Mr. Warwick, directing your attention to that document and the figure provided in there under the contract sum of \$2,995,205.00, now pertaining to that particular figure, does the Federal Housing Administration in any way dictate to either the owner or the contractor the amount of that particular figure?

A. No, sir.

(T. 1164)

MR. SHERMAN:

One of the other things that has to be certified to is that the lump sum contract has been paid. Isn't that true?

A. I believe that's correct. That is a question for our legal counsel. I don't know.

MR. HUTCHINSON TESTIFIES PERTAINING TO
CHARGE ORDERS AS FOLLOWS (T. 347-350)
BY MR. SHERMAN:

Q. Now, in regard to these change orders, Mr. Hutchinson, the FHA as such is not interested how much the owner pays the contractor to make a change as long as the change -- if it involves a change in the plans and specifications, FHA approves it, isn't that correct?

A. Yes. The FHA is primarily concerned --

Q. (Interposing) Only to the point that if and when there is an application by the owner to increase the amount of the mortgage on that property, then FHA assesses the amount for estimates at the same time for the benefit of Irving Trust Company as to how much the change, total change on the property could be safely increased in the mortgage itself, and be insured by FHA.

A. Again, they are just as concerned about a decrease, you see.

Q. Yes.

A. The legal effect of a change order is to change the construction contract by that much.

Q. But there is nothing on this change order that tells the mortgagor or the owner that he can only pay the contractor so many dollars?

A. No, there is nothing on that.

Q. And there is nothing on the change order, an endorsement at any time from FHA that in any way deals with financial amount of the change order itself as between the owner and contractor. Is there?

A. No, there is no change. It doesn't affect them. It's just to determine whether the FHA will accept the

proposed change at all and if so how much they will increase the insurance on the mortgage.

Q. And the process of handling each individual change order, is that they are handled in this manner are they not? They originate with the owner, the mortgagor, and are prepared by the owner, are they not?

A. That's right.

Q. Then they are submitted to the contractor for approval by the contractor, isn't that true?

A. Either the contractor or the owner. They originate then to the lender and then to the FHA.

Q. Then they go directly to Irving Trust Company in New York for endorsement by the Irving Trust Company in the place provided for by the signature of the mortgagee, isn't that correct?

A. That's correct.

Q. Then they go to the Federal Housing Administrator's office, in this case in Salt Lake City, Utah, to determine whether or not the particular requested change is a beneficial change to the property, and the plans and specifications can be changed accordingly, isn't that correct?

A. That's correct.

Q. And at no time during that procedure is FHA interested in any monetary transactions between the owner and the contractor as to how much the owner is going to pay the contractor for that particular change —

A. (Interposing) Well, —

Q. — until such time when the owner requests an increase in the mortgage, then it becomes a factor, but not until that time, isn't that true?

A. Only to this extent. They are concerned with the mortgagor's ability. If the change orders indicate that the mortgagor corporation is going to be obligated to pay more than the construction contract, or increased by more than ten percent, then the FHA becomes concerned on that, then they may have to increase the construction bond for performance on the construction of the project.

Q. Then it becomes a bonding transaction.

A. That's right.

Q. It doesn't have anything to do with the amount of money that is going to be paid to the owner of the contract, does it?

A. No.

Q. The change order says on the face of it by executing it whether it's an increase or decrease in the mortgage, if it's an increase whether the mortgage is increased or not, the mortgagor agrees to pay for the change, isn't that true?

A. That's right.

Q. No further questions.

REDIRECT EXAMINATION

BY MR. KING:

Q. I just have one question, Mr. Hutchinson. The lump sum contract you have been talking about, as I understand it, will never be amended in amount. That is a fixed amount.

A. That's right.

MR. SHERMAN:

But it's amended is it not, Mr. Hutchinson, by any change order?

A. That is entirely between the parties.

MR. SHERMAN:

The lump sum contract itself provides that the contractor, at the time of the execution of that lump sum contract, agrees with the owner to build that project in accordance with the plans and specifications then in existence, isn't that true?

