

1955

Pacific States Cast Iron Pipe Company and Alvin T. Locke v. Harsh Utah Corporation et al : Respondent's Petition and Brief for Rehearing

Utah Supreme Court

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No. 8336

IN THE SUPREME COURT
of the
STATE OF UTAH

FILED
SEP 22 1956

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.

RESPONDENT'S PETITION AND
BRIEF FOR REHEARING

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

Defendants and Appellants.

No. 8336

PETITION FOR REHEARING
AND
BRIEF IN SUPPORT THEREOF

PETITION FOR REHEARING

Alvin T. Locke, intervening plaintiff and respondent herein, petitions this Honorable Court for a rehearing and re-argument in the above entitled case. The petition is based upon the following grounds:

POINT I.

THE COURT ERRED IN CONSTRUING THE CONTRACT OF OCTOBER 4th, 1951, AS CONTEMPLATING RECEIPTS FROM MORTGAGE BORROWING RATHER THAN THE CONSTRUCTION CONTRACT — "LUMP SUM" PRICE AS THE SOURCE OF REVENUE IN COMPUTING PROFITS EARNED IN CONNECTION WITH THE CONSTRUCTION OF THE PROJECT.

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POINT IV.

THE COURT ERRED IN FAILING TO CONSIDER POINT II OF RESPONDENT'S CROSS APPEAL AND IN FAILING TO HOLD THAT APPELLANTS MAY NOT RECEIVE OUT OF CONSTRUCTION PROFITS TEN PERCENT (10%) OF THE AMOUNT OF THE BID BEFORE COMPUTING RESPONDENT'S BONUS.

WHEREFORE, the respondent, petitioner herein, prays that the judgment and opinion of the court be re-examined and a re-argument permitted of the entire case.

A brief in support of this petition is filed herewith.

JOHN M. SHERMAN

and

YOUNG, THATCHER & GLASMANN

By PAUL THATCHER

Attorneys for Petitioner

PAUL THATCHER, hereby certifies that he is one of the attorneys for the respondent, petitioner herein, and that in his opinion there is good cause to believe that the opinion is erroneous on the grounds set forth in the following brief and that the case ought to be re-examined and re-argued as prayed for in said petition.

DATED this 13th day of September, 1956.

PAUL THATCHER

BRIEF IN SUPPORT OF PETITION FOR REHEARING

ARGUMENT

INTRODUCTORY STATEMENT

In its opinion filed herein this Court observes that it has a great deal of sympathy for the trial court which was required to wade through a morass of perjury and claimed embezzlement, accusations and counter accusations and recriminations. Certainly this Court deserves no less sympathy, as the plain duty of each member requires that he also wade through the same morass which

is now congealed into a cold record, unwarmed and unilluminated by the personalities and manner of the several parties and witnesses which served to highlight and clarify not only the trial but the evidence and the relationships of the parties. Nevertheless the members of this Court cannot, under their oaths as judges, escape that duty.

The Court will appreciate, we are sure, that ordinarily Respondent would not ask the Court to reconsider an opinion reached by four of its members. **However**, this case has, if only because of the criminal activities of the defendant Schnitzer and his purchased henchman, become something of a "*cause celebre*" in the Far West, and not only justice, but Utah's reputation for justice and fair dealing is involved. Moreover, the amounts involved are not inconsiderable or unimportant (at least to the Respondent). The Respondent also is disturbed by the failure of the majority of this Court even to consider, discuss or dispose of the two points earnestly raised by his Cross Appeal, a favorable ruling on either of which would have required the awarding some bonus to appellant Locke. Finally the Court's opinion (evidently on the theory that one may "give a dog a bad name and hang him") gratuitously characterizes Respondent Locke as a "deep reacher" and as "probably the party with influence," — i.e., a "five percenter" — without anything in the record to support such slurs, whereas the record shows that Locke throughout acted with complete

honesty and integrity, both as to Schnitzer and the sub-contractors. No honorable man should be expected to "stand still" under such circumstances.

It would seem further that, in view of the difficult condition of the record, more weight really should have been given to the findings and determination of the learned trial judge, who is generally recognized as one of the most respected, learned, patient, careful, conscientious and diligent judges in the State, with some 20 years of judicial experience behind him.

These considerations, with an abiding conviction that the majority of this Court inadvertently fell into grave error and did grave injustice because of a misunderstanding of the facts, the situation of the contracting parties, and the law and procedures relating to Wherry Housing projects impel Respondent to file this petition and brief. Under the circumstances it is felt that our duty to the Court as well as to the Respondent would permit no less.

POINT I.

THE COURT ERRED IN CONSTRUING THE CONTRACT OF OCTOBER 4th, 1951, AS CONTEMPLATING RECEIPTS FROM MORTGAGE BORROWING RATHER THAN THE CONSTRUCTION CONTRACT — "LUMP SUM" PRICE AS THE SOURCE OF REVENUE IN COMPUTING PROFITS EARNED IN CONNECTION WITH THE CONSTRUCTION OF THE PROJECT.

A

At the outset Respondent is compelled to point out that the opinion of the majority of the Court is very

apparently based upon a completely erroneous misconception of a basic fact. On page 2, and again on page 8 of the opinion it is said that the agreement of October 4, 1951, *was prepared by Locke's Attorney*, and the Court accordingly construes it most strictly against Locke. *This is not the fact, and the record so shows.*

The evidence on this point is to be found on page 52, of the transcript, and is as follows:

“QUESTION BY MR. SHERMAN

ANSWER BY HAROLD J. SCHNITZER

- “Q. Isn't it a fact, Mr. Schnitzer, that that particular contract dated October 4, 1951 was prepared by Mr. Frank L. Whitaker?
- A. No. I beg your pardon. *It was prepared by Mr. Schnitzer (Louis Schnitzer, attorney) with Mr. Whitaker in conference, but the form was prepared by Mr. Schnitzer, and the final agreement was prepared by Mr. Schnitzer.*
- Q. Well then, other than the *preparation of the document itself by your cousin, Mr. Louis Schnitzer*, was it at any time formally brought to the attention of the board of directors as such of Harsh Investment Corporation?
- A. Harsh Investment Corporation has never, to my knowledge, ever had a formal meeting for the particular purpose of considering the October 4 contract with Locke.
- Q. Then the only discussion of it then was between yourself as director and Louis Schnitzer as a director at or about the time that

the contract itself was prepared. Is that correct?

A. That's correct."

It is clear—*absolutely clear*—that the contract was prepared not by Locke's attorney, but by Louis Schnitzer, Harold J. Schnitzer's cousin, man, and henchman, who even went so far as to aid and counsel with defendant Schnitzer by phone concerning Schnitzer's plans to commit perjury in this case, as the record shows (Tr. 1024-1026), and Locke had no more than perfunctory legal counsel from Mr. Whitaker in this regard—and Whitaker later turned up as one of Schnitzer's Portland attorneys.

These (contrary to the statements in the opinion) being the facts, it is the universal and familiar rule that the agreement of October 4, 1951, as well as all previous agreements which were prepared by Schnitzer himself, must be strictly construed against Schnitzer and his corporation, and liberally construed in favor of Locke.

17 C. J. S., "*Contracts*," Section 324, p. 751, states the general rule as follows:

"To the extent that a contract is susceptible to two constructions by reason of doubt or uncertainty as to the meaning of ambiguous language, it is to be construed most strongly or strictly against the party by whom, or in whose behalf, the contract was prepared or the ambiguous language was used and liberally and most strongly in favor of the party who is not the author and not responsible for the use of the lan-

guage giving rise to the doubt and uncertainty.”
Read v. Forced Underfiring Corp., 82 U. 529, 26
 P. 2d, 325;

Jordon v. Madsen, 69 U. 112, 252 P. 570;
Penn Star Mining Co. v. Lyman, 64 U. 343, 231
 P. 107;

General Mills v. Cragun, 103 U. 239, 134 P. 2d
 1089;

Gregerson v. Equitable Life Ins. Co., 256 P. 2d
 566 (Utah, 1953).

