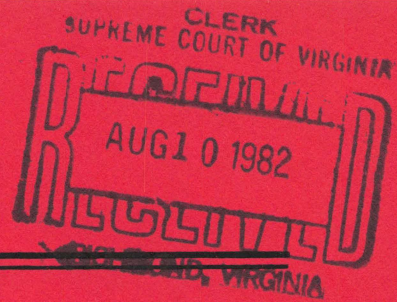
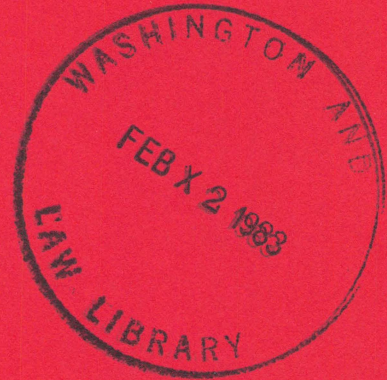


22412 492



IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 811770



ALVIN E. GREENWALT,

Appellant

v.

COMMONWEALTH OF VIRGINIA,

Appellee

APPENDIX

Walter Jervis Sheffield
Thomas L. Bricken
SHEFFIELD & BRICKEN
904 Princess Ann Street
Suite 407
Fredericksburg, Virginia 22401-5892

Counsel for Appellant

Francis W. Pedrotty, III
Assistant Attorney General
101 North Eighth Street
Criminal Law Division
Richmond, Virginia 23219

Counsel for Appellee

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COMMONWEALTH OF VIRGINIA

COUNTY OF SPOTSYLVANIA, to-wit:

The Grand Jurors of the Commonwealth of Virginia in and for the body of Spotsylvania County, and now attending the Circuit Court of said County, upon their oaths present:

That on or about the period from August 31, 1979 through February 22, 1980, Alvin E. Greenwalt did unlawfully, with intent to defraud, retain or use funds paid by Mr. and Mrs. Ralph Bishop, or their agent, to him as the contractor under a contract for the construction of a residential dwelling on their property known as Lot 20 of Snow Hill Subdivision in Spotsylvania County, Virginia, for a purpose other than to pay persons performing labor upon or furnishing material for such construction while amounts for which he was liable or became liable under his contract for such labor or materials remained unpaid.

In violation of Section 43-13 of the Code of Virginia (1950), as amended, in the County aforesaid, against the peace and dignity of the Commonwealth.

Upon the testimony of Mrs. Lucy Cooper and Mrs. Anita Bishop, witnesses duly sworn and sent before the Grand Jury to testify.

Punishment: A fine of not less than \$500.00 nor more than \$2,000.00, or by confinement in jail not less than 30 days nor more than 12 months, either or both.

COMMONWEALTH OF VIRGINIA
IN THE CIRCUIT COURT OF
SPOTSYLVANIA COUNTY

COMMONWEALTH

V.

ALVIN E. GREENWALT

INDICTMENT FOR A ~~felony~~ MISDEMEANOR J.A.T.
by grand

A TRUE BILL: ✓

George W. Bricker Jr.
Foreman

1-20-81
Date

Thomas Bricker (misdemeanor)

Jury - Yes

7-10-81 - 10:00

Bond \$1000.00 - per recognizance

N O T I C E

TO THE HONORABLE JOHN A. JAMISON, JUDGE OF SAID COURT;
THE HONORABLE MARGARETT M. COOKE, CLERK OF THE CIRCUIT COURT OF
SPOTSYLVANIA COUNTY; and THE HONORABLE MARK GARDNER, COMMONWEALTH'S
ATTORNEY FOR SPOTSYLVANIA COUNTY:

PLEASE TAKE NOTICE of my intent to appear on behalf of
the Defendant , Alvin E. Greenwalt, at the next motion day of this
Court, June 15, 1981, for purposes of arguing the attached Motion
seeking a dismissal of the indictment against the Defendant.

Respectfully Submitted,

ALVIN E. GREENWALT

BY:

Counsel

WALTER JERVIS SHEFFIELD
SHEFFIELD AND BRICKEN, P.C.
Attorneys at Law
904 Princess Anne Street
Fredericksburg, Virginia 22401
703-373-2500

C E R T I F I C A T E

The undersigned hereby certifies that he has this 4th
day of June, 1981, mailed, postage prepaid, a true copy of the
foregoing Notice to Mark Gardner, Gardner and Maupin, The Pro-
fessional Building, Spotsylvania, Virginia 22553.

WALTER JERVIS SHEFFIELD

CLERK'S OFFICE
CIRCUIT COURT
SPOTSYLVANIA CO. VA.
JUN 5 10 23 AM '81
RECORDED & INDEXED
20 MC
AL

M O T I O N

TO THE HONORABLE JOHN A. JAMISON, JUDGE OF SAID COURT:

Comes now, your Defendant, Alvin E. Greenwalt, by counsel, who respectfully moves the Court as follows:

1. Your Defendant currently stands indicted in this Court on the charge of unlawfully violating §43-13 of the Code of Virginia (1950) as amended, to-wit: " with intent to defraud, retain, and use funds paid by Mr. and Mrs. Ralph Bishop or their agent, to him as the contractor under a contract for the construction of a residential dwelling on their property known as Lot 20, Snow Hill Subdivision, Spotsylvania County, for a purpose other than to pay perons performing labor upon or furnishing material for said construction while amounts for which he was liable or became liable under his contract for such labor or materials remain unpaid", said indictment having been returned at the January, 1981 term of said Court.

2. At the time said indictment was returned, your Defendant had previously been charged by the Commonwealth of Virginia in the General District Court of Spotsylvania County, Virginia, for embezzling funds which he had received for Lucy Cooper, said charges being based on the identical facts which were presented to the Grand Jury and upon which the Grand Jury acted in the paragraph one above.

3. That on November 12, 1980, in the aforesaid General District Court, the Commonwealth Attorney for the County of Spotsylvania moved to have the charges referenced in paragraph two above, brought against the Defendant under § 43-13 of the

Code of Virginia (1950) as amended, and that such motion was opposed by Defendant's counsel, but granted by the General District Court Judge.

4. That on November 12, 1980, in the aforesaid General District Court, upon a plea of not guilty to the charges then being brought under §43-13, and at the conclusion of the Commonwealth's case which involved the full examination of no less than seven sworn witnesses on behalf of the Commonwealth, the Honorable Joseph L. Savage, granted the Defendant's motion over the objection of the Commonwealth to strike the Commonwealth's evidence based on his finding that there was insufficient evidence to indicate that the Defendant intended to defraud or unlawfully retain, use, or appropriate such funds to his own use and dismissed the charge against the Defendant.

5. That all of the facts placed before the aforesaid General District Court by the Commonwealth's seven witnesses dealt with circumstances that arose prior to June 1, 1980; which facts are identical to those upon which the indictment is based.

WHEREFORE, your Defendant prays that the indictment against him be dismissed on the grounds of: (1) jeopardy has already attached on said charge and further proceedings would constitute double jeopardy; and, (2) that the issue of intent, retainance, use or appropriation of funds by the Defendant, as alleged in the indictment has been ruled upon by the General District Court of Spotsylvania County, Virginia, and that the Commonwealth is estopped to now assert otherwise.

Respectfully Submitted,

ALVIN E. GREENWALT

BY:


Counsel

WALTER JERVIS SHEFFIELD, ESQUIRE
SHEFFIELD AND BRICKEN, P.C.
Attorneys at Law
904 Princess Anne Street
Fredericksburg, Virginia
703-373-2500

C E R T I F I C A T E

4th The undersigned hereby certifies that he has this day of June, 1981, mailed, postage prepaid, a true copy of the foregoing Motion, to Mark Gardner, Gardner and Maupin, The Professional Building, Spotsylvania, Virginia 22553, Commonwealth Attorney for The County of Spotsylvania, Virginia.


WALTER CERVIS SHEFFIELD

CLERK'S OFFICE
CIRCUIT COURT
SPOTSYLVANIA CO. VA.
JUN 5 10 23 AM '81
RECORDED & DOCKETED

WARRANT OF ARREST - FELONY

VA. CODE ANN. § 19.2-71-72

Spotsylvania

CITY OR COUNTY

☒ General District Court
☐ Juvenile and Domestic Relations District Court

☒ Criminal
☐ Traffic

TO ANY AUTHORIZED OFFICER:

You are hereby commanded in the name of the Commonwealth of Virginia forthwith to arrest the Accused, and to bring the Accused before the Court to answer the charge that the Accused, within this city or county, on or about

21 Oct 80 1479 August 1979 and thereafter *JS* did unlawfully and feloniously

embezzle \$2,500 which he received for Lucy Cooper, trading as

Chancellor Plumbing & Heating, Inc. *JS*

with intent to defraud, retain or use part of the funds paid by or on behalf of Ralph Bishop under a contract for construction of a dwelling in Snow Hill Subdivision for a purpose other than for said Chancellor Plumbing & Heating, Inc. for labor and materials supplied thereon.

43-13 *JS*

18-2-111, Code of Virginia

in violation of Section

I, the undersigned, have found probable cause to believe that the Accused committed the offense charged, based on the sworn statements of

(Phone 898-1700)

Lucy Cooper, P. O. Box 1264, College Sta., Fredericksburg, Complainant.

22 Oct 80 1320 hours

DATE AND TIME ISSUED

HEARING DATE FILE NO.

Arraign first trial 86-74
date after arrest 12

Oct 17 1980 11-12
\$3,500 ²⁰ bond

ALVIN GREENWALT

ACCUSED / 124

Churchill Dr. Chancellor

ADDRESS / LOCATION

(Office 501 Westwood Ofc Par

RACE	SEX	DOB	FT	HT	IN	EYES	HAIR	MO	DO
W	M	170	6	0	0	Bl	Bl	01	01
SSN: 528-42-8513									

WARRANT OF ARREST
FELONY

EXECUTED by arresting the Accused named above on this day

10/23/80 11:53
DATE AND TIME

C. J. Hart 024 ARRESTING OFF

Spotsylvania County

Badge No. agency and jurisdiction

C. J. Waddy, JR

ATTORNEY FOR THE ACCUSED

SWIFT & ROICKEN
PRESENT

ER OF PRELIMINARY HEARING

my right to a preliminary hearing before the Court named in this warrant to determine
s probable cause to believe that I committed a felony AND, having the consequences of my
d to me by the Judge of this Court, I nevertheless WAIVE MY RIGHT TO A PRELIM-
ING on this warrant

Certified to the Circuit Court of this jurisdiction

APPEAL

Y DATED/NOTED

BOND SET	DATE WITHDRAWN
CLERK	JUDGE

ACCUSED, (1)

ATTORNEY FOR ACCUSED

DISPOSITION OF CASE

accused named within was brought before me
red this day, and upon hearing the evidence
case certified to the Grand Jury of this
diction, at its next term (date), having found
able cause to believe that the Accused com-
ed the felony charged.
the Accused be discharged.
le prosecu on Commonwealth's motion
motion to change bond
ased ☐ decreased bond to
..... (special conditions on
ditions of Release and Bond)
harge reduced to

On this reduced charge, I impose the following
sentence on the Accused:

☐ fine with \$
☐ suspended
☐ DAY MONTHS in jail with
☐ DAY HS Suspended
☐ months
☐ License suspended
Restitution of payable to
by as condition of suspended
sentence.
☐ BOND FORFEITED in the sum of \$
☐ BOND applied to fine and costs
OTHER:

which the Accused was arraigned and
ded

ITY
[GUILTY] ☐ not a confederate

was found
ulity
y as charged above
y of

ATTORNEY(S) PRESENT: COMMONWEALTH DEFENSE

11-12-80

DATE

JUDGE

FINE

COSTS

Misdemeanor
Conviction

112 TRIAL FEE
113 BAIL FEE
305 FILING FEE
132 CCE
120 CT. APPT. ATTY.
013 WITNESS FEE

Preliminary Hearing
Assessments

119 COMM. ATTY.
203 COMM. ATTY.
120 CT. APPT. ATTY.
113 WITNESS FEE

Other (specify):

RECEIPT NO

DATE PAID

AFFIDAVIT OF SURETY

The undersigned state under oath that the following information is true:

Mildred Levin

(Names of All Owners of Property Pledged as Security)

3315 Churchill Drive

(Address of Property)

Lot #194 Waverly Village Sec 2A

(Description of Property)

Fair market value of property:

\$ 44,700.00

Less encumbrances to title:

Mortgages or deeds of trust

\$ 21,000.00

Unpaid taxes

\$ —

Unsatisfied judgments

\$ —

Other surety bonds

\$ —

Other (assessments, mechanic's liens, etc.) Specify
type of lien.

\$ —

Total Encumbrances

\$ 21,000.00

NET EQUITY \$ 23,700.00

The undersigned further state they are the sole owners of the property, that there are no other encumbrances on the property and that no other person, group, or entity has any equity interest in the property described above.

M

Name (Print or Type)

MILDRED LEVIN

(seal)

Signature

MILDRED LEVIN

Name (Print or Type)

Mildred Levin

(seal)

Signature

Name (Print or Type)

Signature

(seal)

Sworn/Affirmed and signed before me this day:

10-23-80

(Date of Attestation)

Man Belle Stephens

☐ Clerk

☒ Magistrate

☐ Notary Public

SUBPOENA for WITNESSES

Spotsylvania

CITY OR COUNTY

☒ Juvenile and Domestic Relations District Court ☐ Civil ☒ Criminal ☐ Traffic

Juvenile and Domestic Relations District Court

Spotsylvania Court House

STREET ADDRESS OF COURT

TO ANY AUTHORIZED OFFICER:

You are hereby commanded to summon forthwith the witnesses listed below to appear on

Nov. 12, 1980 at ~~XXXX~~ 1:00 AM/PM to testify in the above case.

RETURNS: Each witness was served as indicated below, according to law (unless not found).

NAME.....	Bruce Lee
ADDRESS.....	% R. C. Lee Carpet Mart
	Fredericksburg, Va.
Tel.	
<input type="checkbox"/> PERSONAL SERVICE	No.
Being unable to make personal service, a copy was delivered in the following manner:	
<input type="checkbox"/> Delivered to person found in charge of usual place of business or employment during business hours and giving information of its purport.	
<input type="checkbox"/> Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode of party named above after giving information of its purport. List name, age of recipient, and relation of recipient to party named above.	
<input checked="" type="checkbox"/> Posted on front door of usual place of abode, address listed above. (Other authorized recipient not found.)	
<input type="checkbox"/> Served on Secretary of the Commonwealth	
<input type="checkbox"/> Served on Clerk of State Corporation Commission	
<input type="checkbox"/> Served on Commissioner of Division of Motor Vehicles	
Not found <i>[Signature]</i>	
SERVING OFFICER	
DATE for I. C. WADDY, JR.	

NAME.....	
ADDRESS.....	
Tel.	
<input type="checkbox"/> PERSONAL SERVICE	No.
Being unable to make personal service, a copy was delivered in the following manner:	
<input type="checkbox"/> Delivered to person found in charge of usual place of business or employment during business hours and giving information of its purport.	
<input type="checkbox"/> Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode of party named above after giving information of its purport. List name, age of recipient, and relation of recipient to party named above.	
<input type="checkbox"/> Posted on front door of usual place of abode, address listed above. (Other authorized recipient not found.)	
<input type="checkbox"/> Served on Secretary of the Commonwealth	
<input type="checkbox"/> Served on Clerk of State Corporation Commission	
<input type="checkbox"/> Served on Commissioner of Division of Motor Vehicles	
Not found	
SERVING OFFICER	
DATE for	

Failure to comply with this subpoena could cause you to be fined or jailed in contempt of court.

188
RETURN DATE

FILE NO.

Nov. 12, 1980

SUBPOENA for WITNESSES

☒ Commonwealth of Virginia for

☐ CITY ☒ COUNTY ☐ TOWN of

for

In re / V.

Alvin Greenwalt

(Embezzlement)

The witnesses are subpoenaed to testify on behalf of:

☒ Commonwealth of Virginia for

☐ the City, County, or Town indicated for

☐ Plaintiff(s) for ☐ Defendant(s) for

☐ Juvenile

11/7/80

[Signature]
DATE ISSUED
CLERK ☐ MAGISTRATE ☐ JUDGE ☐
☐ Commonwealth's Attorney

SUBPOENA for WITNESSES

VA. CODE ANN. § 8.01 - 407, 14.1 - 195, 16.1 - 265
19.2 - 267, and Rule 3A-15

Spotsylvania County

CITY OR COUNTY

☒ General District Court (☐ Civil ☒ Criminal ☐ Traffic)

☐ Juvenile and Domestic Relations District Court

Spotsylvania Court House

STREET ADDRESS OF COURT

TO NY AUTHORIZED OFFICER:

You are hereby commanded to summon forthwith the witnesses listed below to appear on

November 12, 1980 at 9:00 AM/PM to testify in the above case.

RETURN: Each witness was served as indicated below, according to law (unless not found).

NAME <u>Ralph Bishop</u>	
ADDRESS	
Tel.	
<input checked="" type="checkbox"/> PERSONAL SERVICE	No.
Being unable to make personal service, a copy was delivered in the following manner:	
Delivered to person found in charge of usual place of business or employment during business hours and giving information of its purport.	
<input type="checkbox"/> Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode of party named above after giving information of its purport. List name, age of recipient, and relation of recipient to party named above.	
<input type="checkbox"/> Posted on front door of usual place of abode, address listed above. (Other authorized recipient not found.)	
<input type="checkbox"/> Served on Secretary of the Commonwealth	
<input type="checkbox"/> Served on Clerk of State Corporation Commission	
<input type="checkbox"/> Served on Commissioner of Division of Motor Vehicles	
Not found	<u>R. L. SEAY</u>
SERVING OFFICER	
DATE <u>11-12-80</u>	for <u>T. C. Waddy, Jr.</u>

NAME	
ADDRESS	
Tel.	
<input type="checkbox"/> PERSONAL SERVICE	No.
Being unable to make personal service, a copy was delivered in the following manner:	
<input type="checkbox"/> Delivered to person found in charge of usual place of business or employment during business hours and giving information of its purport.	
<input type="checkbox"/> Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode of party named above after giving information of its purport. List name, age of recipient, and relation of recipient to party named above.	
<input type="checkbox"/> Posted on front door of usual place of abode, address listed above. (Other authorized recipient not found.)	
<input type="checkbox"/> Served on Secretary of the Commonwealth	
<input type="checkbox"/> Served on Clerk of State Corporation Commission	
<input type="checkbox"/> Served on Commissioner of Division of Motor Vehicles	
<input type="checkbox"/> Not found
SERVING OFFICER	
DATE	for

RETURN DATE

FILE NO.

Nov. 12, 1980

80-1406

SUBPOENA for WITNESSES

☒ Commonwealth of Virginia for

☐ CITY ☐ COUNTY ☐ TOWN of

for

☐

In re / V.

Alvin Greenwalt

The witnesses are subpoenaed to testify on behalf of:

☒ Commonwealth of Virginia for

☐ the City, County, or Town indicated for

☐ Plaintiff(s) for ☐ Defendant(s) for

☐ Juvenile

11/10/80

DATE ISSUED

☒ X

CLERK

☐ MAGISTRATE

☐ JUDGE

☐ Commonwealth's Attorney

to comply with this subpoena could cause you to be fined or jailed
pt of court.

SUBPOENA for WITNESSES

VA. CODE ANN. § 8.01 - 407.14.1 - 195.1b.1 - 265
19.2 - 267, and Rule 3A:15

RETURN DATE

FILE NO.

Nov. 12, 1980

SUBPOENA for WITNESSES

☒ Commonwealth of Virginia for
☐ CITY ☒ COUNTY ☐ TOWN of
for

In re / V.

Alvin Greenwalt

(Embezzlement)

The witnesses are subpoenaed to testify on behalf of:

☒ Commonwealth of Virginia for
☐ the City, County, or Town indicated for
☐ Plaintiff(s) for ☐ Defendant(s) for
☐ Juvenile

11/7/80

DATE ISSUED

CLERK

☐ MAGISTRATE

☐ JUDGE

☐ Commonwealth's Attorney

Spotsylvania
CITY OR COUNTY
General District Court (☐ Civil ☒ Criminal ☐ Traffic)
Juvenile and Domestic Relations District Court
Spotsylvania Court House
STREET ADDRESS OF COURT

TO ANY AUTHORIZED OFFICER:

I hereby commanded to summon forthwith the witnesses listed below to appear on

Nov. 12, 1980 at 1:00 AM/PM to testify in the above case.

IF RETURNS: Each witness was served as indicated below, according to law (unless not found).

NAME Frank Elliott

ADDRESS % Union Bank & Trust Co
Bowling Green, Va.

Tel.

☒ PERSONAL SERVICE

No.

Being unable to make personal service, a copy was delivered in the following manner:

- ☐ Delivered to person found in charge of usual place of business or employment during business hours and giving information of its purport.
☐ Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode of party named above after giving information of its purport. List name, age of recipient, and relation of recipient to party named above.

- ☐ Posted on front door of usual place of abode, address listed above. (Other authorized recipient not found.)
☐ Served on Secretary of the Commonwealth
☐ Served on Clerk of State Corporation Commission
☐ Served on Commissioner of Division of Motor Vehicles

Not found

SERVING OFFICER

DATE

for

NAME

ADDRESS

Tel.

☐ PERSONAL SERVICE

No.

Being unable to make personal service, a copy was delivered in the following manner:

- ☐ Delivered to person found in charge of usual place of business or employment during business hours and giving information of its purport.
☐ Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode of party named above after giving information of its purport. List name, age of recipient, and relation of recipient to party named above.

- ☐ Posted on front door of usual place of abode, address listed above. (Other authorized recipient not found.)
☐ Served on Secretary of the Commonwealth
☐ Served on Clerk of State Corporation Commission
☐ Served on Commissioner of Division of Motor Vehicles

Not found

SERVING OFFICER

DATE

for

Failure to comply with this subpoena could cause you to be fined or jailed
contempt of court.

SUBPOENA for WITNESSES

VA. CODE ANN. § 8.01 - 407, 14.1 - 195, 16.1 - 265
19.2 - 267, and Rule 3A:15

Spotsylvania

CITY OR COUNTY

☒ General District Court (☐ Civil ☒ Criminal ☐ Traffic)

☐ Juvenile and Domestic Relations District Court

Spotsylvania Court House

STREET ADDRESS OF COURT

TO MY AUTHORIZED OFFICER:

You are hereby commanded to summon forthwith the witnesses listed below to appear on

Nov. 12, 1980 at 1:00 AM/PM to testify in the above case.

REMARKS: Each witness was served as indicated below, according to law (unless not found).

NAME Sid Seale

% J. W. Masters, Inc.
ADDRESS

Tel.

No.

☒ PERSONAL SERVICE

Being unable to make personal service, a copy was delivered in the following manner:

Delivered to person found in charge of usual place of business or employment during business hours and giving information of its purport.

Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode of party named above after giving information of its purport. List name, age of recipient, and relation of recipient to party named above.

- ☐ Posted on front door of usual place of abode, address listed above. (Other authorized recipient not found.)
- ☐ Served on Secretary of the Commonwealth
- ☐ Served on Clerk of State Corporation Commission
- ☐ Served on Commissioner of Division of Motor Vehicles

Not found

SERVING OFFICER

DATE

for

NAME

ADDRESS

Tel.

No.

☐ PERSONAL SERVICE

Being unable to make personal service, a copy was delivered in the following manner:

☐ Delivered to person found in charge of usual place of business or employment during business hours and giving information of its purport.

☐ Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode of party named above after giving information of its purport. List name, age of recipient, and relation of recipient to party named above.

- ☐ Posted on front door of usual place of abode, address listed above. (Other authorized recipient not found.)
- ☐ Served on Secretary of the Commonwealth
- ☐ Served on Clerk of State Corporation Commission
- ☐ Served on Commissioner of Division of Motor Vehicles

☐ Not found

SERVING OFFICER

DATE

for

RETURN DATE

FILE NO.

Nov. 12, 1980

SUBPOENA for WITNESSES

☒ Commonwealth of Virginia for

☐ CITY ☒ COUNTY ☐ TOWN of

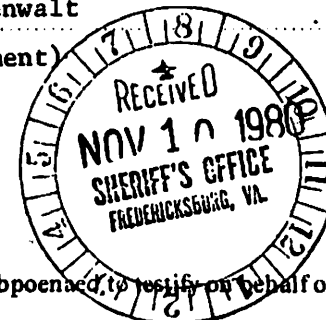
for

☐

In re / V.

Alvin Greenwalt

(Embezzlement)



The witnesses are subpoenaed to testify on behalf of:

☒ Commonwealth of Virginia for

☐ the City, County, or Town indicated for

☐ Plaintiff(s) for ☐ Defendant(s) for

☐ Juvenile

11/7/80

DATE ISSUED

Kate Bolens

☐

CLERK

☐

MAGISTRATE

☐

JUDGE

☐ Commonwealth's Attorney

13 to comply with this subpoena could cause you to be fined or jailed
out of court.

CONDITIONS OF RELEASE AND RECOGNIZANCE

VA. CODE ANN. § 19.2-123.19.2-258

promises to appear before the

trict Court ☒ Criminal Division ☐ Traffic Division
Domestic Relations District Court ☐ Circuit Court

Spotsylvania Court House, VA.
(STREET ADDRESS OF COURT)

10-27-80

9 A.M.

to answer the following charge(s) against the accused.

Embezzlement

The Accused further promises to appear to answer for the offenses for which he may be charged at all times and
ces and before any court or judge to which this case may be rescheduled, continued, transferred, certified or ap-
he Accused promises not to depart the Commonwealth of Virginia without leave of such court or judge, to
p the peace and be of good behavior until final disposition of this case.

OTHER CONDITIONS ON REVERSE SIDE

I, the Accused, hereby promise to fulfill faithfully the conditions given above

Alvin E. Greenwalt
(Accused)

WARNING: Failure to fulfill the terms conditions above or any violation thereof may result in your arrest and forfeiture
the bond on the lower portion of this page (if applicable). Failure to appear may result in your being tried and con-
ted in your absence. Failure to appear is a separate offense. If bonded to appear in circuit court on a misdemeanor
arge, failure to appear constitutes waiver of trial by jury.

The accused is released into the custody of the person/organization named below, on the condition that said
stodian make all reasonable effort to ensure that the accused fulfill the conditions given above, and that any violation
or ppearance of the accused be promptly reported to the court.

Name of Custodian

Address

Signature of Custodian

The Accused, and Surety(ies) (if any), each hereby acknowledges himself, his heirs and assigns indebted to
ommonwealth of Virginia for ☐ City or Locality named above in the sum of \$ *7,000.00*
ECURED by: ☐ CASH DEPOSIT ☐ SURETY BOND ☒ REAL PROPERTY located at: ☐ UNSECURED

Lot # 194 Waverly Village Sec. 2-A

id if secured by real property, the undersigned, having demonstrated to the officer taking this bond the nature of their interest
the property, also make oath that the equity of the undersigned in the property equals or exceeds the amount of this bond).
ie undersigned each waives all benefit of homestead exemptions as to this debt and further covenants jointly and severally that
ne of them shall permit or cause title to or possession of the property pledged to secure this bond to be transferred in any
anner to any degree or encumbered to the extent of this obligation. The above terms of the conditions of Release and Re-
gnizance are hereby incorporated by reference.

the Accused shall faithfully fulfill the conditions of release and recognizance given above, this debt is to be void;
herwise this debt is to remain in full force and effect until declared void by a Court of competent jurisdiction.

Mildred Levin
(SEAL)

Alvin E. Greenwalt
(SEAL) (Accused)

HEARING DATE

FILE NO.

Oct. 27, 1980
9 A.M.

CONDITIONS of RELEASE RECOGNIZANCE, and BOND

Alvin E. Greenwalt
ACCUSED
3412 Churchill Dr. Chancell
Spotsylvania Tel. No. *786-8000*

RETURNABLE TO:

Spotsylvania
☐ General District Court (CRIMINAL)
☐ General District Court (TRAFFIC)
☐ Juvenile & Domestic Relations District Court
☐ Circuit Court

DATE RECEIVED

DATE DISBURSED/DISCHARGED

BOND AMOUNT

RECEIPT NO. (IF CASH DEPOSIT)

\$

ADMITTANCE TO BAIL: The promise to
fulfill the conditions of release, and the bond,
if any, were subscribed and sworn to before me
this day. The Accused is ordered released
pursuant to the terms within.

Marjorie Hyde Thayer
☐ CLERK ☒ MAGISTRATE ☐ JUDGE

10-23-80

2:00 P.M.

DATE AND TIME

SURETY: Name(s), Address(es), and if corporate
surety, name(s) of authorized agent(s).

Mildred Levin
3315 Churchill Dr.
Fredericksburg,
VA 22401

VIRGINIA:

**IN THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY, JUNE 15,
1981.**

COMMONWEALTH

VS.

ALVIN E. GREENWALT

This day came Mark S. Gardner, the Attorney for the Commonwealth and Alvin E. Greenwalt, the defendant, and came also Walter Jervis Sheffield, his attorney, upon a motion by the defendant seeking a dismissal of the indictment against him.

The Court, after fully hearing all argument by counsel and careful consideration, does hereby deny the said motion.

RECORDED IN LAW ORDER

BOOK Y PAGE 191

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS BASED ON FORMER
JEOPARDY

1. On November 12, 1980, the Defendant was tried in the Spotsylvania County General District Court in violation of Section 43-13 of the Code of Virginia of 1950, as amended, and based on the testimony of the same seven witnesses. Every fact placed in evidence by the Commonwealth involved a date prior to July 1, 1980. Prior to the beginning of that proceeding, the defense asked the court to declare whether the proceeding was a misdemeanor trial or a preliminary hearing of a felony. The court declined to make a ruling, but dismissed the case at the conclusion of the Commonwealth's evidence upon the Defendant's motion to strike.

An earlier motion was made by the Defendant to dismiss this proceeding based on former jeopardy with that motion being denied by this court.

The Defendant reiterates this motion to dismiss based on former jeopardy at this point, since the Commonwealth has now stipulated that it is proceeding based on a presentment involving a misdemeanor. This stipulation had not been made at the time of the previous motion to dismiss.

Regardless of how the Commonwealth may choose to characterize the proceeding and regardless of the trial judge's failure to say whether the hearing was a misdemeanor trial or a felony preliminary hearing, it is the punishment prescribed by statute which determines whether the offense is a felony or not. United States vs. Johnson, 497 F.2d 548 (4th Circuit, 1974). Where a crime may be construed either a misdemeanor or a felony, the court will construe it a misdemeanor. Young vs. Commonwealth, 155 Va. 1152, 156 S.E. 565 (1931). The facts of the former trial all occurred prior to

July 1, 1980. Section 43-13 applicable to offenses occurring at that time clearly states that it was a misdemeanor offense.

Section 19.2-292 of the Code of Virginia of 1950, as amended, states that "a person acquitted upon the facts and merits on a former trial, may plead such acquittal in bar of a second prosecution for the same offense, notwithstanding any defect in the form or substance of the indictment or accusation on which he was acquitted, . . ." See also Adkins vs. Commonwealth, 175 Va. 590, 9 S.E. 2nd 349 (1940).

Clause 2 of the fifth amendment of the United States Constitution as applied to the states through the fourteenth amendment in Benton vs. Maryland, 1969, clearly prohibits double jeopardy. Collateral estoppel has been regularly applied to similar situations by the federal courts. Ashe vs. Swenson, 397 US 436 (1970), and Illinois vs. Somerville, 410 US 548 (1973). (Copies of the text of the decisions in this paragraph were previously provided to the court.)

Respectfully submitted,


Walter Jervis Sheffield

7/21/81 filed.
THMC
CLK.

[2, 3] It is the government's burden to show the existence of reasonable suspicion of a Customs or Immigration violation. *Marsh v. United States*, *supra*. In this case, the record clearly demonstrates that the government has failed to bear its burden of showing any reasonable suspicion of criminal activity. Totally lacking from the record is any fact which might have given rise to a suspicion on the part of the officers of illegal activity. In *United States v. Wilson*, 492 F.2d 1160 (5th Cir. 1974), the government met this burden in a case involving a checkpoint very near the one involved here by showing that the defendants attempted to elude the Border Patrol. See also, *Haerr v. United States*, 240 F.2d 533 (5th Cir. 1957). This case contains no such evidence.

[4] Finally, the government has totally failed to demonstrate any nexus with the border. In *Almeida-Sanchez v. United States*, *supra*, it was held that a border search could be conducted only at the border or the functional equivalent thereof. 413 U.S. at 272-273. This requirement is not applicable here, but some connection or contact with the border must be shown, even though the vehicle itself need not have crossed the border. *United States v. Byrd*, 494 F.2d 1284 (5th Cir. 1974); *United States v. Bursey*, 491 F.2d 531 (5th Cir. 1974); *United States v. McKim*, 487 F.2d 305 (5th Cir. 1973); *United States v. Steinkoenig*, 487 F.2d 225 (5th Cir. 1973); *United States v. Storm*, *supra*; *Marsh v. United States*, *supra*.

[5] The government cannot fulfill its burden of demonstrating a nexus with the border merely by showing that many violations occur in the vicinity of the search. As this court held more than a year before *Almeida-Sanchez*, "proximity to the frontier does not automatically place a 100-mile strip of citizenry within a deconstitutionalized zone, with its attendant de-escalation of Fourth Amendment requirements." *United States v. McDaniel*, *supra*, at 132-133.

Therefore, because the government has failed to meet its burden of showing a valid border search even under pre-*Almeida-Sanchez* standards, we conclude that the judgment of the district court must be

Reversed.



UNITED STATES of America,
Appellee,
v.

Major Henry JOHNSON, Appellant.
No. 73-2176.

United States Court of Appeals,
Fourth Circuit.

Submitted April 1, 1974.

Decided April 29, 1974.

Defendant was convicted of transporting a firearm in interstate commerce after having been convicted of a felony of forgery in Virginia, and from the judgment of the United States District Court for the Western District of Virginia, at Abingdon, James C. Turk, Chief Judge, the defendant appealed. The Court of Appeals held that the instruction that the prior conviction of forgery was a "felony" under Virginia law did not constitute "plain error" noticeable on appeal notwithstanding defendant's failure to object to the instruction; and that the statute prohibiting the transporting of firearm in interstate commerce after having been convicted of a felony is not unconstitutional as violating the Second, Fourth and Fifth Amendments of the United States Constitution.

Affirmed.

1. Criminal Law §1038.1(4)

In prosecution for transporting a firearm in interstate commerce after

having been convicted of a felony, instruction that defendant's prior conviction of forgery was a "felony" under Virginia law did not constitute "plain error" noticeable on appeal notwithstanding defendant's failure to object to such instruction on theory that Virginia statute allows jury on conviction of forgery an option to sentence to penitentiary or to jail, and since the jury chose to send defendant to jail it reduced the character of offense from felony to misdemeanor, since under Virginia statute whether forgery is a "felony" or a "misdemeanor" is determined by sentence lawfully possible and not upon sentence actually imposed or the nature of the offense. 18 U.S.C.A. § 1202(c)(2); Code Va.1950, § 18.1-6; Fed.Rules Crim.Proc. rules 30, 52(b), 18 U.S.C.A.

2. Weapons ⇐1

The statute prohibiting the transportation of a firearm in interstate commerce after having been convicted of a felony is not unconstitutional as violative of defendant's Second Amendment right to keep and bear arms since the Second Amendment only confers a collective right of keeping and bearing arms which must bear a reasonable relationship to preservation or efficiency of a well-regulated militia. 18 U.S.C.A. § 922(g); U.S.C.A.Const. Amend. 2.

3. Constitutional Law ⇐258(3)

Searches and Seizures ⇐7(24)

Weapons ⇐3

The statute prohibiting the transportation of a firearm in interstate commerce after having been convicted of a felony is not unconstitutional as violating defendant's right protected by Fourth and Fifth Amendments. 18 U.S.C.A. § 922(g); U.S.C.A.Const. Amends. 4, 5.

1. 18 U.S.C. § 922(a)(6). Johnson was acquitted of this charge.

2. Va.Code Ann. § 18.1-96 provides:

If any person forge any writing, other than such as is mentioned in §§ 18.1-92 and 18.1-94, to the prejudice of another's right, or utter, or attempt to employ as true, such

Leigh B. Hanes, Jr., U. S. Atty., and Ronald D. Hodges, Asst. U. S. Atty., on brief for appellee.

Dean MacD. Greiner [Court-appointed], Bristol, Va., on brief for appellant.

Before CRAVEN, BUTZNER and RUSSELL, Circuit Judges.

PER CURIAM.

Major Henry Johnson was convicted by a jury of transporting a firearm in interstate commerce after having been convicted of a felony, 18 U.S.C. § 922(g). He appeals, challenging the district court's instructions and contesting the constitutionality of section 922(g). For the reasons set forth below, we disagree with Johnson's arguments and affirm the conviction.