A. That's the way it reads, yes.

MR. SHERMAN:

And if there is any change in the plans and specifications which are represented by these change orders, then that is a change in the plans and specifications, and a change in which the contractor is entitled to an increase accordingly, is that not true?

A. It could be that way, yes.

MR. WARWICK TESTIFIED PERTAINING TO
CHANGE ORDERS BETWEEN HARSH UTAH
CORPORATION AND HARSH INVESTMENT
CORPORATION AS FOLLOWS (T. 1123-1125)

BY MR. SHERMAN:

Q. Mr. Warwick, in regard to the change orders, is the Federal Housing Administration concerned or interested as between the owner and the contractor as to the amount of these change orders, between the owner and the contractor as such?

A. Not in making our determination, only in so far as reasonableness of the figures are concerned.

Q. And isn't it a fact that the FHA is not concerned with transactions taking place between an owner and a contractor to perform as to the amount required as to perform a particular change?

A. By that you mean what?

Q. The FHA does not in any way dictate to the owner what the owner can pay a contractor to perform a particular change.

A. No.

Q. The FHA is required under this particular procedure, is it not, if it involves a change in the plans and specifications from the architectural section to approve that prior to the time the change can be made?

A. Yes, sir.

Q. And then the subsequent assuming that it has been approved, the subsequent negotiations between the mortgagor and the FHA in so far as finances are concerned, is only for the purposes of determining, at the final closing after the project has been complete, how much if any increase will be granted by the FHA as

mortgage insurance. Isn't that correct?

A. It's assuming that the changes involve increases.

Q. Assuming that the changes have been approved from an architectural standpoint, the plans and specifications have been changed accordingly and FHA has approved those changes, and assuming that those particular changes involve an expenditure of an additional sum in some amount, then the negotiations between the owner and FHA are for the purposes of determining how much increase in mortgage insurance will be granted, isn't that correct?

A. How much, if any.

Q. If any. And that is not based upon the amount of money that the owner may or may not have paid the contractor for performing that particular change, FHA does not dictate or control that particular figure, does it?

A. No.

Q. In other words, isn't it a fact that the owner comes in and says that he has these changes, that they have been made, the changes themselves have been approved, representing to your organization that the owner has paid the contractor, that the changes have cost the owner so much money?

A. Well, these changes are approved or disapproved by FHA on the assumption, yes, that there is either some additional cost or some decrease in cost.

Q. And the negotiations are made for the increase in the mortgage itself. Isn't that correct, and the insurance covering the mortgage?

A. That would be in order.

Q. But that figure that the mortgage may be in-

creased in no way determines the amount of money that the owner is to pay the contractor for a particular change or group of changes, does it?

A. Unless that was the agreement between the owner and the contractor, no.

Q. But in so far as any information in your files are concerned, that does not appear to be the case. Is that correct?

A. I do not believe we have any information on that point.

MR. ARTHUR W. ISAKSON, CONSTRUCTION INSPECTOR FOR F. H. A. TESTIFIED REGARDING CHANGE ORDERS AS FOLLOWS (T. 279-280) BY MR. SHERMAN:

Q. Yes, Mr. Isakson. Now, from that document can you ascertain what the total amount was of the change orders requested by Harsh Utah Corporation and approved for work to be done or work done on the Hill Field Air Force Base by the Federal Housing Administration with reference to the changes one through 79, does that document that you have indicate what the total amount of money was on approved change orders as evaluated by Harsh Utah Corporation and Harsh Investment Company?

A. The total that I have here is the amount as requested by the mortgagor on the change orders that were approved subject, of course, to any omissions or errors that were inadvertently made.

Q. Now, what is the total amount of those approved change orders as requested by Harsh Utah Corporation?

A. \$279,126.00

Q. Now, that I understand, Mr. Isakson, is all of the approved change orders to date, is that correct?

A. That is as it is today.

Q. Now, in addition to that, is there a change order upon which Harsh Utah Corporation has requested reconsideration for approval?