It is obvious that the Court, misled by a misapprehension of the true fact as to the draftmanship of the agreement, followed exactly the contrary rule, construed the contract strictly against Locke, as the supposed draftsman, and so fell into error.

In this connection we are also constrained to call to the Court's attention the well established rule of law that where a trial court, after hearing all the evidence and considering the weight thereof and the demeanor of the witnesses, has entered a judgment, every presumption is indulged in favor of the correctness of the judgment, and it will be presumed that the Court found the facts which will support the judgment if there is any evidence in the record which would support or justify such a finding if made.

Lawrence v. Bamberger Railroad Company, 3 U.
 247, 282 P. 2d 335;

McCallum v. Clothier, 121 Utah 311, 241 P. 2d 468.

Let us turn now to the core of this controversy; the construction of the agreement of October 4, 1951. As the Court in its opinion very properly observed, the basic disagreement between the parties goes to the measurement of construction profit, and, more specifically, what construction income was contemplated and intended by them to be used as the basis for computing such profits, or (even more specifically) whether the parties really intended that for such purpose the money *borrowed* by the Owner from Irving Trust Company should be deemed the only money “*earned*” in connection with the construction, or whether they intended that the agreed *contract price* to be paid under the construction contract — “lump sum” as supplemented by the “Change Orders” for extra work should be deemed to be the money “*earned*” in connection with the construction.

The learned trial judge after hearing many days of testimony and argument, and after patient, careful and conscientious consideration, properly construed the contract and found that the parties intended the *contract price* under the construction contract should be the basis for computing construction profits earned. This Court, erroneously construing the contract strictly against Locke, concluded that the parties intended that the money *borrowed* was intended to be the sole *earnings* for computing construction profit.

In this case the evidence is clear that Schnitzer and his Attorney drew the October 4th agreement, and the trial court obviously and properly proceeded on that basis to construe the contract strictly against him and liberally for Locke. Accordingly this Court should not upset the trial court's findings and conclusions unless they are clearly contrary to the manifest weight of the evidence or the law, which is certainly not the case here. See Respondent's brief, page 100, and cases there cited. See also:

Zuniga v. Evans, 87 Utah 198, 48 P. 2d 513;
Stanley v. Stanley, 97 U. 520, 94 P. 2d 465;
Olivero v. Eleganti, 61 Utah 475, 214 P. 313;
Jenkins v. Nicolas, 63 Utah 329, 226 P. 177;
Bennett v. Bowen, 65 Utah 444, 238 P. 240.

Although the Court's opinion in several places refers to the "plain, unambiguous terms of the contract," it is abundantly clear that the contract is neither plain nor unambiguous in this regard. In the first place not only did Respondent and his counsel, but also the learned Chief Justice and the learned trial judge have concluded that the meaning of the contract is contrary to that assigned by the majority. In the second place, even the majority have found it necessary in their opinion to rely (mistakenly as has been shown) upon the assumed fact that Locke's attorney drew the document, and also upon the background and previous dealings of the parties in order to arrive at a conclusion as to meaning and intent. (And here again the majority misapprehended the nature and significance of such background and dealings.)

And in the third place, the contract provides for payment of a bonus to Locke based on “*profit earned by Harsh in connection with*” construction, without supplying any definition of the difficult and broad term “profit” nor any definition of or formula for computing or establishing the basic components of any profit. Considering that by October 4, 1951, *both* parties had acquired a thorough knowledge of the requirements and procedures for this Wherry project, and of the various possible sources of both income and expense which each of the several corporations and persons necessarily involved would have, it is clear that the words used in this situation are most *unclear*—and must be construed strictly against Schnitzer, and any doubts as to meaning resolved against him, as he and his attorney drew the document and foisted it off on Locke, the builder. It must be remembered too that Schnitzer was a millionaire financier, accustomed to problems of income, expense, profit and loss, and juggling of profits and funds to save taxes, while Locke was a builder, without riches, and unaccustomed to the fast foot-work which was Schnitzer’s way-of-life in these matters. All this must be inferred and assumed in support of the lower court’s judgment, in accord with the principles referred to above.

B.1)

Actually, the contract itself is so inartificially drawn that it gives few clues as to specific meaning on the points in issue. Considering the brilliant intellectual ability of Schnitzer, which was apparent to all who participated

in the trial below, and the character (or rather, lack of it) of Schnitzer and of his henchmen and feudal retainers, as that was developed and disclosed at the trial—considering all this in the light of the fact that Schnitzer and his cousin-attorney carefully prepared the document, the Court would be entirely justified in inferring that Schnitzer intended the contract as a bated hook on which to catch the unwary Locke, playing him if necessary through financially exhausting litigation to the shallows of bankruptcy where Locke could be forced to capitulate and leave Schnitzer the sole owner of a property costing Schnitzer nothing, but worth millions.

However, the contract does present, *within its four corners*, several cogent clues as to the intention of the parties.

First, the contract provides a bonus to be paid out of “net profit *earned* by Harsh in connection with the *construction* of the aforesaid projects.” The term used is “*earned*”. *Earnings* come either from pay for services rendered or from buying low and selling high. It is in the very nature of things—it is inherent in the meaning and concept of the term—that *earnings*, or *earned profit*, cannot arise in any other way. Now, money *borrowed* is not, and never can be, money *earned*. We repeat: money *borrowed* can never be money *earned*. The meanings of the two words, the fundamental concepts expressed by each, are totally and absolutely different. We challenge the Court to find one dictionary, or even one man on the street, who will say that money *borrowed*

is the same as money *earned*. These are not mere technical niceties of accounting terminology; they are fundamental to the accepted meaning of the English language and to the facts of business life.

We are sure that no lawyer, and no judge who has ever been compelled to borrow money has ever, for tax purposes, reported the money received either as “earned income” or as “earned profit.” We are equally sure that if any busy income tax agent had ever suggested that the money received on the loan was “earned profit” and taxable as such, the outraged protests of that lawyer, and of that judge, would still be echoing in the judicial halls. Money borrowed is *not* money *earned*!

Axiomatically, *earned profit* can come *ONLY* out of *earned* money, and *not* out of *borrowed* money. No matter how ignorant this millionaire and his attorney were on October 4th, 1951, they knew *that* much! And knowing that much, they chose to promise Locke a bonus out of “profits *earned*.” They *knew* better than to use “*earned*” for “*borrowed*.” Clearly they contemplated and intended some legal arrangement by which Harsh Investment Corporation would *earn* money, and probably even *earn* a money profit in connection with the construction of the project. This necessarily and absolutely negatives any purpose or intent to treat the money *borrowed* by Harsh Utah Corporation (the Owner Corporation) as money *earned* by Harsh Investment Corporation (the Sponsor and Building Contractor). Such a conclusion violates—nay, it ravages—the plain and

universally accepted meaning of the terms used. And remember, this contract must be construed most strictly against Schnitzer, its instigator and draftsman.