Johnson was convicted in 1970 under Va.Code Ann. § 18.1-96 of one count of forgery and one count of uttering. He was sentenced to serve consecutive terms of six months in jail for each count. On February 23, 1973, Johnson purchased a .22 caliber handgun from a firearms dealer in Bristol, Virginia, and subsequently transported the gun on his person to Kingsport, Tennessee, where he was arrested and charged with making false statements to a federally licensed firearm dealer in order to acquire a firearm,¹ and transporting a firearm in interstate commerce by a convicted felon.

Johnson complains that the trial court improperly charged the jury that his prior conviction of forgery is a "felony" under Virginia law. He maintains that the Virginia statute allows the jury an option either to sentence him to penitentiary or to jail,² and since it chose to send him to jail, it reduced the character

forged writing, knowing it to be forged, he shall be confined in the penitentiary not less than two years nor more than ten years, or, in the discretion of the jury or the court trying the case without a jury, he shall be confined in jail not less than six months nor more than twelve months. . . .

of his offense from a felony to a misdemeanor.

[1] We note initially that the instruction complained of on appeal was not objected to by defense counsel at the trial. Rule 30 of the Fed.R.Crim.P. is specific: "No party may assign as error any portion of the charge . . . unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Johnson asserts, however, that the instruction constituted "plain error," noticeable on appeal notwithstanding his failure to object. Fed.R.Crim.P. 52(b).³ We think not.

18 U.S.C.A. App. § 1202(c)(2) defines a "felony" as any "offense punishable by imprisonment for a term exceeding one year, but does not include any offense (other than one involving a firearm or explosive) classified as a misdemeanor under the laws of a State and punishable by a term of imprisonment of two years or less." Virginia law provides a simple method to determine whether forgery is to be classified as a "felony" or a "misdemeanor":

Offenses are either felonies or misdemeanors. Such offenses as are *punishable* with death or confinement in the penitentiary are felonies; all other offenses are misdemeanors.

Va.Code Ann. § 18.1-6. (Emphasis added.) This language makes clear that whether forgery is a "felony" or is a "misdemeanor" is determined by the sentence lawfully possible under section 18.1-96 and does not depend upon the

sentence actually imposed or the nature of the offense. *Fletcher v. Commonwealth*, 163 Va. 1007, 175 S.E. 895 (1934); *Benton v. Commonwealth*, 89 Va. 570, 16 S.E. 725 (1893). See also *Hanbury v. Commonwealth*, 203 Va. 182, 122 S.E.2d 911 (1961). Since Johnson was subject to confinement in the penitentiary for a term not to exceed ten years, he was not convicted of a "misdemeanor," even though he was given a lenient sentence.⁴

[2, 3] Johnson's argument that section 922(g) is an unconstitutional violation of his Second Amendment right to keep and bear arms is not new. See, e. g., *United States v. Miller*, 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206 (1939). The courts have consistently held that the Second Amendment only confers a collective right of keeping and bearing arms which must bear a "reasonable relationship to the preservation or efficiency of a well regulated militia." 307 U.S. at 178, 59 S.Ct. at 818. Johnson presents no evidence that section 922(g) in any way affects the maintenance of a well regulated militia. See *Cody v. United States*, 460 F.2d 34 (8th Cir. 1972). Johnson's argument that the statute violates his rights protected by Fourth and Fifth Amendments is without merit. See *United States v. Weatherford*, 471 F.2d 47 (7th Cir. 1972); *United States v. Cabbler*, 429 F.2d 577 (4th Cir. 1970). Cf. *United States v. Bass*, 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971).

We dispense with oral argument and affirm the conviction.

Affirmed.

was not limited under Maryland law. He was sentenced to suspended term of ninety days in jail, a small fine and unsupervised probation for two years. In this situation we felt justified in looking to the actual sentence imposed as evidencing the seriousness of the crime to determine whether the defendant had been convicted of a "felony" or a "misdemeanor" under section 1202(c)(2). Here, the Virginia statute is unambiguous and does not contain the unusual characteristics of the Maryland common law crime of simple assault.

3. Rule 52(b) states:

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

4. Since we hold that Virginia specifically classifies forgery as a "felony," we do not have the problem that was presented to us in *United States v. Schultheis*, 486 F.2d 1331 (4th Cir. 1973). In *Schultheis* the defendant had been convicted of simple assault, a common law crime, the punishment of which

now
§18.2-8
(attached)

Title 18.2.

Crimes and Offenses Generally.

- Chap. 7. Crimes Involving Health and Safety, §§ 18.2-247 to 18.2-324.1.
 10. Crimes Against the Administration of Justice, §§ 18.2-434 to 18.2-480.1.
 12. Miscellaneous, §§ 18.2-493 to 18.2-509.

CHAPTER 1.

IN GENERAL.

Article 3.

Sec.

Classification of Criminal Offenses and Punishment Therefor.

infractions defined.

18.2-10. Punishment for conviction of felony.

Sec.

18.2-8. Felonies, misdemeanors and traffic

ARTICLE 3.

Classification of Criminal Offenses and Punishment Therefor.

§ 18.2-8. Felonies, misdemeanors and traffic infractions defined. — Offenses are either felonies or misdemeanors. Such offenses as are punishable with death or confinement in the penitentiary are felonies; all other offenses are misdemeanors. Traffic infractions are violations of public order as defined in § 46.1-1 (40) and not deemed to be criminal in nature. (Code 1950, § 18.1-6; 1960, c. 358; 1975, cc. 14, 15; 1977, c. 585.)

The 1977 amendment added the third sentence.

Law Review.

For comment on rights of the convicted felon on parole, see 13 U. Rich. L. Rev. 367 (1979).

§ 18.2-9. Classification of criminal offenses.

Law Review. — For survey of Virginia law on criminal law for the year 1974-75, see 61 Va. L. Rev. 1697 (1975). For comment on

sentencing in criminal cases, see 13 U. Rich. L. Rev. 899 (1979).

§ 18.2-10. Punishment for conviction of felony. — The authorized punishments for conviction of a felony are:

- (a) For Class 1 felonies, death, or imprisonment for life.
- (b) For Class 2 felonies, imprisonment for life or for any term not less than twenty years.
- (c) For Class 3 felonies, a term of imprisonment of not less than five years nor more than twenty years.
- (d) For Class 4 felonies, a term of imprisonment of not less than two years nor more than ten years.
- (e) For Class 5 felonies, a term of imprisonment of not less than one year nor more than ten years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than twelve months and a fine of not more than one thousand dollars, either or both.
- (f) For Class 6 felonies, a term of imprisonment of not less than one year nor more than five years, or in the discretion of the jury or the court trying the case

mind was weakened during the last one or two weeks of her life; nor is the situation changed because Mrs. Emma Kelley has said that her aunt, on September 16, labored under hallucinations.

As we have elsewhere observed, will cases are not particularly helpful as controlling authorities when they turn upon matters of fact rather than upon matters of law.

Thornton v. Thornton's Ex'rs, 141 Va. 232, 126 S. E. 69, 72, is in point as authority to show the power of this court over a verdict approved below. This court, in reversing that judgment, said: "To permit this verdict to stand would be to ignore long and well-established doctrines, and to substitute the judgment of the jury for the will of the testator, and this without evidence to justify such a conclusion."

In Huff v. Welch, 115 Va. 74, 78 S. E. 573, 579, it appears that at the first trial there was a hung jury, as was the case here. At the second trial the jury found against the will. It was affirmed below, and this court set that judgment aside on an appeal. Citing from Young v. Barner, 27 Grat. (68 Va.) 96, it commented upon the high respect which should be paid to such a judgment, but said: "When there has been a plain and palpable deviation from the proof, interference on the part of the appellate court is warranted."

Culpepper v. Robie, 155 Va. —, 154 S. E. 687, is cited to support contestants. That case, to a large extent, turns upon its facts, and so is not controlling here.

One man should not dictate, change, or annul another's will either in court or out. The preservation of the privilege of making one's own will brings to the old and helpless a consideration which might not otherwise always be extended to them, and should not be whittled away.

For reasons stated, the will of September 1, 1927, must be upheld, and it is so ordered.
Reversed.

YOUNG v. COMMONWEALTH.

Supreme Court of Appeals of Virginia.
Jan. 15, 1931.

1. Criminal law §27.

Crime construable either as misdemeanor or felony will be construed as misdemeanor.

2. Statutes §241(1).

Penal statute must be construed strictly in favor of accused.

3. Criminal law §27.

Second or subsequent offense of driving while intoxicated is only misdemeanor (Acts 1924, c. 407, § 6, as amended by Acts 1926, c. 231, and § 25, as amended by Acts 1928, c. 413; Code 1919, § 4758).

4. Elections §90.

Inclusion of word "feloniously" in indictment charging statutory misdemeanor does not make charge felony so as to deprive one convicted thereunder of elective franchise (Code 1919, § 4875; Const. 1902, § 23).

5. Indictment and Information §59.

That indictment contained word "feloniously" did not raise second offense of driving while intoxicated from misdemeanor to felony (Acts 1924, c. 407, § 6, as amended by Acts 1926, c. 231, and § 25, as amended by Acts 1928, c. 413; Code 1919, § 4875; Const. 1902, § 23).

6. Indictment and Information §159(1).

Court, when advised that indictment for second offense of driving while intoxicated improperly contained word "feloniously," should have amended indictment by striking out objectionable word, and proceeded with trial (Acts 1924, c. 407, § 6, as amended by Acts 1926, c. 231, and § 25, as amended by Acts 1928, c. 413; Code 1919, § 4875).

Error to Circuit Court, Elizabeth City County.

Harry Young was convicted of a misdemeanor, to wit, a second offense of unlawfully driving an automobile while under the influence of intoxicants, and he brings error.

Affirmed.

A. W. E. Bassette, Jr., of Hampton, and M. A. Kearney, of Phoebus, for plaintiff in error.

John R. Saunders, Atty. Gen., for the Commonwealth.

HUDGINS, J.

The material parts of the indictment against the accused are as follows: "That Harry Young * * * did unlawfully and feloniously run and drive an automobile while under the influence of intoxicants * * * that * * * Harry Young has once before been convicted and sentenced for a like offense in the State of Virginia, to-wit, for the offense of unlawfully driving an automobile while under the influence of intoxicants * * * and before the commission of the offense hereinbefore charged * * * before the Circuit Court for the County of Elizabeth City."

A demurrer and motion to quash the indictment were filed on the ground that the offense

§ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

charged was not a felony. The demurrer was overruled, motion to quash denied, the accused pleaded not guilty, waived a jury, and, with the consent of the attorney for the commonwealth, all questions of law and fact were submitted to the court. The accused was found guilty, and his punishment fixed at six months' confinement in the county jail, a fine of \$200, and he was required to give bond in the sum of \$500, conditioned that he should not again within a period of one year violate the prohibition law.

[1-3] The only error assigned, and the only point raised, is in the use of the word "feloniously" in the indictment.

It is contended by the accused that, under the provisions of section 25 of the Prohibition Act (Acts 1924, c. 407, § 25, as amended by Acts 1928, c. 413), a second, or subsequent, offense for driving an automobile while under the influence of intoxicants is not a felony, but a misdemeanor. The correctness of this contention is not seriously questioned by the Attorney General. Section 6 of the Prohibition Law (Acts 1924, c. 407, § 6, as amended by Acts 1928, c. 231), which prescribes the punishment for most of the violations of the act, states in express terms that the punishment shall be as therein prescribed, "except as otherwise provided." Under the provisions of section 25, the maximum penalty which may be imposed for a second offense is a fine of \$1,000 and two years' confinement in prison. The place of confinement, whether in jail or in the penitentiary, is not stated in the statute.

Section 4758, Code, defines felonies to be "such offenses as are punishable with death or confinement in the penitentiary . . . all other offenses are misdemeanors." There is nothing in the statute which prohibits imprisonment in jail for a longer period than one year. Where a crime may be construed either a misdemeanor or a felony, the court will construe it a misdemeanor, thus applying the well-recognized principle that a penal statute must be construed strictly in favor of the accused.

[4, 5] The accused contends that the conviction on the indictment which contains the word "feloniously" deprives him of his elective franchise rights under the provisions of section 23 of the Constitution.

In the case of *Jolly v. Commonwealth*, 130 Va. 756, 118 S. E. 109, 112, the accused, in the third and fourth counts of the indictment, was charged with receiving stolen goods, but the indictment omitted the word "feloniously." It was held that the indictment was for a statutory felony and was sufficient. The court said: "It would hardly be possible to conceive of a more formal or a more inconse-

quential defect, if defect it was at all, than the omission of the word 'feloniously'."

The same objection was raised in the case of *Staples v. Commonwealth*, 140 Va. 583, 125 S. E. 319, and the court there adhered to the ruling in the case of *Jolly v. Commonwealth*. In both cases the convictions were on a charge of a statutory felony, though in neither case did the indictment contain the word "felony" or "feloniously." The result of each conviction was to deprive the defendant of the right to vote.

These decisions declare the law in this state to be that the omission of the word "feloniously" in an indictment charging a statutory felony is not error, if the acts constituting the crime are sufficiently set forth. It would logically seem to follow that the converse of the proposition is equally true, i. e., that the inclusion of the word "feloniously" in an indictment charging a statutory misdemeanor does not make the charge a felony. Section 4875 provides that "no indictment . . . shall be quashed or deemed invalid . . . for the omission or insertion of any . . . words of mere form or surplusage."

As was stated in the case of *Jolly v. Commonwealth*, supra: "The judicial and legislative policy of this state is to have both civil and criminal cases tried on their merits and as far as possible to ignore mere formal defects." *Morris v. Commonwealth*, 145 Va. 880, 134 S. E. 567.

In the instant case, an examination of the order shows that the accused was found guilty and his punishment fixed at a fine and confinement in jail. From the order alone it is impossible to tell on what charge the accused was tried. An examination of the indictment itself is necessary to ascertain whether the accused was charged with a felony or with a misdemeanor. Such an examination would reveal that he was tried for a second offense of driving an automobile while under the influence of intoxicants, which charge is not a felony, although the word "feloniously" is found in the indictment.

[6] When the attention of the trial court was called to the fact that the indictment contained the word "feloniously," it should have amended the indictment by striking out the objectionable word, and then proceeded with the trial.

In order that there may be no doubt of the preservation of the elective franchise privileges of the accused, the order affirming the action of the lower court will show on its face that the conviction was on a misdemeanor charge.

Affirmed.

of guilt and the question of the punishment to be inflicted upon the accused is a jury for its determination. The accused and the public are both entitled to the independent judgment of the court upon the degree of his guilt and the punishment to be inflicted uninfluenced by the judgment or advice of the "jury" or other bystanders. *Dixon v. Commonwealth*, 161 Va. 1098, 172 S.E. 277 (1934); *Hobson v. Youell*, 177 Va. 906, 15 S.E.2d 76 (1941).

Fixing punishment by agreement permissible. — The practice, developed in a

number of trial courts, whereby upon the arraignment of the accused and his plea of guilty, one of the attorneys, in the presence of the other, states to the court the essential facts constituting the crime charged and the punishment agreed upon, whereupon the court accepts such recommendation and, without examining the witnesses, fixes the punishment accordingly, is permissible under this section but such practice may be abused and should not be extended. *Hobson v. Youell*, 177 Va. 906, 15 S.E.2d 76 (1941).

§ 19.2-289. Conviction of petit larceny. — In a prosecution for grand larceny, if it be found that the thing stolen is of less value than one hundred dollars, the jury may find the accused guilty of petit larceny. (Code 1950, § 19.1-252; 1960, c. 366; 1966, c. 247; 1975, c. 495.)

§ 19.2-290. Conviction of petit larceny though thing stolen be worth more than one hundred dollars. — In a prosecution for petit larceny, though the thing stolen be of the value of one hundred dollars or more, the jury may find the accused guilty; and upon a conviction under this or the preceding section (§ 19.2-289) the accused shall be sentenced for petit larceny. (Code 1950, § 19.1-253; 1960, c. 366; 1966, c. 247; 1975, c. 495.)

Discrepancies between indictment and evidence as to value of property stolen are contemplated by this section. *Holly v. Commonwealth*, 113 Va. 769, 75 S.E. 88 (1912).

§ 19.2-291. Faulty counts; motion to strike; general verdict of guilty. — When there are several counts in the indictment one or more of which are faulty, the accused may move to strike the faulty count or counts or move the court to instruct the jury to disregard them. If he does neither and a general verdict of guilty is found, judgment shall be entered against the accused, if any count be good, though others be faulty, unless the court can plainly see that the verdict could not have been found on the good count. If the accused demurs to the faulty count or moves the court to instruct the jury to disregard it and his demurrer or motion is overruled and there is a general verdict of guilty and it cannot be seen on which count the verdict was founded, if the jury has been discharged, it shall be set aside; but if it is manifest that it could not have been found on the bad count, the verdict shall be allowed to stand. (Code 1950, § 19.1-255; 1960, c. 366; 1975, c. 495.)

When judgment not affected by bad count. — In a prosecution for violation of a city ordinance no demurrer to the warrant, which contained two counts, was interposed and no motion was made to instruct the jury to disregard the first count. There was a general verdict of guilty, which might well have been found under the second count. Under this

section, even if the first count was bad, the regularity of the judgment was not affected thereby. *Collins v. City of Radford*, 134 Va. 518, 113 S.E. 735 (1922).

A motion to exclude evidence which could only be applicable to the faulty count, is in effect a motion to disregard that count. *Rand v. Commonwealth*, 50 Va. (9 Gratt.) 738 (1852).

ARTICLE 2.

Former Jeopardy.

§ 19.2-292. Acquittal by jury on merits bar to further prosecution for same offense. — A person acquitted upon the facts and merits on a former trial, may plead such acquittal in bar of a second prosecution for the same offense, notwithstanding any defect in the form or substance of the indictment or accusation on which he was acquitted, unless the case be for a violation of the law relating to the State revenue and the acquittal be reversed on a writ of error

on behalf of the Commonwealth. (Code 1950, § 19.1-257; 1960, c. 366; 1975, c. 495.)

Cross reference. — As to other provisions providing for appeal in prosecutions for violation of State revenue laws, see § 19.2-317.

Section does not apply when warrants were quashed because void. — This section, providing immunity against a second trial for the same offense, speaks only of cases in which there has first been an acquittal "by the jury upon the facts and merits." It does not in terms at least, apply to a case, where no jury was sworn, but the warrant of a justice of the peace was quashed and dismissed on the ground that the statute under which it was issued was unconstitutional and void. *Commonwealth v. Perrow*, 124 Va. 805, 97 S.E. 820 (1919).

Nor when indictment was dismissed for variance. — When defendant was acquitted on the first trial because of a variance between the indictment and the proof, this acquittal could not be pleaded in bar to a second trial on the same crime. *Burress v. Commonwealth*, 68 Va. (27 Gratt.) 934 (1876), overruled on another point, *Keister's Ex's v. Philips' Ex's*, 124 Va. 585, 98 S.E. 674 (1919).

Nor when quashed for racial discrimination in selection of grand jury. — Where former indictments against defendant were quashed on his motion because of racial discrimination in the selection of the grand jury, and a jury verdict on one of them was set aside and annulled, and

subsequently another grand jury returned indictments against defendant substantially identical with the former ones, pleas of autrefois acquit would not lie to the new indictments, for defendant was not in jeopardy under the invalid indictments. *Mealy v. Commonwealth*, 193 Va. 216, 68 S.E.2d 507 (1952).

Acquittal on defective indictment. — This section was intended to apply when a person had been brought to trial under a defective indictment upon the facts and merits, and acquitted. He may then plead such acquittal in bar of a second prosecution for the same offense, notwithstanding the defective indictment. *Rosser v. Commonwealth*, 159 Va. 1028, 167 S.E. 257 (1933); *Burress v. Commonwealth*, 68 Va. (27 Gratt.) 934 (1876), overruled on another point, *Keister's Ex's v. Philips' Ex's*, 124 Va. 585, 98 S.E. 674 (1919).

Former trial by court or jury may constitute jeopardy. — The spirit and purpose of the immunity intended to be secured by the doctrine of double jeopardy is violated whenever a defendant in any criminal case has been formerly tried by competent authority — whether court or jury — and discharged upon a defense constituting a bar to the proceeding, whether that defense is rested upon the law or the facts. *Adkins v. Commonwealth*, 175 Va. 590, 9 S.E.2d 349 (1940).

§ 19.2-293. When acquittal not a bar to further prosecution for same offense. — A person acquitted of an offense on the ground of a variance between the allegations and the proof of the indictment or other accusation, or upon an exception to the form or substance thereof, may be arraigned again on a new indictment or other proper accusation, and tried and convicted for the same offense, notwithstanding such former acquittal. (Code 1950, § 19.1-258; 1960, c. 366; 1975, c. 495.)

Cross references. — For constitutional provisions as to former jeopardy, see Va. Const., art. I, § 8. See generally § 19.2-292 and note. As to effect of verdict of not guilty of felony on subsequent prosecution for attempt, see § 19.2-286. As to discharge of accused for failure to try within time prescribed, see note to § 19.2-243.

Discharge of jury after excluding State's evidence does not bar subsequent prosecution. — The court discharged the jury after sustaining motion of the defendant to exclude the Commonwealth's evidence on the ground of variance. The discharge of the jury on such ground did not bar a subsequent prosecution. *Robinson v. Commonwealth*, 73 Va. (32 Gratt.) 866 (1879).

Nor does verdict set aside for variance. — A second indictment being for the same act of embezzling as the first, and the prisoner having been indicted, tried and convicted in time, and the verdict set aside for variance between

allegation and proof as to ownership of the property, the second indictment was proper and in time, and the prisoner is not entitled to be discharged. *Commonwealth v. Adcock*, 49 Va. (8 Gratt.) 661 (1851). See also *Robinson v. Commonwealth*, 73 Va. (32 Gratt.) 866 (1879).

Section 19.2-243 is to be read as a proviso to this section, so as to authorize the trial and conviction of a party upon a new indictment or proper accusation who has been acquitted on the ground of variance, or upon an exception to the form or substance of the indictment, only if this new indictment is found and the trial had within three terms after the prisoner was first held for trial. *Commonwealth v. Adcock*, 49 Va. (8 Gratt.) 661 (1851).

When discharge upon demurrer bars further prosecution. — Where defendant was indicted and charged with the commission of the crime of bigamy and with counselling, aiding and abetting and assisting in the commission of the crime of bigamy, and a demurrer to that

There was no error, we think, in the refusal of the court to grant this instruction. We do not think that there was any evidence of the abandonment of the original agreement upon which an instruction could be based. Indeed, the testimony was decidedly contrary to this view.

We think the jury was properly instructed, and that their verdict and the judgment of the court were plainly right. The judgment is affirmed.

Affirmed.



ADKINS v. COMMONWEALTH.

Supreme Court of Appeals of Virginia.

June 10, 1940.

1. Criminal law §186

Where demurrer to indictment charging bigamy and aiding and abetting in commission of bigamy concretely presented question whether, as a matter of law, an unmarried man can be an accessory to the crime of bigamy, and such demurrer was sustained by unambiguous order directing that defendant be discharged and go "without day", plea of "autrefois acquit" in subsequent prosecution for aiding and abetting in bigamy was good. Code 1936, §§ 4764, 4774.

2. Criminal law §185

Though "jeopardy", as ordinarily understood, refers to the danger of conviction and punishment which defendant incurs in a criminal case where a jury has been impaneled and sworn, the spirit and purpose of the immunity against double jeopardy will be violated whenever a defendant has been formerly tried by competent authority, whether court or jury, and discharged upon a defense constituting a bar to the proceeding, whether upon the law or upon the facts.

See Words and Phrases, Permanent Edition, for all other definitions of "Jeopardy".

3. Criminal law §1134(1)

The chief concern of appellate court is not to sit as a jury and determine guilt or innocence of accused, but to ascertain whether accused has been accorded a fair and impartial trial according to law.

4. Criminal law §59(5)

If a statute makes the doing of a thing criminal, under common-law principles it includes, with the actual doer, persons who are present lending their countenance and aid.

5. Criminal law §67

With regard to both common-law and statutory offenses, mere incapacity to commit the offense as a principal in the first degree does not prevent one who aids and abets the principal from being held liable as a principal in the second degree. Code 1936, § 4764.

6. Criminal law §59(1)

The failure of statute creating an offense to provide for the guilt of accomplices does not necessarily indicate intent to exclude such parties from criminal responsibility.

7. Bigamy §1

An unmarried person who knowingly marries a married person may be guilty of bigamy as an aider and abettor, though bigamy statute refers specifically to married persons. Code 1936, §§ 3, 4538, 4704.

Error to Circuit Court, Giles County; A. C. Buchanan, Judge.

Oren Weldon Adkins was convicted of aiding and abetting in the commission of bigamy, and he brings error.

Reversed.

Argued before CAMPBELL, C. J., and HUDGINS, GREGORY, BROWNING, EGGLESTON, and SPRATLEY, JJ.

W. B. Snidow, of Pearisburg, for plaintiff in error.

Abram P. Staples, Atty. Gen., and Walter E. Rogers, of Richmond, for the Commonwealth.

CAMPBELL, Chief Justice.

Oren Weldon Adkins was arraigned, tried and convicted upon an indictment charging him with aiding and abetting Pearl Copeland Miller in the commission of the crime of bigamy. He was sentenced in conformity with the verdict of the jury to serve three years in the penitentiary.

The facts are undisputed. The Commonwealth proved that on the 3rd day of September, 1938, Pearl Copeland Miller

"It is therefore considered and ordered by the court that the defendant be discharged from said indictment and may go thereof without day."

Following the entry of this order, the accused was again arraigned upon a second indictment which charged him with aiding and abetting Pearl Miller in the commission of the crime of bigamy. Upon his arraignment, he filed a plea of autrefois acquit. The plea is carefully drawn and sets forth in detail all the court proceedings relative to the case.

The crux of the plea of autrefois acquit is that by his demurrer the accused admitted the allegations of fact in the first indictment and submitted to the court, by the demurrer thereto, the legal proposition that the indictment did not charge him with the commission of a criminal offense and that the second indictment charges the commission of the same felony set forth in the first indictment; that having been acquitted on the merits and discharged from custody, he should not be required to answer the second indictment.

The attorney for the Commonwealth filed a demurrer to the plea of autrefois acquit, which demurrer was sustained. Upon his plea of not guilty, accused was tried by a jury, convicted, and sentenced by the court to the penitentiary.

The action of the court in sustaining the demurrer to the plea of autrefois acquit is assigned as error.

No question of former jeopardy (though analogous to the plea filed) was raised by the plea interposed by the accused as it is founded solely on the legal proposition that having once been acquitted on the merits and discharged "without day" he is protected from further prosecution.

[1] It has been suggested that sections 4764 and 4774 of the Code throw light on the question involved. We do not think so. The question is, did the trial court sustain the demurrer to the first indictment and each count thereof on the ground that, as a matter of law, an unmarried man cannot be an accessory to the crime of bigamy? As stated, this question, in our opinion, was concretely presented by the demurrer filed by the accused. The Attorney General, however, contends that the facts set forth in the plea of autrefois acquit do not sustain the contention of the accused; that it was not established that the accused had been discharged from the

first indictment because the court ruled that the acts with which he was charged did not constitute a crime. This contention is untenable. If the order sustaining the demurrer contains any language of an ambiguous nature, we fail to perceive it. There is not a syllable which indicates that the demurrer was sustained without prejudice. There is not a word in it which indicates that the demurrer was sustained on the ground that it was defective in form. The court, as evinced by the order, sustained the demurrer as to each count thereof on the ground relied upon by the accused and discharged him "without day". This, in our opinion, was an ultimate decision upon a question of law, and the conclusion of the court is controlled by the decision of this court in *Commonwealth v. Perrow*, 124 Va. 805, 815, 97 S.E. 820, 821. In that case it appears that Perrow was convicted and fined \$75 upon a warrant issued by a justice of the peace of Buckingham county charging him with "soliciting labor illegally and contrary to" law. He appealed to the circuit court, and that court, being of opinion that the statute involved was unconstitutional and void, quashed and dismissed the warrant.

[2] Judge Kelly, delivering the unanimous decision of the court, had this to say: "There was no jury trial in the instant case, and we have not overlooked the fact that jeopardy, as ordinarily understood in legal parlance, refers to the danger of conviction and punishment which a defendant incurs in a criminal case where a jury has been impaneled and sworn. But we are of opinion that the spirit and purpose of the immunity intended to be secured by the doctrine in question will be violated whenever a defendant in any criminal case has been formerly tried by competent authority, whether court or jury, and discharged upon a defense constituting a bar to the proceeding, whether that defense be rested upon the law or the facts." This conclusion is in conformity with the rule announced in *Am. & Eng. Ency. Law*, Vol. XXIV, p. 831, that:

"A fact once determined by a court of competent jurisdiction in a criminal proceeding cannot again be litigated between the same parties unless a different rule applies in criminal proceedings from that which obtains in civil proceedings but it is well settled that the rule is the same in both classes of cases. *Com. v. Ellis*, 160 Mass. 165 [35 N.E. 773]."

See also *Rosser v. Commonwealth*, 159 Va. 1028, 1033, 167 S.E. 257, where Mr. Justice Gregory distinguishes the Perrow case from the case of *Dulin v. Lillard*, 91 Va. 718, 20 S.E. 821.

[3] It is with regret that we reach the conclusion that the trial court erred in sustaining the demurrer to the plea of autrefois acquit for the reasons hereafter set forth, but we repeat what was said by this court in *Elliott v. Commonwealth*, 172 Va. 595, 601, 1 S.E.2d 273, 276:

"However conclusively the evidence shows the guilt of the accused, when it is admitted that he has been tried contrary to law, then to hold that he has had a fair trial under the law is a non sequitur."

"The chief concern of the appellate court is not to sit as a jury and determine the guilt or innocence of an accused, but its chief concern is to ascertain whether or not an accused has been accorded a fair and impartial trial according to law."

The fundamental question involved in this case is of so great importance to the judiciary, the legal profession and to society, that we feel it our duty to express our view in regard to its determination. However, this has been so ably done by Mr. M. Ray Doubles, Dean, and Mr. J. Westwood Smithers, Professor, of the School of Law of the University of Richmond, in a paper prepared by them, that we are content to adopt their view therein expressed as the conclusion of the court:

"May an unmarried person who marries another, knowing that the latter is already married, be convicted of aiding and abetting the commission of bigamy by the latter?"

"As the Court had occasion to say in the case of *Farewell v. Commonwealth*, 167 Va. 475, 189 S.E. 321 [323], decided in 1937, 'Bigamy was not punishable at common law, but was regarded as an offense of ecclesiastical cognizance. It was, however, during the reign of Edward I of England recognized as a statutory offense * * *'. In 1604, by the Act of 1 James I, c. 2, it was made punishable as a felony in the temporal courts, but only when committed 'within his majesty's dominions of England and Wales.' Thus by the terms of the statute it was made local to England and Wales, and our Virginia Code, Section 3, incorpo-

rates as a part of the law of Virginia only those Acts of Parliament made in aid of the common law prior to the fourth year of the reign of James the First, of a general nature, not local to England."

"The statute punishing bigamy in Virginia, Michie Code 1936, Section 4538, provides as follows: '*Person marrying when former husband or wife is living; how punished*.—If any person, being married, shall, during the life of the former husband or wife, marry another person in this State, or if the marriage with such other person take place out of the State, shall thereafter cohabit with such other person in this State, he shall be confined in the penitentiary not less than three nor more than eight years.'

"The statute in Virginia, unlike the statute of some of the states, does not in terms make the competent party to the bigamous marriage punishable. Illustrative cases from other jurisdictions which arose under statutes which in terms make the competent party punishable are: *State v. Caulder*, Sup.Ct. of Mo., 262 S.W. 1023; *State v. Sayko*, 37 Idaho 430, 216 P. 1036; *Baker v. State*, 79 Fla. 365, 84 So. 99; *Brooks v. State*, 74 Ark. 58, 84 S.W. 1033; *Arnold v. State*, 53 Ga. 574. Nor does the bigamy statute in Virginia provide in terms for the punishment of accessories, aiders, and abettors.

"At common law, criminal liability is not limited to those persons who actually commit the criminal deed. All other persons who assist in the commission of the crime, or counsel or procure another to commit the offense, or aid or assist the one who has committed an offense are punishable as parties thereto. In general these same principles apply to statutory offenses, and statutes creating offenses not punishable at common law carry with them the incidents of common law offenses in absence of compelling reason to the contrary.

"In an early Virginia case, Judge Lyons said: 'There are rules for construing statutes; and one is that the best construction of a statute, is to construe it as near to the reason of the common law as may be, and by the course which that observes in cases of its own.' *Chichester v. Vass*, 1 Call 83, 5 Va. 83 at page 102, 1 Am.Dec. 509.

[4] "At common law all persons present giving aid and comfort to another

committing an offense, even a felony, are regarded as principals. Therefore, if a statute makes the doing of a thing criminal, it includes, with the actual doer, persons who are present lending their countenance and aid. * * * Whatever is newly created by statute draws to itself the same qualities and incidents as if it had existed at the common law. In other words, the statute is to be interpreted after the rules and incidents of the common law. * * * When a statute creates a new felony, whether out of what was before innocent, or was a misdemeanor, those who are aiding one who personally commits it are principals. Bishop, *Statutory Crimes*, 2nd Ed., Sections 135, 139, and cases cited.

"Statutes defining and punishing offenses are also to be construed in accordance with the common law principles in relation to principals and accessories." Clark and Marshall, *Crimes*, 3rd Ed., 1927, Section 31e.

"In *Commonwealth v. Carter*, 94 Ky. 527, 23 S.W. 344, the defendant was prosecuted as an accessory to the statutory offense of breaking into a storehouse. After saying that 'there can be no doubt of the correctness of the rule that in statutory offenses, where the plain intent of the statute is to inflict punishment only on the person actually committing the offense, others cannot be brought within its provisions as principals upon proof that they were aiders and abettors', the court held that this statute was not of that type, and continued: 'There is as much reason for punishing those aiding and abetting in a felony created by statute as there is in a felony at common law.'

"Is there any reason why this general common law principle is inapplicable to the crime of bigamy?

"It may be argued that, inasmuch as an unmarried person is incapable of committing bigamy as a principal in the first degree, therefore he cannot be convicted of committing the offense as a principal in the second degree. In this connection our attention is called to Section 4764 of the Code which provides: 'In the case of every felony, every principal in the second degree and every accessory before the fact may be indicted, tried, convicted, and punished in all respects, as if a principal in the first degree.' * * * Under this statute a principal in the sec-

ond degree receives the same punishment as a principal in the first degree, but obviously it was not intended to grant immunity to those parties who would have been classified as second-degree principals before the statute was enacted.

[5] "It is well settled with regard to both common law and statutory offenses, that the mere fact of incapacity to commit the offense as a principal in the first degree does not prevent one who aids and abets the principal offender from being held criminally liable as a principal in the second degree. This question was decided in Virginia in the case of *Law v. Commonwealth*, 1881, 75 Va. 885, 40 Am. Rep. 750, where a boy under the age of fourteen years and therefore conclusively presumed to be incapable of committing rape as a principal in the first degree, was nevertheless held to have committed rape as a principal in the second degree when he aided and abetted the commission of the offense by another. Similarly, in the famous *Lord Audley's Case*, C.P. 1631; Hutt. 115, a husband was held guilty as a principal in the second degree to the rape of his own wife. For further illustrations of this well established proposition, see note, 25 *Virginia Law Review* 844, 845-6.

[6] "When the legislature creates a statutory offense, does its failure to provide for the guilt of accomplices indicate an intent to exclude such parties from criminal responsibility? We believe that in answering this question a distinction should be noted between offenses necessarily involving the cooperative action of two or more persons and offenses which may be committed by one person alone. With respect to the latter class of cases, it seems clear that such an omission in the statute is not generally considered significant. Thus where statutes confine the offense of embezzlement to agents, employees, or persons holding a relation of confidence or trust toward the owner of the property misappropriated, and make no mention of accomplices, persons not occupying a fiduciary relation toward the owner are convicted of the offense as accessories or as principals in the second degree. *State v. Nahoum*, 1931, 172 La. 83, 133 So. 370. And with respect to the former class of cases, where the question involves the liability of persons other than the necessary cooperating party, there seems to be no reasonable ground

for supposing that the legislative intent was directed to the exclusion of the familiar liability of a third person who aids and abets the commission of the crime. This view has the support of all the text writers whose works we have examined, with reference to the crime of bigamy.

"Wharton, in his work on Criminal Law, 12th Ed., Sec. 2035, says: 'To bigamy, as to all other offenses, applies the law of principal and accessory, as hereinbefore expressed. Where the offense is a felony, then one present, knowingly aiding and abetting, even as a party, is a principal in the second degree; and persons promoting, without being present, are accessories before the fact. Where the offense is a misdemeanor, all concerned are principals.' See also, Miller on Criminal Law, Section 133(c), and May's Criminal Law, 4th Ed., Section 138, page 212.

"In *Boggus v. State*, 1866, 34 Ga. 275, a third person who knowingly aided and abetted a bigamous marriage by words of encouragement and by himself being validly married at the same time, was held guilty of bigamy as a principal in the second degree. The court said:

"Suppose the Rev. Mr. Parks, who officiated as clergyman in marrying Davis and Miss Windham, had known that Davis was a married man at the time, would he not have been guilty of the offence of bigamy in the second degree?