A. There is.

Q. And do you know what the number of that particular change order is?

A. Number 77.

RE CHANGE ORDER 77 MR. ISAKSON
TESTIFIED ON PAGES 435-436 AS FOLLOWS
BY MR. SHERMAN:

Q. All right. Mr. Isakson, that same change order represents to your office, does it not, that the Harsh Construction Company represents that their cost and expenditures to effect the change covered by this change order, according to their computation and evaluation, would be in the sum of \$54,719.67. Isn't that correct?

A. There was a corrected figure here of \$106.88. This was the new total.

Q. Then the total put on there by Harsh Utah Corporation representing to your office that this change order would cost \$54,826.55 is the figure and is the representation made by that corporation to F. H. A. Isn't that correct?

A. This is Mr. Schnitzer's figure, and this is mine, the total.

Q. The total submitted though and represented by Harsh Investment Company, I notice has—that is Harold J. Schnitzer's initials.

A. Yes.

Q. Indicating that he added to the figure of \$54,719.67 in his own handwriting the figure of \$106.88 with the initials H. S. by it.

A. That's correct.

Q. And the word "total" is yours.

A. No.

Q. Who put the word "total" in there, if you remember?

A. I believe Mr. Schnitzer.

Q. And the total of the two figures in red there of \$54,826.55 is yours.

A. That's correct.

MR. ELLIS TESTIFIES CONCERNING WITH-
DRAWAL OF FUNDS BY SCHNITZER
(T. 1094-1095)

BY MR. SHERMAN:

Q. Now, isn't it also true, Mr. Ellis, that if the original escrow funds deposited pertaining to the Hill Field Air Force Base project in the original instance at the date of closing of the mortgage which I beleive that we have had identified here as being approximately \$624,000.00. Isn't that correct?

A. I think that's correct.

Q. Now, \$300,000.00 of those funds had been withdrawn in November 1952 by Mr. Schnitzer, and \$220,000.00 withdrawn in February of 1953 by Mr. Schnitzer, and another \$104,000.00 withdrawn in March of 1953 by Mr. Schnitzer, which I believe you testified to, and I beleive it's your testimony that totals \$624,000.00 withdrawals in that period of time, that there would not have been sufficient funds available to both Harsh Utah Corporation and Harsh Investment Corporation to completely carry out the terms and conditions of the lump sum contract whereby Harsh Utah Corporation could pay to Harsh Investment Company the sum of \$2,995,205.00 and still be sufficient funds to pay the items to be paid by Harsh Utah Corporation as set up on your books.

A. I can't deny that.

Q. And then it would not have been necessary to have gone through these Inter-company transfers here that you speak of and that you have outlined on exhibit number 247.

A. That's right.

Q. No further questions.

HAROLD J. SCHNITZER TESTIFIED RE PAY-
MENT OF CONSTRUCTION CONTRACT—"LUMP
SUM" AND FUNDS AVAILABLE TO BUILD HILL
AIR FORCE BASE HOUSING PROJECT AS
FOLLOWS (T. 989-992)

BY MR. SHERMAN:

Q. Is it your purpose, Mr. Schnitzer, to convey to this court that you were to have no funds of your own in these projects and that you were only to spend FHA mortgage insured funds to construction the projects?

MR. KING:

I object to it as calling for a conclusion and un-intelligible and goes to the very question that Your Honor had to decide.

THE COURT:

The objection is overruled.

A. I have never on this stand attempted to convey that impression, Mr. Sherman. I have never made any statement to that effect.

Q. Isn't it a fact, Mr. Schnitzer, that you have repeatedly said that the only income and the only funds available for the construction of the Hill Field Force Base project was the amount of the mortgage?

A. The mortgage was intended to be the funds with which the project was to be built, yes.

Q. And you know that in addition to that bid the FHA requirements were that you were required to put additional money up of your own funds, isn't that true?

A. That was always understood, escrow fund.

Q. The escrow fund, and for payment of certain costs of the owner-management corporation totalling

\$585,000.00 on the Hill Field Air Force Base Project. Isn't that true?

A. In so far as FHA is concerned, those funds can be used to pay off any obligation, yes.

Q. And they are to pay off the cost of the project that the owner was to pay, according to your own witness' testimony, Mr. Hutchinson. Isn't that true?