But, says the Court's opinion, "any profit to be figured . . . under this contract . . . must be figured upon a profit calculated to the *owner-sponsor-manager corporation* and not to the *construction corporation*." (Opinion, P. 7.) *How can this be?* The *owner corporation* (Harsh Utah) was the *manager* and the borrower, but *was not*, and under F. H. A. requirements could not be the sponsor or the *construction corporation*. The *sponsor corporation* (Harsh Investment Corporation) was also the *construction corporation*, but *was not* and under F. H. A. requirements, it could not be the *owner* or the *borrower*. Moreover, on October 4th, 1951, Harsh Utah, the owner-manager, was not yet in existence, and was not a party to the contract. With all submission, it is utterly unreasonable to suppose that these parties on October 4th, 1951, intended to contract for a bonus based on money to be borrowed by another corporation not yet in existence, which borrowed money *would have to be repaid with interest*, and part of which money to be borrowed by the future corporation, they styled "*profit earned by Harsh*," the contracting corporation! This is *reductio ad absurdum*!

One of the most elementary rules of construction of contracts is that it must be presumed that the parties intended their agreement and each clause thereof to have some legal effect. Therefore the parties must be pre-

sumed to have contemplated some arrangement by which Harsh Investment Corporation, the contracting party, might *earn a profit* out of which (if large enough), Locke would be paid a *bonus*. That much surely must be conceded by all. And yet under the construction adopted by the Court *neither* corporation could possibly *earn a profit* out of which the bonus could be paid; the contract is utterly and completely meaningless when so construed, and could not become operative under any circumstances.

Consider the situation. The opinion says, in effect, that the agreed compensation to the builder, Harsh Investment Corporation, under the Construction Contract—"Lump Sum" must be disregarded, and, although executed, is meaningless and irrelevant to these issues; the opinion says that the parties did not intend the contract price to be a basis on which construction profits to this corporation can be computed; the owner need not pay the contractor the agreed price even though the work is done. (Opinion, Pp. 6 and 7.) *But this is the only possible source of construction revenue or profit to Harsh Investment.* Therefore, Harsh Investment cannot possibly earn any profit out of which to pay Locke the bonus it solemnly agreed to pay him out of construction profits. In other words, the opinion says the parties agreed and intended that Locke should be paid a bonus out of a profit which the parties knew and intended could not

and should not be the source of the bonus—a manifestly absurd and internally inconsistent interpretation, and one which the parties simply could not have intended.

Consider the other phase of the contract as construed by the Court: The profit contemplated (says the opinion) was the excess of the amount borrowed by the owner (Harsh Utah) over the actual costs of construction incurred by the sister contractor corporation (Harsh Investment). When stated thus, simply and baldly, it would seem that this interpretation must fall of its own weight. How could any business man, no matter how ignorant or gullible, intend so to contract? *Obviously, no profit could ever be realized and no bonus ever paid under such a contract*, (and it must be presumed that they intended *something* by their contract). The Court in its computations overlooked in the maze of figures and evidence a fundamental fact which no borrower is ever allowed by the lender to forget: *Borrowed money must be repaid*.

That is what the accountants were talking about when they testified that mortgage proceeds are never income on which a profit can be based—there is always that offsetting obligation to repay.

Suppose, for argument, that Schnitzer had proposed such an agreement to Locke and the latter had sat down with a pencil to figure his probable bonus under that “heads I win, tails you lose” supposition. His notes would have come up like this:

“HARSH UTAH CONSTRUCTION PROFIT”

Income :

(a) Mortgage Receipts	\$ 2,636,800.00	
Less: Repayment of Principal	2,636,800.00	
Net Income from Mortgage		Nothing
(b) Mortgage proceeds on change orders	178,672.00	
Less: Repayment	178,672.00	
Net Income, Mortgage, based on change orders		Nothing
(c) Rental Income		<u>\$ 165,986.49</u>
Total Net Income		<u>\$ 165,986.49</u>

Expenses :

(a) Direct construction expense	\$2,656,457.21	
(b) Indirect construction expense	45,631.34	
(c) Additional construction expense	69,597.31	<u>\$2,771,685.86</u>
Inevitable (and terrific loss)....		<u>-\$2,605,699.37</u>

And, if rental income is rejected, the inevitable construction loss to the owner under this construction of the contract is always exactly equal to the cost of construction. *No profit is possible* and hence no bonus would be possible. This is utterly inconceivable and manifestly absurd. Locke may be a fool, but Schnitzer is smart enough to know Locke would not fall for any such shell game. Neither intended any such inherently abortive and absurd arrangement.

What, then, did these parties intend? They intended a very simple and business-like arrangement:

First, Locke, having held under their previous agreement a half-interest in both the construction and ownership phases of the three projects, surrendered to Schnitzer his half interest in the ownership phase only.

Second, Schnitzer's "finance fee" for financing the project was increased from the previous 10% of the amount of the mortgage to 10% of the amount of the bids submitted on the project, an increase in this finance fee of \$13,020.00.

Third, by this time it was *known* that Harsh Investment was low bidder on three projects mentioned in the agreement which would cost nine or ten million dollars to construct, and that the projects would probably be awarded to Harsh (Tr. 324, 874-875, 880-881, 34M-40M, 199M-200M, 786-788). If Locke was to retire as an owner from the joint venture, and therefore would not direct construction as an owner, who would direct it and in what capacity? Certainly not financier Schnitzer. Locke was the only one in sight, and it was necessary to Schnitzer that he be tied up to carry through construction. Therefore Locke was retained as general construction superintendent on all three projects at \$1,000 per month. Locke thus acquired the doubtful privilege of working his head off and his heart out carrying the responsibility for what then appeared to be \$10,000,000 worth of construction in three widely scattered states. If anyone ever expected to earn, and did earn his wage twice over,

Locke did. This was no "position"—this was a "job." Locke earned every penny of his salary by the sweat of his brow—not by the surrender of his half-interest in the rentals after the construction period as the Court intimates in its opinion. It is probable that no other competent construction man would have assumed those responsibilities for twice the salary, and Locke would not have done so except that he had a stake in the construction profits which he could protect and enhance by making sure that the construction was accomplished with the utmost efficiency and economy.

Finally, Locke, having ceased to be a co-owner, and having become an employee of the construction contractor, it was necessary to provide for payment to him of his retained share of the construction profits after payment of Schnitzer's "finance fee." The simple and obvious way to do this was to provide that the contractor pay him, as superintendent, a bonus equal to one-half of the construction profits after payment of Schnitzer's finance fee. This was the agreement signed.

Obviously, it was intended then that the sponsor corporation, Harsh Investment Corporation, would become the prime contractor for the construction of the projects. The contract (prepared by Schnitzer, *not* Locke, may we remind the Court) provided that the bonus should be paid out of the "profit earned by Harsh in connection with the *construction*" as heretofore pointed out. Moreover, it is further provided that these provisions as to computing the bonus would apply "in the

event the *construction* work is handled in any other manner than contracting the entire job on any or all of said projects as hereinafter set forth.” In other words, *it was intended that, with the exception noted, any construction contract made would be on such terms that Harsh could make a construction profit, and Locke could share therein.* Schnitzer and his corporation thereunto plighted their troth, and Locke (who could estimate construction costs, but could not foresee that Schnitzer would shortly become a confessed perjurer and defrauder) believed and trusted them.

Schnitzer’s then intention to compute income and profit on the basis of the construction contract price is clearly shown by the fact that when work was started on the first (Montana) project, pursuant to the contract, the books pertaining thereto were set up to reflect income *based on construction contract* payments, and only later did he cause these entries to be changed—apparently for tax purposes (T. 459-551; Respondent’s original brief, appendix pp. 1 to 3).