"And, because Boggus was a single man and, therefore, could not have been convicted of bigamy, as principal, himself, if he had married Miss Windham, yet, why could he not be guilty in the second degree, as present, aiding and abetting Davis?"

"In *State v. Warady*, 1910, 78 N.J.L. 687, 75 A. 977 [1910], a third person who knowingly aided and abetted a bigamous marriage was held guilty as an aider and abettor of the crime of bigamy, which was then a misdemeanor in New Jersey. The court said: 'The defendant below, though he did not marry the woman himself, was shown to the satisfaction of the jury to have been present at the ceremony, to have urged the parties to contract the marriage, and to have aided them in various ways in so contracting it. He was thus a direct participant in the crime as a principal in the second degree. The fact that he is described in the indictment as abetting, counseling, and

assisting, etc., does not alter the nature of the offense. He remains a principal.

"When the statutory offense is of such a nature that it cannot be committed by the principal offender, without the assistance and cooperation of another, and when the liability of such other is in question, it can be forcefully argued that the legislature had in contemplation the participation of the necessary cooperating party and that its failure to provide for the guilt of such party logically implies an intent not to make such party punishable. *Lott v. United States*, 9 Cir., 1913, 205 F. 28, 46 L.R.A., N.S., 409. See note 25 Virginia Law Review 844, 848. In our bigamy statute, quoted above, the 'other person' participating in a bigamous marriage with a married person is mentioned three times and yet there is no provision for his or her punishment.

"However, an examination of cases involving other statutory offenses of a similar nature does not lend substantial support to this argument. In the leading English case of *Regina v. Tyrrell*, 1894, 1 Q.B. 710, it was held to be no offense for a girl between the ages of thirteen and sixteen to aid and abet a male person in the commission of the statutory misdemeanor of having unlawful carnal knowledge of her. This decision was based, however, not on the mere negative ground that the legislature omitted to provide punishment for one whose participation it must have contemplated, but on the affirmative ground that the statute was passed for the purpose of protecting women and girls against themselves and that it would be practically impossible to obtain convictions under the statute if it were held to create an offense in the woman or girl as well as in the man. Cf. *Bibbs v. Commonwealth*, 1921, 129 Va. 768, 106 S.E. 363.

"In *Gebardi et al. v. United States*, 1932, 287 U.S. 112, 53 S.Ct. 35 [38], 77 L.Ed. 206, 84 A.L.R. 370, it was held that although the Mann Act includes specifically those who 'aid or assist' in the transportation of women for purposes of prostitution, nevertheless a woman who merely consented to being transported for such purposes without giving further aid or assistance was not guilty of a violation of the Act. In this case, the failure of Congress expressly to provide for the punishment of the woman transported was given as a reason for the decision, but the fact

that the female in such cases is the victim for whose protection the statute was enacted seems clearly to be a contributing reason. The court cited *Regina v. Tyrrell*, supra, and said: "The principle, determinative of this case, is the same."

"In cases involving adultery there is a conflict of opinion as to the guilt of the unmarried participant in intercourse. In *Re Cooper*, 1912, 162 Cal. 81, 121 P. 318, it was held that an unmarried woman would not be guilty of adultery as defined in that State and hence was not liable for aiding and abetting the commission of the offense. But in *State v. Case*, 1912, 61 Or. 265, 122 P. 304, the Oregon court held that an unmarried woman who has carnal intercourse with a married man is guilty of aiding and abetting the offense of adultery. Where simple fornication is punishable, the fact that the unmarried party may be convicted of such crime may explain the failure to convict him as a party to the crime of adultery. In *Commonwealth v. Lafferty*, 1849, 6 Grat. 672, 47 Va. 672, the General Court of Virginia held that an unmarried man who participated in sexual intercourse with a married woman was guilty of fornication.

The cases lending the strongest support to the contention that the failure of a statute to provide for the liability of a contemplated, necessary participant shows an intent not to punish such participant, are the decisions acquitting the purchaser of liquor sold in violation of statute. See *Lott v. United States*, 9 Cir. 1913, 205 F. 28, 46 L.R.A.N.S. 409. However, it is believed that the practical difficulty of enforcement of such statutes which would have resulted from the conviction of such purchasers was largely responsible for such decisions. The Supreme Court of the United States, in speaking of *Lott v. United States*, and the statutes involved in such cases, said: "Probably it was thought more important to preserve the complete freedom of the purchaser to testify against the seller than to punish him for making the purchase." *United States v. Farrar*, 1930, 281 U.S. 624, 50 S.Ct. 425, 427, 74 L.Ed. 1078, 68 A.L.R. 892. Other cases holding the purchaser not punishable are based on reasons other than the supposed intent of the legislature. In *State v. Teahan*, 1882, 50 Conn. 92, it was held that, while the purchaser induces the sale of liquor, he does not assist or abet the seller in making the sale.

"In Virginia no such reasoning was persuasive. In *Crosby v. Commonwealth*, 1922, 132 Va. 518, 110 S.E. 270 [271], the purchaser of liquor sold in violation of statute was held to be an accomplice to the crime, the Court stating that 'of this we have no doubt * * *'. See also, *Faulkner v. Town of South Boston*, 1924, 139 Va. 569, 123 S.E. 358.

[7] "In none of the cases considered above does the decision seem to rest on the legislative intent as gathered solely from the mere omission in the statute of any provision for the guilt of a contemplated, necessary party. The intent of the legislature not to punish such party is found either in the purpose of the statute to protect such party, the practical difficulty of convicting the principal offender if the cooperating party be held punishable, or in the fact that the cooperating party is, nevertheless, liable to punishment for an equally serious, but distinct, offense. None of these reasons are present in our consideration of the Virginia bigamy statute. No one would contend that the statute was enacted primarily to protect an unmarried person who knowingly enters into a bigamous marriage. To hold such a person guilty as a party to the crime of bigamy would not create any substantial obstacle to the enforcement of the statute. Unlike the case of an illegal sale of liquor, the discovery and prosecution of bigamy does not depend vitally upon the testimony of the unmarried party to the bigamous marriage. Unlike the case of an unmarried person who engages in intercourse with a married person, the unmarried party must either be held guilty of aiding and abetting the crime of bigamy or else go unpunished. This is clearly true in such a case as the one before us where the parties have not cohabited in the state.

"It is argued that to hold an unmarried person guilty as a party to the crime of bigamy when he or she knowingly marries a married person would, result, in convicting some supine girl who, completely under the influence of a man whom she knew to be married, might give away to his persuasions and entreaties and marry him. On the other hand, to hold that such a person is not a party to the crime of bigamy would enable an unmarried man of mature years and experience to persuade a young married girl to marry him without fear of punishment.

"Our conclusions drawn from our examination of cases involving other statutory offenses are supported by the only two decisions of which we are aware that involve the liability of the unmarried party who knowingly enters into a bigamous marriage, where there is no express statutory provision for such liability.

"In *Regina v. Brawn and Webb*, 1843, 1 Car. & K. 144, 174 English Reprint 751, the English bigamy statute expressly provided that 'every person counselling, aiding, and abetting such offender, shall be guilty of felony,' 9 Geo. IV, c. 31, s. 22, but included no express mention of the unmarried party to the marriage. An unmarried man who knowingly married a married woman was convicted under the statute, Lord Denman, C. J., telling the jury: 'With regard to the other prisoner, Webb, you are to say whether he counseled Mrs. Brawn to commit the felony, but to constitute the offense in him, I think that he must be shewn to have known that she was a married woman. You will say on the evidence whether you are satisfied that he knew it.'

"In *Burgess v. State*, 1920, 88 Tex. Cr. R. 146, 225 S.W. 182, 183, there was nothing in the Texas bigamy statute providing for the punishment of accomplices. One Burgess, who had been convicted of the felony of bigamy, assigned as error the refusal of the trial court to charge the law of accomplice testimony as applicable to the unmarried woman (a Mrs. Evans) who was the other party to the bigamous marriage. The Texas Court of Criminal Appeals, on the original hearing, affirmed the action of the trial court, saying: 'This court has often held that one is not an accomplice who cannot be prosecuted for the offense with which the accused is charged. * * * It goes without saying that Mrs. Evans could not be prosecuted for the offense of bigamy; she not having a lawful spouse then living.' On rehearing, however, the Court, 'after a careful examination of the authorities' reversed its holding that Mrs. Evans was not an accomplice. After quoting Wharton on Criminal Law, 11th Ed., Sections 2018 and 2019, the Court held that one present, knowingly aiding and abetting a bigamous marriage, even as a party, is a principal. The Court further said: 'If Mr. Wharton is correct, and it must be conceded that no authorities holding to the contrary are before us, then Mrs. Evans, if she knew that appellant

was married before she entered into said bigamous relation with him, would come under the provisions of our law relative to accomplice testimony, when she became a witness in the case.'

"In commenting on this decision, May's Criminal Law, 4th Ed., Section 138 says: 'Such a holding appears to make generally unnecessary statutes which punish any unmarried person who knowingly marries the spouse of another.'

"Judge Justin Miller, of the United States Court of Appeals for the District of Columbia, in his book on Criminal Law, Section 133(c), written in 1934 when he was Dean of the School of Law of Duke University, said: 'The statutes of some of states expressly make the competent party to the bigamous marriage criminally liable if he or she knew of the first marriage, and, even in the absence of such a statute, he or she should be liable as a principal in the second degree, on principle.'

The judgment of the trial court will be reversed and annulled and an order will be entered by this court discharging the accused from custody.

Reversed.



CITY OF NORFOLK v. HALL

Supreme Court of Appeals of Virginia.

June 10, 1940.

Rehearing Denied Sept. 11, 1940.

1. Appeal and error §=989

After a jury's verdict has been approved by a trial court, reviewing court in determining whether evidence supports jury's findings will consider only so much of the evidence as is favorable to the prevailing party, and if such evidence is credible and sufficient to sustain the verdict, it is not to be discredited because of contradictions.

2. Trial §=140(1)

The jury are the sole judges of the credibility of the witnesses.

3. Automobiles §=308(10)

In action against municipal corporation by automobile passenger who suffered injuries when automobile was driven over drains in a street, whether sole proximate cause

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STRIKE

1. What must the Commonwealth show in order to establish a prima facie case of criminal intent on the part of a corporate officer for acts done by or on behalf of the corporation?

In Bourgeois vs. Commonwealth, 217 Va. 268 (1976), the Virginia Supreme Court reversed the lower court ruling, and held that the evidence had been insufficient as a matter of law to hold the defendant criminally responsible for acts done by the corporation. Mr. Bourgeois had been charged with larceny by false pretense because the corporation of which he was President had received duplicate payments for services provided on twenty-four separate incidences. Although the Commonwealth had only been able to connect Mr. Bourgeois directly to one of the payments, the argument on appeal was "that Bourgeois as President of Revco controlled its funds, was responsible for criminal acts perpetrated by the corporation, and could not now hide behind the corporate shield." 217 Va. 273. A Supreme Court ruled in this matter that "where the crime charged involves guilty knowledge or criminal intent, it is essential to the criminal liability of an officer of a corporation that he actually and personally did the acts which constitute the offense, or that they were done under his direction or with his permission." 217 Va. 274.

In the case before us today, Section 43-13 of the Code of Virginia states that prima facie evidence with intent to defraud may be shown by the use by the contractor of any money paid to him under the contract for any other purpose before paying the subcontractor. The general contractor in this case was Brandy Construction Co., therefore, the Commonwealth is required to go

the extra step and show that Mr. Greenwalt as a corporate officer actually and personally used such money, or that the use was done under his direction or with his permission. There has been no evidence produced showing that any of the monies received from Union Bank and Trust were used by Mr. Greenwalt personally, or that any of the monies received and used by Brandy Construction Co. was done so under Mr. Greenwalt's direction or with his permission.

Respectfully submitted,



Walter Jervis Sheffield

7/21/81 filed.
JMC
clk.

Richmond**BRUCE E. BOURGEOIS V. COMMONWEALTH OF VIRGINIA.**

September 2, 1976.

Record No. 751161.

Present, All the Justices.

(1) Larceny by False Pretenses—Elements.**(2) Evidence Other Criminal Acts—Fraudulent Intent—General Scheme
—Corporate President.**

1. In order to convict one of larceny by obtaining money by false pretenses, Commonwealth must prove (1) intent to defraud; (2) actual fraud; (3) use of false pretenses for the purpose of perpetrating the fraud; and (4) accomplishment of the fraud by means of the false pretenses used for the purpose, that is the false pretenses to some degree must have induced the owner to part with his property. False pretense must be a representation as to an existing fact or a past event.
2. It was error to admit list of 24 instances of duplicate payments received by corporation for training students under vocational rehabilitation program, one payment from Commonwealth and duplicate payment from student. Commonwealth failed to establish that defendant, president of corporation, had any connection with the duplicate payments received by the corporation. When crime charged involves guilty knowledge or criminal intent, it is essential to the criminal liability of an officer of the corporation that he actually and personally did the acts which constitute the offense, or that they were done by his direction or permission. Evidence is insufficient to hold defendant criminally responsible as a matter of law for the duplicate payments received in all but one instance listed. Consequently it was error to admit list. Error was not harmless since Commonwealth relied heavily on list, at trial and on appeal, to show fraudulent intent.

Error to a judgment of the Circuit Court of the City of Richmond,
Division II. Hon. Frank A. S. Wright, judge presiding.

Reversed and remanded.

*Robert H. Patterson, Jr. (W. Carter Younger; McGuire, Woods
& Battle, on brief), for plaintiff in error.*

*Gilbert W. Haith, Assistant Attorney General (Andrew P. Miller,
Attorney General, on brief), for defendant in error.*

COCHRAN, J., delivered the opinion of the court.

In a jury trial the defendant, Bruce E. Bourgeois, was found guilty of grand larceny, and his punishment was fixed at confinement for two years in the penitentiary. We granted Bourgeois a writ of error on limited grounds, to the judgment order entered on the jury verdict to consider his challenges to the sufficiency of the evidence and the admissibility of certain evidence adduced against him.

Bourgeois was charged in two indictments with grand larceny. The Commonwealth proceeded on the theory that Bourgeois had obtained money by false pretenses in violation of Code § 18.1-118 (Repl. Vol. 1960).¹ By bill of particulars the Commonwealth alleged, as to the first indictment, that Bourgeois collected and received \$200 from Everett Dandridge as payment for services and thereafter falsely feloniously and with fraudulent intent caused the Treasurer of Virginia to make payment for the same services. Concerning the second indictment, the Commonwealth made a similar allegation in respect to a specified sum collected by the defendant from Bennett Durhan

At the conclusion of the Commonwealth's evidence, the defendant moved to strike the evidence as to both indictments, and this motion was overruled. The defendant introduced no evidence and renewed his motion to strike, which was granted as to the second indictment but overruled as to the first. After the jury returned a verdict of guilty as charged under the first indictment, the trial court took under advisement but subsequently denied the defendant's motion to set aside the verdict because of insufficient evidence.

The evidence sufficiently established that Bourgeois was president of Revco Tractor-Trailer Training, Inc. (Revco), a corporation which provided instruction for individuals interested in learning how to operate trucks; that the Department of Vocational Rehabilitation Virginia (DVR), functioning under an agreement whereby it received matching funds from the federal government, made rehabilitative services available to physically, emotionally and mentally disabled and handicapped persons for the purpose of enabling them to adjust

¹ Code § 18.1-118 (Repl. Vol. 1960) provided:

"Obtaining money or signature, etc., by false pretense.—If any person obtains by any false pretense or token, from any person, with intent to defraud, money or other property which may be the subject of larceny, he shall be deemed guilty of larceny thereof; or if he obtain, by any false pretense or token, with such intent the signature of any person to a writing, the false making whereof would be forgery, he shall be confined in the penitentiary not less than two nor more than ten years."

to their disabilities and return to gainful employment; that Revco was a "vendor" in the DVR nomenclature, in that DVR had contracted with Revco to provide training services for DVR students, or "clients"; and that DVR established the fee rates to be charged by a vendor who, after receiving the required authorization from a DVR counsellor, furnished services to a client.

Robert Brockleshurst, Jr., a Regional Director of DVR, testified to the procedure utilized to pay a vendor for services rendered to a DVR client. A DVR counsellor, cognizant of the fee rates approved by DVR, determined whether the client qualified for particular services. He then arranged with a vendor for the client to receive the appropriate services and authorized payment from DVR funds. After the client received the authorized training the vendor sent to the counsellor a progress report and a bill for services rendered. An invoice was prepared by the counsellor and forwarded to the state comptroller, who issued the check to the vendor. By regulation DVR was required "to make use of any other financial resources" of the client before committing DVR funds.

Brockleshurst testified that in May, 1972, it came to his attention that in certain cases counsellors might not have been following the proper procedure. Ascertaining that Revco was the vendor in some of these cases, Brockleshurst visited the office of the corporation in June, conferred with Bourgeois, whom he knew to be "the administrative head" of the business, and examined the Revco files concerning DVR clients.

On July 20, 1972, Brockleshurst met with Bourgeois and examined a list prepared by Bourgeois showing the amounts paid by the Commonwealth for 76 DVR students trained by Revco. The name of Everett Dandridge was on the list, together with a notation that DVR had paid to Revco the established fee of \$795, the amount authorized for his training instruction. Brockleshurst found, from his own investigation, that of 85 DVR students trained by Revco some had personally paid money to Revco, and that Revco had also ultimately received the full amount of tuition charges from DVR. On August 9, 1972, Bourgeois presented a list to Brockleshurst showing such duplicate payments and wrote out and delivered to him a check payable to DVR for the total amount of the overpayment.

Over the defendant's objection, the trial court admitted into evidence as Exhibit 4 that list, identified by Brockleshurst, revealing that duplicate payments for 24 DVR students, including Dandridge, had been received by Revco in the aggregate amount of \$5,860. The

amount of the overpayment for Dandridge was \$200. Brockleshurst testified that Bourgeois informed him that these students applied to Revco for training, paid certain amounts at that time, and subsequently were referred to DVR, where counsellors authorized payment of the full amount of tuition.

On cross-examination Brockleshurst testified that Bourgeois stated that the discrepancies had arisen "because of problems in his book-keeping system". The witness conceded that he had reported to his superior that DVR had authorized all the funds which were paid to Revco and that Revco "had followed the authorizations and procedures". Brockleshurst also conceded that DVR had reinstated Revco on the list of approved vendors.

William Creekmur, a former DVR counsellor, testified that he received Dandridge's name from Bourgeois, who was aware of Creekmur's "need for clients" so that "the counsellors would look good, the Department would look good, and it would result in more federal funds" for his unit; that he had used Revco as a vendor; that he had dealt only with Bourgeois at Revco; and that he had prepared the DVR file on Dandridge. Although that file noted an initial interview with Dandridge on April 3, 1972, listed as the referral date, Creekmur admitted that he had never met Dandridge and had acquired all the information about him from Bourgeois. Included in the file was a case plan for Dandridge, which forecast payment of \$795 for one unit of training as a truck driver, and a copy of the Revco bill for the full amount of his tuition.

Creekmur further testified that the Revco bill was forwarded to DVR by letter dated May 8, 1972, signed by Bunny Imburg, Bourgeois's secretary. Both the letter and the bill were typed on stationery bearing the printed name of Bourgeois as president of Revco. Typed at the lower left-hand corner of the letter were two sets of initials, separated by a colon, corresponding with those of Bourgeois and Bunny Imburg. Denying any knowledge that Revco had collected money directly from Dandridge, Creekmur insisted that, if he had known of this payment, he would have subtracted it from the authorized tuition payment made by DVR. Creekmur conceded, however, that if he had performed his duty of interviewing Dandridge he would have discovered that this client had already partially paid Revco.

Dandridge testified that he had never heard of DVR; that he read about Revco in the newspaper and applied in person to Bourgeois; that at the first meeting he signed a contract with Revco to obtain instruction costing \$795 and paid Bourgeois \$200 in cash, for which

he obtained a receipt. The receipt and a copy of the contract, both dated April 6, 1972, and signed by Bourgeois on behalf of Revco, were admitted into evidence. At that time Dandridge learned from Bourgeois that in some cases a student might qualify for financial assistance from the State but that if Dandridge could not obtain such aid, upon completion of the course, Revco would arrange for him to pay the balance in monthly installments.

Bennett Durham, a DVR client whose name also appeared on the list of those who had personally paid to Revco money which was later duplicated by DVR payment, testified that he did not know Bourgeois, but had paid \$695 in two payments to Bourgeois's father, whom he identified in court. Consequently, the trial court found the evidence insufficient as a matter of law to connect Bourgeois with the Durham duplicate payment.

Proof that the accused obtained money by false pretenses will sustain an indictment for larceny. *Bateman v. Commonwealth*, 205 Va. 595, 600, 139 S.E.2d 102, 106 (1964).

[1] In order to convict one of larceny by false pretenses, however, the Commonwealth must prove four elements of the offense charged: (1) an intent to defraud; (2) an actual fraud; (3) use of false pretenses for the purpose of perpetrating the fraud; and (4) accomplishment of the fraud by means of the false pretenses used for the purpose, that is, the false pretenses to some degree must have induced the owner to part with his property. *Anable v. Commonwealth*, 24 Gratt. (65 Va.) 563, 567-68 (1873). See also *Hagy v. Commonwealth*, 168 Va. 663, 190 S.E. 144 (1937). Moreover, the false pretense must be a representation as to an existing fact or a past event. *Hubbard v. Commonwealth*, 201 Va. 61, 109 S.E.2d 100 (1959).

The Commonwealth's case against Bourgeois was grounded on the premise that he had requested authorization from Creekmur for the full tuition for Dandridge's training when he had already received from Dandridge a partial tuition payment of \$200 on account. On appeal the Commonwealth has taken the position on brief that the Revco bill for \$795 constituted the false pretense, although the Commonwealth had conceded at trial, and the trial court had held, that Revco's subsequent billing of DVR for the full tuition of \$795 was not a "token" of false pretense within the contemplation of the statute. In argument before us the Assistant Attorney General insisted that the false pretense was the failure to advise the Commonwealth that partial payment had been received, so that the offense could have been committed by a combination of failure to disclose and subsequent

submission of the bill. Reliance solely on the bill was expressly disavowed.

We cannot say that the Commonwealth's evidence, exclusive of Exhibit 4, while obviously weak, is insufficient as a matter of law. In permitting Exhibit 4 to go to the jury, however, the trial court committed error which requires reversal of Bourgeois's conviction.

This exhibit, listing the duplicate payments received by Revco for 24 students, was introduced for the purpose of showing the payment made by Dandridge and to show a common scheme to defraud. The trial court admitted the exhibit and testimony relevant thereto but cautioned the jury that this evidence was admitted "only for the purpose of bearing on the intent of the defendant" in receiving the payments for which he had been indicted.

Where a material element of the crime is the fraudulent intent of the accused both the Commonwealth and the accused are allowed broad scope in introducing evidence with even the slightest tendency to establish or negate such intent. *Page v. Commonwealth*, 148 Va. 733, 741-42, 138 S.E. 510, 512 (1927). Thus, where an accused has perpetrated similar frauds and by false representation obtained valuable consideration, evidence of such acts has been held to be admissible as bearing on fraudulent intent. *Hubbard v. Commonwealth*, *supra*, 201 Va. at 67, 109 S.E. 2d at 105; *Trogdon v. Commonwealth*, 31 Gratt. (72 Va.) 862, 870-71 (1878). Introduction of such evidence has been limited to evidence of other crimes which constitute a part of the general scheme of which the crime charged is a part. *See Kirkpatrick v. Commonwealth*, 211 Va. 269, 176 S.E.2d 802 (1970); *Walker v. Commonwealth*, 1 Leigh (28 Va.) 574 (1829).

In the present case, the Commonwealth failed to establish that Bourgeois had any connection with the duplicate payments listed in Exhibit 4, except for the Dandridge payment. Indeed, no evidence was adduced to identify the recipient of any other payments made by students, except the two made by Bennett Durham. And it was the uncontradicted testimony of Durham that he paid, not Bourgeois, but Bourgeois's father, who was also employed by Revco. Thus, there was no evidence that Bourgeois had knowledge, when full tuition payments were received from DVR funds, that Revco had already obtained the partial payments from the 23 students, other than Dandridge, listed on Exhibit 4.

The Assistant Attorney General urged in oral argument that Bourgeois as president of Revco controlled its funds, was responsible for criminal acts perpetrated by the corporation, and cannot now hide

behind the corporate shield. However, the general rule is that where the crime charged involves guilty knowledge or criminal intent, it is essential to the criminal liability of an officer of a corporation that he actually and personally did the acts which constitute the offense, or that they were done under his direction or with his permission. *State v. Thomas*, 123 Wash. 299, 212 P. 253 (1923); Annot., 33 A.L.R. 787 (1924); 19 Am. Jur. 2d *Corporations*, § 1390, at 787 (1965); 50 Am. Jur. 2d *Larceny*, § 79, at 249-50 (1970). An officer cannot avoid criminal responsibility for an illegal act on the ground that it was done in his official capacity or through the instrumentality of the corporation which he controls and dominates and which he has employed for that purpose. *State v. Picheco*, 2 Conn. Cir. 584, 203 A.2d 242 (1964). And where the business itself involves a violation of the law all who participate in it are liable. *Crall & Ostrander's Case*, 103 Va. 855, 859, 49 S.E. 638, 640 (1905). See *Carolene Products Co. v. United States*, 140 F.2d 61, 65 (4th Cir. 1944).

In *Revell v. Commonwealth*, 215 Va. 708, 213 S.E.2d 756 (1975), an embezzlement case, we considered the status of the accused who, one witness testified, "appeared to be the boss" of the business. In the absence of evidence that his position placed him in control of the other employees or funds of the company which received the benefit of the embezzlement, we reversed the accused's conviction.

In the present case, there is evidence that Bourgeois was president of Revco, but there is no evidence that he controlled its employees or funds, or that he was the alter ego of the corporation. As president he alone signed the Revco check to reimburse DVR for the duplicate payments, but the check contained another signature line for the vice-president, permitting the inference that the vice-president also had authority to sign checks for the corporation. There is no evidence as to the extent of Bourgeois's authority, the number of other officers and employees of Revco and their respective duties, or the business procedures of the corporation, from which knowledge of any wrongdoing by other Revco officers or employees might be imputed to Bourgeois. Therefore, the evidence is insufficient to hold Bourgeois criminally responsible as a matter of law for the duplicate payments which Revco received for training the 23 DVR clients. Consequently, the trial court erred in admitting Exhibit 4, without requiring that it be supported by evidence, which was never adduced, that Bourgeois knowingly caused the duplicate payments to be made.

We cannot say that the error was harmless. The Commonwealth relied heavily upon this exhibit, at trial and on appeal, to show fraudu-

lent intent on the part of Bourgeois. It may have contributed significantly to the defendant's conviction.

Accordingly, the judgment of conviction is reversed, and the case is remanded for a new trial.

Reversed and remanded.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STRIKE

(Point #2)

To constitute a prima facie case, the Commonwealth must have provided evidence that: (1) the defendant is a contractor; (2) he intended to defraud; (3) by using funds, or any part thereof, paid by the Union Bank and Trust Company to Brandy Construction Co. under the Bishop contract for any other purpose than to pay persons performing labor upon or furnishing materials under the Bishop contract.

Evidence must have been introduced of Mr. Greenwalt's intent to defraud, which the Commonwealth has not done. Section 43-13 does, however, state that if the Commonwealth in its evidence has demonstrated use by Mr. Greenwalt of any monies paid to him under the contract, before paying all amounts due or to become due for labor performed or materials furnished for any other purpose than paying such amounts, that the prima facie case shall be presumed.

This case concerns a cost overrun and it is logical to understand how some of the subcontractors and material men could remain unpaid if all of the funds received by Brandy Construction Co. were used to pay other subcontractors and material men first. There is no evidence before the court that this was not done and that all the money received by Brandy Construction Co. was not disbursed to other subcontractors and material men. This is basically an embezzlement type of crime and there is not tracing that funds received under this contract were used for any other purpose whatsoever. If some use of funds from this account had been shown to apply to the benefit of Mr. Greenwalt, personally, the possibility of this checking account containing funds personally

contributed by Mr. Greenwalt earlier or being rightfully due to Mr. Greenwalt from the construction of other houses has not been obviated.

The Supreme Court has truly indicated the type of personal and direct intent to defraud which it feels is appropriate to sustain a conviction under this statute. Overstreet vs. Commonwealth, 193 Va. 104, 67 S.E.2d 875 (1951). In the Overstreet case, a corporate officer showed bills and checks to a homeowner in Prince George County and directly represented that such bills were to be or had been paid which constituted direct fraud on the part of the defendant. The defendant put forth no evidence so that he failed to meet the burden of going forward which existed in the statute at that time and which has now been removed from the statute. The court referred to the defendant as "arrogant, elusive and evasive." There was no evidence that any payments had been paid to anyone providing labor or materials under the contract. There was one job involved in this checking account and evidence that checks left the account for the sole personal use of the defendant.

In the case before the bar, there is no direct fraud in evidence; no burden on the defendant to "go forward" with any documentation; no evidence of arrogance, elusiveness, or evasiveness on the part of the defendant; there is evidence that several payments for labor and material were made on the job; and no evidence of funds diverted to personal use whatsoever. Consequently, no intent could reasonably be construed from the evidence before

the court under the standard of sufficiency of evidence as stated
in Limbaugh vs. Commonwealth, 149 Va. 383, 140 S.E. 133 (1927).

Respectfully submitted,



Walter Jervie Sheffield

7/21/81 filed.
mnc
cek.

\$ 2000.00 FINE

30 DAYS IN JAIL

OR

We the jury find the defendant not guilty.

Foreman

VIRGINIA:

IN THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY, JULY 21,
1981.

COMMONWEALTH

VS.

ALVIN E. GREENWALT

This day came Mark S. Gardner, the attorney for the Commonwealth and Alvin E. Greenwalt, the defendant, who stands indicted for a misdemeanor, to-wit: Misappropriation of Funds as charges in the Indictment, appeared according to the conditions of his recognizance and came also his attorneys, Thomas L. Bricken and Walter J. Sheffield.

The defendant by counsel filed his memorandum of law in support of motion to dismiss based on former jeopardy and memorandum of law on the burden of going forward with evidence on both of which motions the Court heard argument by the Commonwealth and the defendant, which motions were overruled and exceptions were noted.

Whereupon the accused waived the reading of the misdemeanor Indictment and pleaded not guilty to said Indictment, which plea was tendered by the accused in person, who requested trial by jury.

The Court then impanelled thirteen qualified jurors, free from exception for the trial of the defendant, in the manner provided by law. Whereupon the Attorney for the Commonwealth and the attorney for the defendant each alternately exercised their

rights to strike the names of three veniremen from the panel, as provided by law, and the remaining seven jurors, constituting the jury for the trial of the defendant, were duly sworn.

After opening statements, the Court and jury heard the evidence presented by the Commonwealth. At the conclusion of the Commonwealth's evidence, the attorneys for the defendant filed his memorandum of law in support of motion to strike which motion was overruled and exception was noted. The evidence of the defendant was presented and concluded. At the conclusion of all of the evidence, the attorneys for the defendant renewed their motion to strike the Commonwealth's evidence on the same grounds, which motion was again overruled, exceptions to both of said rulings the defendant duly took.

After hearing the evidence the instructions of the Court and argument of counsel, the jurors were sent to the jury room to consider their verdict. They subsequently returned their verdict in open court, in the following words. "We the jury find the defendant guilty of misappropriation of funds as charged in the indictment and fix the punishment at: \$2000.00 fine 30 days in jail Frank P. Benton, Foreman."

Thereupon counsel for the defendant moved the Court to poll the jury individually which motion was granted and the jury was polled individually as to their verdict, each of said jurors reaffirming his vote.

The attorneys for the defendant then moved the Court to set aside the verdict, for reasons stated to the record, which motion was overruled.

Thereupon the attorneys for the defendant moved the Court for a mistrial for reasons stated to the record, which motion was overruled.

Whereupon the Court finds the defendant guilty of misappropriation of funds as charged in the Indictment and sentences the defendant to confinement in jail for the term of 30 days and a fine of \$2000.00.

It is adjudged that the Commonwealth recover from the defendant the sum of \$, the costs assessed in this proceeding and the sum of \$2000.00, the fine assessed by the jury.

After pronouncing sentence, the Court advised the defendant of his right to petition for an appeal to the Supreme Court of Virginia. Counsel for the defendant advised the Court that the defendant desires to appeal the judgment rendered and accordingly the Court suspends the execution of the sentence until the said appeal is acted upon provided the defendant files a notice of appeal and posts a \$2500.00 bond with cash or corporate surety, by July 22, 1981, no later than 4:00 P. M.

The Court certifies that at all times during the trial of this case the defendant was present in person and his attorneys were likewise present in person and represented the defendant capably.

The defendant was placed in the custody of the Sheriff to await bond.

RECORDED IN LAW ORDER
BOOK Y PAGE 273

ASSIGNMENTS OF ERROR

1. The Court erred in concluding that the theory of "former jeopardy" did not attach to this case thereby permitting the Appellant to be tried and convicted after he had been previously acquitted in a manner involving jeopardy stemming from charges alleging the same misdemeanor offense. Specifically, the Court erred in denying the Appellant's pre-trial motion to dismiss and his preliminary motion to dismiss based on this reasoning. The Court further specifically erred in failing to grant the Appellant's motions to strike at the conclusion of the Commonwealth's evidence and at the conclusion of the Appellant's case thereby permitting the case to go to jury. Finally, the Court specifically erred in failing to grant the Appellant's motion to set aside the verdict as contrary to the law based on former jeopardy at the conclusion of the trial.

2. The Court erred in interpreting §43-13 of the Code of Virginia of 1950, as amended, in regard to the distinctions it made concerning the evidenciary elements and presumptions between the words "useage" and "retainage". Specifically, in denying the preliminary motion on this issue, the Appellant was placed at a procedural disadvantage. By denying the Appellant's motions to strike at the conclusion of the Commonwealth's evidence and the conclusion of the Appellant's case, the Court exceeded discretion permitting the case to go to jury, since as a matter of law the facts were insufficient to reach a factual conclusion necessary to support a conviction. The Court's granting of instruction #5 over the objection of the Appellant further

prejudiced the Appellant's position before the jury through the Court's misinterpretation of this section. Finally, the denial of the Appellant's motion to set aside the verdict repeated these same errors.

3. The Court erred in its determination that there were sufficient facts to establish a prima facie case of criminal intent on the part of the Appellant as a corporate officer for acts done by or on behalf a corporation. Specifically, by denying the Appellant's motion to strike at the conclusion of the Commonwealth's evidence and the Appellant's case, the Court incorrectly determined that there were facts sufficient to impute corporate wrong-doing to the Appellant. By the Court's overruling of the Appellant's objection, it permitted the Commonwealth to argue and examine witnesses before the jury in a manner that improperly imputed personal criminal responsibility to the Appellant for corporate actions. Finally, the errors were repeated in the Court's denial of the motion to set aside the verdict.

FRANCES K. HALEY & ASSOCIATES

Court Reporters

Courthouse Building

Fredericksburg, Virginia 22401

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* * *



6.

NOTE: The jury panel depart
from the Courtroom in the company of the Sheriff.

JURY OUT

MR. SHEFFIELD: May we have stated for
the record that the Commonwealth's Attorney has
stated that this is a misdemeanor proceeding.

MR. GARDNER: Yes, sir.

MR. SHEFFIELD: Secondly, Your Honor,
Mr. Bricken and I worked on this case together,
and for purposes of the second motion that we wish
to make outside the realm of the jury, he would
like to talk as to the disjunctive nature of
Section 43-13, but I will be handling the case
entirely in front of the jury.

MR. BRICKEN: Your Honor, Section 43-13
is the statute that contains the wording retained
or use of funds in connection with the money involved
in this matter, and since the wording in this
statute is in the disjunctive, which is very similar



1 JURY OUT

2
3 to Section 18.2-172, in which the statute requires
4 that the Commonwealth on a single-count indictment
5 proceed against an individual either on forgery
6 or uttering.

7 We would propose that
8 since this is a single-count indictment and has
9 been brought in the disjunctive, the Commonwealth
10 would be required at this point to eliminate one
11 or the other and proceed either on the retainage
12 or the usage of funds, Your Honor, in making the
13 analogy to 18.2-172.

14 THE COURT: All right, sir, do you want
15 to respond?

16 MR. GARDNER: Your Honor, I need to tell
17 you a little bit about what the use involved in
18 order for Your Honor to understand my reason for
19 opposing the motion. This case has to do with
20 the allegations of misappropriated funds based
21 on a contract between Mr. Greenwalt and a couple



JURY OUT

by the name of Bishop to build a home on their lot.

In the way of a proffer or a statement or whatever, I believe the Commonwealth's evidence will show there was a contract and an approximate amount of some seventy thousand or eighty thousand dollars; that seventy-one thousand dollars and some odd cents were actually paid under the contract to Mr. Greenwalt; and I am not sure of the exact figure that we can prove today, but over twenty thousand dollars was not paid to people who either supplied labor or materials to the construction of that house. The house was not completed and was later completed by the Bishops themselves by applying additional funds to the construction.