A. If the project cost exceeds the mortgage disbursements the escrow funds are supposed to be available for that purpose.

Q. And they are supposed to be available further for the purpose of paying the lump sum contract entered into with the contractor. Isn't that true?

A. No. That is not necessarily true.

Q. It's certainly true according to FHA rules and regulations. Isn't it, Mr. Schnitzer?

A. I don't believe that the FHA regulations that I have ever seen state that.

Q. Now, Mr. Schnitzer, you know what the lump sum contract provides. It provides the owner manager pay the contractor \$2,995,205.00 doesn't it?

A. That is the figure of the contract, yes.

Q. And prior to the time that figure was placed in that contract in July of 1952, you had signed an identical, except for the figure, lump sum contract in the State of Montana, hadn't you?

A. That's true.

Q. And you knew every provision in those contracts.

A. I have so testified when we signed the Montana contract I became familiar with the lump sum contract.

Q. And that was in March of 1951 that you signed the Montana contract?

A. That's right.

Q. And you signed the one in Utah in July of 1952.

A. July 1952, correct.

Q. And you knew what the terms and conditions of this contract was and the contract provided in the Utah contract that the owner, Harsh Utah Corporation, would pay to the contractor \$2,995,205.00. Isn't that correct.

A. That's right.

Q. On the original plans and specifications.

A. That's right.

Q. In order to do that it would be necessary to have the mortgage money you receive plus the additional funds of the escrow, wouldn't it?

A. To do what?

Q. To pay the contract of \$2,995,205.00.

Not necessarily.

Q. How else could it be paid, Mr. Schnitzer?

A. Paid in the manner followed by many of these sponsors.

Q. I'm asking you how on the Hill Field Air Force Base project.

MR. KING:

If Mr. Sherman will permit Mr. Schnitzer to answer the question, he might get an answer. He can't get an answer if he talks all the time.

Q. I'm asking you, Mr. Schnitzer, how could the Hill Field Air Force Base project sponsor, Harsh Utah Com-

pany pay to Harsh Investment Company \$2,995,205.00 without putting additional funds in over and above the mortgage amount of money?

A. They can do it in the manner approved by the FHA.

Q. And the FHA is not concerned with how it's done, and the only thing that you are required to do in so far as that is concerned is to certify to the FHA at the time it's closed finally and turned over to Fanny Mae, that the contractor has been paid and that all the sub-contractors and materialmen have been paid, isn't that true?

A. You are absolutely right.

MR. ELLIS TESTIFIES RE WITHDRAWAL OF
FUNDS BY SCHNITZER AND PAYMENT OF
CONSTRUCTION CONTRACT — "LUMP SUM"
(T. 424, 425)

BY MR. SHERMAN:

Q. And you are familiar with the fact, are you not, Mr. Ellis, that the lump sum contract entered into on the 21st day of July of 1952 between Harsh Investment Corporation and Harsh Utah Corporation calls for the payment of funds of Harsh Utah Corporation to Harsh Investment Company of \$2,995,205.00. Isn't that correct?

A. That I think is the lump sum price.

Q. And it would be absolutely impossible for Harsh Utah Corporation to carry out the terms and conditions of that agreement with Harsh Investment Corporation after having been paid out Mr. Harold J. Schnitzer the sum of \$624,000.00 between November of 1952 and March 24, of 1953, wouldn't it?

A. I don't believe it would.

Q. How could it have been done by funds available to Harsh Utah Corporation?

A. If you refer to cash, that is one thing.

Q. I am referring to cash. The contract doesn't refer to it being paid in automobiles, does it?

A. The contract specifies the amount of \$4,995,000.00

Q. Of cash.

A. However, Harsh Investment Company hasn't received \$2,995,000.00.

Q. And when they receive all of the money, the ten percent withheld in Irving Trust Company's hands, they still will not have received \$2,995,000.00, will they?