B.2)

The next cogent clue given by the contract itself as to the true intent of the parties is: Schnitzer and his attorney chose to promise a bonus out of the Harsh Investment’s earnings “in connection with the *construction*” of the projects, not in connection with the *financing* of the projects. The view adopted by the court’s opinion, that *borrowed money* was the intended basis of the earned profit necessarily and obviously can be true only

if the profit intended was one to be realized out of *financing*, for the borrowing of money is a *financing*, not a *construction* operation. The money borrowed could not possibly be said to be “earned in connection with the *construction*” — the consideration for the loan was the promise to repay with interest—not the construction of the houses. On the other hand, the consideration for the construction of the houses (as specified in *all* the relevant exhibits) was the “lump sum” contract price—not the loan of the money, and conversely, the consideration for payment of the “lump-sum” contract price was the construction of the houses by the contractor — not the owner’s promise to repay. Only the “lump-sum” contract price can truthfully or logically be said to be “earned in connection with the construction” as specified in the contract.

Everything: the October 4th contract itself, the construction contract, the note and mortgage, the Wherry Housing law and regulations, the testimony of the expert auditors, accepted business practice, the testimony of Locke, the stipulation and background of the parties, and the learned trial judge’s findings—everything, that is, except the lying testimony and lying records belatedly prepared at the direction of the confessed perjurer Schnitzer—requires that this court affirm the trial court’s finding that the “lump-sum” contract was intended to be the basis for computing “profits earned in connection with the construction.”

C.

It is necessary also to say something about the clause of the October 4, 1951, agreement to the effect that, if none of the Schnitzer interests should do the construction work, and "if Harsh should elect to enter into any agreement with any other firm, person or corporation to perform *the entire construction work* on any or all of said projects *on the basis of a guaranteed profit to Harsh*" then Locke should receive certain salary for services required plus 10% of Harsh's "guaranteed profit."

In the Court below, in the original briefs and at the oral argument this provision was tacitly or expressly conceded to be inapplicable to the facts as they developed, and was not explained or argued. Therefore, until this Court picked it up and used it as a basis for its interpretation of the applicable portion of the agreement no analysis was deemed necessary in an already extensive brief. However—

In the Court's opinion it is argued that this supports the conclusion that the parties, notwithstanding their clear references to "profits earned," really expected to pay a bonus out of money borrowed from Irving Trust Company (which the opinion identifies with the Government) and that they considered they would receive profit out of the borrowed money. But when this is considered in the light of customary practices and procedures in financing and contracting the construction of building projects of all kinds, it gives no support to any such strained construction. On the contrary.

It is such a general practice and custom in financial and building circles to use the arrangement contemplated that the Court probably, upon refreshing its judicial recollection, will take judicial notice thereof. If not, we submit it is the Court's clear duty under the Utah Rules of Civil Procedure and in the interests of justice to return the case to the trial court for the taking of further evidence before depriving Locke of his legal rights and moneys because of a misapprehension arising for the *first time* in this Court. As it now stands, we have no choice but to present in this brief the custom and procedures contemplated by the clause which troubled the Court.

What they had in mind was, simply, the very common practice of a prime contractor subcontracting the entire job for a price less than the original contract price, thus assuring the prime contractor a guaranteed profit equal to the difference between the prime contract price and the sub-contract price. For example, if in this case, Harsh Investment Corporation, having received from the owner, Harsh Utah Corporation, the contract to build the Hill Field Air Force Base Project for \$2,995,205, had immediately sub-contracted the entire job to Vitt Construction Company, who agreed to build the project for \$2,600,000, this clause would have become operative. Vitt being so obligated by contract backed by a surety performance bond to do the work for the lesser figure, Harsh is, in effect, "guaranteed" a profit of \$395,205 on the transaction.

All the prime contractor, Harsh, would have to do would be to watch Vitt to make sure it and its surety performed as agreed. For this it would need the services of an expert construction man as an "inspector" whose function would be "to supervise the *construction*—to ascertain that said projects are performed *in accordance with the plans and specifications AGREED TO BY HARSH*, and Locke shall devote his full time and attention in connection therewith," as provided in this clause of the contract. This was to have been Locke's role if Harsh had so sub-contracted the *entire* job in one piece. It is too clear for argument that unless Harsh sub-contracted the construction of the entire project as indicated the parties would not be concerned with the quoted provision. No "guaranteed profit" to Harsh could then arise in connection with construction.

If the Court will re-read the contract in the light of this practice understood by the parties, it will be very clear indeed that all parties intended that the sponsor, Harsh Investment Corporation, should *in any event* be the prime contractor also, and that if Harsh sub-contracted the *entire job* to an outsider, Locke would get a bonus of 10% of the difference (or "guaranteed profit") while if the project was constructed by Harsh in any other manner (i.e., directly, or by "*employing*" Schnitzer, or by piecemeal subcontracting), then Locke would get a bonus equal to 50% of Harsh's net construction profit computed after deduction of the 10% "finance fee" to be paid Schnitzer for financing the construction of the project. Such was the simple, bus-

inesslike and effective agreement made by the parties—*drawn by Schnitzer*, and then approved and signed by Locke. Under that agreement the basis of the profits was, and must have been contemplated as being the price to be paid Harsh under the “Construction Contract-Lump Sum” which the parties shortly thereafter did in fact cause to be executed between the Owner Corporation and Harsh, and which they both knew would have to be executed under requirements of F. H. A. and the financing institution.

D

Although the Court’s opinion refers to the agreement of October 4th as “clear and unambiguous,” it finds it necessary to refer to the background and history of the parties, their previous dealings and the mistaken assumption that the agreement was drawn by Locke in order to arrive at the conclusion that they intended “*money borrowed*” to be “*money earned*.” With all due submission, in the interests of justice it must be said that the Court’s opinion evidences a misunderstanding and misconstruction of this background, history and previous dealings as shown by the evidence.

While it is true that at the outset, in June of 1951, Locke alone was familiar with Wherry Housing procedures and requirements, by October 4th, Schnitzer had applied his very superior, if amoral, intelligence to the problem, had studied, and was thoroughly familiar with the entire set up. He had worked with Locke in preparing and submitting bids on several projects, and

knew from beginning to end all of the requirements and all of the possible alternative procedures, as is well evidenced by the alternative provisions of the contract, which he testified he himself drafted before it was polished by his cousin-attorney.

Moreover, he had, even prior to the agreement of August 29, 1951, hired the Portland attorney Walter E. Hutchinson, who was an expert in, and limited his practice exclusively to the legal aspects of Wherry Housing projects. He aided Schnitzer and Locke setting up the entire program; he computed the amount of the compensation fixed in the lump-sum construction contract and prepared the contract itself as the attorney for Schnitzer's interests; and was Schnitzer's advisor and man thenceforth, even to the extent that he, a lawyer, admittedly committed perjury in the course of the trial at Schnitzer's behest (T. 810-812).