Now, the statute, the gravamen of the offense relates to the failure of the contractor who receives money under such



JURY OUT

contract to apply that money to the payment of subcontractors or material men who supplied labor or materials to the construction. The language Mr. Bricken is referring to, the retain or use, is in the disjunctive, but not in the sense that he cited two separate offenses. I think it is intentionally worded that way because it is not incumbent on the Commonwealth to prove that Mr. Greenwalt retained the money or actually used the money for some other purpose because it makes no difference.

The offense is completely whether he received the money and failed to apply it to the payment of subcontractors or material men, and I can tell Your Honor now that I have no way of proffering what, in fact, was done with the money. What we can proffer is that he did receive the money and the material men and suppliers to a very great degree were not paid for work



JURY OUT

and materials provided, so it would be the Commonwealth's position that it is not incumbent on the Commonwealth to prove that the money was retained in a particular account or in a particular place or used for a particular purpose but simply that it was received and not used for the purpose for which it was intended.

THE COURT: Well, would you read that language in the statute that you analogized this indictment to, the uttering and forgery?

MR. SHEFFIELD: I don't have it with me.

THE COURT: Is that a photostat copy?

MR. BRICKEN: I don't have a copy of 18.2 in front of me, Your Honor.

THE COURT: The one you are speaking of is forgery or uttering?

MR. BRICKEN: It describes the charge of forgery or uttering or attempting to employ as true a certain instrument.



JURY OUT

1
2
3 THE COURT: And the Commonwealth has to
4 prove it among those particular charges?

5 MR. BRICKEN: Well, primarily, what we
6 would like at this point is on a single-count indict-
7 ment, such as a forgery case. The Commonwealth
8 either brings a charge of uttering or forgery or
9 attempting to employ as true and to carry the analogy
10 over into this case as in what Mr. Gardner just
11 said. If he brings this case primarily on the
12 misappropriation of these funds, the misappropriation
13 would be the misuse and not the retainage. There
14 is, in my mind, quite a bit of difference between
15 retainage of the money and the use of the money.

16 THE COURT: What is the language of the
17 statute? Is the language of the statute retain
18 or use?

19 MR. GARDNER: Yes, sir.

20 MR. BRICKEN: I can read it: "Any contrac-
21 tor or subcontractor who shall, with intent to



JURY OUT

defraud, retain or use the funds or any part thereof,
paid by the owner or his agent," and it goes on
to tell you how he got the money.

THE COURT: That is far enough. That
statute makes it a crime to retain or use. That
statute doesn't mean it makes it a crime to do
one or the other. It's simply sort of a phrase
that means depriving the rightful owner.

MR. BRICKEN: Further on in the statute,
Your Honor, it uses the verb use or "use by the
contractor" and doesn't refer any further to the
word retainage; and it is clear to me from what
Mr. Gardner said if having a choice on which to
proceed, he would probably proceed on the use or
misuse of this money as opposed to retainage.

THE COURT: Well, I can understand your
position, of course, and I think your analogy cer-
tainly helps me to understand your position, but
I think using the forgery and uttering statute



JURY OUT

is probably -- well, it explains to me what you are saying, but those are separate crimes, and this is all one crime, retain or use. I will have to overrule your motion.

MR. BRICKEN: Thank you.

MR. SHEFFIELD: Thank you, Your Honor. We have two other motions we would like to make.

THE COURT: Do you also understand that the Commonwealth is required to pay only for a felony Court Reporter?

MR. SHEFFIELD: Yes, sir. One of the motions is a reiteration and amendment of an earlier motion that we made regarding former jeopardy. To try to bring the Court's attention to what I feel are mandates of the Constitution and statute, I tried to write it down to save some time.

Your Honor, we now are in a different posture than we were in when we made the motion several weeks ago for numerous



1 JURY OUT

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3 reasons. We have different case authority that
4 will absolutely demonstrate beyond any reasonable,
5 legal question that the proceeding that occurred
6 on November 12 was a misdemeanor hearing and,
7 secondly, the Commonwealth has stipulated that
8 it is a misdemeanor hearing.

9 I think we are now in
10 a better posture to deal with this in that on November
11 12, Mr. Greenwalt was brought into Court and was
12 charged with the offense that the Commonwealth's
13 Attorney described. All of the facts that occurred
14 prior to July 1, 1980, which is an important date
15 because the statute changed rather drastically.
16 Prior to that date, it was a misdemeanor, and after
17 that date, it was a felony.

18 All the facts in that
19 case dictate it was. In the earlier time we argued
20 before the Court, we thought it was a misdemeanor.
21 At the time of the hearing, and I would ask that



1 JURY OUT

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3 Mr. Gardner correct me if I misstate it, but at
4 the beginning of that particular hearing, we asked
5 Judge Savage if he would tell us whether he was
6 there on a misdemeanor hearing on the merits or
7 there for a preliminary hearing on a felony. We
8 took the position that it was a misdemeanor.

9 The Commonwealth took
10 the position that it was a preliminary hearing
11 on a felony. Judge Savage said that he did not
12 feel he could rule on that point, and he didn't
13 ever decide. The Commonwealth put on their evidence
14 and, based on the motion to strike, the case was
15 dismissed.

16 There are two cases which
17 I think are very important. United States v. John-
18 son and Young v. Commonwealth, and I have them
19 attached to the motion. I think the law is clear
20 in Virginia in regards to what is a felony and
21 what is a misdemeanor.



JURY OUT

The fact that the Commonwealth may choose to call a case a felony is fine, but here you have it from the Fourth Circuit of Appeals that in Virginia, under Virginia statute whether forgery is a misdemeanor or felony. Whether it is a misdemeanor or a felony on any crime is determined by the sentence that is lawfully possible and not upon the sentence actually imposed.

Secondly, on page 550 in the Johnson case, the Virginia law prescribes a simple method to determine whether a case is a felony or a misdemeanor. Offenses are either felonies or misdemeanors based on the sentence, and behind that case, you will find a copy of Section 18.2-8, which states that if a crime doesn't have confinement in the penitentiary or death, that is deemed a misdemeanor.

Beyond that, Your Honor, Young v. Commonwealth, which is a case from 1931



1 **JURY OUT**

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3 which has been the law for many years in the Common-
4 wealth, says that where a crime may be construed
5 either a misdemeanor or a felony, the Court will
6 construe it a misdemeanor, thus applying the well-
7 recognized principle of the penal statute that
8 it must be construed directly in favor of the accused.

9 No question that this is
10 a misdemeanor today. There was a debate in the
11 lower Court, and the Judge refused to rule whether
12 it was a misdemeanor or a felony. It is unclear,
13 and the law says if it is unclear, it is a misde-
14 meanor. If this is a misdemeanor, then it is former
15 jeopardy, Your Honor, and we feel strongly about
16 it.

17 In Section 19.2-292 of
18 the Code of Virginia dealing with the facts on
19 a former trial and acquittal may plead such acquittal
20 in bar of a second prosecution for the same offense,
21 notwithstanding any defect in the form or substance



1 **JURY OUT**

2
3 of the indictment or accusation on which he was
4 acquitted.

5 Finally, we have the Adkins
6 case, which is 9 S.E. 2nd 349. This, again, upholds
7 the principle of a person placed in jeopardy, and
8 we have sworn witnesses in that that shouldn't
9 be subjected to the cost and inconvenience and
10 public embarrassment for standing trial for the
11 same offense.

12 We would ask for these
13 reasons that the case be dismissed at this point.

14 THE COURT: All right, sir. Mr. Gardner,
15 do you want to respond?

16 MR. GARDNER: Your Honor, this has been
17 fully covered by the Court on a previous motion
18 which was taken up on motions day, and Mr. Sheffield
19 has added nothing new in the way of the law or
20 facts to change the Court's opinion about it. What
21 it boils down to is Mr. Sheffield feels like the



JURY OUT

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3 law in effect at the time of this offense permits
4 only a prosecution for a misdemeanor. That is
5 his opinion on the law.

6 The fact is that the charge
7 was originally brought on a warrant for a felony.
8 The defendant was arrested for a felony on that
9 warrant, and the preliminary hearing was held.
10 The warrant is marked and in the Court file, and
11 Your Honor reviewed it when we had the motion before.

12 Judge Savage did not rule
13 on Mr. Sheffield's motion at that time, which was
14 to declare the law in effect prohibited anything
15 more than a misdemeanor punishment. That was not
16 decided by Judge Savage. That question is not
17 now before the Court because the defendant was
18 not placed in jeopardy, but all that was being
19 done was the Court was conducting a probable cause
20 hearing.

21 THE COURT: You are satisfied about that?



1 JURY OUT

2
3 Apparently, Mr. Sheffield does not agree with
4 you.

5 MR. GARDNER: That is my reason for saying
6 that. I believe Mr. Sheffield earnestly and sin-
7 cerely believed at the time that it was incorrect
8 legally for the Commonwealth to have charged Mr.
9 Greenwalt with a felony.

10 It is his position that
11 a felony conviction couldn't have stood because
12 the law in effect at the time, as he viewed it,
13 would have limited the conviction to a misdemeanor
14 conviction.

15 THE COURT: I assume he is now saying
16 that since it was changed to a misdemeanor he has
17 already had a trial on the misdemeanor, but you
18 are saying that was a preliminary hearing on a
19 felony.

20 MR. GARDNER: That is right. That is
21 what it was, and Judge Savage refused to dismiss



JURY OUT

it. It was not dismissed. It just was not certified,
and it is marked on the warrant not certified.

I chose, therefore, to
go over the Grand Jury and present an indictment
for a misdemeanor. That has been done, but the
defendant has not been placed in jeopardy before
this because all that was before Judge Savage was
probable cause; and if he had found probable cause,
there would have been no punishment. It would
have been certified to the Grand Jury. He has
never been placed in jeopardy and has not to this
moment.

THE COURT: What exactly did the lower
Court do? What did Judge Savage actually do?

MR. GARDNER: Judge Savage refused to
certify it to the Grand Jury as a felony.

THE COURT: He didn't make a finding
of not guilty?

MR. GARDNER: No, sir, he didn't, and

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JURY OUT

the warrant supports my statement to that effect because it is marked not certified, and the face of the warrant is labeled a felony warrant, and the offense charged is unlawful and felonious such and such.

THE COURT: Well, Mr. Sheffield, you have a very interesting academic question, which might be a perfectly good defense at this point, and I assure you there will be plenty of additional opportunities for the Court to consider it, but at this point, I will have to overrule the motion to strike.

If you get an adverse verdict in this case, you will have opportunity to argue this in great length, but my reason for holding as I do is this was, in fact, simply a preliminary hearing on a felony in which it was not certified. A Commonwealth's Attorney does have a right, notwithstanding non-certification



JURY OUT

by the District Court, to go ahead and present the indictment to the Grand Jury, and they returned a true bill on this misdemeanor.

I understand your argument that you feel he was actually tried on a misdemeanor and dismissed. At least, that was the effect of the hearing in the Court below, and I understand that. I think it is a good point for you to bring up, but unless you have got something new to add, I will overrule the motion.

MR. SHEFFIELD: If I might note my exception along these lines, and, it is always a pleasure to have the opportunity to argue with Mr. Commonwealth in that there are some new facts. One, this has been stipulated to for the first time as a misdemeanor hearing. I think there was some confusion in the trial until this time.

Secondly, there has been new law brought before the Court this time that



1 JURY OUT

2
3 was not brought here last time; and, thirdly, I
4 disagree with the factual representations regarding
5 the statement made by Judge Savage. Judge Savage
6 said from the bench, Your Honor, that he did not
7 see that a crime had been committed.

8 THE COURT: He could have dismissed it
9 and found him not guilty on the misdemeanor, and
10 the Commonwealth's Attorney has the right to present
11 it to the Grand Jury because the Grand Jury is
12 superior in the line of judicial rank, you might
13 say, to the District Court.

14 MR. SHEFFIELD: I understand that.

15 THE COURT: They saw fit to indict him.
16 I have to rule against you at this point. As I
17 explained to you, if you get an adverse verdict,
18 you will have plenty of opportunity to argue and
19 brief it, so I will have to overrule you.

20 MR. SHEFFIELD: All right, Your Honor.
21 Mr. Bricken has a final preliminary motion regarding
the statute we have to proceed under today.



38.

1 Commonwealth with intent to defraud, retain or
2 use funds paid by Mr. and Mrs. Ralph Bishop to
3 him as the contractor under a contract for the
4 construction of a residential dwelling on their
5 property known as Lot 20 of Snow Hill Subdivision.
6 It is alleged further that it was used for purposes
7 other than to pay persons performing labor upon
8 or furnishing material for such construction while
9 amounts for which he was liable or became liable
10 under the contract.

11 In other words, it charges
12 him with the misappropriation or misuse of funds
13 or retention of funds by him in an illegal and
14 unlawful fashion as alleged in the indictment.
15 What I need to know from you are any of you related
16 by blood or marriage or friendship with the defen-
17 dant, Alvin E. Greenwalt or Mr. and Mrs. Bishop?
18 Are any of you in that relationship or do any of
19 you know Mr. Greenwalt or Mr. and Mrs. Bishop?
20
21

NOTE: No reply from jury panel.



NOTE: The jurors who were eliminated now depart from the Courtroom.

THE COURT: Members of the jury, some of you, I believe, were on the jury this morning, and you know that opening statements, which the attorneys may now wish to make to you, are not to be considered by you as evidence. Evidence comes only from the witnesses who take the stand and testify and from any exhibits that may be approved for your inspection. Please keep that in mind.

Also, keep in mind that while you are out of the Courtroom for any reason please do not talk about the case until you get the case to decide after it is completed.

All right, gentlemen.

MR. GARDNER: Thank you, Your Honor.

Ladies and gentlemen of the jury, some of you may be wondering why, especially if you served on the jury this morning, there are only seven of you now. This morning's trial was a felony, and this



1 is a misdemeanor trial that we are about to go
2 through, and a smaller jury is used on a misdemeanor.

3 As the Judge told you
4 and you know from this morning if you served this
5 morning, what I am about to say and what Mr. Sheffield
6 is going to say is not evidence in the case, but
7 I think it will be helpful to you to have some
8 idea what the case is all about so that you can
9 better follow the evidence.

10 The charges against Mr.
11 Alvin Greenwalt and the case you are about to hear
12 stems from a contract entered into by Mr. Greenwalt
13 who was at the time engaged in the building business
14 and Mr. and Mrs. Ralph Bishop.

15 Under that contract, Mr.
16 Greenwalt agreed to build a home on a lot in Snow
17 Hill Subdivision, a couple of miles up the road
18 here on Route 208, that was already purchased by
19 the Bishops, and all of the specifications were
20 set out in the contract, the type of home, the
21 materials and so forth, and the construction called



1 for eighty-three thousand three hundred and ninety
2 dollars, and the contract was entered into in April
3 of 1979.

4 Now, the house was never
5 finished by Mr. Greenwalt. I believe the testimony
6 will show that there are some things yet to be
7 done to it, although the Bishops are living in
8 the house.

9 The Bishops took a construc-
10 tion loan from the Union Bank and Trust Company
11 in Bowling Green for the purchase price and, through
12 the bank, made draws for the payment on the contract
13 to Mr. Greenwalt as the construction progressed.
14 The total amount of money received by Mr. Greenwalt
15 from the bank was in excess of seventy thousand
16 dollars and, yet, there is a substantial amount
17 in terms of dollars and cents which has not been
18 paid to those people who performed labor on the
19 house or provided materials.

20 In other words, people
21 like J. W. Masters, people like R. C. Lee Carpet



50.

1 and Tile, which did the flooring work, people like
2 Danielson who drilled the well, and people who
3 actually provided services in the construction
4 of that home have not been paid in full despite
5 the fact that Mr. Greenwalt received over seventy
6 thousand dollars of the contract price.

7 Now, if you can keep in
8 mind what the case is all about, I think it will
9 be -- you will see that it is a fairly simple case
10 really. What it boils down to and what I believe
11 will be shown as facts from the evidence is that
12 a contract was entered into whereby Mr. Greenwalt
13 agreed to build a certain type of house for the
14 Bishops for eighty-three thousand and some odd
15 dollars; that he received in excess of seventy
16 thousand dollars; and, yet, he has failed to pay
17 for more than twenty thousand dollars worth of
18 materials and suppliers who actually did work or
19 provided the materials on that house, and what
20 the offense boils down to is a misappropriation
21 of funds.



The Commonwealth is alleging that Mr. Greenwalt received this money under the contract and that he was supposed to pay for the labor done and the materials provided on the construction of this house, and that is where the money should have gone first and that his failure to use the money in that way, regardless of what he used it for, is a misappropriation of funds.

Now, the Commonwealth's evidence will come from numerous witnesses. Mr. and Mrs. Bishop will testify briefly about signing the contract and what the purchase price was and so forth. There will be several witnesses from the companies who either provided work or materials on the job and what they did there, what they billed and what they have been paid.

There will be testimony from an appraiser as to the value of the home and land to show that, in fact, the house is not worth much more than the contract called for.

I want to thank you. I



1 know it has been a long day for some, particularly
2 those who had to be here for the case early this
3 morning. I thank you for your attention during
4 this case. Thank you very much.

5 MR. SHEFFIELD: Gentlemen, Ms. Davis,
6 this is a very unusual case in that we really should
7 not be here at all. We have a situation that is
8 regrettable and something that you are going to
9 hear about. You are going to hear that Mr. and
10 Mrs. Bishop came to this area and decided to build
11 a house and contracted with Brandy Construction
12 Company, which was a corporation.

13 The Bishops got a loan
14 from the Union Bank and Trust Company in Bowling
15 Green, and several draws were made on that loan.

16 Now, the Commonwealth,
17 as Mr. Gardner has already told you, is going to
18 come in and have a number of witnesses who will
19 say we did work on the house and didn't get paid.
20 I am not here to tell you that they didn't get
21 paid because they didn't. The problem that we



1 have with this is there are two ways of working
2 in the civil system of the Courts today.

3 When you have a civil
4 debt for somebody, you go into civil Court and
5 get a mechanic's lien. That is the way you try
6 to get paid. This is very, very different. This
7 is a criminal case.

8 The Commonwealth of Virginia
9 is asking you to deprive Mr. Greenwalt of his liberty,
10 to brandish him as a criminal, to put him in jail
11 and/or seek a fine for the work he did in regards
12 to Brandy Construction Company on the Bishops'
13 house.

14 Now, you are going to
15 hear witnesses come in, as I said, and say they
16 were not paid, but the whole point is this is a
17 cost-overrun case, in which I don't think you have
18 any question that money came to Brandy Construction
19 Company, but where did the money go.

20 I ask you to ask yourselves
21 when you hear the evidence that you will hear. Show



1 me just one penny that went into Mr. Greenwalt's
2 pocket in some way. That is what I ask you to
3 do. Now has he put himself in this case to take
4 advantage of the money that came to him on the
5 house.

6 They may come in and say
7 that six thousand dollars is owed on the house
8 still at this point, and there may be testimony
9 that there is more than that owed. I don't know.
10 how much.

11 There are a number of
12 people who were paid, and you don't know where
13 all the money went. Mr. Gardner said it is a simple
14 case. He is going to come in and say there are
15 people who have not been paid. The question is
16 where is there criminal intent involved. Will
17 the Commonwealth be able to show you, beyond a
18 reasonable doubt, that anybody tried to steal money
19 or embezzle money or tried to take money away from
20 the Bishops or the Union Bank and Trust Company?

21 Again, it is a cost-overrun



1 case. When you get x-amount of dollars, and this
2 many bills, somebody is not going to get paid,
3 and that is what happened. I think the evidence
4 will show that and that neither what I say or what
5 Mr. Gardner says is evidence.

6 The truth of the matter
7 is when there is not enough money to go around
8 somebody doesn't get paid. It is sad, and many
9 builders you will hear from had the same problem,
10 but I tell you that it is not a crime.

11 I want to thank you for
12 your attention, and I hope that later on in the
13 case when I remind you of the question that I asked
14 you earlier about the presumption of innocence
15 that you will remember that. Thank you.

16 Your Honor, we move for
17 the exclusion of the witnesses, please.

18 THE COURT: All right, all witnesses
19 that expect to testify please stand over here and
20 be sworn.

21 THE SHERIFF: Come on up here.



1 **THE CLERK:** Raise your right hand. Do
2 you solemnly swear that the evidence you give in
3 this case will be the truth, the whole truth, and
4 nothing but the truth, so help you God?

5
6 **NOTE:** The witnesses all answer
7 in the affirmative.

8
9 **THE COURT:** Gentlemen, wait outside.
10 The Sheriff will try to make you as comfortable
11 as possible, and you will be called as soon as
12 you are needed.

13
14 **NOTE:** The witnesses depart
15 from the Courtroom in the company of the Sheriff.

16
17 **MR. SHEFFIELD:** May I also ask that anyone
18 not in the Courtroom be put under instruction not
19 to discuss the case and that may remain out of
20 the Courtroom?

21 **THE COURT:** All right, inform the witnesses
80 not to discuss the case.



1 MR. SHEFFIELD: And any additional witnesses
2 that come in.

3 THE COURT: Any additional witnesses
4 that come in you tell them the same thing.

5 THE SHERIFF: I told them.

6 THE COURT: And any new witnesses. Who
7 are they, Mr. Sheffield?

8 MR. SHEFFIELD: Your Honor, we have one
9 witness who was not present, and that is Judge
10 Cox.

11 THE SHERIFF: Is he in chambers?

12 MR. SHEFFIELD: No, he is present, but
13 I don't know where. There are others in the hall
14 that I want to ask that the Court give instruction
15 to.

16 THE COURT: Inform any of the witnesses
17 that were not sworn.

18 THE SHERIFF: I just informed them, Judge.

19 THE COURT: All right, call your first
20 witness. I believe you finished your opening state-
21 ment. Are you ready for a witness?



direct - Mrs. Bishop

1 MR. GARDNER: Yes, sir, call Mrs. Anita
2 Bishop.

3 THE CLERK: Do you solemnly swear the
4 evidence you give will be the truth, the whole
5 truth, and nothing but the truth, so help you God?

6 THE WITNESS: I do.

7 THE SHERIFF: Have a seat over there.
8

9 ANITA BISHOP, a witness, being
10 called for examination by the Commonwealth, first
11 being duly sworn, testified as follows:
12

13 DIRECT EXAMINATION

14 BY MR. GARDNER:

15 Q State your name and address, please,
16 for the jury.

17 A Anita Bishop, Post Office Box 415, Snow
18 Hill Subdivision, Spotsylvania.

19 Q Where do you live?

20 A Snow Hill Subdivision, Lot 20.

21 Q Is that subdivision located in Spotsylvania
82 County?



direct - Mrs. Bishop

- 1 A Yes.
- 2 Q How long have you lived there?
- 3 A About a year and a half now, roughly.
- 4 Q Do you recall when you moved in?
- 5 A February 28, 1980.
- 6 Q Do you know the defendant, Alvin Green-
- 7 walt?
- 8 A Yes, I do.
- 9 Q How do you know him, Mrs. Bishop?
- 10 A He was the general contractor. We signed
- 11 a contract with him to build our home.
- 12 Q The home you are now living in?
- 13 A Yes.
- 14 Q Do you recall when that contract was
- 15 signed?
- 16 A April of 1979.
- 17 Q Do you recall the purchase price or
- 18 the contract price?
- 19 A Eighty-three, nine-fifty.
- 20 Q Eighty-three thousand nine hundred and
- 21 fifty dollars?



direct - Mrs. Bishop

1 A Yes.

2 Q How did you and your husband plan to
3 make payments on that contract?

4 A We set up a construction loan with the
5 Union Bank and Trust, and Mr. Greenwalt was to draw on it
6 as needed for materials.

7 Q As the construction progressed?

8 A Yes.

9 Q And that bank is located in Caroline
10 County?

11 A Yes.

12 Q Can you describe for the jury briefly --
13 I don't expect you to tell specifications and so forth, but
14 briefly, what kind of home was to be built by Mr. Greenwalt?

15 A A five-bedroom rambler with a basement
16 and attached garage.

17 Q Was he to do all the work?

18 A Yes.

19 Q I show you a couple of photographs, Mrs.
20 Bishop. First of all, let me show you this photograph and
21 ask if you can identify it.



direct - Mrs. Bishop

1 A That is our home. This picture was
2 taken in the spring of this year.

3 Q In the spring of this year?

4 A Yes.

5 Q Did you actually take the photograph?

6 A Yes, sir, we did.

7 Q Does it accurately represent the way
8 the home looked in the spring of 1981?

9 A Yes, sir.

10 Q Is that the way the home was to have
11 been completed under the contract?

12 A Yes.

13

14 MR. SHEFFIELD: Objection, Your Honor.

15 That calls for a conclusion from the witness, and
16 I think it is a little bit out of line.

17 THE COURT: Well, it is --

18 MR. SHEFFIELD: The contract will speak
19 for itself.

20 THE COURT: She is one of the owners.

21 I think it is proper for her to answer that. Over-
ruled.



direct - Mrs. Bishop

1 MR. GARDNER: Thank you. I offer these
2 into evidence.

3 THE COURT: If there is no objection,
4 it will be admitted.

5 MR. SHEFFIELD: Your Honor --

6 THE COURT: Do you have an objection?

7 MR. SHEFFIELD: Did Mrs. Bishop testify
8 that she took the pictures?

9 MR. GARDNER: Yes.

10 MR. SHEFFIELD: No objection.

11
12 NOTE: The above referred to
13 photograph is now being marked and filed by the
14 Court as Commonwealth's Exhibit One.

15
16 Q Mrs. Bishop, I show you another photograph
17 which is marked as Commonwealth's Exhibit Two for identification
18 and ask if you can identify that.

19 A Yes, this is our home under construction.
20 This was taken in December of 1979.

21 Q Did you take this photograph also?



direct - Mrs. Bishop

1 A Yes, we did.

2 Q Does that accurately represent the way
3 that the home looked in December of 1979?

4 A Yes, it does.

5
6 MR. GARDNER: I offer this.

7 THE COURT: If there is no objection,
8 it will be admitted.

9 MR. SHEFFIELD: No objection.

10
11 NOTE: The above referred to
12 photograph is now being marked and filed by the
13 Court as Commonwealth's Exhibit Two.

14
15 Q Under the contract, Mrs. Bishop, what
16 was the expected completion date of your home?

17 A The contract read six months.

18 Q The photograph that has been introduced
19 as Commonwealth's Exhibit Two was taken how many months after
20 the contract was signed?

21 A Eight months.



direct - Mrs. Bishop

1 Q April to December, is that right?

2 A Yes.

3 Q Of course, the house was not completed
4 at that time, was it?

5 A No.

6 Q When was the house actually completed?

7 A The house is not completed, per se,
8 as yet.

9 Q What remains to be done on the house
10 in accordance with the contract?

11 A Right now, we are down to minor things,
12 such as we do not --

13
14 MR. SHEFFIELD: (Interjecting) Your
15 Honor, I think if we are going to talk about the
16 contract, it should be introduced first, talking
17 in all fairness.

18 MR. GARDNER: I am sorry, Judge, but
19 this copy is not stapled.

20
21 Q Mrs. Bishop, I show you several pages



direct - Mrs. Bishop

1 of documents, and I ask you if you can identify these for
2 the jury.

3 A This is a copy of the contract that
4 we signed with Mr. Greenwalt.

5 Q Does that contract specify the terms
6 and the work that is to be done on the house in the building
7 of the house?

8 A Yes.

9 Q Is that an accurate copy as far as you
10 can tell?

11 A As far as I can tell, yes.

12
13 MR. GARDNER: I offer this as an exhibit.

14 THE COURT: No objection it will be
15 admitted.

16
17 NOTE: The above referred to
18 contract is now being marked and filed by the Court
19 as Commonwealth's Exhibit Three.

20
21 Q Now, Mrs. Bishop, what is it that has



direct - Mrs. Bishop

1 not as of yet been done on the house that should have been
2 in accordance with the contract?

3
4 MR. SHEFFIELD: I will stipulate that
5 the contract has not been completed.

6 THE COURT: That might be helpful, but
7 I suppose that the Commonwealth has to know what
8 specifically has not been completed.

9 MR. GARDNER: Thank you, Your Honor.

10
11 A Well, like the contract called and
12 specified for drain blocks under the down spouts, and we
13 do not have those yet.

14 Q Can your husband better testify to that?

15 A Yes. We don't even have an occupancy
16 permit on the home yet.

17 Q But you are residing there?

18 A Yes, we have a temporary occupancy permit.

19 Q About the loan that you have with the
20 Union Bank and Trust Company in Bowling Green, what was the
21 total amount of that loan to be? Do you recall the total
50 amount?



direct - Mrs. Bishop

1 A (no response from witness)

2 Q Not how much was drawn on it, but how
3 much you all were committed for?

4 A Just a minute. I don't have the commit-
5 ment papers with me, but it was in the neighborhood of eighty
6 thousand dollars.

7 Q It was very near the full amount of
8 the contract cost?

9 A Yes.

10 Q Do you know how much was actually drawn?

11 A Seventy-six thousand dollars.

12

13 MR. SHEFFIELD: Your Honor, is that
14 testimony from personal knowledge or is that what
15 she thinks?

16 THE COURT: You can cross examine her
17 on that when you start.

18

19 Q You are liable to repay that money,
20 aren't you? You are liable to pay the money back for the
21 money drawn?



direct - Mrs. Bishop

1 A Correct.

2 Q So you know how much you owe?

3 A Yes, correct.

4 Q How much has been drawn on the account?

5 A Seventy-six thousand dollars has been
6 drawn on it.

7 Q Okay. Now, all of that money was drawn
8 for what purpose?

9 A To pay for --

10

11 MR. SHEFFIELD: (Interjecting) Your
12 Honor, objection. If she didn't draw it, how
13 would she know the purpose?

14 MR. GARDNER: Judge, it is her account
15 and she is in control. The bank is acting as her
16 agent.

17 THE COURT: Objection overruled.

18 THE WITNESS: Repeat the question.

19

20 Q For what purpose was the money drawn
21 from the account?



direct - Mrs. Bishop

1 A It was to be drawn to pay for materials
2 or to pay subcontractors in the construction of our home.

3
4 MR. GARDNER: That is all, Mrs. Bishop.

5 Answer Mr. Sheffield.

6
7 CROSS EXAMINATION

8 BY MR. SHEFFIELD:

9 Q Mrs. Bishop, you say that the money
10 was to be drawn for materials and labor on the house?

11 A Sir?

12 Q You said that the money was only to
13 be withdrawn for labor and materials on the house?

14 A Yes.

15 Q Was any of that money that was withdrawn
16 from that account used to pay interest on that loan?

17 A That I don't know.

18 Q So you are not sure if all of the money
19 was to be used purely for materials and labor or some might
20 have been interest?

21 A I know the certification said the materials
and workmen were to be paid.



cross -- Mrs. Bishop

1 Q Yes, but to answer my question, you
2 are not sure whether the money was to be used solely for
3 materials and labor or if some was to be used to repay the
4 interest on the loan?

5 A No, I don't know that.

6 Q Now, calling your attention to the contract,
7 the contract bears your signature or a copy of your signature?

8 A Yes.

9 Q And this contract is with Brandy Construc-
10 tion Company?

11 A That is correct.

12 Q Are you employed, Mrs. Bishop?

13 A No, I am not.

14 Q Now, this lot, you bought the lot your-
15 selves ahead of time?

16 A Correct.

17 Q What did you pay for that lot?

18 A Forty-one thousand five hundred dollars.

19 Q And you testified that the total contract
20 was eighty-three thousand nine hundred and fifty dollars?

21 A Correct.



cross - Mrs. Bishop

1 Q Now, did you ever authorize any payments
2 as far as Union Bank and Trust Company or was that your husband
3 that did that?

4 A Either one or two times, I authorized
5 it.

6 Q Did you do that over the telephone?

7 A Yes.

8 Q Who did you receive the phone call from
9 at the bank?

10 A Mr. Elliott. I called them; they didn't
11 call me.

12 Q So you called and authorized the payments
13 upon at least two occasions?

14 A On one occasion when Al said he needed
15 ten thousand dollars. At that time, we had authorized more
16 money out, and he said that he needed ten thousand dollars,
17 so I had to call and authorize it.

18 Q But you did authorize it?

19 A Yes.

20 Q Did you ever see these checks that came
21 from the bank of Bowling Green?



CROSS - Mrs. Bishop

1 A No, I did not.

2 Q Do you know who they were made payable
3 to?

4 A Sir?

5 Q Do you know who the checks were made
6 payable to?

7 A I didn't see the checks, so I wouldn't
8 know.

9 Q Now, do you know whether or not Brandy
10 Construction Company has paid for the following materials and
11 labor put into your house? Do you know if Brandy Construction,
12 from your knowledge, has paid for the air conditioner installed
13 there?

14 A As far as I know, that has been paid.

15 Q It has been paid. All right. How about
16 the bricks and blocks used on your house?

17 A Excuse me a moment. As far as I know,
18 yes.

19 Q How about the two brick masons that
20 worked on your house?

21 A Kim, the mason, was in Court to get
96 a judgment to get his money I know.



cross - Mrs. Bishop

1 MR. SHEFFIELD: Your Honor, I will ask
2 the Court to instruct the witness to answer my
3 question.

4
5 Q Do you know if the two brick masons
6 were paid for the work on your house, Mrs. Bishop?

7
8 MR. GARDNER: I ask the Court to instruct
9 her to answer only if she knows personally that
10 they received it. Not whether you have been told
11 or heard from some other source, but only if you
12 know from your knowledge.

13 THE COURT: That is correct.

14
15 Q Do you know if the two brick masons
16 have been paid for the work on your house?

17 A I don't know that.

18
19 THE COURT: If you don't know, just
20 say so.
21



Cross - Mrs. Bishop

1 Q Do you know if the cabinets in the house
2 have been paid for?

3 A Half of them have been.

4 Q Who made the cabinets?

5 A Marsh Furniture Company in North Carolina.

6 Q When did they bill for that? Do you
7 know of your own knowledge it has been paid or not?

8 A My husband called the credit manager
9 in North Carolina two weeks ago.

10 Q That was your husband. Did you call?

11 A No, sir, I did not.

12

13 MR. GARDNER: Your Honor, this is based
14 on hearsay. Mr. Greenwalt would be in a far better
15 position to tell whether they have been paid.

16 THE COURT: That is true. You are
17 subject to getting yourself hearsay answers with
18 questions of that sort. If she doesn't know, she
19 will have to say she doesn't know or I can't answer
20 the question.

21

THE WITNESS: I can answer it, but some-
body told me.



cross - Mrs. Bishop

1 Q Do you know if the carpenters have been
2 paid for the work done?

3 A I don't know.

4 Q Do you know if the persons who laid
5 the concrete slabs at your house have been paid?

6 A I don't know.

7 Q Do you know if the person who did the
8 electrical wiring has been paid?

9 A He personally told me -- may I say that,
10 sir? He personally told me that Al owed him eight hundred
11 dollars yet.

12 Q Who was that individual?

13 A Woody Carpenter.

14 Q Did Mr. Carpenter tell you that he has
15 not been paid eight hundred dollars on your house?

16 A Yes, sir.

17 Q When did he tell you that?

18 A February 23 of this year.

19 Q Do you know if he has been paid since
20 that time?

21 A I don't know.



cross - Mrs. Bishop

1 Q So your answer is that at this point
2 in time you don't know if the person who did the electrical
3 wiring for your house has been paid for the work he did on
4 your house, do you?

5 A No, I don't.

6 Q Do you know personally whether the exca-
7 vation on your house has been paid?

8
9 MR. GARDNER: Judge, I think it is safe
10 to say that she doesn't know. We have called the
11 witnesses who have not been paid to testify to
12 that. Mr. Sheffield is free to call Mr. Greenwalt.

13 THE COURT: Mr. Sheffield, maybe you
14 could save a little time by not asking her those
15 questions. It is obvious that what she says is
16 based on hearsay.

17 THE WITNESS: Even if they told me?

18 MR. GARDNER: If they told you, that
19 is hearsay, and that is the only way you have to
20 know.

21 THE COURT: You have to know of your



direct - Mr. Bishop

1 DIRECT EXAMINATION

2 BY MR. GARDNER:

3 Q State your name and occupation for the
4 jury, please, Mr. Bishop.

5 A Ralph Bishop, electronics engineer.

6 Q Where do you live?

7 A In Spotsylvania County, Snow Hill Sub-
8 division.

9 Q Is the lady who just testified, Anita,
10 is that your wife?

11 A That is correct.

12 Q Mr. Bishop, can you tell the jury what
13 has been done to your home in Snow Hill either by you personally
14 or at your expense since Mr. Greenwalt stopped construction
15 on it?

16 A I think I have it handwritten here.

17
18 MR. SHEFFIELD: Your Honor, I have to
19 inquire as to the relevancy to this line of ques-
20 tioning. I am sure that Mr. Bishop did a lot of
21 the work on the house, as anyone would, and I



direct - Mr. Bishop

1 would ask what relevancy there is to the charge
2 that Mr. Greenwalt has embezzled money.