A. No.

Q. Because they have paid in the meantime \$624,000.00 out to Mr. Harold J. Schnitzer, didn't they?

A. That is not the reason they will not receive that amount of money. They will not receive \$2,995,000.00.

Q. Because the mortgage is \$2,600,000.00.

A. Yes.

Q. In other words, to make up the difference there would have to be additional funds available to Harsh Utah Corporation. Isn't that true?

A. That's correct.

Q. And those additional funds were originally placed in escrow, were they not?

A. I believe they are.

Q. And then they were paid back out of the escrow to Mr. Harold J. Schnitzer between November of 1952 to March 24, 1953, isn't that correct?

A. That's right.

Q. And they were not then available to make payment from the Harsh Utah Corporation to Harsh Investment Company, were they?

A. No.

LOCKE RE CONSTRUCTION COSTS AND PRO-
JECT COSTS DETERMINATION OF PROFIT
(T. 794, 795)

BY MR. KING:

Q. And then you also discussed with him the fact that you might want to include rental income and add it to the amount of the mortgage payment to bring up the amount of money available to pay costs so that if there was a possibility of profit that would be taken into account.

A. Mr. King, I knew what that project cost was, and I knew what the contract value was. I knew very well there was profit.

Q. You knew all the costs too, did you not?

A. Absolutely, I knew exactly what the costs were, and I knew what the contract value was.

Q. That's all I want to know, Mr. Locke. Thank you very much.

BY MR. SHERMAN:

Q. What was said on that particular occasion that Mr. King has just referred to about rental income, if anything.

A. We had spent fifty or sixty thousand dollars in Montana overtime that he was charging on the construction company. I didn't feel it would be fair to penalize the contractor for that expenditure, and that is when he said the rental income would be calculated.

Q. Now, Mr. Locke, do you know approximately how much money was spent in Utah on Hill Field Air Force Base project on overtime alone?

A. I would say close to 45 to 50 thousand dollars.

Q. Now, Mr. Locke, did your conferences in Washington pertain to the mortgage increases on the change orders in any way have anything to do in regard to the value of those same change orders between Harsh Montana Corporation the owner and Harsh Construction the builder?

A. Oh, absolutely not.

Q. What did they pertain to?

A. A mortgage increase for the owner.

Q. That's all.

MR. GOLDBERG TESTIFIES IN RE MORTGAGE
PROCEEDS AND INCOME (T. 571, 572)

MR. KING 2:

Q. That's why I want to get Mr. Goldberg and me
straightened out as to who got \$2,995,000.00.

THE COURT:

Harsh Investment is yet to get it or has got it.

A. That's true.

Q. From Harsh Utah Corporation.

A. That's true.

Q. Now, Mr. Goldberg, then this sum of money
which the Irving Trust Company is to pay this amount
of \$279,000.00, that isn't payable to Harsh Investment at
all, is it?

A. No.

Q. That's to Harsh Utah.

A. That's true.

Q. To [So ?] this figure \$2,995,000.00 income to
Harsh Investment isn't in the same category.

A. Absolutely two different categories. One is
liability and the other income.

Q. All right. Now, let's go along here; then as I
understand it we've got one thing straightened out when
you say gross income contract price we are talking about
gross income to Harsh Investment Corporation.

A. That's true.

MR. GOLDBERG TESTIFIES IN RE THE CARD
GREAVES REPORT — EX. 182 (T. 591)

MR. KING 2:

Q. Is only that you have included in your report—.

A. (Interposing) Mr. King, I said his report does not reflect the net profit or loss under the respective contracts. All there is in there are costs.

Q. That is as I understand it. And he didn't claim to have an audit which showed the income.

A. Who didn't claim?

Q. Mr. Greaves in this report.

A. No, Absolutely not. I testified to that.

Q. Now, he had an audit when you were up there, did he not?

A. Mr. Greaves told me he had never seen the contract. He didn't know what the income to the construction company was. He didn't know what the change orders are. He was instructed just to prepare a statement showing the cost of both corporations and that is what he did.

Q. He had an audit to show you income figure though, didn't he?

A. He did not.

Q. Didn't he show you that figure?

A. Absolutely not.