Hutchinson, Schnitzer's man, knew, and before October 4, 1951, Schnitzer knew, (1) that Harsh Investment Corporation, the Sponsor, could not, under F. H. A. requirements act also as Owner, and a separate Owner corporation would have to be organized under Utah law (*Administrative Rules and Regulations for Military Housing Insurance under Title VIII of the National Housing Act, Sections IV, 4.(a) and V, 4*); (2) that the Owner corporation would, under F. H. A. and lender's requirement, have to enter into a "lump-sum" construction contract for the projects with a legally separate corporation bonded by surety company to complete the

projects for the stipulated price which was required to be paid to the contractor, as Hutchinson testified (T. 333-344; 829-832; 335-337; 1115-1116); (3) that while a limited profit might be *earned* by the construction contractor—whether speculative or guaranteed by sub-contract—the principal profit which the facts and the Wherry Housing Act practically guaranteed was to be derived from rentals over a 75 year term, *which were income-tax free* for the first 33 years; (4) that the *money borrowed* from Irving Trust Co. for construction *would have to be repaid or these rental profits would be lost by mortgage foreclosure*; (5) that Schnitzer, as a millionaire, would tax-wise get least out of *earned* profit, and profit most out of tax free, long term rental income, while Locke's earned income would fall in a lower tax bracket and he needed quick profits for a stake for his future; (6) that F. H. A. required the Owner-Mortgagor (not the Sponsor or the Contractor) to secure completion of the project by depositing in escrow cash or U.S. securities equal to 10% of the estimated project replacement cost (the owner's required "10% equity"), which funds F. H. A. and Irving Trust Co. *required to be expended for work and material on the physical improvements prior to the advance of any mortgage money* (Exhibit 228, "Invitation," paragraphs 7 and 8; Regulations, Section V 2; T. 1117-1121); (7) that Harsh Investment Corporation, the Sponsor, would also be the prime construction contractor to earn what construction profits were available in the projects, which had been estimated and bid (see the Contract as analyzed,

supra, and subsequent behavior of the parties thereunder before Schnitzer's greed evoked his larcenous tendencies against his erstwhile friend and collaborator, Locke); (8) that Locke, under the August 29th agreement, then owned a half interest in both the construction and ownership-rental phases of all three projects bid (August 29th agreement, quoted in opinion); and (9) finally, that Locke's construction know-how and experience were essential to Schnitzer in the building of the projects (Court Opinion, recognizing that Schnitzer had limited construction knowledge).

All these facts and the knowledge of *both* parties thereof either appear clearly from the evidence received by the trial court, or the trial court was entitled to infer and find from evidence received. The careful, conscientious, learned and experienced trial court obviously did so, for it construed the contract and found the intention of the parties in accord with the obvious requirements thereof, and as Locke has always contended.

It is the law that where the trial court has entered a judgment, this Court will presume every finding and inference of fact necessary to support the judgment which the record will in any way support, even though such finding is not specifically made and entered by the trial court, and findings will be implied or supplied if necessary.

5 C. J. S. "*Appeal and Error*" Section 1564h, pp. 418 et seq.;

Ibid. section 1566;

Baird v. Upper Canal Irr. Co., 70 Utah 57, 257
Pac. 1060 (Syll. 14)

Thus, while it is true, as the Court's opinion states, that the law is that "an *integrated contract* cannot be varied by parol evidence" (emphasis added), we are not dealing here with an integrated contract specifying that Locke shall be paid a bonus out of "*excess money borrowed by the Owner* in connection with the *construction*;" we are dealing with a contract specifying that Locke shall be paid a bonus out of "*profits earned by Harsh* in connection with the *construction*." As the Contract does not specify the formula for computing the "profit earned by Harsh," the trial court very properly received evidence and made its findings on the intention of the parties in order to fill in this hiatus. The Court's findings and judgment are amply supported in the record, and hence with all due submission, should not have been upset here. See the authorities cited on pages 100-101 of Respondent's original brief herein.

And if this Contract is to be regarded as an integrated contract, not to be varied by parol evidence, the judgment of the Court below is eminently correct on this point, and should be affirmed as giving effect to the Contract as written, by computing "*profits earned by Harsh in connection with the construction*" in accord with the accepted usual and ordinary meaning of these words in their everyday usage by ordinary business men.

With all due submission, to construe the words "*profits earned by Harsh*" (which, *under law, could not*

be the Owner) as meaning "*Excess money borrowed and to be repaid by the Owner,*" as is done in the opinion herein, *is for the Court completely to re-write the Contract made by the parties*, so that it becomes completely meaningless and impossible to execute, as has been herein demonstrated. This "re-write job" also does grave injustice to Locke, whose actions, honor and integrity are unimpeached on this record outside of the testimony of the admitted perjurer and defrauder Schnitzer.

We think the Court should be reminded, in the interests of common justice, that Locke was no "deep-reacher." He was a man with an idea for the earning of an honest profit in a lawful way, and who was unfortunate enough to fall in with a well-heeled thief (to use the applicable, plain term) and not to discover Schnitzer's true character until it was too late. This could happen to anyone, and should not be used by the Court to stigmatize Locke's name on the public record or to deprive him of the rightful proceeds of his idea, skill and toil.

In this connection we think our duty requires that we remind the Court that it was largely on the basis of Locke's testimony that the lower Court was able to circumvent Schnitzer's schemes to defraud the sub-contractors Moulding, Waterfall, et al, out of their compensation, and to enter judgments in their favor in excess of \$246,378.58. Locke did this even though it was then apparent that every dollar ordered paid to a sub-contractor cost Locke personally the sum of fifty cents. His testimony for the sub-contractors cost him

\$123,000.00 in round figures. Is this the act of a “deep-reacher”—the act of a co-conspirator to defraud both the Government and the Utah sub-contractors? The answer is obvious: No! It is the act of an honest man and fellow victim who had walked unknowingly into Schnitzer’s snares—a man entitled to justice.

In its opinion the Court comments that the prospect of rental profits from the project were “remote, speculative, and highly uncertain,” and intimates that in October of 1951 Locke was and should have been happy, even anxious, to surrender a half interest therein in return for a \$1000 per month salary during the construction period. In assuming this position the Court overlooks several most important facts bearing on Locke’s attitude and the intention of the parties. In the first place it then appeared that Locke, for this salary, would have to direct and have full direct responsibility for the construction of 3 widely separated and difficult rush projects costing nine or ten million dollars to build, while reporting to and coordinating with Schnitzer at the headquarters in Portland, Oregon. *He was going to earn that salary, or even double that amount, with labor, sweat and tears, and both parties knew it. He didn’t have to “buy” the salary twice, and Schnitzer had to have a construction superintendent.* In the second place, in October, 1951 the rentals looked like the surest investment as well as the tax-free phase of the profit, which would continue over **a lifetime**. The Government had certified, and the parties knew, that there was a critical shortage of housing in the areas

involved. From Wherry Housing procedures and rules and the terms of the "Invitation" to bid on the project (Exhibit 228, paragraph 6) they knew that rentals would be fixed so as to bring 6½% per annum on the difference between the mortgage and the estimated replacement cost on a 93% occupancy factor, (a chart of which is set forth hereafter), with rentals to be adjusted upward to bring the same return if the occupancy factor fell below 93%. Previously constructed Wherry projects were (and continue to be) phenomenally successful. Schnitzer was only required to put up certain escrow funds, *while Locke was not required to put up any money*, and the remaining 90% could be borrowed with an F. H. A. guaranty at an annual interest which could not exceed 4% per annum. So, *as it appeared to these joint venturers in 1951*, Locke, for his idea and services in preparing bids, and making estimates, etc., owned a half interest in probable construction profits and in the apparently "brass-bound cinch" tax-free rental profits over a lifetime—a life pension.

Actually, as shown by Exhibit 443, tendered by defendants, the ultimately approved replacement cost of *the Hill Field project alone*, was \$3,547,860.00, while the mortgage was \$2,791,200.00, leaving an Owner's equity at the outset of \$756,660.00.

For the purpose of illustration of what was contemplated, we have set out in *Appendix I* a computation of tax-free rental income *from the Hill Field project*

alone, prepared on the basis of these figures and Government regulations for the first 10-year period.

From that computation it is apparent that Locke (an optimistic builder) very probably considered he had prior to October 4, 1951, a half interest in probable *construction* profits of more than \$181,000 (the bid had been raised after the computation shown in Exhibit 222, appellant's brief, Appendix 36) plus tax-free rental profit *for the first 10 of 75 years* amounting to \$375,985 as a *minimum*, less Schnitzer's finance fee — and all this in return for that great basis of American business: a sound idea with know-how, all without having to risk a dime of capital. And this is only *one of three* projects which would go on for 75 years!