3 MR. GARDNER: Your Honor, Mr. Sheffield
4 has taken the position that this whole mess stems
5 from a cost-overflow, and the Commonwealth has taken
6 the position that Mr. Greenwalt received seventy-
7 one thousand dollars, and the house, completed,
8 is only worth ninety thousand dollars a year and
9 a month later, and a good part of the completed
10 value or the near-completed value is due to the
11 work Mr. Bishop and his wife did or paid for
12 beyond what was done or paid to Mr. Greenwalt.

13 THE COURT: Your question to Mr. Bishop
14 was what?

15 MR. GARDNER: What he has personally
16 done or paid other people to do since Mr. Greenwalt
17 abandoned the contract or stopped working on the
18 construction.

19 THE COURT: I will overrule the objection,
20 and he may respond.

21 THE WITNESS: May I ask a question because



direct - Mr. Bishop

1 some of the stuff was during the contract, like,
2 I furnished the appliances and lights.

3
4 Q What I am after, Mr. Bishop, are things
5 that you provided by yourself or paid other persons to do
6 on the house, which Mr. Greenwalt was responsible for under
7 the contract?

8
9 THE COURT: Not things he was supposed
10 to have done or did not do.

11
12 Q I want you to testify to what you did
13 in the way of labor, what you paid other people to do that
14 provided labor or materials, things that should have been
15 done during the construction by Mr. Greenwalt but were not?

16
17 MR. SHEFFIELD: If I may object, the
18 only thing in evidence is that Brandy Construction
19 was involved with the Bishops. I don't think there
20 is anything in evidence that Mr. Greenwalt may
21 have been responsible for any of it.



direct - Mr. Bishop

1 Q Let me rephrase it this way, Mr. Bishop.
2 When you signed this contract and went through the several
3 months of construction and telephone calls and so forth,
4 were you dealing with Brandy Construction or Alvin Greenwalt?

5
6 THE COURT: Are they two separate entities?
7 Is this a corporation?

8 MR. GARDNER: That is a good question,
9 Your Honor. I think the evidence will show that
10 it was conducted as a sole proprietorship as far
11 as anyone knew. I think that is important.

12 THE COURT: It has to be one or the
13 other. I don't think that ought to hold up the
14 trial here, but are you making a claim that Alvin
15 Greenwalt is a separate entity from Brandy Construc-
16 tion, which is owned by somebody else or a corpora-
17 tion?

18 MR. SHEFFIELD: Your Honor, the only
19 contract we have here with the Bishops is Brandy
20 Construction. It is up to the Commonwealth to
21 show that Mr. Greenwalt had personal liability
as far as the Bishops were concerned.



direct - Mr. Bishop

1 THE COURT: You can talk about Brandy
2 Construction, Mr. Gardner, or you could call Mr.
3 Greenwalt as an adverse witness on the question
4 of the relationship to the corporation if you need
5 to or to establish whether or not it was a separate
6 entity or whether or not it was a corporation or
7 a sole proprietorship. I think you can ascertain
8 that by calling Mr. Greenwalt if you want to, but
9 right now, I guess you will have to proceed --

10 MR. GARDNER: (Interjecting) Judge,
11 could I question some of the witnesses as to how
12 they dealt in the construction on the contract,
13 because I am afraid I might not be able to call
14 Mr. Greenwalt in a criminal case as an adverse
15 witness.

16 THE COURT: I am mistaken. Thank you.
17 You are right. You cannot call him as an adverse
18 witness, but you can ask the other witnesses.

19 MR. GARDNER: Thank you.

20
21 Q Mr. Bishop, during the construction



direct - Mr. Bishop

1 process and during the negotiations on the contract, who
2 did you deal with?

3 A Mr. Greenwalt.

4 Q Did you ever deal with anyone other
5 than Mr. Greenwalt?

6 A No, no one else.

7 Q The contract itself, is there any place
8 indicating to you that you were dealing with a corporation?

9 A No, sir, it never did show whether it
10 was a corporation involved in it.

11 Q Were you told by Mr. Greenwalt or anyone
12 else you were dealing with a corporation?

13 A No, sir.

14 Q On the second page where it is signed,
15 the first signature, can you tell me whose signature that
16 is?

17 A Alvin Greenwalt.

18 Q Did you witness him sign that?

19 A Yes, sir.

20 Q Did he sign it Alvin Greenwalt, president,
21 or Alvin Greenwalt on behalf of Brandy Construction or simply
Alvin Greenwalt?



direct - Mr. Bishop

1 A Just Alvin Greenwalt.

2 Q Mr. Bishop, the four pages of this contract,
3 there is a heading up here referring to Brandy Construction,
4 is that correct?

5 A Correct.

6 Q Does that refer to a corporation or
7 a company?

8 A No, sir, it says Brandy Construction.

9 Q This is part of your contract with Mr.
10 Greenwalt, correct?

11 A That is correct.

12 Q Now, Mr. Bishop, in your opinion, who
13 was it that was building your home?

14 A Mr. Greenwalt was.

15 Q After Mr. Greenwalt stopped construction --
16 well, do you recall when he stopped construction? When was
17 the last time he came out or sent someone else out?

18 A I can't remember exactly, but probably --
19 we moved in the place February 28, I believe it was.

20 Q Of last year?

21 A 1980, and there was a couple of things
done after that, but just minor things.



direct - Mr. Bishop

1 Q Now, you don't recall exactly when or
2 approximately when it was the last time prior to your moving
3 in that he had gone to the property and performed any work
4 or sent someone else out to perform work?

5 A They worked up until the day I moved
6 in because I believe the carpet was installed just prior
7 to moving.

8 Q Why did you move in before the house
9 was completed?

10 A He was late on the contract, and I had
11 already sold the other house and had to move out and give
12 it to the owners.

13 Q To get back to the original question,
14 Mr. Bishop, can you tell the jury what you, yourself, did
15 or paid other persons to do which should have been done under
16 the contract on the construction of your home?

17 A We put all the appliances in, but that
18 was deducted from the contract.

19 Q That is not something then that Mr.
20 Greenwalt was paid to do, is it?

21 A He could put them in or I could put



direct - Mr. Bishop

1 them in. It was up to me. It would be subtracted if I put
2 them in myself.

3 Q Just tell the jury what things you did
4 or paid to do that were required to be done under the contract?

5 A Well, those were required if I didn't
6 do it.

7 Q Things that he was paid for, not things
8 that he received allowances for or that you received allowances
9 for.

10 A The outside concrete was put in.

11 Q What kind of concrete?

12 A The patio work and some walkway work.

13 Q Did you do that yourself or pay to have
14 it done?

15 A I paid a concrete subcontractor to do
16 it.

17 Q How much did you pay?

18 A Eight hundred dollars. I had the chimney
19 extended. I paid one hundred dollars for that.

20 MR. SHEFFIELD: Your Honor, ask the
21 witness to speak up.



direct - Mr. Bishop

1 A I paid one hundred dollars to have the
2 chimney raised to the height that the contract specified.
3 The contract specified that he would pay five hundred towards
4 towards the points on the mortgage settlement, and I paid
5 that. I paid one hundred and seventy-one dollars for interest
6 where the contract specified that he would pay the interest
7 on the construction loan until such time that I moved in.

8 I put screens on. No
9 screens were ever provided, and I paid approximately four
10 hundred dollars to get the screens and so forth.

11 One of the footing drains
12 was never buried. When Vepco was there, I paid fifteen dollars
13 to put that in.

14 We bought about fifty
15 dollars in moulding and so forth to finish up the service
16 area. Do you want the things not done?

17 Q Do you have a total figure for what
18 you actually paid for yourself to other persons to complete
19 the contract?

20 A I don't have that figured out that way.
21 I have a total price, but there is quite a bit to be done.



direct - Mr. Bishop

1 Q Go ahead and tell the jury what remains
2 to be done under the contract?

3 A On the back, it was supposed to be a
4 twelve by eighteen glassed-in porch that was never put on.
5 Splash blocks were specified in the contract.

6 Q What are splash blocks?

7 A The things at the end of the gutter
8 where the water comes down and hits the ground, and it is
9 supposed to take the water away from the footings.

10
11 MR. GARDNER: Can you hear?

12 THE COURT: Sheriff, tell them out there
13 to talk a little less loudly.

14
15 Q Go ahead.

16 A The balance of the sink, the little
17 scallop things, were never put on. I procured that for twenty-
18 five dollars. There was supposed to be cabinets in the service
19 area, and they were never put in. That's probably one hundred
20 dollars or so. I had to have a new roof put on because the
21 roof that was on it was defective, and I could never get
Mr. Greenwalt to come out and fix it.



direct - Mr. Bishop

1 Q Did you ever talk to him about the defect?

2 A I had my lawyer send him a letter regarding
3 it. Mr. Sheffield answered it, I believe, or somebody did
4 and said that is one thing they would not do, and I paid
5 forty-eight hundred dollars for a new roof. Behind the
6 chimney, water was pouring in where it was not flashed right.
7 You could see the cosmetic effect that there was too much
8 of an overhang on the shingles, and I believe in the informa-
9 tion that you have there is an architect's report regarding
10 this defective work.

11 Q What about the work you, yourself, did,
12 Mr. Bishop, you or your family?

13 A We did a lot of the lawn work. Some
14 was done by his people but some wasn't, and we did it. We
15 painted the service area. We painted the interior because
16 the carpet was ready to be laid, and nothing was painted.

17 Q All of that work was to have been done
18 by Mr. Greenwalt under the contract?

19 A Yes.

20 Q Have you totaled a figure that would
21 cover what you, yourself, did or paid to have done that should
112 have been done by Mr. Greenwalt?



direct - Mr. Bishop

1 A Well, including the appliances and every-
2 thing I supplied which were really a part of the total price
3 of the contract but should have been subtracted, the money
4 that I put into it and the work I put into it is approximately
5 thirteen thousand dollars.

6 Q Is the home completed yet?

7 A No, sir, I don't have the glassed-in
8 porch. I have the valance, but I don't have it up yet. There
9 are a few more things to be done yet.

10 Q Did there come times during the construc-
11 tion on your house where you authorized draws on the loan
12 from Union Bank and Trust?

13 A Yes, at certain intervals, he would
14 approach me and say that we did this much work, and I would,
15 like, ten thousand or fifteen thousand dollars or whatever
16 he felt the work was worth, and I would call the bank for
17 him to draw money from my construction loan.

18 Q What was your understanding the money
19 was being drawn for, for what purpose was it to be used for?

20 A To pay people for the work done.

21 Q If the home was not progressing according



direct - Mr. Bishop

1 to the contract and was, in fact, never finished, why was
2 it you authorized these draws periodically?

3 A Well, because he was progressing, and
4 we had milestones for completion, and some were partially
5 done, and we felt that he had met these milestones towards
6 completion.

7 Q Did you or your wife attempt to keep
8 up with the subcontractors and materials as they were being
9 paid as construction progressed?

10 A No, because I didn't know who the sub-
11 contractors were.

12 Q Let me ask you one question about the
13 loan. Do you know whether any interest payments were made
14 on the loan from the money withdrawn by Mr. Greenwalt?

15 A Well, yes. Usually, he would make a
16 draw, and he would pay the interest on that loan on the day
17 of the draw.

18 Q And that was part of the contract agree-
19 ment?

20 A Yes, that he would pay the interest.
21



cross - Mr. Bishop

1 MR. GARDNER: Thank you. Answer Mr.
2 Sheffield.

3
4 CROSS EXAMINATION

5 BY MR. SHEFFIELD:

6 Q Mr. Bishop, where did you say that you
7 worked?

8 A I didn't say.

9 Q Where do you work, sir?

10 A Washington, D.C.

11 Q For whom?

12 A The Federal Government.

13 Q In what branch?

14 A The Federal Aviation Agency.

15 Q Have you always worked for the Federal
16 Government?

17 A I wouldn't say always. I have since
18 1955 though.

19 Q Now, on the contract, it appears on
20 the back page of the contract, a signature signed Brandy
21 Construction Company by Alvin E. Greenwalt, is that correct?



cross - Mr. Bishop

1 A No, I wasn't at the bank when they were
2 picked up.

3 Q Now, you also testified that some of
4 the landscaping work you did, but some had been done by Brandy
5 Construction or subcontractors, is that correct?

6 A There was a colored fellow out there
7 that did part of it, but I don't know who he worked for or
8 anything about it.

9
10 MR. SHEFFIELD: I have no further ques-
11 tions. Thank you.

12 MR. GARDNER: I have one or two things
13 I think we had better clear up.

14
15 REDIRECT EXAMINATION

16 BY MR. GARDNER:

17 Q On the matter of the credits, the things
18 that you purchased should have been credits on the contract?

19 A Correct, it should have been deducted
20 from the contract price.

21 Q If you can, figure how much these



redirect - Mr. Bishop

1 things total and tell the jury what the total amount would
2 be minus these things.

3 A I paid fifteen hundred dollars for the
4 appliances, and five hundred dollars for the light fixtures,
5 and that is what the contract called for.

6 Q So that is two thousand dollars of the
7 thirteen thousand dollar figure?

8 A I don't want to figure the settlement
9 fees of five hundred dollars which he was supposed to have
10 paid. I paid nine hundred total. He was supposed to have
11 paid five hundred.

12 Q So the appliances and the light fixtures,
13 the agreement was if you paid for them that that amount would
14 be deducted from the contract price?

15 A Correct. That is two items.

16 Q If you deduct those amounts, how much
17 is left that you actually paid or still have left to pay?

18 A It would make it eleven thousand dollars.

19 Q Now, Mr. Sheffield asked you whether
20 you made any direct payments to Mr. Greenwalt yourself, and
21 you said that you did not, is that right?



redirect -- Mr. Bishop

1 A Correct.

2 Q Whose money was it that Mr. Greenwalt
3 received from the Union Bank and Trust Company?

4 A It was my construction loan under my
5 name.

6 Q And that is money that you are responsible
7 to pay?

8 A That's right.

9
10 MR. SHEFFIELD: There is no evidence
11 that Mr. Greenwalt received one penny. Brandy
12 Construction is the only entity we have heard
13 anything about.

14 THE COURT: That is argument for the
15 jury. I will overrule the objection at this time.

16 MR. GARDNER: That is all, Your Honor.

17 THE COURT: All right, you may step
18 down, Mr. Bishop.

19

20

21

WITNESS STOOD ASIDE



direct - Mr. Elliott

1 MR. GARDNER: Call Mr. Frank Elliott.

2 THE CLERK: Do you solemnly swear that
3 the evidence you give in this case will be the
4 truth, the whole truth, and nothing but the truth,
5 so help you God?

6 THE WITNESS: I do.

7 THE COURT: Come around and have a
8 seat, sir.

9
10 NOTE: Counsel are conferring
11 at the bench, which conference is unreported.

12
13 FRANK ELLIOTT, a witness, being
14 called for examination by the Commonwealth, first
15 being duly sworn, testified as follows:

16
17 DIRECT EXAMINATION

18 BY MR. GARDNER:

19 Q Mr. Elliott, would you state your name
20 and occupation, please?

21 A My name is Frank Elliott, and I am a
banker.



direct - Mr. Elliott:

1 Q What bank do you work with?

2 A The Union Bank and Trust Company in
3 Bowling Green.

4 Q What is your position there?

5 A I am vice-president.

6 Q Back in 1979, Mr. Elliott, did the Union
7 Bank and Trust Company extend a construction loan to Mr.
8 and Mrs. Ralph Bishop of Spotsylvania County?

9 A That is correct.

10 Q Tell the jury what the total loan commit-
11 ment on that construction loan was. How much money was actually
12 promised or committed to the Bishops?

13 A Well, I have the commitment in the file,
14 and the amount of the commitment for the project was eighty-
15 five thousand dollars.

16 Q How much of that money was paid out,
17 do you remember? Has it all been drawn now?

18 A I believe seventy-six thousand dollars
19 was actually paid out prior to the permanent.

20 Q Prior to converting the loan to the
21 permanent financing?



direct - Mr. Elliott

1 A Yes, I have a record here of the amount,
2 if you desire that.

3 Q Who was the general contractor for that
4 project to your knowledge?

5 A Alvin Greenwalt, Brandy Construction.

6 Q You say Alvin Greenwalt, Brandy Construc-
7 tion. Were they one and the same or two different entities?

8 A Well, let me think about that. I believe
9 that they were one and the same.

10 Q Why do you say that?

11 A I suppose the reason that I say that is
12 because of my relationship with the Bishops who were the
13 customers of the bank whenever we referred to the contractor.
14 In fact, I recall very vividly in my mind instructing Mr.
15 Bishop to check around and to be sure that he got a very
16 good, reputable contractor, and he came up with Al Greenwalt.

17 Q Can you explain what is meant by a construc-
18 tion draw? I am not sure that everyone on the jury would
19 know that. What is meant by the phrase of draws on a contract
20 or a loan like this?

21 A There can be different interpretations.



direct - Mr. Elliott

1 The most general one, the one that our bank uses, is a draw
2 is made when a certain amount of work has been completed,
3 that work being represented by both materials going to the
4 job and the labor expended.

5 Q The seventy-six thousand dollars that
6 you said was paid out, prior to converting that to permanent
7 financing, was that paid in the form of draws?

8 A Yes, it was.

9 Q To whom was that paid?

10 A To Alvin Greenwalt and Brandy Construction.

11 Q Who actually received that physically
12 and came and picked up the checks that you issued, Mr. Elliott?

13 A Mr. Greenwalt's secretary named Betty.
14 I don't remember the last name.

15 Q She is the one who physically took posses-
16 sion of the checks?

17 A That is correct.

18 Q Was there anything required by the bank
19 in the way of documentation before those draws would be issued
20 by the bank?

21 A Yes, we required a certification by



direct - Mr. Elliott

1 the contractor that the materials and labor had been paid
2 for prior to the draw up to that point.

3 Q Mr. Elliott, I want to show you a group
4 of papers stapled together, seven pages. They are marked
5 for identification as Commonwealth's Exhibit Four. Would
6 you look at those and tell the jury what they are?

7 A These are certifications that my bank
8 requires prior to each draw that all the material and costs
9 have been covered as of that date the draw was made.

10 Q As of the date of the certification?

11 A The date of the certification, yes,
12 because we would not want to put out money that was to be
13 used for anything other than materials and labor on Mr. Bishop's
14 job, and that is why we required that.

15 Q Who signed each one of these certifications?

16 A Signed by Alvin Greenwalt, Brandy Construc-
17 tion in the first one. One is signed by Alvin Greenwalt,
18 president, Brandy Construction. All the rest are signed
19 identical to the first one.

20 MR. GARDNER: I would like to offer
21 this group of papers as Commonwealth's Exhibit Four.



direct - Mr. Elliott

1 THE COURT: No objection, it will be
2 admitted.

3
4 NOTE: The above referred to
5 certifications are now being marked and filed by
6 the Court as Commonwealth's Exhibit Four.

7
8 Q Mr. Elliott, was there any additional
9 money loaned by your bank to the Bishops for the construction
10 of their home?

11 A Yes, but let me clarify that.

12 Q Yes, sir.

13 A As I mentioned, the loan was seventy-
14 six thousand dollars. Our commitment to the Bishops was
15 predicated on the fact that he would sell his property in
16 Annandale, Virginia, where he was moving from, and the proceeds
17 from the sale of that property would be used to pay off
18 the original loan, which was forty thousand, two, and that
19 thirty-five thousand dollars of that money would go towards
20 the loan of seventy-six thousand dollars. This was paid
21 down, and then, later on, because there was still room in



direct - Mr. Elliott

1 the commitment, they borrowed an additional three thousand
2 dollars more.

3 Q Mr. Elliott, did there come a time that
4 you asked on behalf of the bank that an appraisal of the
5 property be done by an expert?

6 A Yes, sir.

7 Q Do you recall when that was?

8 A That was sometime in 1980. I have the
9 appraisal in the file, and it is dated and everything, but
10 I would have to look it up. I don't recall the exact date.

11 Q Who was the appraiser?

12 A Orrick Johnson.

13 Q What was the purpose of that appraisal,
14 Mr. Elliott?

15 A Prior to a permanent loan, the bank
16 required a professional appraisal, and that was the reason
17 that I called Mr. Johnson.

18 Q That was prior to converting it to a
19 permanent loan?

20 A Yes.

21 MR. GARDNER: That's all, Mr. Elliott.

Answer Mr. Sheffield's questions, please.



cross - Mr. Elliott

1 **THE WITNESS: Yes, sir.**

2
3 **CROSS EXAMINATION**

4 **BY MR. SHEFFIELD:**

5 **Q Mr. Elliott, is buying a house a pretty**
6 **good investment in today's market?**

7
8 **MR. GARDNER: That calls for an opinion,**
9 **Your Honor, and is not relevant.**

10 **THE COURT: I don't believe that it**
11 **is relevant. I will sustain the objection.**

12 **MR. SHEFFIELD: All right, sir. A**
13 **witness that the defense has summoned has come in,**
14 **and I ask for the rule on the exclusion of the**
15 **witness.**

16 **THE COURT: You want the witness excused?**

17 **MR. SHEFFIELD: Yes, sir, Your Honor.**
18 **You will have to be excused, Judge Cox.**

19 **JUDGE COX: Where do you want me to wait?**

20 **THE COURT: Maybe he could be taken out**
21 **of order in a short while. Let's go ahead.**



cross - Mr. Elliott

1 Q Mr. Elliott, you said the total contract
2 was eighty-five thousand dollars, is that correct, sir?

3 A Repeat that question.

4 Q You said the total loan commitment that
5 the Bishops had was eighty-five thousand dollars on the construc-
6 tion loan, is that correct?

7 A That is correct.

8 Q And there was seventy-six thousand dollars
9 disbursed?

10 A That is correct.

11 Q You testified that -- you were asked
12 to whom it was disbursed. Wasn't it disbursed to Brandy
13 Construction Company?

14 A It was -- I would have to check the
15 actual checks to see, and I don't have possession of them
16 to see if it was disbursed to Brandy Construction or to Mr.
17 Greenwalt, but to my recollection, it was disbursed to Brandy
18 Construction Company.

19 Q To your knowledge, is Brandy Construction
20 Company a Virginia corporation?

21 A Yes, sir, it is. May I qualify myself



cross - Mr. Elliott

1 on that? At the time, I did not check with the State Corpora-
2 tion Commission.

3 Q But you now do know that at the time
4 those disbursements were made that Brandy Construction Company
5 was a corporation?

6 A Now, I do.

7 Q Thank you, sir. When those draws were
8 made, didn't the bank, in fact, get back interest payments
9 from Brandy Construction?

10 A Yes, that is true, but all of it was
11 not paid.

12 Q Yes, sir, I understand that, but as
13 each draw was made Brandy Construction, under the way it
14 was set up, was supposed to pay the interest on the Bishops'
15 loan?

16 A That is right.

17 Q I show you five checks, and ask if you
18 have any familiarity with these and if you can identify the
19 payee on these five checks?

20 A The Union Bank and Trust Company.

21 Q Yes, sir. I ask if you would look



cross - Mr. Elliott

1 at the back of the checks and identify the endorsement on
2 those checks.

3 A The Union Bank and Trust Company.

4 Q Do you believe that these were the interest
5 payments on that construction loan that came back as each
6 draw was distributed to Brandy Construction?

7 A That is my understanding, yes.

8
9 MR. SHEFFIELD: I would like to introduce
10 those into evidence, Your Honor.

11 THE COURT: No objection, it will be
12 admitted.

13 MR. GARDNER: No objection, Your Honor.

14
15 NOTE: The above referred to
16 five checks are now being marked and filed by the
17 Court as Defendant's Exhibit One.

18
19 Q Did you notice who they were signed
20 by, Mr. Elliott?

21 A I did not notice. No, I didn't.



cross - Mr. Elliott

1 Q But those were checks written on checks
2 that had Brandy Construction?

3 A I was looking at the payee and the endorser.

4 Q I am sorry, but I wasn't trying to trick
5 you.

6
7 MR. GARDNER: We will stipulate that
8 they are Brandy Construction checks, Your Honor.

9
10 Q You also testified that you got what
11 you called certifications prior to disbursement of a draw?

12 A The certification was brought in by
13 the secretary prior to the draw.

14 Q Now, sir, isn't it true that you called
15 Brandy Construction and dictated the sentence used in the
16 certifications at the beginning of this loan?

17 A I recall Mr. Greenwalt calling me in
18 regards to it. I believe Mr. Greenwalt was the one that
19 originally stated that.

20 Q But the language was satisfactory to
21 you as an officer of the Union Bank and Trust Company?



cross - Mr. Elliott

1 A Yes, it was.

2 Q And, yet, you chose to use the word
3 "cover" rather than "paid." Is there any significance to
4 that?

5 A No, because they are synonymous to me.

6 Q If you used the word "cover," does that
7 mean you meant to use the word "paid," but you chose to use
8 the word "cover?"

9 A If you want to use that terminology,
10 yes, sir.

11 Q Yet you received this from Brandy Con-
12 struction Company and you received it prior to making distri-
13 butions and yet the certification says that these bills are
14 paid but, in effect, what you mean is that the bills are
15 going to be paid? Is that really the way that it works?

16 A Let me think about that, mister.

17 Q Let me give you a little time to think
18 about it.

19 A Let's put it this way. The draws were
20 being used for working capital; therefore, we wanted to be
21 sure that all bills had been paid prior to the draw to buy
more materials and to pay for labor.



cross - Mr. Elliott

1 Q Yet, on your statement you required
2 that all materials and costs have been covered in the past
3 tense, and you required Brandy Construction to give you this,
4 and you would give them a check, but, really, the check you
5 gave was going to pay the labor and materials that had been
6 performed within that block of time, is that the understanding?

7 A In that block of time?

8 Q Yes, sir, since the last draw was made?

9
10 MR. SHEFFIELD: Let me strike that ques-
11 tion and rephrase it.

12
13 Q In other words, the process meant that
14 a certain amount of construction would proceed until it got
15 to, like, a milepost, and the contractor would make contact
16 and then you would make contact with the Bishops to see if
17 they authorized you to make a disbursement?

18 A Yes.

19 Q And you did that six or seven times?

20 A I am sure that I did. I stayed on the
21 phone quite a bit with the Bishops.



cross - Mr. Elliott

1 Q Were they calling you a lot during the
2 entire contract?

3 A Yes.

4 Q So that when they authorized this, then
5 you would receive what you have referred to as a certificate
6 saying yes, a certain amount of work had been paid for?

7 A Right.

8 Q And you would give a check. If the
9 work had been paid for, what would it go for?

10 A I just told you working capital. That
11 is normal in the trade.

12 Q In effect, that goes to pay for work
13 and labor that had been performed since the last draw?

14 A Yes, sort of to replace funds that were
15 supposedly paid out of Mr. Greenwalt's own funds.

16 Q I show you two documents which are en-
17 titled "waiver of liens," and ask if you are familiar with
18 these?

19 A Yes, I am.

20 Q What is a waiver of lien type of document?

21 A A waiver of lien is used by the banks.



redirect - Mr. Elliott

1 Q Mr. Elliott, can you identify these
2 documents? Are they copies of the cashier's checks issued
3 by the Union Bank and Trust Company?

4 A Yes, they are.

5 Q On what account or on what loan were
6 these checks issued, the original checks?

7 A They were issued on the account of,
8 as far as Union Bank and Trust Company is concerned, the
9 Bishops and paid to the order of Brandy Construction.

10 Q Are these checks which you have been
11 testifying about?

12 A Yes, they are.

13 Q Are these copies of the original checks
14 made after they were returned to the bank?

15 A Yes, they are.

16 Q In fact, these copies were made by you
17 or someone under your supervision at the bank, weren't they?

18 A That is correct.

19
20 THE COURT: I think that makes them ad-
21 missible, and they will be admitted. I have to
overrule you.



redirect - Mr. Elliott

NOTE: The above referred to
checks are now being marked and filed by the Court
as Commonwealth's Exhibit Five.

Q Now, Mr. Sheffield asked you if you
knew whose account they were deposited in. Can you tell
from looking at the copies who received the checks or to
whose account they were deposited?

A Yes, I can on some of them but not all
of them because some say deposit only. This check has been
credited to an account at the National Bank of Fredericksburg.
On that check, the payee is Brandy Construction Company.

Q Isn't it true if it is for deposit only
that it is deposited in the payee's account?

A That is true.

Q And all these checks indicated that
they were deposited to the account of Brandy Construction?

A That's correct.

MR. GARDNER: I offer this as the same
exhibit.



redirect - Mr. Elliott

1 MR. SHEFFIELD: I have to object based
2 on the original document rule, and the cites that
3 I have to put on that are Lee v. Topscott, 2 Va. 276,
4 which is an ancient case in the Commonwealth, and
5 Butts v. Commonwealth, 145 Va. 800, and I call
6 the Court's attention to two highly regarded writings
7 in McCormick, Section 230, and also in Friend's
8 at page 344.

9 In this particular situation,
10 we have a witness who has no idea where the checks
11 went and does not have the original checks with
12 him, and yet, they were available. These checks
13 are very difficult to read, and I think it is
14 incumbent on the Commonwealth to trace them down.

15 THE COURT: This witness testified as an
16 officer of the bank that he was familiar with them.
17 He did identify them as being copies of the checks
18 in question, and I think with that remedy that he has
19 caused these checks to rise to the required copy rule,
20 so the objection will be overruled and will be admitted.

21 MR. GARDNER: Just two more points, Your Honor.

THE COURT: All right.



redirect - Mr. Elliott

1 Q Mr. Elliott, Mr. Sheffield asked you
2 several questions and, in fact, went into great length about
3 the lien waivers and that kind of thing and finally asked
4 you if you were relying on the Bishops to tell you whether
5 or not the work had gone well up to the time a certification
6 was made and the draw was released from the bank, and you
7 indicated that you were relying on the Bishops. Who were
8 you relying on to tell you whether the mechanics, the people
9 who provided the material and labor, were paid up to the
10 date of the certification? Were you relying on the Bishops
11 or on Mr. Greenwalt?

12 A Mr. Greenwalt.

13 Q Finally, you indicated that you had
14 checked with the State Corporation Commission and determined
15 that Brandy Construction is, in fact, a Virginia Corporation,
16 is that correct, since the time of the draw and so forth?

17 A No, I didn't indicate that. I haven't
18 personally checked with the State Corporation Commission.

19 Q So you really don't know if Brandy Con-
20 struction is a corporation or not, do you?

21 A No, I don't know from personal knowledge.



redirect - Mr. Elliott

1 Q Was there anything brought to your atten-
2 tion during the course of this loan that led you to believe
3 that you were dealing with a corporation as opposed to Al
4 Greenwalt, doing business as Brandy Construction Company?

5 A I made an assumption initially that
6 Brandy Construction Company was not a corporation. I recall
7 in the beginning that Mr. Bishop wanted to be his own con-
8 tractor, and my bank has a policy, unless it is a very excep-
9 tional case, of not making a loan to an individual who wants
10 to be his own contractor, and I suggested to the Bishops
11 that he go out and find himself a good contractor, who will
12 give him a turn-key job and for his protection and the bank's
13 protection.

14 Mr. Bishop went out and
15 did research it and came up with Brandy Construction Company
16 and Mr. Greenwalt.

17
18 MR. GARDNER: That is all. Thank you.

19 MR. SHEFFIELD: One final thing if I
20 may on recross.
21



direct - Mr. Johnson

1 MR. GARDNER: Call Orrick Johnson, please.

2 MR. SHEFFIELD: Your Honor, the defense
3 will stipulate that Mr. Johnson is a well-known
4 expert appraiser in this area, and I will waive
5 any qualifications.

6 THE COURT: All right, thank you.

7
8 ORRICK JOHNSON, a witness, being
9 called for examination by the Commonwealth, first
10 being duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY MR. GARDNER:

13 Q Mr. Johnson, in the interest of saving
14 time, Mr. Sheffield has agreed to stipulate that you are
15 qualified to make expert appraisals and the Court accepts
16 you as that so you won't have to go into your education and
17 so forth.

18 A Okay.

19 Q Would you state, for the jury, your
20 name and occupation, please?
21



direct - Mr. Johnson

1 A My name is Orrick Johnson. I am a real
2 estate appraiser and broker, and my address is 402 William
3 Street, Fredericksburg, Virginia.

4 Q Mr. Johnson, were you called upon by
5 the Union Bank and Trust Company of Bowling Green to make
6 an appraisal of property known as Lot 20 in Snow Hill Sub-
7 division in Spotsylvania?

8 A I was, in November of 1980.

9 Q Mr. Johnson, I know there are several
10 methods of appraising, but what method do you consider the
11 most reliable?

12 A We were requested by the Union Bank
13 and Trust to make an appraisal, and there are two approaches,
14 the cost approach and the market approach. The market approach
15 uses the sales of similar property.

16 Q Is that approach based on comparisons
17 of purchase prices actually paid for a similiar piece of
18 real estate?

19 A We take market sales and compare them
20 to the subject property and make adjustments for any differences.

21 Q Was that approach used in appraising
140 this particular piece of property, Mr. Johnson?



direct - Mr. Johnson

1 A It was.

2 Q Tell the jury what figure you came up
3 with the appraisal in 1980.

4 A November 13, 1980, we appraised the
5 building and land for one hundred and thirty thousand dollars.

6 Q Did you try to break down how much of
7 that value was attributable to the land and how much to the
8 home?

9 A We also used the cost approach, and
10 we allocated about forty thousand dollars to the land. It
11 is my understanding that is what they did pay for a little
12 over ten acres of land. We take the house and land as a
13 package, and it is tough to divorce the land from the house,
14 but approximately forty thousand dollars would be the land
15 value.

16 Q Mr. Johnson, at the time of your appraisal,
17 was that house completed?

18 A It was mainly completed, maybe ninety-
19 eight percent complete.

20 Q Can you tell us if the Bishops were,
21 in fact, living in it?



direct - Mr. Johnson

1 A It was occupied at the time that we
2 inspected the house.

3 Q Now, Mr. Johnson, during the time between,
4 say, December of 1979, and November of 1980, would the value
5 of that house have increased or decreased?

6 A That was the period before the high
7 interest rates. The building costs and materials were going
8 up at one percent a month and values in the area were going
9 from seven to ten percent a year.

10 Q From seven to ten percent a year?

11 A Yes, sir.

12 Q Would there have been a similar increase
13 between April of 1979 and December of 1979?

14 A I would say that the same would apply.

15 Q So that between April of 1979 and November
16 of 1980, perhaps as much as twelve to fourteen percent increase
17 might have been expected?

18 A My appraisal did not take that into
19 consideration, but from my experience in the real estate
20 business, I think that is a fair amount to say it would have
21 been increased.



direct - Mrs. Danielson

1 Q Mrs. Danielson, state your name and
2 occupation for the jury, please.

3 A Anna N. Danielson, secretary of John
4 R. Danielson, Well Drilling, and we are basically a well
5 and drain field business.

6 Q Were you in that business back in 1979
7 and 1980 in this area?

8 A Yes, we were.

9 Q Where is the corporation based?

10 A Where is our corporation based? In
11 Virginia at Four Mile Fork.

12 Q Is that in Spotsylvania County?

13 A Yes, sir.

14 Q Did your company have any occasion to
15 do work drilling a well or any other work in the property
16 known as Lot 20 in Snow Hill, the property owned by Mr. and
17 Mrs. Ralph Bishop?

18 A Yes, we took a bore out and encountered
19 rock. We took a bore and went back a second time and encoun-
20 tered rock again and, subsequently, went back with a drill.

21 Q Boring and drilling are two different



direct - Mrs. Danielson

1 methods of making or creating a well, is that right, Mrs.
2 Danielson?

3 A That is correct.

4 Q At whose request was that done by the
5 Danielson Company?

6 A Al Greenwalt either called or came by
7 the office. This arrangement was the normal one that we
8 used to do work. The bill was sent out to Brandy Construction
9 Company dash Al Greenwalt.

10 Q Brandy Construction dash Al Greenwalt?

11 A Yes, and I have a bill here. His name
12 is on the second line of that one.

13 Q Is this a true copy of one of the bills
14 sent to Mr. Greenwalt for this work you actually did on the
15 Bishop property?

16 A Yes, there were originally three copies,
17 and that is the second copy.

18
19 MR. GARDNER: I would like to offer this.

20 THE COURT: Any objection?

21 MR. SHEFFIELD: I have no problem with it.



direct - Mrs. Danielson

1 NOTE: The above referred to
2 Danielson bill is now being marked and filed by
3 the Court as Commonwealth's Exhibit Six.

4
5 Q Mrs. Danielson, how much in dollars
6 and cents was billed to Al Greenwalt for the work done on
7 the lot in Snow Hill, the Bishops' lot?

8 A No charge was made for the first attempt
9 at boring the well. I think we charged one hundred and seven-
10 teen dollars for the second time that the boring rig went
11 out there. The total came to, I believe, eighteen hundred
12 and ninety-nine dollars.