It is thus apparent that Locke (an optimistic builder) considered he had prior to October 4, 1951, a half interest in probable construction profits of more than \$181,000 (the bid had been raised after the computation shown in Exhibit 22, appellant's brief, Appendix 36) plus tax-free rental profit *for the first 10 of 75 years* amounting to \$375,985 as a *minimum*, less Schnitzer's finance fee — and all this in return for that great basis of American business: a sound idea with know-how, and without having to risk a dime of capital. And this is only *one of three* projects which would go on for 75 years!

We respectfully submit to the Court that it is *inconceivable* that Locke intended to exchange this project for a tough, hard construction job, at bare wages for an experienced General Construction Superintendent and

Builder, especially when such men were being offered employment anywhere at premium prices at the time, as the Court judicially knows. Indeed, such skills still demand a premium.

It is equally inconceivable that Schnitzer, in drafting the new contract could have thought he could get Locke to give up this kind of a prospect for a mere job plus the absolutely *impossible* prospect of a bonus to be paid out of the profits of *borrowed money*, all of which had to be repaid under the law. Never did Locke appear that gullible. No, as the Contract says, the parties intended Locke to get a bonus out of "*profits earned by Harsh*" in the performance of a construction contract for the contemplated and required Owner corporation, *which could only be based on the lump-sum contract price*. Harsh had, and could expect no income from any other source.

When the parties met in 1951, Schnitzer, although still in his twenties, was already a millionaire. This is not accomplished without a sharp nose for a good business proposition, and it is obvious that in Wherry Housing he instantly recognized one. That he was not mistaken is well proven by the history of such projects generally, and particularly by the section on Wherry Housing contained in *Report No. 1890 of the 84th Congress, 2nd Session, House of Representatives, entitled "Authorizing Construction; Construction for the Military Departments."* An excerpt therefrom is printed in *Appendix II* hereof. It is there shown that the average

Wherry Unit cost less than \$9000 to build, and will bring an annual rental of \$1080, or \$81,000 over the term of a 75 year lease. This of course was based on 100% occupancy, whereas the projects were designed to return 61½% of cost on 93% occupancy. The Hill Field rentals over the term will gross \$23,898,000 based on 93% occupancy, or \$25,575,000 based on 100% occupancy. And these rentals will be paid out of housing allowances to Government military personnel.

No wonder the Committee recommended that the Government acquire these projects for the replacement cost, in this case, \$3,547,860.

Since then, in the *National Housing Act* of 1956, *Section* 512, printed in Appendix III hereof, the Congress has authorized the purchase of such projects for the estimated replacement cost less depreciation (which, by regulation, is on a 50 year base, or 2% per annum). The project was not certified as complete until January, 1955, so, as the mortgage amortizes (over 33⅓ years) more rapidly than the property depreciates, Schnitzer's equity should be worth more now in cash than the \$756,660 it was worth at completion. And at completion Schnitzer had already withdrawn more than he had advanced on the project: *he didn't, and doesn't, have a penny of his own invested.*

That's not so bad, on another man's idea and know-how! Schnitzer will still have a tremendous profit, even if he is required to pay Locke what he owes him. It's not

so inconceivable that he should agree to pay Locke a bonus for such an idea plus know-how.

The Court also comments in effect that the parties could not have intended to base a bonus on an unascertained and highly arbitrary amount of a contract between two wholly owned Schnitzer corporations, which he could have set at a figure so low as to insure no profit at all. The answer to this is twofold. First, Locke had not then discovered Schnitzer's true character, and obviously trusted and was entitled to trust him to do the right, proper and fair thing as contemplated. Second and more important, perhaps, both had been working with the expert Hutchinson, and both knew that if the contract price was set unreasonably low Harsh could not get a performance bond as required by law and regulation, and Schnitzer, who was already having difficulty (according to his statements to Locke) in raising the money for the "additional cash requirements over the mortgage owner's equity," would have to raise and escrow substantial additional funds to insure the completion of the contract, as Hutchinson testified before the trial court. This gave assurance that the contract price (which Hutchinson computed from F. H. A. considerations and requirements) would be as contemplated, and on that basis Locke *knew* he could cause Harsh to do the work at a profit which would assure him a substantial bonus. See the Regulations, Section V 5, and Hutchinson's testimony before the trial Court (T. 339-342; 829-833) as set out in Respondent's original brief, Appendix, pp. 4 to 7 and 16 to 21.

In the light of this situation it is inconceivable that Locke, in signing an agreement for a bonus to be paid out of "profit earned by Harsh" really intended his bonus to come, as the Court suggests, from "surplus moneys borrowed by the owner," which would have to be repaid to the lender before Schnitzer could get any tax-free rental profits. It is equally inconceivable that Schnitzer really intended any such result or contract; and again, *Schnitzer's contract must be construed most strictly against him.*

The intention attributed to the parties by the Court necessarily presupposes and presumes a presently formed conspiracy between the parties to defraud the lender, Irving Trust Co., and the Government out of the money to be borrowed with no intention of ever repaying the same, and there is no evidence whatsoever to support such a finding, especially as to Locke. Moreover, the law of Utah, and elsewhere, is that fraud is never presumed, but must be proved in every case by clear and convincing evidence.

Lane v. Peterson, 68 Utah 585, 251 Pac. 374;

Rawson v. Handy, 88 Utah 131; 408 Pac. 2nd, 473, 479.

Chapman v. Troy Laundry Co., 87 Utah 15, 47 Pac. 2nd 524;

37 C. J. S. "*Fraud*" section 94;

Ibid, section 114.

On the contrary, a lawful, proper and effective intention and contract must, under familiar rules, be pre-

sumed and applied in the absence, as here, of clear and convincing evidence to the contrary.

The Court also says that it is inconceivable that Schnitzer intended Locke to be paid a bonus out of inter-company profits computed from income paid in part out of his own contributed equity funds. Why? Employers frequently pay bonuses to employees with good and profitable ideas. Besides, Locke would get as bonus only what he already owned as co-venturer under the August 29th agreement, and Schnitzer the millionaire, would acquire Locke's former half interest in the *expected tax-free rentals*—a great inducement.

Surely this is both conceivable and logical, and Schnitzer had to leave in his 10% equity anyway, under the law. It went out *first* in contract payments under the regulations.

Finally, the Court assumes and states that the August 29th agreement contemplated profits out of borrowed money—"moneys received from the Government for such construction"—and argues therefrom that the parties therefore intended the same basis for profit in the October 4th contract. *The premise is false.* If the Court will re-read the August 29th agreement, it will be very clear that *all* it does in this regard is to guarantee Schnitzer a profit "off the top" which is "*equal*" to 10% of monies received from the Government. A guarantee of a profit "*equal*" to 10% of the mortgage (if that is what was intended, as *no* money ever was intended to be actually received "from the government") is quite a

different thing from profits "*received out of*" monies from the Government.

The Court erred in holding that *borrowed mortgage money* was intended to be the income basis of "profit earned by Harsh." It should, in common justice correct that error.

POINT II.

THE COURT ERRED IN HOLDING THAT NET RENTAL INCOME DURING THE CONSTRUCTION PERIOD IS NOT TO BE INCLUDED AS REVENUE IN COMPUTING PROFITS EARNED IN CONNECTION WITH THE CONSTRUCTION OF THE PROJECT:

Although this Court, in setting forth what it considered to be the proper formula for computing Locke's bonus, in its decision did include as a part of income the net rental receipts during the construction period of \$165,986.49, the Court further stated "nor can we agree with the trial court that Locke was entitled to share in any rentals."