13 Q Does the bill show the correct amount
14 total?

15 A Yes, it does.

16 Q How much of that money has been paid
17 to the Danielson Company?

18 A None.

19 Q None of it has been paid?

20 A None.

21 Q Does that bill show the date it was
sent?



direct - Mrs. Danielson

1 A Yes, it does at the top.
2 Q What is that date?
3 A February 18, 1980.
4 Q And nothing has been paid to date?
5 A None.
6 Q Mrs. Danielson, had you and your company
7 done other work for Al Greenwalt?
8 A Had we done?
9 Q Yes, ma'am.
10 A Yes.
11 Q In your dealings with Al Greenwalt,
12 did you --

13
14 MR. SHEFFIELD: (Interjecting) Objec-
15 tion, Your Honor. Do we have to hear all of this?
16 The Commonwealth has fifty million witnesses here.

17 MR. GARDNER: We don't have fifty
18 million witnesses, Your Honor. Mr. Sheffield has
19 required the Commonwealth to prove certain things
20 and, yet, he doesn't want me to.

21 THE COURT: Is it related to Snow Hill?



direct - Mrs. Danielson

1 MR. GARDNER: It will go to show that
2 he was doing business as Al Greenwalt.

3 THE COURT: For that purpose, I will
4 allow it. Overruled.

5
6 Q Mrs. Danielson, in your company's dealings
7 with Al Greenwalt, were you dealing with a corporation or
8 did you feel or were you led to believe that you were dealing
9 with Al Greenwalt, the individual?

10 A To be perfectly honest, I never knew
11 it was a corporation. Even their checks said Brandy Construc-
12 tion Company. As far as I knew, it was Al Greenwalt operating
13 or trading as Brandy Construction Company.

14
15 MR. GARDNER: Thank you, Mrs. Danielson.

16 MR. SHEFFIELD: May we approach the
17 bench a moment, please?

18
19 NOTE: Counsel are conferring
20 at the bench, which conference is unreported.
21



direct - Mrs. Cooper

1 THE COURT: You are free to leave.

2

3

4

WITNESS STOOD ASIDE

5

6

MR. GARDNER: Call Mrs. Lucy Cooper.

7

8

9

10

THE CLERK: Raise your right hand. Do
you solemnly swear the evidence you give in this
case will be the truth, the whole truth, and nothing
but the truth, so help you God?

11

THE WITNESS: I do.

12

13

14

15

16

LUCY COOPER, a witness, being
called for examination by the Commonwealth, first
being duly sworn, testified as follows:

17

DIRECT EXAMINATION

18

BY MR. GARDNER:

19

20

Q Mrs. Cooper, state your name and occupation,
please.

21

A Lucy Cooper, and I work for Chancellor

148 Plumbing and Heating as a secretary.



direct - Mrs. Cooper

1 Q Where is that located?

2 A Up on Route 17 at the Interstate Business
3 Park.

4 Q In Stafford County?

5 A Yes, sir.

6 Q Now, what are your duties as secretary?

7 A I fix the bills, type the proposals
8 up, carry the bills up and pick checks up.

9 Q Do you keep the books for the company?

10 A Yes, sir.

11 Q Were you in that position or in that
12 capacity when work was performed by Chancellor Plumbing on
13 the Bishops' home in Spotsylvania County?

14 A Yes, sir, I was.

15 Q When was that work done?

16 A The work started October 2 of 1979,
17 and we did the ground work, which is the water pipe and plastic
18 pipe.

19 Q That was done in October of 1979?

20 A Yes, sir, and he paid that on February
21 22, 1980.



direct - Mrs. Cooper

1 Q How much was the bill for the ground
2 work and how much was paid in February?

3 A One thousand five hundred and fifty
4 dollars, and he paid that bill in full. That was the first
5 draw.

6 Q Is it fair or accurate to say that
7 plumbing work in residential houses are done in stages?

8 A Yes, sir, it is usually three stages.

9 Q What are those stages?

10 A The ground work, if there is not a crawl
11 space, you do the crawl space, and run the water and plastic
12 lines, and the final is fixtures.

13 Q What do you mean exactly? The people
14 on the jury are not plumbers, and they may not understand
15 what you are saying. Can you tell us in clear, everyday
16 language what that consists of?

17 A The ground work is the foundation, where
18 they put the sewer lines in for the water to go out. After
19 the foundation is put up and they have the house underway,
20 that is when we run the water pipe lines in the house and
21 the plastic lines through the house, and the third stage
is the fixtures;



direct - Mrs. Cooper

1 Q Is that the setting of the commode and
2 so forth?

3 A Yes, sir, and the hot water heater.

4 Q I believe you said Chancellor Plumbing
5 was paid for the first statement of work in full?

6 A Yes, sir.

7 Q How much was the bill on the second
8 stage of the work on the house?

9 A One thousand sixty-seven dollars and
10 seventy cents, but we also had to add the pump in the storage
11 tank, which is separate from the contract.

12 Q What do you mean separate from the con-
13 tract?

14 A Yes, the complete price of the house.

15 Q What do you mean by that?

16 A The complete price to do just the house
17 alone was two thousand three hundred and fifty dollars.

18 Q Do you mean the work done outside of
19 the dwelling house itself?

20 A Right. The pump and storage tank, that
21 is separate from the house price.



direct - Mrs. Cooper

1 Q What do you mean by the pump and storage
2 tank?

3 A When they have to have a well, we have
4 to put that in.

5 Q Is that to store the water and pump
6 the water to the house?

7 A Yes, sir.

8 Q What was that amount?

9 A The final draw on the fixtures was one
10 thousand sixty-seven dollars and seventy cents. The pump
11 and storage tank was one thousand three hundred and fifty
12 dollars.

13 Q What was the second figure?

14 A One thousand three hundred and fifty
15 dollars.

16 Q What are these figures totaled, do you
17 know?

18 A I have one here for two thousand four
19 hundred and twenty-nine dollars and seventy cents.

20 Q How many of those bills were actually
21 paid to Chancellor Plumbing and Heating?



direct - Mrs. Cooper

1 A Nothing has been paid as of yet. None
2 of the final, and not the pump and storage tank.

3 Q When was the work completed and billed?

4 A February 8, 1980, and February 21, 1980.

5 Q The second stage was billed February
6 8 and the final stage on February 21, 1980, is that right?

7 A Yes, sir, correct.

8 Q Where were those bills sent?

9 A Hand-carried to Al Greenwalt.

10 Q Did you do that?

11 A Yes, sir.

12
13 MR. GARDNER: That's all. Answer Mr.

14 Sheffield.

15
16 CROSS EXAMINATION

17 BY MR. SHEFFIELD:

18 Q Mrs. Cooper, have you had any conversa-
19 tion at all this afternoon in the hall with Mrs. Bishop?

20 A No, sir. We were out there talking
21 about fishing and our children and things like that. Everyone
out there was talking.



cross - Mrs. Cooper

1 Q Now, Mrs. Cooper, who did Chancellor
2 Plumbing and Heating, Inc. deal with? Did they deal with
3 Brandy Construction Company?

4 A We dealt with Brandy Construction, which
5 is Al Greenwalt.

6 Q How do you know that?

7 A Because that is what the checks were
8 written for. The checks he did pay was Al Greenwalt, and
9 we dealt with Al Greenwalt.

10 Q You dealt with Mr. Greenwalt in the
11 same way that people would deal with you for your corporation?

12 A I guess.

13 Q Now, you testified that you received
14 fifteen hundred and fifty dollars which covered the rough-in
15 for the first stage?

16 A Right.

17 Q I show you a copy signed by William
18 Cooper of an estimate of the work, in which it says that
19 the first and second stages were to be fifteen hundred and
20 fifty dollars?

21 A The reason for that is the ground work



redirect - Mrs. Cooper

1 A No, only the one house.

2 Q Had you been asked, would you have signed
3 one prior to being paid?

4 A No, sir, I would not.

5
6 MR. SHEFFIELD: Objection.

7 THE COURT: I think you are right, Mr.
8 Sheffield. I will rule in your favor.

9
10 Q You mentioned before to Mr. Sheffield
11 that you had received other checks from Brandy Construction
12 signed by persons other than Jenny Greenwalt?

13 A Yes, sir.

14 Q Who signed the other checks?

15 A Betty has signed them and so has Al.

16 Q Can you explain why there was an increase
17 between the amount of the estimate that you gave and the
18 amount of the final bill for the work on this job?

19 A The only increase was when he come up
20 with the whole figure. Like I told you before, the pump
21 and storage tank is not included in the contract on the house.



redirect - Mrs. Cooper

1 Q How much did the pump and storage tank
2 come to?

3 A One thousand three hundred and fifty
4 dollars.

5 Q Let me ask it this way. Is any of the
6 difference between the estimate that you gave and the total
7 final bill you gave attributable to inflation and an increase
8 in your cost?

9 A The only difference in it is the extra
10 on the final bill.

11 Q So the only difference is what you were
12 asked by Mr. Greenwalt to do?

13 A Yes, sir.

14
15 MR. GARDNER: Thank you.

16 THE COURT: You may step down. Any
17 reason to hold Mrs. Cooper?

18 MR. SHEFFIELD: No, sir.

19 MR. GARDNER: No, sir.

20 THE COURT: You are free to leave.
21



direct - Mr. Seale

1 MR. GARDNER: Call Sidney Seale, please.

2 THE CLERK: Do you solemnly swear the
3 evidence you give in this case will be the truth,
4 the whole truth, and nothing but the truth, so
5 help you God?

6 THE WITNESS: I do.

7
8 SIDNEY SEALE, a witness, being
9 called for examination by the Commonwealth, first
10 being duly sworn, testified as follows:
11

12 DIRECT EXAMINATION

13 BY MR. GARDNER:

14 Q State your name and occupation for the
15 jury.

16 A Sidney Seale, Assistant Treasurer of
17 J. W. Masters, Incorporated.

18 Q I expect that most of you know, but
19 tell the jury what J. W. Masters, Incorporated does and where
20 it is located?

21 A J. W. Masters is a lumber and building



direct - Mr. Seale

1 supply firm in the City of Fredericksburg, where we supply
2 all types of building materials for construction.

3 Q Was J. W. Masters in that type of business
4 between April of 1979 and February of 1980?

5 A Yes, sir.

6 Q During that period of time, Mr. Seale,
7 did J. W. Masters supply materials for construction on the
8 home that the Bishops now reside in in Snow Hill?

9 A Yes, we did.

10 Q Can you tell the jury from your records
11 in dollars and cents how much material was actually provided
12 for that home?

13 A By our records, we had approximately
14 eleven thousand dollars, almost twelve thousand total.

15 Q Almost twelve thousand dollars?

16 A Yes, sir.

17 Q How much of that has now been paid,
18 Mr. Seale?

19 A The total amount has now been paid.

20 Q And when was it paid?

21 A Well, in September of '79, we had



direct - Mr. Seale

1 approximately nine hundred and fifty dollars paid. In October
2 of '79, there was another nine hundred and thirty dollars
3 approximately paid. In February of 1980, there was one thousand
4 six hundred and fifty dollars paid. In March of this year,
5 the remainder, which was eleven thousand dollars was paid.

6 Q So between February of 1980 and March
7 of this year a sum of eleven thousand dollars was still owed
8 on the materials provided for that home?

9 A Yes, sir.

10 Q Can you tell this jury how it was that
11 Masters collected their eleven thousand dollars?

12
13 MR. SHEFFIELD: I object. I don't see
14 the relevancy. The testimony was the money was
15 owed and the money was all paid in March, but to
16 what extent of how it was paid doesn't have any
17 bearing on the proceeding.

18 MR. GARDNER: Mr. Sheffield has asked
19 a witness who supplied material whether they tried
20 through means of a mechanic's lien or civil judgment
21 against Al Greenwalt or Brandy Construction Company



direct - Mr. Seale

1 to collect the money owed. Now we have a witness
2 who has collected their money, and Mr. Sheffield
3 objects to telling the jury how he did that.

4 THE COURT: I think you have to be fair,
5 Mr. Sheffield. I have to overrule you on it.

6
7 Q Can you explain to the jury, Mr. Seale,
8 how it was that Masters collected that eleven thousand dollars
9 in March?

10 A In March, we received the proceeds from
11 a foreclosure sale, I believe, on Lot 85 in Sheraton Hills
12 East, and those proceeds were used to pay this job.

13
14 MR. GARDNER: Thank you, Mr. Seale.
15 That is all I have.

16 THE COURT: All right, sir, cross examine.

17
18 CROSS EXAMINATION

19 BY MR. SHEFFIELD:

20 Q Mr. Seale, let's make it clear now.
21 In this past March, you received eleven thousand dollars
160 that was owed to you from this house?



direct - Mr. Lee

1 MR. GARDNER: Thank you, Mr. Seale.

2
3
4 WITNESS STOOD ASIDE

5
6 MR. GARDNER: Call Bruce Lee.

7 THE CLERK: Raise your right hand. Do
8 you solemnly swear the evidence you give in this
9 case will be the truth, the whole truth, and nothing
10 but the truth, so help you God?

11 THE WITNESS: I do.

12
13 BRUCE LEE, a witness, being
14 called for examination by the Commonwealth, first
15 being duly sworn, testified as follows:

16
17 DIRECT EXAMINATION

18 BY MR. GARDNER:

19 Q Mr. Lee, state your name and occupation.

20 A Bruce Lee, vice president of R. C. Lee's
21 Carpet Mart.



direct - Mr. Lee

1 Q Were you actually working with the company
2 or an officer in the company back between April of 1979 and
3 February of 1980?

4 A Yes, sir.

5 Q Where is that located?

6 A 3711 Lafayette Boulevard in Spotsylvania
7 County.

8 Q During that period of time, did R. C.
9 Lee provide floor carpet and tile and so forth for a home
10 built for the Bishops in Snow Hill?

11 A Yes, we did.

12 Q At whose request was that work done?

13 A Mr. Greenwalt.

14 Q Can you tell the jury how much was billed
15 for that work and how much was paid?

16 A Okay. In February of 1980, the bill
17 was twenty-four hundred forty-two dollars and fifteen cents.

18 Q Typically, carpet and tile would be
19 the last thing billed on a home, is that correct?

20 A Just about the last thing done, yes.

21 Q And that was in February of 1980?



direct - Mr. Lee

1 A Yes, it was billed out on February 20,
2 1980.

3 Q What was the exact amount, Mr. Lee?

4 A Twenty-four forty-two and fifteen cents.

5 Q How much of that amount is still owed
6 to R. C. Lee?

7 A All of it.

8
9 MR. GARDNER: Thank you, Mr. Lee.
10

11 CROSS EXAMINATION

12 BY MR. SHEFFIELD:

13 Q Mr. Lee, R. C. Lee Carpet and Tile is
14 a corporation, is that right?

15 A Yes, sir.

16 Q Are you a sole shareholder?

17 A No, sir.

18 Q Are you a shareholder?

19 A Yes, a third.

20 Q On the figure you are talking about
21 of twenty-four hundred forty-two dollars and fifteen cents,



cross - Mr. Lee

1 did you pursue a civil remedy to try to collect the money
2 owed?

3 A Did we?

4 Q Yes, sir, have you?

5 A Yes, sir, we have.

6 Q Have you filed a mechanic's lien and
7 a motion for judgment against Brandy Construction Company?

8 A Yes, we did.

9 Q To your knowledge, is Brandy Construction
10 a corporation like R. C. Lee?

11 A At the time, I didn't know, but yes,
12 I know now.

13
14 MR. SHEFFIELD: No further questions.

15 MR. GARDNER: One question.

16
17 REDIRECT EXAMINATION

18 BY MR. GARDNER:

19 Q Mr. Sheffield asked you if you filed
20 a mechanic's lien to collect the money and you said you had
21 or R. C. Lee had?



direct - Mr. Beale

1 DIRECT EXAMINATION

2 BY MR. GARDNER:

3 Q Mr. Beale, state your name and occupation
4 for the jury.

5 A My name is David Beale, manager of
6 Davenport Insulation, Inc. in Fredericksburg.

7 Q Has that company been in business since
8 prior to April of 1979?

9 A Yes, sir.

10 Q Have you been employed with the company
11 since that time?

12 A Yes, sir.

13 Q When did you actually begin work in
14 the company here in Fredericksburg?

15 A Since 1973.

16 Q During the period of time between April
17 of 1979 and February of 1980, did Davenport Insulation provide
18 labor and / or materials for the home built for Mr. and Mrs.
19 Bishop in Snow Hill in Spotsylvania County?

20 A Yes, sir, we did.

Q What work and materials were provided?



direct - Mr. Beale

1 A We provided eight hundred and fifty
2 dollars worth of insulation mainly to Lot 20 in Snow Hill.

3 Q Did you all install it or simply deliver
4 that?

5 A We installed it, yes, sir.

6 Q Who requested that that work be done
7 by Davenport Insulation?

8 A Mr. Greenwalt.

9 Q When did you bill -- when did Davenport
10 Insulation bill for that job?

11 A February 19.

12 Q February 19 of 1980?

13 A Yes, sir, '80.

14 Q What was the total amount of that bill?

15 A Eight hundred and fifty dollars.

16 Q How much of that bill has been paid
17 to date?

18 A None of it, sir.

19
20 MR. GARDNER: Thank you. Cross examine.
21



cross - Mr. Beale

CROSS EXAMINATION

BY MR. SHEFFIELD:

Q Davenport Insulation is a corporation,
isn't it, Mr. Beale?

A Yes, sir.

Q Have you filed civil suit against Brandy
Construction?

A We placed a judgment against Mr. Greenwalt.

Q That was against Brandy Construction,
wasn't it?

A Yes, sir.

THE COURT: Let's find out who it is
against.

THE WITNESS: Brandy Construction
and Al and Virginia Greenwalt.

Q I show you a copy of the execution on
this, and does that say Brandy Construction, Inc.?

A Yes, sir.

Q Do you know from your personal knowledge



cross - Mr. Beale

1 whether this was a judgment against either Mr. or Mrs. Green-
2 walt personally?

3 A No, sir, I don't, unless these documents
4 say something, but I can't say.

5 Q I also show you a check for five hundred
6 and sixteen dollars to Davenport Insulation dated December
7 of 1979 on the Brandy Construction account.

8 A Right.

9 Q Do your records indicate having received
10 that?

11 A Yes, sir.

12 Q And you have been credited for that?

13 A Yes, sir.

14 Q I ask is Mr. Alvin Greenwalt's name
15 anywhere on that check?

16 A May I see the front. No, it says Jenny.

17 Q Was this partial payment on the work
18 done in Snow Hill, Mr. Beale?

19 A I have a recorded invoice here, a bill
20 that says Lot 140 crossed out and says Lot 20 instead.

21 Q That was Lot 20 in Snow Hill that this



cross - Mr. Beale

1 amount of five hundred and sixteen dollars was applied to,
2 wasn't it?

3 A I am not sure it was.

4 Q But you did get five hundred and sixteen
5 dollars?

6 A Yes, sir.

7
8 MR. SHEFFIELD: I would like to introduce
9 this as a defense exhibit.

10
11 NOTE: The above referred to
12 check is now being marked and filed by the Court
13 as Defendant's Exhibit Four.

14
15 REDIRECT EXAMINATION

16 BY MR. GARDNER:

17 Q I am a little confused. You testified
18 that eight hundred and fifteen dollars was billed?

19 A Correct, for the ceiling and crawl space.

20 Q Mr. Sheffield has produced a check made
21 payable to Davenport Insulation. Are you sure or can you



redirect - Mr. Beale

1 tell from your records whether or not it was a check for
2 Lot 20 in Snow Hill?

3 A I was not the manager at that time.
4 Jeff Bowles was. According to the records, on October 31,
5 we did work on the side walls for Lot 20. This bill does
6 not show whether it was Lot 20. We have a check here or
7 a copy of a check which shows five hundred and sixteen dollars.
8 We did more work on November 15.

9 Q November 15 of what year?

10 A 1979. We did work on December 29 for
11 another house, which was never paid for, and then, apparently,
12 the last house was the ceiling on February 19 for Lot 20,
13 Snow Hill. I believe we have billed at different times.
14 The February bill is for eight hundred and fifty dollars
15 which has never been paid.

16 Q None has been paid, is that correct?

17 A Correct.

18 MR. GARDNER: Thank you.

19 MR. SHEFFIELD: One followup.
20
21



direct - Mr. Guillotte

1 BY MR. GARDNER:

2 Q I believe you were sworn?

3 A Yes, I sure was.

4 Q If you would, state your name and occu-
5 pation.

6 A Mark Guillotte, credit officer of Lowe's
7 in Fredericksburg.

8 Q Where is that office located?

9 A Highway One, south, Four Mile Fork area.

10 Q Mr. Guillotte, can you testify as to
11 whether or not the office you work for provided building
12 materials and supplies for construction of the home on the
13 Bishops' property in Snow Hill?

14 A We sure did.

15 Q How much in terms of dollars and cents
16 was provided for that construction as far as the building
17 materials?

18 A Four thousand dollars. Well, a total
19 amount of four thousand one hundred and ninety-nine dollars
20 and seventy-three cents is still owed in material charges
21 and accumulated service charges of six hundred and eighty-
nine dollars.



direct - Mr. Guillotte

1 Q But four thousand dollars is still owed
2 on that?

3 A Yes, sir.

4 Q When was the last time materials were
5 provided for that job?

6 A February 18, 1980.

7 Q That is the last billing?

8 A That is the last invoice.

9 Q Were all of those four thousand one
10 hundred and ninety-nine dollars and seventy-three cents worth
11 of materials provided on that date or is that the last date
12 of billing?

13 A That is the last date of the bill. This
14 runs from September of 1970 until the date I just gave you.

15 Q Who requested those materials for the
16 construction?

17 A That I can't testify to. I was not
18 present at the time, sir.

19 Q Who were the bills made out to?

20 A Brandy Construction.

21 MR. GARDNER: That's all.



1 JURY OUT

2
3 MR. BRICKEN: Your Honor, we have a motion
4 to strike based on two parts primarily. I will
5 address the first part and Mr. Sheffield will
6 address the second part. The part I will be
7 addressing concerns the corporation, and the Common-
8 wealth's burden of proving criminal intent on the
9 part of an officer.

10 I think it has certainly
11 been clear through the testimony by the Commonwealth's
12 witnesses that, at least, the majority of them
13 if not all of them, were dealing with Brandy Con-
14 struction Company, although most did not really
15 know that Company or Co. -- C-O-period -- was,
16 in fact, a Virginia designation for an incorporated
17 entity. They were, in fact, dealing with a corpora-
18 tion, and Brandy Construction Company was incorpo-
19 rated in November of 1977.

20 What I have outlined here
21 is what the Commonwealth is required to establish



1 JURY OUT

2
3 in order to proceed and show a prima facie case
4 of criminal intent on the part of a corporate offi-
5 cer, and there is a fairly recent case of Bourgeois
6 v. Commonwealth, which I have, and the second
7 paragraph is the thrust of this argument.

8 Your Honor, what that
9 case held was in the lower Court Mr. Bourgeois
10 was convicted of larceny by false pretense for
11 having received duplicate payments for some services
12 provided by his corporation, of which he was the
13 president, and the Commonwealth was only able to
14 show that he had actually received one of the payments.

15 Your Honor, the meat of
16 the matter is in the last sentence where it states
17 that the Supreme Court ruled that "where the crime
18 charged involves guilty knowledge or criminal intent,
19 it is essential to the criminal liability of an
20 officer of a corporation that he actually and per-
21 sonally did the acts which constitute the offense



1 JURY OUT

2
3 or that they were done under his direction or with
4 his permission," and the cite is there.

5 In the case before us,
6 in order to prove a prima facie case with intent
7 to defraud, they can show the use or they must
8 show the use of any money paid to him under the
9 contract. The general contractor was Brandy Con-
10 struction Company and because it was a corporate
11 entity, the Commonwealth is required to go the
12 extra step and show that Mr. Greenwalt as a corporate
13 officer actually and personally used that money
14 in connection with Section 43-13 of the Code or
15 that the use was done under his direction or with
16 his permission, and there has been no evidence
17 produced showing the money received from the Union
18 Bank and Trust Company was used by Mr. Greenwalt
19 personally.

20 In fact, it was made out
21 to Brandy Construction Company, and it was pointed



1 JURY OUT

2
3 out when Mr. Elliott testified that none of the
4 checks had Mr. Greenwalt's signature. They were
5 deposited -- some of them were deposited into the
6 Brandy Construction account, and so we have no
7 evidence that Mr. Greenwalt had any actual know-
8 ledge of any of the payments being received or
9 if there were disbursements made on this account,
10 that Mr. Greenwalt either did so personally or
11 that they were done under his direction.

12 In fact, all of the checks
13 that have been produced so far have not had Mr.
14 Greenwalt's signature, Your Honor, and I urge that
15 the Commonwealth has not sustained their burden
16 of a prima facie case as far as proving criminal
17 liability of a corporate officer.

18 MR. SHEFFIELD: Thank you, Mr. Bricken.
19 The second part of our motion to strike, Your Honor,
20 goes directly to the gravamen of the case, which
21 the Commonwealth described earlier. I must ask



1 JURY OUT

2
3 the Court to look carefully at the statute under
4 which we are proceeding. The Commonwealth has
5 to prove, in order to survive a motion to strike,
6 that there was an intent to defraud. You must
7 look at the statute very carefully, Your Honor,
8 because it is an intent-type of criminal charge,
9 and that this defraud was by the use of the funds
10 or any part thereof paid by the Union Bank and
11 Trust Company on behalf of the Bishops to Brandy
12 Construction.

13 Now, the statute says
14 to show that if the Commonwealth could show use
15 of the money applied to anything else that was
16 not directly related to this contract that they
17 do not have to show anything more for the purpose
18 of intent to survive a motion to strike, and it
19 is difficult for the Commonwealth to do that. There
20 is no question about it and, yet, they have to
21 show intent.



1 JURY OUT

2
3 Now, I ask you if you have
4 heard one single thing about the use of this money
5 for a non-permitted use or any type of purpose,
6 Your Honor. I don't think there is anyway the
7 Commonwealth's evidence can be taken inside out
8 or turned around and argued that would show that
the money went for any purpose.

10 Now, there is not enough
11 money to go around. I make no bones about that,
12 but we are confident it is a cost-overrun case,
13 which it is, but the statute goes to an intended
14 situation, and I think if there is no use shown,
15 you go back to the first paragraph of the statute,
16 meaning the Commonwealth has got to show some intent
17 to retain or use the funds.

18 Now, there isn't any type
19 of intent shown. It is regrettable, but everyone
20 is not paid, and that is it. Everyone is not paid,
21 but where can it be shown there is any criminal



1 JURY OUT

2
3 intent by the fact that people have not been paid?
4 I draw the Court's attention to one simple case,
5 and that is the Overstreet case, which is attached
6 to my motion. I suggest to the Court that it take
7 a look at the case to get a feeling for what the
8 Supreme Court --

9 THE COURT: (Interjecting) Well, Over-
10 street was convicted and the conviction was affirmed.

11 MR. SHEFFIELD: Yes, sir, that is true,
12 but I want the Court to look at the type of intent
13 they felt was needed in that particular case.

14 What I am saying is there
15 is no intent shown in this case. In Overstreet,
16 it was directly obvious, where Mr. Overstreet came
17 in and showed the owners of the house a bill and
18 a check. He said this bill was going to be paid
19 with this money, and he told them this was being
20 done this way when, in fact, it was not. Secondly,
21 there was this type of direct representation,



JURY OUT

and there was no evidence put on at all on the part of the defense, but that does not concern us.

When the Court looks at this case, we are talking about embezzlement or misappropriation of funds that have come into a person's hands by right and are then misused in some manner or unlawfully retained. Has the Commonwealth shown that Brandy Construction has unlawfully retained more money than it got or has retained less than it got? No, it has not shown that.

There is no one piece of evidence here that shows that these people who come in to complain were not paid simply because the money ran out. The one thing I think the Court should look at -- I guess we have heard from twelve or thirteen witnesses on behalf of the Commonwealth, and we heard a lot of people say they got paid through a civil suit, and it is regrettable that



1 JURY OUT

2
3 they had to do that, but they got paid. We have
4 a situation where payments are going on now. If
5 you take a total of all these witnesses who testified
6 today, Danielson, Cooper, R.C. Lee, and the others,
7 you have seven thousand six hundred and thirty
8 dollars and eighty-five cents. The contract was
9 eighty-three thousand three hundred and ninety
10 dollars and not eighty-three nine-fifty. There
11 was seventy-six thousand dollars in draws. The
12 bank has got seventy-three hundred and ninety dollars.
13 Somewhere along the line, there is a question about
14 the credits and this type of thing, but we are
15 talking about a case that is, in effect, between
16 hundreds of dollars between what these people are
17 owed and what the bank withheld.

18 Now, I suppose that type
19 of argument is the type of argument you end up
20 talking to the jury about, but I would ask the
21



1 JURY OUT

2
3 Court at this point to grant the motion to strike
4 because of the point that Mr. Bricken has raised
5 in that there is no showing of any criminal intent
6 as a corporate officer. There is not one bit of
7 evidence showing that Mr. Greenwalt did anything,
8 much less intended to do anything, and there is
9 nothing here as far as use. I think if the defense
10 rested here, there is nothing that could be done.
11 There is just not any evidence there showing criminal
12 intent.

13 I can say this before
14 Your Honor, outside of the hearing of the jury,
15 that that is what happened before Judge Savage
16 in the lower Court.

17 MR. GARDNER: You can say it, but it
18 is totally improper. There is no reason for Mr.
19 Sheffield to make an argument before this Court
20 as to what Judge Savage did below, Your Honor,
21



1 JURY OUT

2
3 and I am confident that Your Honor will ignore
4 that.

5 THE COURT: Well, I don't know. I won't
6 rule on it. I can't consider --

7 MR. SHEFFIELD: (Interjecting) I want
8 to apologize to Mr. Gardner. It is important to
9 us, but I want to apologize to Mr. Gardner. He
10 has been very cooperative with us and, yet, Your
11 Honor, this is the kind of case that is unusual,
12 and it is certainly up to the prosecutor to take
13 the action he does, but we are talking about a
14 flood of litigation. I am telling you you are
15 opening up the doors to litigation, and they are
16 going to knock the doors down with criminal warrants.

17 It is a civil matter,
18 Your Honor. Mr. Greenwalt is not a criminal, and
19 I ask you to grant the motion to strike.

20 THE COURT: All right, sir.

21 MR. GARDNER: If I might reply to these



JURY OUT

arguments in the reverse order, since that is the easiest way for my mind to work. Whether this is a civil case or a criminal case is not a question for this Court to decide. The General Assembly decided when a contractor receives money under a contract to do construction work and they retain that money for purposes other than paying material men or paying labor, then they have committed a crime.

I may disagree with whether that is proper or appropriate and Mr. Sheffield and Your Honor may, but the General Assembly made that decision, but whether or not the allegations against Mr. Greenwalt constitute a criminal charge or not is beyond the scope of argument on a motion to strike or any other motion before this Court.

The statute that Mr. Bricken argued to the Court should apply. That is the



1 JURY OUT

2
3 more recent statute, and that statute says that
4 a crime is committed when the funds are used or
5 retained, and it goes on to say that the use of
6 those funds by a contractor for purposes other
7 than paying the material men or laborers constitute
8 a prima facie case of intent to defraud.

9 Now, use or retain, I
10 submit, in that statute are interchangeable. They
11 are synonymous. It means the same thing. They
12 use the word "use," and follow it with the word
13 "retain" as sort of amplification which means the
14 same thing.

15 The Commonwealth cannot
16 prove what Mr. Greenwalt or any other defendant
17 has done with fifteen thousand dollars received
18 from a given bank on a given construction draw
19 unless Mr. Greenwalt or some other defendant admits
20 what he has done. There is no way to trace all
21 the funds coming in on each job to show that he



1 JURY OUT

2
3 used the fifteen thousand dollars to pay on another
4 job. That is the reason the statute is written
5 that way, so that if the money is received and
6 not paid to the suppliers and the materials, then
7 a prima facie case is established.

8 Now, the figures here
9 are important and may be difficult to follow because
10 they are what shows that the money received by
11 Mr. Greenwalt must have been retained or used for
12 some purpose other than to pay the material men
13 and laborers. If you start with the contract,
14 it calls for eighty-three thousand three hundred
15 and ninety dollars. You subtract that figure,
16 the eleven thousand dollars that Mr. Bishop said
17 he either paid out to other people that he did
18 himself or still has yet to do to complete the
19 contract, you have seventy-two thousand three hundred
20 and ninety dollars. Seventy-six thousand was actually
21 paid to Mr. Greenwalt.



1 JURY OUT

2
3 Now, if you total all the
4 figures testified to by the material men and laborers
5 in this case, you have twenty-two thousand seven
6 hundred and twenty-one dollars and fifty-eight
7 cents, and you have the eleven thousand dollars
8 paid to Masters in March of 1981 by a foreclosure
9 on an unrelated piece of property.

10 You take twenty-two thousand
11 seven hundred and twenty-one dollars and fifty-
12 eight cents and subtract it from seventy-two thousand
13 three hundred and ninety, and you wind up with
14 forty-nine thousand six hundred and sixty-eight
15 dollars and forty-two cents. That is a difference
16 of more than twenty-six thousand dollars between
17 the figure actually paid to Mr. Greenwalt or to
18 Brandy Construction and what has actually been paid
19 out as far as we can tell from the evidence in
20 the case so far. If this was two thousand six
21 hundred dollars, I would agree that it would not



1 JURY OUT

2
3 be sufficient. If you are talking about twenty-
4 six thousand dollars, it just seems overwhelming
5 to me to argue that the Commonwealth has not shown
6 a prima facie case with intent to defraud.

7 There is another thing
8 to consider of the expert testimony from the apprai-
9 ser that this property almost a year and a couple
10 of months later after completion, the house itself,
11 was worth ninety thousand dollars.

12 Mr. Sheffield keeps men-
13 tioning a cost-ouerrun. If that house was worth
14 ninety thousand dollars in November of 1980 and
15 the contract called for eighty-three thousand three
16 hundred and ninety dollars in April of 1979, it
17 is hard to see how this could have been a cost-
18 ouerrun when Mr. Johnson said there should have
19 been a twelve to fourteen percent increase in the
20 value.

21 In other words, if you



1 JURY OUT

2
3 increase the eighty-three thousand three hundred
4 and ninety dollar value by the twelve percent,
5 which is the lower figure Mr. Johnson used, you
6 come up with ninety-three thousand three hundred
7 and ninety-six dollars and eighty cents. That
8 is three thousand dollars and some odd dollars
9 more than what Mr. Johnson said the property was
10 worth.

11 I can't follow how there
12 could have been a cost-overrun that would have
13 left some twenty-two thousand dollars unpaid. The
14 figures just don't add up, Your Honor.

15 I don't know if the jury
16 will agree or won't, but it seems to me under this
17 statute, there is a prima facie case of a crime
18 established, and I submit that the jury ought to
19 decide the question.

20 The other issue I can
21 recall being raised by defense counsel is the



1 JURY OUT

2
3 question of whether we are talking about Brandy
4 Construction or the defendant, Al Greenwalt, per-
5 sonally. All of the witnesses who testified for
6 the Commonwealth testified that they were requested
7 to do the work by Al Greenwalt, and they did the
8 work at his request.

9
10 Several of them billed
11 Brandy Construction Company, but I don't think
12 any of them said they thought they were dealing
13 with a corporation. They all said they were dealing
14 with Al Greenwalt trading as Brandy Construction.

15
16 There is no question on
17 the Commonwealth's evidence. It may be challenged
18 by the defense, but the Commonwealth's evidence
19 shows that Al Greenwalt was trading and doing business
20 as Brandy Construction. All these people looked
21 to him for payment, and when they dealt with the
22 company, they dealt with Al Greenwalt.

23 The money was not placed



JURY OUT

in his hand but delivered to an agent acting for him after certification that all of the subcontractors up to that point were paid. Without belaboring it, that is another point to show intent to defraud because Mr. Elliott told us he took that to mean, the certification to mean that the money received at that point would be used to pay the past indebtedness; that the debts up to that point were paid. This was work funds to be used to pay future debts.

These were used to certify that debts up to that date were paid and, in fact, were not, and shows an intent to defraud, and I would ask Your Honor to overrule the motion to strike and allow the matter to go to the jury.

MR. SHEFFIELD: Finally, Your Honor, you have to look at the statute carefully. I think you have to take judicial notice -- the Court and the public is on notice to look in the Clerk's



1 JURY OUT

2
3 Office at the Charter Books. When Brandy Construc-
4 tion has been on the Charter Books for years, then
5 the public is the one it is up to to find that
6 out.

7 I don't think anybody
8 said that they tried to trick them to do business
9 with a corporation as opposed to an entity. As
10 a matter of fact, every single person the Common-
11 wealth used was a corporation or had somebody
12 representing a corporation.

13 Now, if you look at the
14 retainage question, the question really is what
15 has been retained. The banks retain some money,
16 but the point is the use, Your Honor. There is
17 no way that anybody can show the money was used
18 for anything else.