It is submitted that the trial court in its findings of fact did properly include as construction income in determining the profits to be divided between the parties, the amount of \$165,986.49 received as rentals during the construction period. This is supported unequivocally by the testimony and records presented to the trial court.

Although it is admittedly true that under the terms of the October 4th agreement Locke had no interest in or to the ownership or management of the projects, it is also true that Locke's interest by the terms and conditions

of said agreement was "limited to the construction of said projects or any of them as in the manner hereinabove set forth." A distinction was properly made by the trial court as to the construction period involved in its interpretation of the October 4th agreement. The construction period pertaining to the Hill Field Air Force Base project was a period of 24 months, beginning on July 21st of 1952 and terminating in July of 1954. This was substantiated by the testimony of Harold J. Schnitzer (T. 119-120). It was further substantiated by the terms and conditions of the "lump sum" construction contract (Exhibit 61) which allowed a period of 24 months to build said project. The commitment for mortgage insurance (Exhibit 186) likewise establishes this 24-month period by determining when the amortization of the mortgage itself shall commence at a time 24 months after the construction is to start. The mortgage executed by Harsh Utah Corporation (Exhibit 63) and the Building & Loan Agreement (Exhibit 64) again clearly set forth the 24-month period.

The above mentioned documents and other evidence contained in the record before the trial court clearly establish that Locke's interest in the construction of this project continued for the full construction period of 24 months. According to the above set forth documents the owner-manager, Harsh Utah Corporation, was not required to amortize or make payments on the mortgage until the end of the said 24-month period, and as a matter of actual fact, Harsh Utah Corporation did not fully take over owner-manager responsibility nor was

the project finally accepted by the United States Government and a final mortgage executed by Harsh Utah Corporation as mortgagor until January of 1955.

Respondent Locke testified that there was an agreement between himself and Appellant Schnitzer to the effect that income from rentals during the above mentioned 24-month period of construction would be included in computing Locke's interest under the contract of October 4, 1951 (T. 42-M-45-M, 797). It is certainly not reasonable to believe or to conceive that Locke as General Construction Superintendent would have expended large sums of money for overtime on these projects without the compensating factor of rental income in mind. *By this subsequent agreement the Contract of October 4th was modified to the extent of the construction period rentals.*

During the course of the trial documentary exhibits were introduced to support the fact that Harold J. Schnitzer himself clearly intended that rental income should be used to defray construction expenses. This Court's attention is directed to the letters, Exhibits 181, 184, 185, 213, 231, 233 and 238. When read and understood, and read against the background of the relationship between the various corporations, (to wit; Harsh Montana as owner in Montana, Harsh Construction Co. as the contractor in Montana; Harsh Utah as the owner in Utah and Harsh Investment Corporation as the contractor in Utah; and Harsh California, the owner in California, and Harsh Construction Co. again the contracting organi-

zation in California) and considered in the light of *the testimony of Mr. Schnitzer as to the relationships being identical between these various corporations* (T. 119, 120), these letters most clearly and definitely sustain the trial Court's Findings of Fact pertaining to this rental income.

Ex. 185 is a letter from Harsh Utah Corporation signed by Mr. Schnitzer which says, in part, "Lack of rental income from completed units, which income was *anticipated* by sponsor to *defray construction costs* on the original bid" is clear and convincing evidence as to the intent of Mr. Schnitzer, although some of the oral testimony on his behalf may have been to the contrary.

The evidence before the trial Court, taken in its entirety, from various places in the transcript and from documentary evidence submitted, clearly established a construction period pertaining to the Hill Field Air Force Base Housing Project of 24 months and it was this construction period in which Mr. Locke had a direct interest under the terms and conditions of the October 4th, 1951 agreement. The documentary evidence hereinabove quoted and set forth clearly shows that it was the intent of Schnitzer to defray construction costs by rental receipts. The evidence further clearly shows that Harsh Utah Corporation could not assume its role as owner-manager of the Hill Field Air Force Base Housing Project until such time as it had been completely constructed and had been accepted by the Federal Housing Administration and the United States Air Force.

It is, therefore, respectfully submitted, that there is

clear, convincing and unequivocal evidence to support the trial Court's Finding that rental income in the amount of \$165,986.49 during said construction period should be properly used in the computation of profits in which Locke should participate and there is no evidence and/or logical argument upon which this Court can base a proper reversal of the trial Court's decision in this regard.

POINT III.

THE COURT ERRED IN FAILING TO CONSIDER POINT I OF RESPONDENT'S CROSS APPEAL AND IN FAILING TO HOLD THAT THE AMOUNT OF REVENUE FOR THE CHANGE ORDER EXTRAS WAS \$333,952.55 INSTEAD OF \$178,672.00.

It appears from a careful reading of the decision of this Court, that, other than to note that the trial Court rejected plaintiff's contention as to change orders and allowed further income only to the extent that the change orders resulted in an increase in the mortgage amount rather than the amount of the contracts for change orders between Harsh Investment Corporation and Harsh Utah Corporation, this Court did not concern itself with the matters presented by Point I of Respondent's brief on cross appeal.

Respondent submits that the issue presented by Point I of his original brief was presented earnestly and in good faith, and that he is entitled to a fair consideration thereof and ruling thereon by this court under the provisions of the Utah Constitution, Article VIII, Section 25.

Respondent respectfully requests and urges the members of this Court to examine carefully the terminology of Exs. 164 and 196 which are the change orders themselves. Respondent submits that these documents are a contract between Harsh Utah Corporation and Harsh Investment Corporation and which, under the terms and conditions of the plans and specifications which was made a part of the Construction Contract—"Lump Sum" that the only conclusion that can be lawfully or logically be drawn is the consideration that Harsh Investment Corporation as the contractor is entitled to receive on said change orders the contract price of \$333,952.55.

The facts and law applicable to this issue are quite fully argued under Point I of Respondent's brief on cross-appeal (original brief, pp. 80 to 87). The argument under Point I of this brief is also relevant.

Respondent therefore will not repeat these facts and arguments, but respectfully requests and urges this Court to rule on this issue in accord with the law and the facts as submitted in Respondent's briefs.

POINT IV.

THE COURT ERRED IN FAILING TO CONSIDER POINT II OF RESPONDENT'S CROSS APPEAL AND IN FAILING TO HOLD THAT APPELLANTS MAY NOT RECEIVE OUT OF CONSTRUCTION PROFITS TEN PERCENT (10%) OF THE AMOUNT OF THE BID BEFORE COMPUTING RESPONDENT'S BONUS.

Respondent again submits, after carefully reading this Court's decision, that it is apparent that this Court did not consider nor did it determine a very material

issue in this matter, as to whether or not, under the terms and conditions of the October 4th, 1951 agreement, Harsh was entitled to retain ten percent (10%) of the total amount of the bid before computing the bonus to which Locke was entitled.

Appellants attempt to establish that Schnitzer adequately financed the project by a continual process of transferring funds from one corporation to another and from one project to another as the occasion may require or demand. This theory of appellants is absolutely contrary to the rules and regulations of the Federal Housing Administration; it is absolutely contrary to the terms and conditions of the mortgage and the building and loan agreement. It is inconceivable that appellants would attempt to assert that it was proper in any manner to transfer funds from one project to another. A careful analysis by this Court of the facts will lead to only one conclusion in this matter. In Montana, Harsh Montana borrowed funds from Manufacturers Trust Company with which to assist in the construction of the Montana project. In Utah, Harsh Utah borrowed from the Irving Trust Company funds with which to assist in the construction of this project, and any manipulation of these TRUST funds between projects in any manner whatsoever would have been in violation of the terms and conditions of the individual mortgages, the commitment for mortgage insurance and the building and loan agreement as well as the F. H. A. rules and regulations.

Any contention that Locke had knowledge of these transfers during the construction of the various projects

is not supported by any evidence or the record before the trial Court. Locke was the construction superintendent, busily engaged in building projects in the states of Montana and Utah and did not concern himself with the financial manipulations carried on by Schnitzer during the course of construction of the projects.

Appellants would urge in their reply brief that Ex. 195 as submitted on behalf of appellants was never controverted or attacked and attempt to set this up as an accounting for funds on Hill Field Air Force Base. The testimony of Mr. Ellis, the accountant for the various Harsh companies, clearly shows that this is not true and that the sum of \$1,040,505.00 was expended by Harsh Investment Corporation during the construction of the Hill Field Air Force Base Housing Project on activities of various Schnitzer corporations other than the Hill Field Project (T. 475). As a result, the owner never has paid the contractor the lump-sum contract price, or the amounts due it under the "change order" contracts.

As has been demonstrated, it was from these payments to the contractor that the construction profit and Locke's bonus is to be computed and paid. As the trial court found, Schnitzer did not perform his obligation to finance the project, and hence has never earned his "finance fee."

Respondent did not, prior to this Court's decision, file a reply to the "Reply Brief of Appellants," although the reply brief of said appellants contains many arguments and statements which cannot in any manner what-

soever be supported by the evidence and the record. Respondent assumed and still assumes that this Court would disregard the arguments therein contained that were not supported by the evidence before the trial court.

Respondent will not reiterate his theory and argument on this point, which are presented on pages 87 to 109 of his original brief. However, Respondent does respectfully request and again urges this Court carefully to consider and rule upon the argument and issue there submitted.

Respondent is confident, and respectfully submits that such careful consideration will result in a ruling in Respondent's favor on this issue.

CONCLUSION

As stated at the outset, each member of this Court is entitled to and has our sympathy when he is confronted with the task of sifting the truth out of this voluminous record, encumbered as it is with the lies, the evasions, the half-truths, and the plausible inventions of the intellectual perjurer Schnitzer—but the duty, in the service of justice, is inescapable and non-delegable.

The Appellant's late-filed reply brief (which so peculiarly and markedly differs in style and presentation from his original brief) seems to have influenced greatly the Court's opinion. It is earnestly submitted, however, that most, if not all, of the assertions which found their way from this brief into the Court's opinion are erroneous and contrary to the trial court's proper

findings and the evidence. An example is the characterization of anticipated rental profits as “entirely fictitious, speculative and uncertain” — and yet, as the court also observes, neither party “planned on losing any money”! And in fact those profits were reasonably expected to net millions over the years, as shown above in the sample tabulation of tax-free rental profits. And this is only one sample of many. The Court’s mistaken statement that Locke’s attorney drafted the key agreement is another and terribly important one.

The Court has been misled by Schnitzer’s plausible inventions, and, it is very respectfully submitted, the members of the Court have a duty now to check every fact and concept against the record and to correct its misapprehensions—an admittedly difficult but not impossible task.

Respondent is confident that when this is done the Court will withdraw its present opinion and decision, modify the judgment as prayed in Respondent’s cross-appeal, and affirm the lower court’s judgment as so modified.

Respectfully submitted,

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APPENDIX

APPENDIX I
Illustrative Computation of Expected Rental Profits:
First 10 Years

	1. ANNUAL INCOME	2. ANNUAL OPERATING & MAINTENANCE EXPENSE	3. ANNUAL RESERVE FOR REPLACEMENT	4. ANNUAL TAXES	5. ANNUAL DEBT SERVICE INCLUDING PAYMENT OF PRINCIPAL & INTEREST	6. NET ANNUAL PROFIT AT 93% OCCUPANCY (Guaranteed)	7. NET ANNUAL PROFIT AT 100% OCCUPANCY (*)
1 yr.	\$318,651	\$81,362	\$16,710	\$30,612	\$167,430	\$ 22,537	\$ 46,522
2 yrs.	318,651	81,362	16,710	30,612	164,083	25,884	49,869
3 yrs.	318,651	81,362	16,710	30,612	160,736	29,231	53,216
4 yrs.	318,651	81,362	16,710	30,612	157,389	32,578	56,563
5 yrs.	318,651	81,362	16,710	30,612	154,042	35,925	59,910
6 yrs.	318,651	81,362	16,710	30,612	150,695	39,272	63,252
7 yrs.	318,651	81,362	16,710	30,612	147,348	42,619	66,604
8 yrs.	318,651	81,362	16,710	30,612	144,001	45,966	69,951
9 yrs.	318,651	81,362	16,710	30,612	140,654	49,313	73,298
10 yrs.	318,651	81,362	16,710	30,612	137,307	52,660	76,645
TOTAL MINIMUM NET, TAX-FREE INCOME FOR TEN YEARS....						\$375,985	\$615,830

(*) At 100% occupancy the income in Column 1 would be increased by the difference that Column 7 exceeds Column 6. (Izakson's testimony at time of trial was that Hill Field Air Force Base Housing Project was 100% occupied.)

APPENDIX II

Excerpt from Report No. 1890, 84th Congress, 2nd Session, House of Representatives

"TITLE VIII (Wherry Housing)

"The history of the so-called Wherry housing program is well-known and needs no repetition here. It was embarked upon when it appeared that it provided the only feasible method for providing much-needed family housing for our military personnel. It served a useful purpose. In the committee's opinion, however, the time has come when this unusually expensive program must be reviewed and action taken which will eliminate costs which are wholly unnecessary.

"With the foregoing thoughts in mind, the committee inserted a new section 419 which would permit the purchase by the Government of Wherry housing projects. The savings to be effected are so large that it would be an unreasonable man indeed who would deny the wisdom of embarking upon this program of purchase. Briefly stated, a Wherry owner or sponsor holds a lease for 50 or 75 years from the Government which gives him the right to future income for the period of his lease. When one considers that the housing unit involved cost less than \$9,000 to construct, and that the average housing allowance is \$90 a month or \$1,080 a year, it is clear that the Government will spend exorbitant sums prior to the time that it will have possession of the house. For example, the Congress will be appropriating housing allowance at the average rate of \$1.080 per year per unit for either 50 or 75 years. For those leases which cover 50 years, the cost to the Government for the \$9,000 unit will be \$54,000.

The cost to the Government for the 75-year lease unit will be \$81,000. There are today approximately 82,000 Wherry units. One needs but to multiply 82,000 times \$54,000 to conclude that prompt and aggressive action of the kind contemplated by this section must be taken."

APPENDIX III

Section 512, National Housing Act of 1956

"ACQUISITION OF WHERRY ACT HOUSING

"SEC. 512. Section 404 of the Housing Amendments of 1955 is amended to read as follows:

'SEC. 404 (a). Whenever the Secretary of Defense or his designee deems it necessary for the purpose of this title, he may acquire by purchase, donation, condemnation, or other means of transfer, any land or (with the approval of the Federal Housing Commissioner) any housing financed with mortgages insured under the provisions of title VIII of the National Housing Act as in effect prior to the enactment of the Housing Amendments of 1955. *The purchase price of any such housing shall not exceed the Federal Housing Commissioner's estimate of the replacement cost of such housing and related property (not including the value of any improvements installed or constructed with appropriated funds) as of the date of final endorsement for mortgage insurance reduced by an appropriate allowance for physical depreciation as determined by the Secretary of Defense or his designee upon the advice of the Commissioner:* Provided, That in any case where the Secretary or his designee acquires a project held by the Commissioner, the price paid shall not exceed the face value of the debentures (plus accrued interest thereon) which the Commissioner issued in acquiring such project.'"