19 THE COURT: It is not the use, but the
20 illegal retention as used. I am not saying he
21 did it, but a defendant can put it into a private



1 JURY OUT

2
3 savings account and that would not be a proper
4 use. That would be retention, and I think that
5 is why the statute uses both use and retain to
6 take care of that.

7 MR. SHEFFIELD: In looking at the statute,
8 it says intent coupled with either use or retainage.
9 That is what you have got to show. If you can
10 show any use for improper purposes, let it go past
11 the motion to strike and send it to the jury, but
12 there is no evidence as far as use or as far as
13 retainage. You don't get over the prima facie
14 case of the retainage. You only get it on the
15 use, so absent any intent at all, and there is
16 none, then retainage alone does not do it.

17 THE COURT: All right, sir, I have listened
18 to your argument --

19 MR. SHEFFIELD: Thank you.

20 THE COURT: And Mr. Bricken, and I think
21 you made an excellent argument, but I think it



1 JURY OUT

2
3 is an argument more for the jury. I think the
4 question of intent is a question of fact for the
5 jury.

6 I can't find as a matter
7 of law since there is a jury that there was no
8 intent. How I might decide the case may be entirely
9 different from the way the jury decides it. They
10 may feel you are right, but you do have a jury,
11 and I don't see how I can find as a matter of law
12 that there is not, at least, a prima facie case
13 here on which a jury can find one way or the other
14 with respect to intent.

15 I agree with you that intent
16 is important, and they may agree, but you have
17 a jury, and it is improper for the Judge to step
18 into the function of the jury. If I struck the
19 evidence at this point, I would be in error. If
20 there were no jury, I might buy the argument, but
21 I think it would be improper for me to strike



1 JURY OUT

2
3 the evidence, and I think it is a jury question
4 all the way through based on the evidence here.

5 Let me ask you this. I
6 was thinking -- I will have to overrule the motion
7 to strike. What I was thinking of doing is adjourning
8 for dinner. I see that you have Judge Cox standing
9 by. Can you call him now and let him go, and then
10 we will adjourn for dinner.

11 MR. BRICKEN: Your Honor, I want to take
12 up the question of my motion on the burden of going
13 forward as far as the third paragraph of the statute
14 is concerned.

15 THE COURT: I don't think you have any
16 obligation to go forward. You can go on the evidence
17 now before it. There is no burden on you to go
18 forward. That is out of the statute.

19 MR. BRICKEN: Thank you, Your Honor.

20
21 NOTE: At 6:30 p.m., the

* * *



1 we are ready. Just wait around outside and don't
2 get too far away.

3
4 NOTE: The jury depart from
5 the Courtroom in the company of the Sheriff.
6

7 JURY OUT

8 IN COURTROOM
9

10 MR. SHEFFIELD: Your Honor, I have a
11 couple of motions. Nothing that the Court hasn't
12 heard before, but we are at a different stage of
13 the trial, Your Honor. Before when the motions
14 were made with regards to the motion to strike,
15 the Commonwealth was entitled to have the evidence
16 viewed in the light most favorable to it. Now
17 the burden is shifted.

18 We wish to make the same
19 motion as before in light of the burden now being
20 on the Commonwealth to show these things have not
21 been proven beyond a reasonable doubt.



1 **JURY OUT**

2
3 Mr. Bricken has explained
4 to Your Honor the earlier position that we, the
5 defense, is taking in regards to an absolute lack
6 of evidence regarding any type of personal or actual
7 use of funds by Mr. Alvin Greenwalt in a corporate
8 capacity.

9 The evidence before the
10 jury shows nothing but dealings between all the
11 subcontractors and Mr. and Mrs. Bishop and Brandy
12 Construction Company. There is absolutely no tie
13 between Mr. Greenwalt and Brandy Construction as
14 far as the use of funds or actual or personal know-
15 ledge, and it is wrong to hold him criminally liable
16 under the statute.

17 Secondly, we have no
18 evidence whatsoever of intent on the part of Mr.
19 Greenwalt to either retain the money or to defraud
20 anybody. There is a question certainly as far
21 as retaining. It doesn't seem to be a question



1 JURY OUT

2
3 before the Court but to be submitted to the jury
4 as far as misuse of the funds. That is not what
5 we are here on.

6 Retainage says it has to
7 be shown one, you have to show how much money came
8 in, and we can probably say seventy-six thousand
9 dollars on that. Yet, it has to be shown, and
10 the Commonwealth has to show this, not just the
11 defendant, that there were funds to be retained.

12 If the Commonwealth can
13 show there is enough evidence to show beyond a
14 reasonable doubt that money was retained, it has
15 to be shown that it was retained with an intent
16 to defraud. Your Honor, there is no evidence of
17 any intent to defraud.

18 THE COURT: Mr. Sheffield, it may be
19 required. It may be if we didn't have a jury that
20 I would say that I buy the argument and dismiss
21 the defendant, but I can't do that. We have a



JURY OUT

jury to try the issue of the facts, and you have made an excellent jury argument, but we have a jury. It would be a grave error for the Judge to encroach upon their territory, and I feel that it is a jury question that the Judge cannot usurp, so I will have to overrule the motion to strike.

MR. SHEFFIELD: Yes, sir, I understand.
Note my exception, please.

THE COURT: Let me have the Commonwealth's instructions.

MR. GARDNER: They object to the one about the intent to defraud.

MR. SHEFFIELD: I would like to state my reasons for objecting to that particular instruction. I ask the Court to note our exception because of the fact that the second paragraph of that statute talks in terms of use. It does not talk in terms of retainage and to permit the inference of specific intent to defraud, which this statute calls for



1 JURY OUT

2
3 based on the passive act of retain, I think is
4 unconstitutional and not permitted. Retain is
5 when you don't do anything after you receive it.
6 Use is when you misapply it after getting it.

7 I think the inclusion of
8 the word retainage is a material error, and I would
9 state those facts and try to reserve my point.

10 MR. BRICKEN: The other thing that Mr.
11 Gardner points out we may have one duplicate instruc-
12 tion on circumstantial evidence.

13 MR. GARDNER: I want to object to the
14 officer of a corporation. One reason is that I
15 don't know that there is any proof from the Common-
16 wealth or from the defense that the defendant,
17 Alvin Greenwalt, is an officer of the corporation.

18 There has been a stipulation
19 that Brandy Construction Company has been chartered
20 as a corporation, and the charter appears in the
21 record book of Spotsylvania County. That charter,



JURY OUT

I don't believe, shows the officers of the corporation, and there has been no testimony that Mr. Greenwalt was an officer of the corporation.

It puts me in the position of stipulating that a corporation exists and, yet, I feel like if the defendant is going to rely on that as a defense, then he should put on some evidence as to the makeup of the corporation that he is an officer.

If he had done that, I would be able to cross examine and find out who the stockholders are and who was the chairman of the board and what office he held. I think all of that then would be relevant to this instruction, but there has been no evidence to that effect.

MR. SHEFFIELD: Your Honor, based on the ruling of the Court in Bourgeois v. Commonwealth, 217 Va. 268, at 274, which is a 1976 case, and the Revell case at 215 Va. 708 in 1975, in essence,



1 JURY OUT

2
3 this is a criminal prosecution against Mr. Greenwalt.
4 The records and everything was reachable by the
5 Commonwealth's Attorney if it desired to do this,
6 but it did not, and the burden is on the Commonwealth
7 to trace the funds to impute personal activity
8 on the part of the defendant.

9 Because the Commonwealth
10 has a long track to go, we don't have to help build
11 the bridge to have our client convicted. I think
12 this is the law in the Commonwealth.

13 THE COURT: It is the law, and those
14 two cases are right. The only problem I have is
15 that there is no evidence in the record to show
16 his connection with the corporation or even that
17 he is an officer.

18 MR. SHEFFIELD: That is the way that
19 the defense wants it.

20 THE COURT: But you have to have evidence
21 on which to base an instruction.



JURY OUT

MR. SHEFFIELD: Your Honor, the Commonwealth is trying to prove that this money went to Mr. Greenwalt. The testimony indicates that it went to the corporation. There is no evidence that any money went to Mr. Greenwalt. It went to Mr. Corporation and not Mr. Greenwalt.

THE COURT: There is no evidence to show what connection there is to the corporation.

MR. SHEFFIELD: That's right.

THE COURT: Well, maybe you do want it that way, but that is the chance you have to take in using your professional judgment as to whether or not to put him on the stand, but the instruction has to be backed by evidence before the jury can get it, and there isn't any.

MR. BRICKEN: Might we have just a moment, Your Honor?

NOTE: Counsel and the defendant are conferring.



1 JURY OUT

2
3 MR. SHEFFIELD: Your Honor, I think what
4 I will have to ask the Court to do is you were
5 asked to take judicial notice of Brandy Construction.
6 Maybe we have moved too fast on the thing. It
7 is in the Charter Books and has the officers of
8 the corporation, and the registered agent and director.

9 I am not positive on that,
10 but I have no problem at all with making a copy
11 and bringing it back, and I feel that this connection
12 that the Court apparently wants to see, which I
13 don't agree with, can be established.

14 THE COURT: You can argue that. There
15 is nothing wrong with arguing that, but there is
16 just no evidence here on which to base the instruc-
17 tion.

18 MR. SHEFFIELD: Your Honor, will you
19 give me five minutes to get to the Charter Books?

20 THE COURT: Yes, I will show you that
21 courtesy.



1 JURY OUT

2
3 MR. SHEFFIELD: Thank you.

4 MR. GARDNER: Judge, I prefer that it
5 be admitted as an exhibit, and the reason is that
6 it shows Brandy Construction Company Company and
7 shows only one person involved. As you can tell,
8 there is only one person involved and for that
9 reason, I would like to see it go before the jury
10 rather than stipulate to it.

11 THE COURT: Well, I will give the instruc-
12 tion then. This will be marked as a defense exhibit.

13
14 NOTE: The above referred to
15 copy of the charter is now being marked and filed
16 by the Court as Defendant's Exhibit Seven.

17
18 THE COURT: Bring the jury back.

19
20 NOTE: The jury now return
21 to the Courtroom and are seated in the jury box,



1 after which, all parties present as before, the
2 matter continues as follows:

3
4 JURY IN

5
6 THE COURT: Members of the jury, I will
7 now read the Court's instructions to you. These
8 instructions consist of the law as it applies to
9 the evidence you now have before you. You may
10 take these into the jury room to refer to in
11 arriving at a verdict. The instructions are as
12 follows.

13
14 NOTE: The Court's written
15 instructions are now being read to the jury.

16
17 THE COURT: All right, gentlemen.

18 MR. GARDNER: Thank you, Your Honor.

19 Lady and gentlemen of the jury, I know you are
20 tired, as we all are, and I appreciate your patience
21 and careful listening to particularly me because

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271.

1 I can be tiresome at times, and I apologize if
2 I have been.

3 I want to impose on you
4 because I feel I must impose on you a few minutes
5 longer to make a closing argument in this case.
6 I will try to be as brief as possible.

7 The Court has instructed
8 you now on the law in the case. A couple of the
9 instructions merit some mention from me.

10 The Commonwealth must prove
11 beyond a reasonable doubt that a criminal offense
12 was committed, and that is defined in these instruc-
13 tions, and that an offense was committed by this
14 defendant.

15 Now, the Court instructed
16 you there are four elements of that offense. The
17 first one under the Court's instruction is that
18 Alvin E. Greenwalt is a contractor. There is no
19 question about that from the evidence. The defense's
20 own witnesses indicate that he was, in fact, a
21 contractor.

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1 Secondly, that he intended
2 to defraud. I will say more to you about that,
3 but let's go to the third and fourth element.

4 Three, retain or use funds
5 or any part thereof paid by the owners or his agent
6 to such contractor under contract for the construc-
7 tion of a building annexed to the freehold. That
8 is a mouthful but doesn't mean that much. Here
9 is what it means.

10 It means that the defendant,
11 Mr. Greenwalt, has retained or used funds that
12 he has received; that he has kept or used the money
13 paid to him by Mr. and Mrs. Bishop or their agent.
14 In this case, the agent being the bank. The money
15 paid to Mr. Greenwalt by the bank must be shown
16 to have been retained or used under this contract
17 which was a contract for the construction of a
18 residential dwelling on a lot in Spotsylvania County.

19 There is no question that
20 Mr. Greenwalt received that money and that he received
21 it from the bank as agent for the Bishops.



1 The final and fourth element
2 that he retained or used those funds for any other
3 purpose than to pay persons performing labor upon
4 or furnishing material for such construction.

5 Now, retaining or using
6 the funds in the third element and, in the fourth
7 element, for any purpose other than to pay persons
8 that furnished materials or labor. Those two things
9 tie together.

10 The Commonwealth has shown
11 that the money was paid to Alvin Greenwalt or Brandy
12 Construction, which all the evidence indicates
13 was one in the same. Brandy Construction was Alvin
14 Greenwalt and vice versa.

15 The money was received.
16 The money was not used to pay bills which were
17 incurred for labor or materials on that property,
18 and that is where the offense is complicated.

19 If you believe that that
20 money was retained or used with intent to defraud,
21 now, I hope that will not make it more complicated



1 than it is because the Court has gone on to instruct
2 you that it is not necessary that the facts be
3 proven by direct evidence, but facts can be proven
4 by circumstantial evidence. Circumstantial proof
5 must be consistent with guilt and inconsistent
6 with innocence.

7 Now, the Court has also
8 instructed you that you may infer intent to defraud
9 from proof that the defendant had retained or used
10 the money paid to him under the contract before
11 paying all amounts due and owing or to become due
12 for labor performed or material provided under
13 the contract.

14 Now, all of this about
15 retention of money received by Mr. Greenwalt and
16 intent to defraud all ties together. There is
17 circumstantial evidence of intent to defraud. That
18 evidence is that Mr. Greenwalt received the money
19 and did not apply it to pay these debts. I will
20 say more about what that evidence to show he received
21 the money and didn't apply it to the debt was.



1 If you believe from the
2 evidence that the defendant, Mr. Greenwalt, received
3 the money and did not apply it to the payment of
4 debts for materials or labor furnished on this
5 home, then you may infer, under the Court's instruc-
6 tion, intent to defraud. I submit to you that
7 there is no other inference that can be made con-
8 sistent with the evidence. There is no evidence
9 before you that there was any intent other than
10 to defraud.

11 Let's talk about the evidence
12 that shows that the money was received. Seventy-
13 six thousand dollars was drawn on this contract.
14 The contract was for eighty-three thousand three
15 hundred and ninety dollars. It may be hard to
16 follow without pen and pencil in hand, but this
17 is really important. This is the crux of the case
18 against Mr. Greenwalt.

19 There was a eighty-three
20 thousand three hundred and ninety dollar contract
21 to build this home. There must be somewhere there



1 common sense that tells you Mr. Greenwalt was in
2 the business to make money. There was some margin
3 for profit in there. Understandably, profit margin
4 may be greater or lesser, but there was some margin
5 within that eighty-three thousand three hundred
6 and ninety dollars.

7 According to Mr. Bishop,
8 eleven thousand dollars worth was not done by Mr.
9 Greenwalt under the contract. He quit and left
10 the work that has cost or will cost the Bishops
11 eleven thousand dollars to have done to complete
12 the contract. That means that seventy-two thousand
13 three hundred and ninety dollars worth of work
14 was done on that house.

15 Now, Mr. Sheffield may
16 say no, that is not true, but here is the evidence
17 to support that. You had an expert appraiser say
18 he looked at the property some nineteen months
19 after the contract was signed in April of 1979.
20 The contract called for a price of eighty-three
21 thousand three hundred and ninety dollars.



1 In November of 1980, nine-
2 teen months later, Mr. Johnson goes and appraises
3 the property and said on that date, given everything,
4 given all the Bishops have done to the property
5 since the defendant stopped working on it, it is
6 still only worth ninety thousand dollars. That
7 is the house itself.

8 He also said there would
9 be at least a twelve to fourteen percent increase
10 expected just by time, just by inflation. If you
11 take the lower of these figures, twelve percent
12 of eighty-three thousand three hundred and ninety
13 dollars, which is ten thousand and six dollars.
14 Add that to the contract price, and you come up
15 with a home valued at ninety-three thousand three
16 hundred and ninety-six dollars. That is three
17 thousand dollars more than Mr. Johnson said the
18 house was worth when completed.

19 That is important because
20 the defense attorney has told you in opening state-
21 ment and mentioned several times all through that

There is another reason not to believe that this was a cost-overrun and to believe, in fact, that the defendant received the money and applied it for some other use or kept it or retained or used it. Look at the figures this way. Eighty-three thousand three hundred and ninety dollars on the contract. Eleven thousand dollars that Mr. Bishop and his family had to pay out for themselves to complete that. That leaves seventy-two thousand three hundred and ninety dollars worth of work done. Subtract that from the total figure testified to by all the subcontractors, the Danielson people, Chancellor Plumbing, J. W. Masters, who provided materials, Lee's Carpet,



1 Lowe's building materials, and Davenport Insulation.

2 All those people provided labor and materials on
3 the job are not paid. Masters was obviously paid
4 in March of this year, quite a bit of time after
5 the contract was done, and after Mr. Greenwalt
6 had certified to the bank that all the material
7 men had been paid, but that is beside the point.

8 All of their testimony
9 indicate that twenty-two thousand seven hundred
10 and twenty-one dollars and some odd cents was not
11 paid for labor or materials provided. Subtract
12 that from the seventy-two thousand dollars and
13 you wind up with forty-nine thousand six hundred
14 and some odd dollars that according to the contract
15 price Mr. Greenwalt has actually paid out when,
16 in fact, he received seventy-six thousand dollars.
17 That is nearly thirty thousand dollars which is
18 unexplained that he has received and he has from
19 the evidence, I submit, either retained or used
20 it for some purpose other than paying these people.

21 Masters was paid finally



1 on a foreclosure of a piece of property, not this
2 property, but another piece of property.

3 Mr. Sheffield, I expect
4 will argue to you and rightfully so, that there
5 has been no evidence to show what was done with
6 the money, what was done with the seventy-six thousand
7 dollars that Mr. Greenwalt received.

8 The Commonwealth cannot
9 prove to you what was done with it, and it is not
10 incumbent on the Commonwealth to prove that Mr.
11 Greenwalt received that money and paid it on another
12 house or took a trip to Europe or whatever. It
13 is not required that we prove that because the
14 Court instructs that if you believe that Mr. Green-
15 walt retained or used these funds received under
16 the contract before paying all amounts due or to
17 become due under the contract, then you can infer
18 from that that was intent to defraud and, in fact,
19 a crime was committed.

20 Why can't the Commonwealth
21 prove what Mr. Greenwalt did with the money? It



1 is because, as the defense's own witnesses indicated,
2 there was one bank account, and there were numerous
3 houses under construction, and all the money went
4 into a single account. Payments, presumably for
5 all the houses and everything that might have been
6 paid, all were paid out of that account.

7 We can't look at his books,
8 even if we had them before us, and determine where
9 the seventy-six thousand dollars that was received
10 from the Bishops account actually went.

11 Now, it is true that if
12 the books had been kept in a manner -- I won't
13 say a correct manner, but in a manner in which,
14 according to the witnesses, that you can keep books
15 on a single account and show where the individual's
16 money goes, money from an individual project. The
17 accountant who was called by the defense indicated
18 this. The banker called by the defense indicated
19 this, but most of them indicated they could not
20 say from Mr. Greenwalt's account where the money
21 for this particular project went. His own accountant



1 said that he could not look at Mr. Greenwalt's
2 books and tell you where the seventy-six thousand
3 dollars went.

4 THE COURT: Two minutes.

5 MR. GARDNER: The books were not kept
6 that way. The accountant tells you this. There
7 is no way the Commonwealth of Virginia can figure
8 it out. That is what it boils down to.

9 The criminal intent here
10 is shown from the fact that he received seventy-
11 six thousand dollars. He built a house which he
12 didn't complete, and he left eleven thousand dollars
13 to be done on it, and he left twenty-two thousand
14 and some odd dollars yet to be paid on the contract.

15 That is not cost-overrun.
16 That is not bad business judgment. That is plain
17 fraud. That is exactly what this is. That is
18 what this case is all about.

19 Your Honor, if I could
20 have a few minutes longer.

21 The evidence that is before



you does not show a cost-overflow. Again, I can't help but reiterate the Court's instructions to you. Mr. Greenwalt has no duty to testify and that is true. That is his constitutional right. He has no duty to testify, but he can explain through defense evidence what was done with the money that he received; and in the absence of some explanation as to what was done, I submit, you can only conclude that whatever was done with it was not the proper thing.

He didn't pay for materials.

He didn't pay for supplies. He didn't pay for labor performed on that house.

He called his own accountant and his own bank, and they could not tell you what he did with the money. Therefore, from the evidence, the only conclusion you can draw consistent with the evidence is that he applied it to some use other than the proper use, and that is what misappropriation of funds is all about.

I ask you to consider



1 the evidence and to consider the facts. What we
2 are talking about here is a very large amount of
3 money and in considering that, if you believe that
4 the defense is guilty of that crime beyond a rea-
5 sonable doubt, then consider how much money we
6 are talking about, how much damage we are talking
7 about, how much injury there is to people like
8 the Bishops when they pay this kind of money and
9 don't get what they paid for.

10 Consider those factors
11 in determining the kind of punishment to impose.
12 In Virginia, as jurors, you have a double duty
13 in not only determining guilt or innocence, but
14 in fixing punishment.

15 Again, I thank you for
16 your patience, and I thank you in advance for your
17 deliberations.

18 MR. SHEFFIELD: I thank you also for
19 your attention and patience with us today. All
20 of us attorneys get wordy. I remember the Common-
21 wealth's Attorney saying it was a simple case,



1 on this house? I find it hard-pressed to find
2 anybody a criminal because they simply can't pay
3 a bill.

4 Just a moment, if you
5 will.

6 Again, I ask you when
7 you go to the jury room on your own and away from
8 the lawyers, and probably some of you will be glad
9 to get away, but take a look at the last line of
10 Instruction Three, and it will tell you that you
11 have got to exclude every possible theory, every
12 possible theory under which this situation could
13 have occurred, and I think that we have shown you
14 there is no intent there, lady and gentlemen, and
15 that is what it takes. It takes intent to take
16 a person who owes debts and throw him in prison,
17 and it is just not here. Thank you.

18 MR. GARDNER: Lady and gentlemen, I said
19 to you before this case started that this is a
20 simple case. It is still a simple case.

21 There are lots of figures



1 thrown around and lots of confusion raised in this
2 case, but when it boils right down, it is a simple
3 case.

4 Let me give you an analogy.

5 Suppose at dinner time when we broke for dinner
6 that you congregated and said, "I am going to Four
7 Mile Fork. Does anybody want a Coke," and all
8 of you are thirsty and said, "Sure, I want a Coke.
9 Here is my fifty cents," and each one of you give
10 me fifty cents, two quarters each. They all look
11 alike. They all look alike and you can't tell
12 his quarter from your quarter or from her quarter.
13 You can't tell your quarter from his, and I put
14 it in my pocket.

15 I have got three dollars
16 and fifty cents of your money. When I go to Four
17 Mile Fork, I come back with one Coke, and I am
18 drinking it. You don't know whose money I used.
19 You don't know if I used your money or your money.
20 You can't tell. How can you tell if I lay three
21 dollars in front of you? You can't tell whose



1 money I used, and neither can Mr. Greenwalt's
2 accountant tell you, and neither can the bank tell
3 you. How in God's name can the Commonwealth of
4 Virginia tell you if his own accountant can't tell
5 you where the money went and who was paid.

6 That is what it boils
7 down to. He received Mr. and Mrs. Bishop's money,
8 and he did not use it for the purpose it was given
9 to him. I can't prove what he did with it. It
10 doesn't matter what he did.

11 The fact is that he did
12 not pay the people that he was supposed to pay.
13 The Court has told you that these arguments that
14 we make are not evidence in this case. I think
15 it is very important, given what you have heard.
16 It is important for you to listen to the evidence,
17 as you have, and use your own memory, which is
18 just as good as mine and probably better. Your
19 memory is just as good as any attorney that appeared
20 in this Court, and that is why people like you
21 are placed on the jury.



You think about the evidence you have heard. Did you hear anybody say that the bank in Bowling Green had retained seven or ten thousand dollars not issued on the contract? I don't think you heard that. What you heard the man say was there was an eighty-three thousand dollar loan commitment, and seventy-six thousand was loaned, period. They are not holding seven thousand dollars.

I asked him that, and he said they were not holding any. All they did was convert it over. It was obvious that Mr. Greenwalt was not going to finish the job, so why should he get the seven thousand dollars?

Another thing to think about, the lien waivers. Maybe the Union Bank and Trust used to use the ones like this, but they didn't in this case. They used a verbal certificate. You look at this and try to figure it out. Look at this language and try to figure it out. I can't figure it out, and I am a lawyer, but look at the



1 one the Union Bank and Trust was using. All it
2 says, basically, is that I hereby certify that
3 this debt on this house, the labor and materials,
4 have been paid. It is simple and straightforward,
5 and that is why they use it. That is what they
6 intended. It is simple, and that is what it is
7 all about.

8 The bank gave the man
9 the money because he told them the debts were paid,
10 and that it was going for working capital. The
11 next draw he was to use to pay for materials and
12 labor but didn't do it. That is all it boils down
13 to.

14 Mr. Sheffield tells you
15 that it is incumbent on the Commonwealth to prove
16 all these things about where the money went and
17 says why don't they prove who was paid. They say
18 how about the laborers that work there, how about
19 the secretary, how about all of these things.

20 Who is in the best position
21 to tell you who was paid? The Commonwealth of



1 Virginia? Mr. and Mrs. Bishop? Who do you think
2 is in the best position to tell you, and given
3 the fact you have not been told, despite the fact
4 Mr. Greenwalt's accountant has been called and
5 the banker has been called? What do you think
6 is the logical conclusion consistent with the evidence
7 as to what was done?

8 I submit that if you use
9 your common sense, as you are told that you should,
10 there is only one conclusion to draw. The money
11 was used for some reason other than what it was
12 supposed to be used for. That is what this case
13 boils down to.

14 Mr. Sheffield can use
15 the expression and say that I or the State of Virginia
16 is trying to ruin his life and brandish him as
17 a criminal. We are talking about a possibility
18 of six months in jail and a five hundred dollar
19 fine for a misdemeanor. The Court has instructed
20 you on that. If that ruins his life, then sobeit.
21 He asked for it.



There is one thing I hope it would do. It will brand him as a contractor not to be trusted, as a person you can't trust to give your money to because you don't know where it is going; and if there is anything wrong with that, then there is something wrong with the entire justice system.

When somebody commits a crime, it is their fault. It is not my fault. It is not the State of Virginia's fault. He is at fault. He is an adult. You will have to live with him if you decide to acquit him and what you are doing is sending a message to every carpenter, every plumber in this County and this State who wants to call himself a contractor and wants to print stationery and put a company on it that he can go take people's money and not perform the job that he has agreed to perform and do whatever he very well pleases.

You are giving these people
a license to steal the money of people like the



1 Bishops who entered into a good contract with good
2 faith, and they thought they would get the job
3 performed.

4 Think about the evidence
5 again. It is easy to say the construction business
6 was bad; that the real estate business was bad,
7 but did anybody testify from the statement as Mr.
8 Sheffield said that Alvin Greenwalt's business
9 failed? Did you hear anybody say that? Did you
10 hear anybody say that he was going through lots
11 of trouble?

12 Mr. Sheffield said it,
13 but I didn't hear anybody say it from this witness
14 stand. Did you hear anybody say the cost of building
15 materials went up to such a degree in April of
16 1979 to February of 1980? It created a cost-overrun
17 that prevented him from paying twenty-two thousand
18 dollars in bills. Mr. Sheffield said it, but I
19 didn't hear anybody from the stand say that, and
20 I don't believe that you did.

21 I am not going to keep

THE COURT: Members of the jury, the case is now yours to decide. The first thing you do in the jury room is to elect a foreman. The foreman can be either a man or woman, and the foreman's job and responsibility is to preside over your discussions and to keep the discussions moving along and to sign the verdict once you arrive at one.



1 NOTE: The jury now departs
2 from the Courtroom.

3 JURY OUT

4 THE COURT: All right, sir, any motions?

5 MR. SHEFFIELD: We have several motions,
6 Your Honor. I would like to move at this time
7 to set aside the verdict of the jury as contrary
8 to the facts and the law.

9 The basis for this would
10 be, essentially, along the lines of a motion to
11 strike, which we mentioned earlier in that I feel
12 that the instruction given to the jury to permit
13 them to draw an inference was objected to, and
14 the instruction should be reconsidered at this
15 time. There was not sufficient factors for the
16 jury to draw any type of intent whatsoever.

17 We feel, too, that is
18 the basic basis of the motion to set aside the
19 verdict, and we would make that motion, and ask
20 for a ruling at this time.

21 THE COURT: Any response?



1 JURY OUT

2
3 MR. GARDNER: I think that has been thor-
4 oughly covered, Your Honor, and I don't think I
5 have anything to add to it, and I am opposed to
6 it.

7 THE COURT: I feel that, Mr. Sheffield,
8 it was a jury question, and the jury resolved the
9 question in favor of the Commonwealth and against
10 the defendant. I just don't set jury's verdicts
11 aside. One of the basic tenements of jurisprudence
12 is that the jury's decision is inviolable unless
13 a mistake or an error is made, and I don't see
14 it.

15 It was the election of
16 the defendant to have a jury, and the jury has
17 made the decision.

18 MR. SHEFFIELD: Yes, sir, two more motions.
19 Please don't get upset at this, but we move at
20 this point for a mistrial based on the argument
21 contained in the Commonwealth's Attorney's closing



1 JURY OUT

2
3 statement that seemed to go farther than permitted
4 in law regarding the silence and failure or lack
5 of testimony given by the defendant. I think the
6 gravamen of the closing argument was the failure
7 of the defendant to put on a certain type of evidence,
8 and I think that this argument is improper. I
9 think that it misled the jury, and I think that
10 it resulted in a miscarriage of justice, and I
11 move for a mistrial.

12 MR. GARDNER: I certainly take offense
13 by that, Your Honor. I think the situation in
14 this case is similar to a situation where you find
15 a person in possession of recently stolen goods
16 and where an inference can be drawn from the faulty
17 explanation of the possession of those goods.

18 It is a similar situation
19 with this money, and my comments were strictly
20 towards the failure of the defense, generally,
21 to put on any explanation for what was done with



1 JURY OUT

2
3 the money and not to the defendant's failure per-
4 sonally not to testify. I was very careful not
5 to say anything about that and, furthermore, if
6 I had, I think the objection at this point is not
7 timely. If there was objection to it being made,
8 it should be made at the time closing argument
9 was made, at a time the Court could have cleared
10 any possible defect in the argument, and I would
11 ask the Court to overrule the motion as well.

12 MR. SHEFFIELD: Very briefly, Your Honor.
13 I consider it poor taste among attorneys to interrupt
14 during closing arguments and, secondly, he asked
15 for the jury trial. It was asked for a jury trial
16 over the objection of the defendant.

17 THE COURT: Well, in any event, the Common-
18 wealth is, of course, entitled to ask for a jury
19 trial just as a defendant is. The jury has received
20 this and in a fashion which I am sure is unsatisfactory
21 to the defendant, and that is simply the result



1 JURY OUT

2
3 of the jury's decision. I feel that while I am
4 sure the Commonwealth's Attorney appreciated your
5 sensitivity of not interrupting him that the law
6 is rather positive on that; that all objections
7 having to do with testimony or arguments have to
8 be made in a timely fashion. I will overrule your
9 motion on that.

10 MR. SHEFFIELD: Your Honor, I would like
11 to ask the Court are all of my objections on the
12 former jeopardy and the burden of the instruction
13 and the motion to strike preserved for appeal?

14 THE COURT: Yes, sir, I am sure they
15 are all on the record.

16 MR. SHEFFIELD: Yes, sir, and finally,
17 Your Honor, I hope that the Commonwealth won't
18 misunderstand, but I want to inform the Court respect-
19 fully of our intent. We have to appeal to the
20 Virginia Supreme Court to seek a writ of error,
21



1 JURY OUT

2
3 and I say that without malice towards the Court
4 or the Commonwealth's Attorney, but based on that
5 representation, and based on the fact that it is
6 not a crime of violence and based on the fact there
7 is absolutely no previous record of any type of
8 conviction on behalf of the defendant, I would
9 ask that the same type of bond approach that we
10 have now be maintained, and that the imposition
11 of sentence be suspended pending an appeal.

12 THE COURT: What is the bond in the case
13 now?

14 MR. SHEFFIELD: I think it is a property
15 bond.

16 THE CLERK: It looks like it may be twenty-
17 five hundred dollars.

18 MR. SHEFFIELD: That is what it was
19 originally. I believe it is personal recognizance
20 now, Your Honor.

21 THE COURT: There has been a conviction



BRANDY CONSTRUCTION CO.

P. O. BOX 1261
FREDERICKSBURG, VIRGINIA 22401

COMMONWEALTH EXHIBIT 3

Phone: 371-2663

This contract is made this 19th day of April, 19 79, by and between BRANDY CONSTRUCTION COMPANY, hereinafter known as "BUILDER" and RALPH & ANITA M. BISHOP, husband and wife, hereinafter known as "OWNER".

BUILDER agrees to construct, and OWNERS agrees to purchase a residence building as hereinafter described on real estate in Spotsylvania County known as lot#21, in Snow Hill, plans attached for the total purchase price of \$83,390.00 (Eighty three thousand three hundred and ninety dollars and No/100ths). The purchase price shall be paid when an occupancy permit for the residence has been issued by the authorities of Spotsylvania County, or occupancy by OWNERS, whichever occurs first. This price is for the Construction of a personal residence in accordance with the specifications incorporated in this contract.

"OWNERS" shall pay all costs involved in obtaining a construction permanent loan, however, Builder will pay interest on said construction loan during construction of said house until occupancy.

"BUILDER" to make draws from OWNERS bank or Savings & Loan.

The residence shall be constructed in accordance with the plans hereto attached and identified by the signatures of the parties including the specifications set forth on said plans and in this agreement.

BUILDER will begin construction as soon as conditions set forth have been satisfied and all permits have been obtained. Builder agrees to act in good faith to initiate construction as soon as possible, and will complete the residence within six months with the understanding that BUILDER is not responsible for the acts of God, or delays occasioned through no fault of the BUILDER.

BUILDER will construct the residence in a workmanlike manner according to the prevailing standards of such construction in Spotsylvania County, Virginia. BUILDER will warrant the residence to be free of defects for a period of one year from the date of the OWNERS original occupancy. The manufactures' suppliers' and subcontractors warranties frist. BUILDER shall assist OWNERS in the enforcement of any such manufactures' suppliers, or subcontractors' warranties.

In the event of conflict between the specifications and the plans, written specifications shall prevail; but BUILDER agrees to consult with OWNERS in regard to any such conflict which may occur.

Any changes requested by OWNERS subsequent to the signing of this contract shall be in writing and signed by OWNERS and BUILDER. OWNERS agree to pay the cost, if any, resulting from such change and BUILDER will credit OWNERS for the decreased cost, if any.

Comm. Ex. # 3

THE FOLLOWING ALLOWANCES ARE A PART OF SAID CONTRACT:

1. Total electric fixtures allowance (\$500.00).
2. Total finished floor coverings allowance (\$2,200.00).
3. Total water and septic system allowance (\$3,500.00).
4. Total appliance allowance (\$1,500.00).
5. Total closing cost allowance (\$500.00).

Witness the following signatures and seals:

BRANDY CONSTRUCTION CO.

By:

A. Greenwald (Seal)

Ralph Bishop (Seal)

Ralph Bishop

Anita M. Bishop (Seal)

Anita M. Bishop



BRANDY CONSTRUCTION

(703) 786-8000

Date April 19, 1979

Name Ralph & Anita Bishop County Spotsylvania State Virginia

1. EXCAVATION:

Bearing soil, type undisturbed Minimum depth excavation below finished grade 18"

2. FOUNDATIONS:

Footings: Concrete mix 5 bag Size 10 X 16 Foundation wall: Material Blk Size 8 X 16

Interior foundation wall: Material Blk Piers: N/A

Columns 3" Steel Girders 3 2 x 10 #2

Basement entrance areaway N/A Footing drains 4" plastic tile

Waterproofing foundation coat Parging Mortor

Termite protection Ground spray

Basementless space: Ground cover N/A .004 Insulation Crawl Foundation vents 8 X 16

Access doors 32 X 24 Special foundations N/A

3. FIREPLACES:

Type 2- 8X12 Flues 1 Harmony Room and Basement

Fireplace: Facing 60" each; lining 8 X 12; hearth N/A; Mantel N/A

~~Complex~~ Hearth 4 X 5 slate Harmony Rm, 4 X 5 Brick basement

4. EXTERIOR WALLS:

Wood frame: Grade and species #2 Y.P. 2X 4 on 16 centers

Sheathing celtex; thickness 1/2; width 48; Siding Alum. W/O backer

Exterior painting: Material latex; No. Coats 2; Caulking latex

5. FLOOR FRAMING:

Joist: Wood, grade and species #2 Y.P. Size 2 x 10 spacing 16 "o.c.; bridging 1 X 3

Concrete slab: ☒ Basement floor; ☐ First floor thickness 4 "; reinforcing 6 X 6 10 X10

membrane .004; Fill under slab: Material gravel; thickness 4 ";

6. SUBFLOORING:

Material: Grade and size 1/2 C.D. W/ 5/8 particle board in carpet areas

1/2 C.D. on tile area

7. PARTITION FRAMING:

Studs: Size 2 X 4 Spacing 16 "o.c.

8. CEILING FRAMING:

Joists: N/A

9. ROOF FRAMING:

Rafters: Wood N/A

Roof trusses (see detail): Grade and species Engr. Trusses

10. ROOFING:

Sheathing: Grade and Size 1/2 C.D.

Roofing fiberglass grade S.S.; weight or thickness 235 lbs

11. GUTTERS AND DOWNSPOUTS:

Gutters: Material Alum. prefinished

Downspouts: Material Alum. prefinished

Paint: Material and number of coats N/A; splash blocks per spout

12. FINISH FLOORING:

LOCATION	MATERIAL, COLOR
<u>All finished Flooring per allowance</u>	
<u>Total Floor covering allowance is</u>	<u>2200.00</u>

13. DECORATING: (Paint, wallpaper, tile, etc.)

ROOMS	
Kitchen	All interior painted off white
Bath	With 2 coats of Latex kitchen, baths
	Utility and trim 2 coats enamel
	Chair rail installed in dining room

14. INTERIOR DOORS AND TRIM:

Doors: Type Flush Mahogany stain
 Door trim: Type 2 1/2 Col. F.J.; Base 3 1/2 Col. F.J.

15. WINDOWS:

Windows: Type Wood double hung insulated
 Special Windows: N/A
 Trim: Type 2 1/2 Col. F.J. Paint 2 coats Enamel
 Weatherstripping: Type Alum.; storm sash, number N/A
 Screens: ☐ full, ☒ half Type Alum. number ; screen cloth material N/A
 Basement windows: Type Alum.

16. ENTRANCE AND EXTERIOR DETAIL:

Main entrance door: 30 10 68 6 panel insulated
 Other entrance doors: 6 panel insulated, sliding glass dr. Harmony Rm. and basement.
 Head flashing Alum. Weatherstripping: Type Alum.; saddles Alum.
 Combination storm and screen doors: N/A
 Shutters: Railings Front Only Louvers per plan
 Exterior millwork: per Dr. and windows units

17. CABINETS AND EQUIPMENT:

Kitchen cabinets, Builder samples counter top Builder samples
 Kitchen equipment: Make and Model Appliances by allowance \$ 1500.00
 Medicine cabinets: Make 14 X 22; Model Louvered
 Other cabinets and built-in furniture Builder vanities W/ plate mirrors in baths. Hall 24 X 36
1/2 bath 24 X 30

18. STAIRS:

Stair	Treads	Risers	Stringers	Handrail	Balusters
Basement	By Code	Pine risers and treads			
Main					
Attic					

Disappearing: Make and model number

19. PLUMBING:

Fixture	No.	Make	Size	Color
Sink	1	Kitchen double sink		
Lavatory	4		18 " round	
Water closet	3		STD	
Bath tub	1	Fiberglass	60"	
Shower over tub	1			
Stall Shower	1	48" Fiberglass stall	48"	
Laundry trays	1	Single bowl fiberglass		

House drain (inside): 1 basemt.; Sill Cocks: Number 3
 Water Supply: ☒ Individual ☐ Public
 Water piping: Interior Copper Plastic to wall
 Water heater: Type Electric; make and model /By Plumber Contractor
 Storage tank: Material by well contractor capacity gallons.
☐ gas piping; ☐ cooking, ☐ water heating, ☐ house heating

20. HEATING AND VENTILATING:

3 ton heat pump

Ventilating equipment: attic fan, make and model wired for fan only

Kitchen exhaust fan, make and model instilled by Builder

Bathroom exhaust fan: Number 3 Make and Model By builder

21. ELECTRIC WIRING:

Service: ☐ Overhead ☒ Underground By Electric Co.

Special purpose outlets: ☒ Range, ☒ water heater, ☒ furnace, ☒ dryer, ☐ other

22. LIGHTING FIXTURES:

Total number of fixtures per plan Total allowance for fixture, typical installation, \$ \$ 500.00

23. INSULATION:

Roof N/A (no insulation included for basement)

Ceiling 8" Blown

Wall 3 1/2" blanket

Floor Utility Floor only 3 1/2" Blanket

24. FINISH HARDWARE (Make, material, and finish):

Per Builder Samples

Cash allowances \$

25. GARAGE OR CARPORT:

Garage 22X 22 ceiling and connecting walls sheet rocked and taped

No paint included

26. SEWAGE DISPOSAL:

☐ Public ☒ Individual By allowance ☐ Community

27. LANDSCAPING, PLANTING, WALKS, DRIVES, AND FINISH GRADING:

Landscaping limited to grading of disturbed areas and seeding within 30' of house.

Driveway single lane with Blue stone, 60 tons.

MISCELLANEOUS: (Describe any materials, equipment or other items not shown elsewhere):

- (1) Front center of house will be bricked
- (2) Exposed exterior basement walls will be bricked
- (3) Windows in basement will be wood double hung insulated where grade permits.

Submitted by:

AC Leonard
BRANDY CONSTRUCTION

Approved by:

Ralph Bishop
OWNER

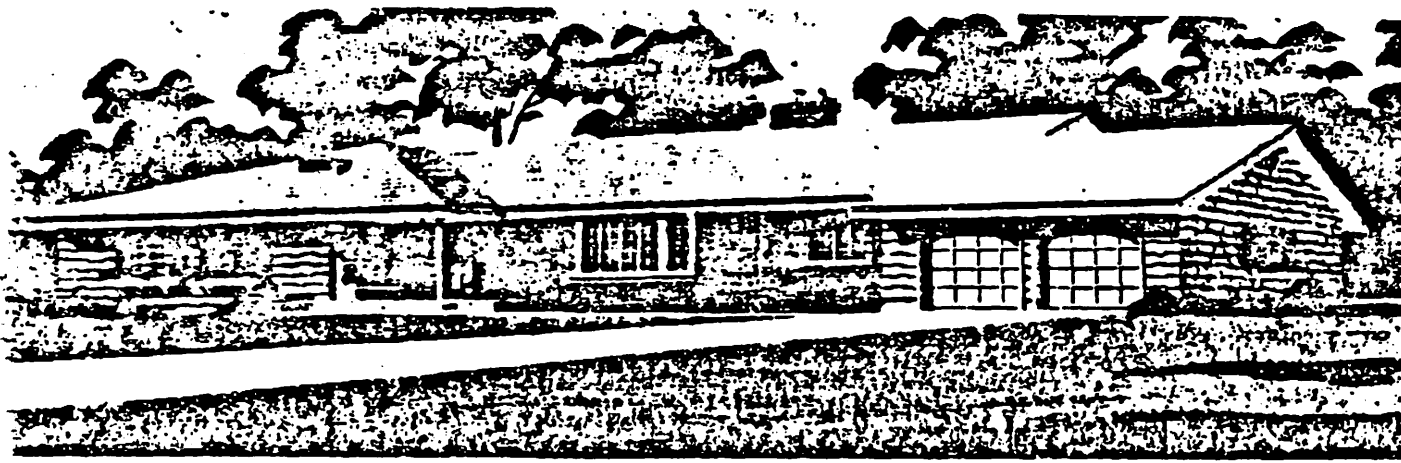
Ralph and Anita Bishop
Lot 21 Snow Hill

Popular Homes and Plans 67th Edition
Plan No# 6592 Page 43.

The following changes and additions will be added to the plans.

1. The house shall be built with all Brandy Standard fixtures.
2. Harmony Room rear wall to be extended straight across back of house.
3. The garage shall be 22' X 22' with side entrance.
4. Brick front as shown on plans with aluminum siding on the balance of house and wood soffits and facing.
5. The house will be shortened 2 feet with area to be removed from living room and harmony room.
6. A 30' by 12' deck to be installed on the rear of the house. 18' X 12' will be covered with shed roof and aluminum siding windows. A sliding glass door to be installed on the open deck side and a storm door installed on garage side of deck. A flue with thimble to be installed for porch.
7. The house will have a full basement except for the service area.

Alfred G. Bennett *Ralph Bishop*



SE PLANS, 48 W. 48, N. Y. 10036

Harmony House, Five Bedrooms

Plan No. F- 6592

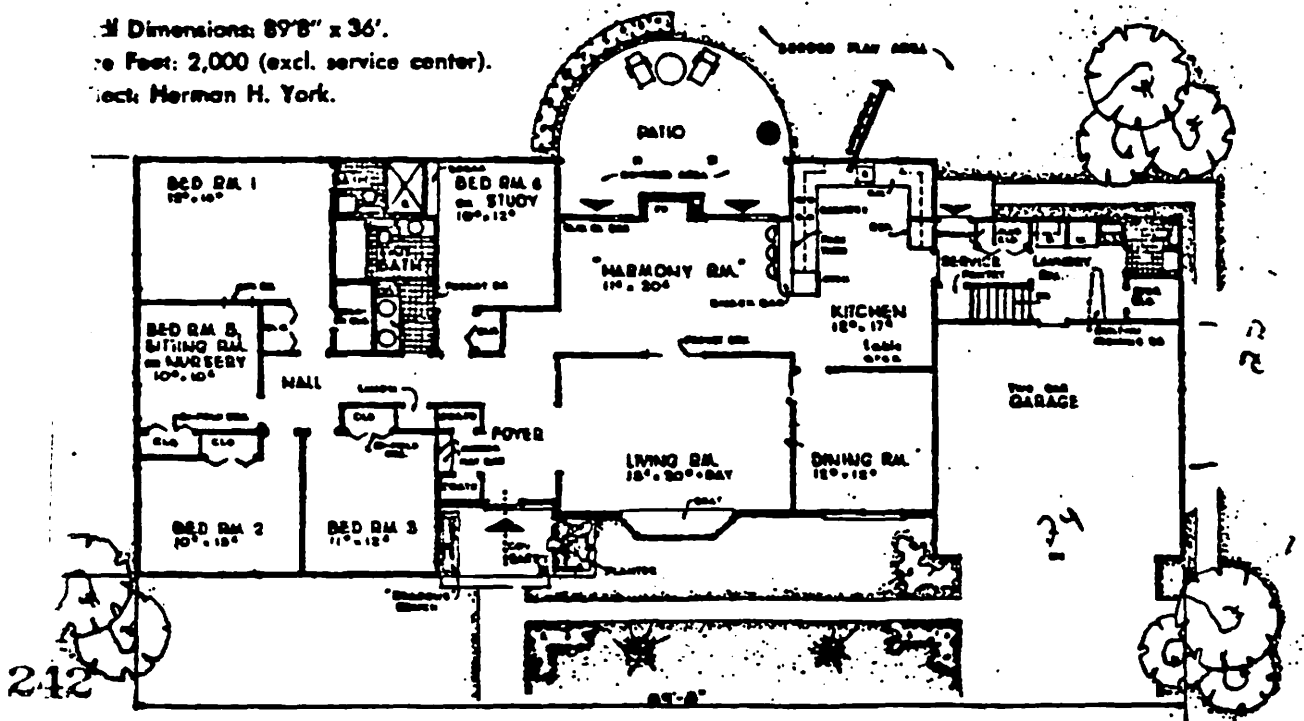
As you enter the front door of this well planned home you will find an attractive foyer with a double closet, a mirror bar combination. Visible from the foyer is a formal living room which has a big window with built-in window seat. Beyond this is the dining room, with two large front windows. At the center of the house there is a "Harmony room", aptly named because it offers facilities for many enjoyable informal get-togethers. For focus there is a fireplace on the side wall flanked by matching sliding glass doors. The doors open on a pretty patio which is partially covered for added comfort. This room, which will see a great deal of use, is not visible from the foyer and can be a more relaxed atmosphere, since the living room is easy to keep in company condition. There is a pocket door between these rooms which, when open, can easily expand entertaining space. A snack bar with a thru separates the harmony room from the kitchen. There is also a spacious table area in one corner.

Three walls of appliances and cupboards with an extra wide window over the sink make for easy worktime supervision of the back yard play area. Next to the kitchen is a service center which includes many conveniences. It has four closets—pantry, storage, mud and broom. Stairs to the basement are here, and a lavatory and room for laundry equipment, plus a rear entry and a door to the attached 2-car garage, make it a true activity hub. In the bedroom area of the house there are two front bedrooms, each with cross-ventilation and bi-fold door closet. The master bedroom has cross-ventilation too, a private bath with enclosed shower, and two closets, one a walk-in. If you wish, a door can connect this room with the fifth bedroom, which can then be used as a sitting room or nursery. The fourth bedroom would also make an ideal study or guest room. The family bath has been split to create a powder room at the front with a pocket door at the side opening on the fifth bedroom.

Overall Dimensions: 89'8" x 36'.

Approx. Foot: 2,000 (excl. service center).

Architect: Herman H. York.





BRANDY CONSTRUCTION CO.

P. O. BOX 1261
FREDERICKSBURG, VIRGINIA 22401

Phone: 371-2663

August 31, 1979

Union Bank & Trust
Bowling Green, Virginia

Att: Frank Elliott

Re: #20 Snow Hill Ralph Bishop

Union Bank & Trust;

This is my certification that all materials and costs
have been covered as a result of this \$ 15,000.00 draw
on August 31, 1979.

Al Greenwalt

A handwritten signature in cursive script that reads "Al Greenwalt". The signature is written in dark ink and is positioned above the company name.

Brandy Construction Co.



BRANDY CONSTRUCTION CO.

P. O. BOX 1261
FREDERICKSBURG, VIRGINIA 22401

Phone: 371-2663

October 5, 1979

Union Bank & Trust
Bowling Green, Virginia

Att: Frank Elliott

Re: #20 Snow Hill Ralph Bishop

Union Bank & Trust;

This is my certification that all materials and costs
have been covered as a result of this \$ 15,000.00 draw
on October 5., 1979.

Al Greenwalt

Brandy Constuction Co.
President

AG/bs



BRANDY CONSTRUCTION CO.

P. O. BOX 1261
FREDERICKSBURG, VIRGINIA 22401

Phone: 371-2663

November 9, 1979

UNION BANK & TRUST
BOWLING GREEN, VIRGINIA

Att: FRANK ELLIOTT

Re: #20 Snow Hill Ralph Bishop

Union Bank & Trust;

This is my certification that all materials and costs have
been covered as a result of this \$ 10,000.00 draw on November 9,
1979.

Al Greenwalt

A handwritten signature in cursive script, appearing to read "Al Greenwalt".

Brandy Construction Co.



BRANDY CONSTRUCTION CO.

P. O. BOX 1261
FREDERICKSBURG, VIRGINIA 22401

Phone: 371-2663

December 14, 1979

Union Bank & Trust
Bowling Green Virginia

Att: Frank Elliott

Re: Lot #20 Snow Hill -Ralph Bishop

~~Union Bank & Trust:~~

This is my certification that all materials and costs have been covered as a result of this \$ 10,000.00 Dollar draw on December 14, 1979.

Al Greenwalt
President

Brandy Construction Co.



BRANDY CONSTRUCTION CO.

P. O. BOX 1261
FREDERICKSBURG, VIRGINIA 22401

Phone: 371-2663

January 25, 1980

Union Bank & Trust
Bowling Green Virginia

Att: Frank Elliott

Re: Ralph Bishop, Lot 20 Snow Hill

Union Bank & Trust;

This is my certification that all materials and costs have
been covered as a result of this \$ 8,000.00 dollar draw
on January 25, 1980.

Al Greenwalt

A handwritten signature in cursive script, appearing to read 'Al Greenwalt'. The signature is fluid and stylized, with a large initial 'A' and a long, sweeping underline.

Brandy Construction Co.
President



BRANDY CONSTRUCTION CO.

P. O. BOX 1261
FREDERICKSBURG, VIRGINIA 22401

Phone: 371-2663

February 8, 1980

Union Bank & Trust
Bowling Green, Virginia.

Att: Frank Elliott

Re: Ralph Bishop, Lot 20 Snow Hill

Union Bank & Trust;

This is my certification that all materials and costs have
been covered as a result of this \$ 8,000.00 dollar draw
on February 8, 1980.

Al Greenwalt

Brandy Construction Co.
President



BRANDY CONSTRUCTION CO.

P. O. BOX 1261
FREDERICKSBURG, VIRGINIA 22401

Phone: 371-2663

February 22, 1980

Union Bank & Trust
Bowling Green, Virginia

Att: Frank Elliott

Re: Ralph Bishop, Lot # 20 Snow Hill

Union Bank & Trust;

This is my certification that all materials and costs have been covered as a result of thos \$ 10,000.00 dollar draw on February 22, 1980.

Al Greenwalt

Brandy Construction Co.
President



UNION BANK AND TRUST COMPANY

BOWLING GREEN, VIRGINIA

34042

August 31, 1979 68-31601
514

**PAY TO THE
ORDER OF.**

Brandy Construction Company

\$ 15,000.00

UNCLAS I500

DOLLARS

CASHIER'S CHECK

W. L. Satterwhite

01:05 1403 1641 01300000 1700 1

0001500000

การปกครองโดยคนดี

SEP-4 79

2455 12021



UNION BANK AND TRUST COMPANY

BOWLING GREEN, VIRGINIA

34290

Y TO THE
ORDER OF

Brandy Construction Co. *****

Oct 5 1979

68-31601
514

\$ 15,000.00

UNION BK. & TRUST CO. **\$15000 AND 00 CTS**

DOLLARS

to: Ralph Bishop

CASHIER'S CHECK

Janet B. Burke

AUTHORIZED SIGNATURE

⑆051403164⑆ 0130000017⑆01

⑆000150000⑆

FOR DEPOSIT ONLY
BRANDY CONSTRUCTION CO.



UNION BANK AND TRUST COMPANY
BOWLING GREEN, VIRGINIA

34567

NOV. 7 19 68-31601
514 01

PAY TO THE
ORDER OF Brandy Construction Company

\$ 10,000.00

1000000000

DOLLARS

Draw - Ralph Bishop D/T

CASHIER'S CHECK

Jeannette B. Burke

AUTHORIZED SIGNATURE

9:051403164: 0430000017#01

0001000000

0022 1505

THE UNION BANK
OF VIRGINIA
FREDERICKSBURG
FREDERICKSBURG, VA
68-123

For Deposit Only
Brandy Const
3rd Floor



UNION BANK AND TRUST COMPANY

BOWLING GREEN, VIRGINIA 22427

35180

Feb. 8 1980 FEB 8 1980

PAY TO THE ORDER OF Brandy Construction Co.

\$ 8000.00

UNION BANK & TRUST CO. 8000000000

DOLLARS

Increase Ralph Bishop D/T

CASHIER'S CHECK

Franklin Elmer

AUTHORIZED SIGNATURE

010514031640 013000001701

000008000000



FOR DEPOSIT ONLY
UNION BANK & TRUST CO.
BOWLING GREEN, VIRGINIA
010514031640



UNION BANK AND TRUST COMPANY

BOWLING GREEN, VIRGINIA 22427

35280

PAY TO THE
ORDER OF

Brandy Construction Co. * + * * * *

FEB 22 80

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65-519
514 01

\$10,000.00

UNION BANK
& TRUST CO.

1000000000

DOLLARS

Increase Ralph Bishop D/T

CASHIER'S CHECK

Franklin E. Ellett

AUTHORIZED SIGNATURE

⑆051403164⑆ 0130000017⑈01

⑈0001000000⑈

THIS CHECK HAS BEEN CREDITED
TO THE ACCOUNT OF
THE WITHIN NAMED PAYEE
NATIONAL BANK OF FREDERICKSBURG, VA.

ANY BANK
RICHMOND
6510-0003

FEB
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PAY TO THE ORDER OF
BRANDY CONSTRUCTION CO.

FEB
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UNION BANK AND TRUST COMPANY

BOWLING GREEN, VIRGINIA

35070

JUN 25 80 19 68-31601
514 01

PAY TO THE
ORDER OF

Brandy Construction Co.

\$8,000.00

UNION BANK
& TRUST CO. 8000000000

DOLLARS

CASHIER'S CHECK

Franklin Elliott

AUTHORIZED SIGNATURE

⑆051403164⑆ 0130000017⑆01

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Commonwealths Ex. #5

THIS CHECK HAS BEEN CREDITED
TO THE ACCOUNT OF
THE WITHIN NAMED PAYEE
NATIONAL BANK OF FREDERICKSBURG, VA

Deposit Only



UNION BANK AND TRUST COMPANY

BOWLING GREEN, VIRGINIA

34792

PAY TO THE
ORDER OF

Brandy Construction Company

DEC 14 79

19

68-316
514 01

\$ 10,000.00

UNION BANK
& TRUST CO.

1000000000

DOLLARS

CASHIER'S CHECK

L. Franklin Elliott

AUTHORIZED SIGNATURE

DEC 14 79

TRUST

BRANDY CONSTRUCTION COMPANY

61202

Deposit Only

JOHN L. DANIELSON, JR., INC.

Drilled & Bored Wells
4616 Hood Drive
FREDERICKSBURG, VIRGINIA 22401
(703) 898-WELL Office (703) 898-6025

SOLD BY		DATE
		Feb. 18 1980
NAME		
Branch Commission		
ADDRESS		PHONE
701 E. Greenwell P.O. Box 1261		371-2663
CITY		
Fredericksburg Va. 22401		
<input type="checkbox"/> PAID	<input type="checkbox"/> CHARGE	<input type="checkbox"/> MOSE. RET'D
<input type="checkbox"/> PAID OUT	<input type="checkbox"/> PAID DUT	<input type="checkbox"/> PD. ON ACCT.

QUAN.	DESCRIPTION	PRICE	AMOUNT
37 FL	1 Drilled Bored Hole	27.00	No Charge
21 FL	2 Drilled Bored Hole 1/2" dia	4.50	117.00
	3		
245 FL	4 Drilled Well	4.50	1592.50
37 FL	5 Casings	3.50	129.50
	6 Grouting		60.00
	7		
	8		1999.00
	9 Discount		
	10 at discount is received by 3/19 - 70.00		
	11	1829.00	
	12 approx. flow by 120 gpm @ 100 ft		
	13 installation of drilled well		
	14		
	14 Remittance due upon receipt.		
	15 1 1/2% interest per month added after 30 days.		
	16 This is an annual percentage rate of 18%		
TOTAL			

RECEIVED BY

Ralph Kustop
Lewi Abel #20

TOTAL

N2

422

Commis. Exp. # 6

Thank You

ad

BRANDY CONSTRUCTION CO.
1201 12th St.
FREDERICKSBURG, VIRGINIA 22401

09781

12/17/78

478.38

Twenty eight and 38/100

The National Bank
of Fredericksburg

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COPIES
101 TR
BOSTON
MA
E.G.
AND
ANY
VA.

8/21

BRANDY CONSTRUCTION CO.
P. O. BOX 1261
FREDERICKSBURG, VA 22401

9540

Oct 5, 1979 68-133
314

PAY TO THE ORDER OF Union Bank & Trust \$ 135.63

One hundred thirty five & 63/100 — DOLLARS

THE NATIONAL BANK OF FREDERICKSBURG
FREDERICKSBURG, VIRGINIA

MEMO Mr. Ralph Bishop Sally Greenwalt

⑆051401331⑆ ⑆103 42 1⑆ ⑆0000013563⑆

RICHMOND
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OCT - 9 79

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UNION BANK AND
TRUST COMPANY
BOWLING GREEN, VA.
68 316

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PAY ANY BANK, P.E.G.
FED. RICHMOND
510-0003-3

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BRANDY CONSTRUCTION Co.
P. O. BOX 251
FREDRICKSBURG, VIRGINIA 22401

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862.50

Union Bank & Trust

The National Bank
of Fredericksburg
Fredericksburg, Virginia

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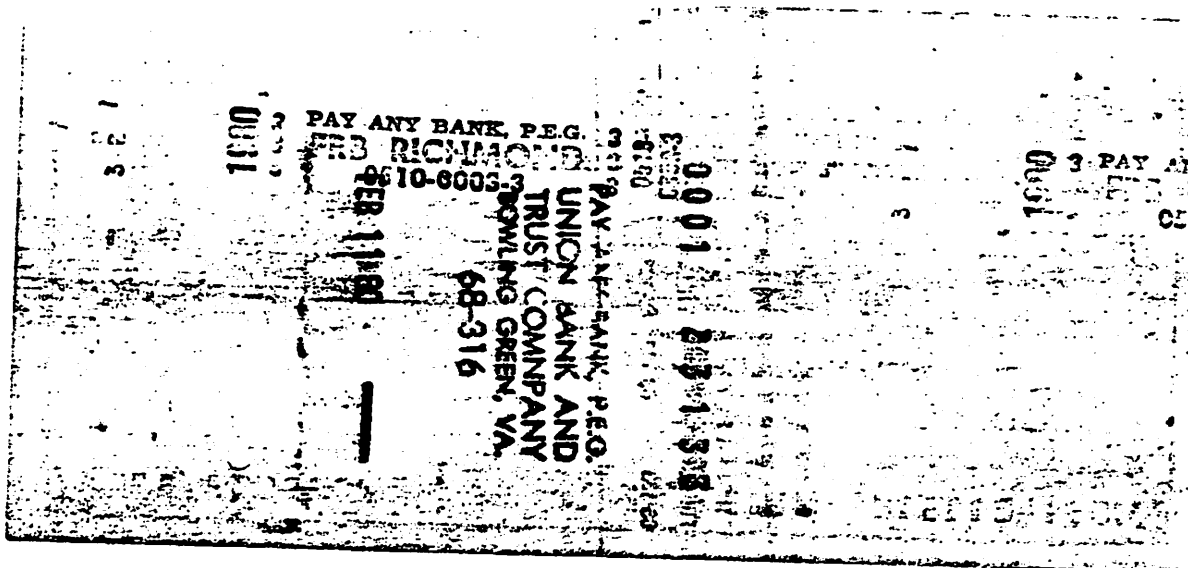
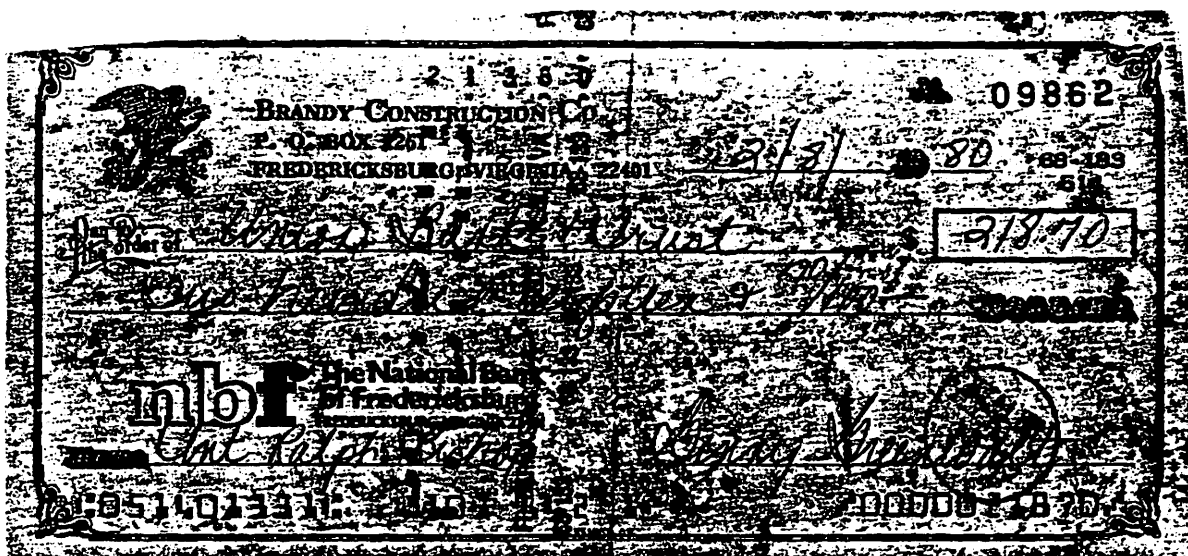
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NOV - 9 79

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AND COMPANY
PORTER GREEN, VA.

5



BRANDY CONSTRUCTION CO.
P. O. BOX 4261
FREDERICKSBURG, VIRGINIA 22401

09897

390-27

10510-1111

10510-1111

PAY ANY BANK, P.E.G.
RICHMOND
0510-0003-3

FEB 22 1981

PAY ANY BANK, P.E.G.
UNION BANK AND
TRUST COMPANY
ROWLING GREEN, VA.
68-316

0001

PAY ANY BANK, P.E.G.
FRB RICHMOND
0510-0003-3

5 checks

Exp. # 1

Chancellor Plumbing & Heating Inc.

P.O. Box 1264 College Station

Fredericksburg, Virginia 22401

DEFENDANT EXHIBIT 2

Brandy Construction Co.
713 Westwood Ofc. Bk.
Fredericksburg, Va. 22401

20

Oct 1, 1979

Dear Sir,

We propose to furnish and install plumbing in house at Snow Hill lot-20 for the sum of Two thousand three hundred and fifty dollars (\$2,350.00).

Following material to be used;

- 1- Fiber glass tub in color-Bone
 - 1- 48inch shower unit in color-Blue
 - 2- 5ft. Alum. shower rods
 - 1- Price Fister tub waste & overflow No-18-010
 - 1- Shower valve only-Moen
 - 1- Shower drain
 - 1- Moen tub & shower valve No-2739
 - 3- Toilets in color
 - 3- Toilet seats in color
 - 3- Sets of brass craft toilet supplies
 - 3- 19in. self rimming vanity bowls in color-steel
 - 3- Sets of Moen lavatory faucets No-4625
 - 3- Sets of brass craft lavatory supplies
 - 1- Moen kitchen sink faucet less spray No-7533
 - 1- Double bowl stainless steel sink
 - 1- Reem 52gal. water heater energy miser
 - 2- Hose bibs-one in front and one in rear
 - 1- Washing machine box
 - A.B.S. plastic for groundwork
 - A.B.S. plastic for waste and vents
 - Type-M copper for water line
 - Roof flanges to be furnish by us, install by others
 - Dishwasher furnish and install by others, hook-up by us
 - Vanity cabinets to be furnished and install by others
 - Sewer and water to terminate 5ft. outside of house
- Any work other than contract work will be \$18.50 first hour, \$13.50 each following hour plus material.

Will not be responsible for any material once it is installed.

Payments to be as follows;

1st. & 2nd. Draw--G-work, waste & vents; \$1,550.00

3rd. Draw--Completion; \$800.00

Accepted by; _____

Date; Oct -3- 79

William A. Cooper Sr.
William A. Cooper Sr.

Defendants' Ex. #2 - Jaf

22580		09896	
BRANDY CONSTRUCTION CO.			
P. O. BOX 4261		2/22/80	
FREDRICKSBURG, VIRGINIA 22401		68-123	
		512	
Charles E. Plummer		1,550.00	
Fifty 9/100		000000	
The National Bank			
of Fredricksburg			
FREDRICKSBURG, VIRGINIA 22401			
#20 Rough		Sandy Crumwell	
0514013311		0000155000	

Chancellor Will & Son
SAS-1702
Defendants' Ex. # 394
0321 60291
THE NATIONAL
FIRE INSURANCE CO. OF N.Y.
FEB 25 1980
DEF #3 VS 11-12-80

2-7-9 1847400 09764

BRANDY CONSTRUCTION CO.
P. O. BOX 211
FREDERICKSBURG, VIRGINIA 22401

12/21/79 516.00

Novelty Insulation
4 inch fiberglass exterior 4' x 10' / 100'

mbf The National Bank
of Fredericksburg
FREDERICKSBURG, VIRGINIA

#20 *Branch* *Branch*

00511013310 0000051600

BANK P.C.
CHAMOND
12002-3

DEC 11

68012 DEC 10 79

1979 4 PAY ANY BANK
43 FRB RICHMOND
0510-0903-3

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FOR DEPOSIT ONLY
DAVENPORT INSULATION CO., INC.

21.5 #4

3 PAY ANY BANK
1

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*Chapter Book 3 page 74
Def. Ex # 7*

ARTICLES OF INCORPORATION
OF
BRANDY CONSTRUCTION CO.

We hereby associate to form a stock corporation under the provisions of Chapter 1 of Title 13.1 of the Code of Virginia and to that end set forth the following:

1. The name of the corporation is Brandy Construction Co.
2. The Corporation is organized for the purpose of contracting and sub-contracting residential and commercial building construction and the purpose of purchasing and developing real estate.
3. In addition, the Corporation shall have the power to enter into partnership agreements with other corporations, partnerships, individuals, and also to carry on business of any character whatsoever that is not prohibited by any law or required to be stated in these articles.
4. The aggregate number of shares which the Corporation shall have the authority to issue and the par value per share are as follows:

<u>Class</u>	<u>Number of Shares</u>	<u>Par Value Per Share</u>
Common-A	5,000	\$10.00

5. The post office address of the initial registered office of the Corporation is: Box 1261 909 Kennedy Lane, Sheration Hills East), Fredericksburg, Virginia 22401.

The name of the county in which the initial registered office and the business is located is Spotsylvania, County Virginia. The name of the initial registered agent of the Corporation is Alvin E. Greenwalt, a resident of Spotsylvania County in the Commonwealth of Virginia and whose business address is the same as the address of the initial registered office of the Corporation.

6. The number of directors constituting the initial board of directors of the corporation shall be fixed by the by-laws as a range of maximum and minimum directors in compliance with Section 13.1-36 of the Code of Virginia of 1950, as amended. The name and address of the initial director is Alvin E. Greenwalt, Box 1261 (909 Kennedy Lane, Sheration Hills East), Fredericksburg, Virginia 22401.

7. Each person now or hereafter a director or officer of the Corporation (and his heirs, executors and administrators shall be indemnified by the Corporation

*1/28/77
referred to
in Corp. Comm
amend. to
Certified M
an receipt
requested*

against all claims, liabilities, judgments, settlements, costs and expenses, including all attorney's fees, imposed upon or reasonable incurred by him in connection with or resulting from any action, suit, proceeding or claim to which he is or may be made a party by reason of his being or having been a director or officer of the Corporation (whether or not a director or officer at the time such costs or expenses are incurred by or imposed upon him), except in relation to matters as to which he shall have finally adjudged in such action, suit or proceeding to be liable for gross negligence or willful misconduct in the performance of his duties as such director or officer. In the event of any other judgment against such director or officer or in the event of a settlement, the indemnification shall be made only if the Corporation shall be advised in the case none of the persons involved shall be or have been a director, by the Board of Directors of the Corporation, and otherwise by independent counsel to be appointed by the Board of Directors of the Corporation, that in its or his opinion such director or officer was not guilty of gross negligence or willful misconduct in the performance of his duty, and in the event of a settlement, that such settlement was or is in the best interest of the Corporation. If the determination is to be made by the Board of Directors, it may rely as to all questions of law on the advice of independent counsel. Such right of indemnification shall not be deemed exclusive of any rights to which he may be entitled under any by-law, agreement, vote of stockholders, or otherwise.

Dated: November 21, 1977

Alvin E. Greenwalt (Seal)
Alvin E. Greenwalt, Incorporator

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

AT RICHMOND
November 28, 1977

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

AT RICHMOND
November 28, 1977

The accompanying articles haveing been delivered to the State Corporation Commission on behalf of Brand Construction Co. and the commission having found that the articles comply with the requirements of law and that all required fees have been paid it is ORDERED that this CERTIFICATE OF INCORPORATION be issued, and that this order, together with the articles, be admitted to record in the office of the Commission; and that the corporation have the authority conferred on it by law in accordance with the articles, subject to the conditions and restrictions imposed by law.

Upon completion of such recordation, this order and the articles shall be forwarded for recordation in the office of the clerk of the Circuit Court of Spotsylvania County.

State Corporation Commission
By Thomas P. Harwood, Commissioner

VIRGINIA:

In the Clerk's Office of the Circuit Court of Spotsylvania County

The foregoing certificate (including the accompanying articles) has been duly recorded in my office this 8th day of December and is now returned to the State Corporation Commission by certified mail.

Teste:

Evelyn P. Sney

, Deputy Clerk

A copy,

Teste: Margaret M. Cook, Clerk.

#####

Charter book 5/104

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

RICHMOND,
July 10, 1980

To the Clerk of the Circuit Court of Spotsylvania Co.

I enclose check for \$1.00, pursuant to the provisions of §13.1-10 or §13.1-209, to pay the cost of recording in your charter book that Brandy Construction Co. has its registered office at 501 Westwood Park, P. O. Box 1261, Fredericksburg, VA 22401 (Spotsylvania Co.) and that the name of its registered agent at that address is Alvin E. Greenwalt, Pres.

Respectfully,

William C. Young,

William C. Young, Clerk

Truly recorded 15 July 1980

Teste: *Bernice M. Meekerson*, Deputy Clerk

a copy,
Teste: *Margaret M. Cook, Clerk.*

#####