

1953

Wayne Jackson and Mildred Jackson v. H. T. Cope and T. Truman Cope : Brief of Appellants

Utah Supreme Court

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F. Robert Bayle; Attorney for Defendants and Appellants;

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In the Supreme Court of the State of Utah

WAYNE JACKSON and MILDRED
JACKSON, his wife,

Plaintiffs and Appellees,

vs.

H. T. COPE and T. TRUMAN COPE,
Co-partners, doing business under
the firm name and style of Cope
Brothers Lumber Co.,

Defendants and Appellants.

Case No.
8012

BRIEF OF APPELLANTS

FILED
AUG 17 1953

Clerk, Supreme Court, Utah.

F. ROBERT BAYLE,

*Attorney for Defendants
and Appellants.*

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The plaintiffs instituted this suit in the District Court of the Third Judicial District in and for Salt Lake County, Utah, alleging that they suffered damages in the sum of \$700.00 by reason of defendants' negligence in executing a lien waiver to plaintiffs' contractor in exchange for a check in that amount paid by the said contractor on his account for lumber and other building

materials purchased by him from the defendants. After a trial before the Court sitting without a jury, judgment was rendered in favor of the plaintiffs for the above amount, plus interest (R. 71, 72, 73, & 74).

STATEMENT OF FACTS

On the 27th day of July, 1950, the plaintiffs entered into a written agreement with one J. H. Holmes whereby the latter as contractor, agreed to construct a five room home for the plaintiffs on property located at 1777 East 21st South Street in Salt Lake City, Utah. (Plaintiffs' Exhibit B, R. 35 & 36). The plaintiffs thereafter negotiated a construction loan with Union Trust Company, and signed a promissory note and mortgage securing the loan of \$9,050.00. (Defendants' Exhibit 1, R. 41). The plaintiffs authorized the loaning institution to discharge funds from their account directly to Holmes upon presentation by him of lien waivers from the various laborers and materialmen with whom he was doing business. (Defendants' Exhibit 1, R. 40, 41, 42 & 44).

The defendants have been engaged as partners for the past five or six years doing business under the firm name of Cope Brothers Lumber Company, and have sold and delivered quantities of lumber and other building materials to plaintiffs' contractor Holmes, who, prior to his bankruptcy in 1951, was constructing dwelling houses in and around Salt Lake City, Utah (R. 46, 47, 63 & 64).

Holmes commenced construction of the plaintiffs' dwelling in the late Summer or early Fall of 1950 (R. 43). He was at that time in the course of constructing several other residences, and this fact was known to both plaintiffs and defendants (R. 46 & 64).

On October 27, 1950, Holmes issued a check from his construction company in the sum of \$700.00, payable to Cope Brothers Lumber Company, and sent it to them by mail (R. 33 & 34). Accompanying this check was a form lien waiver, in blank. Defendant H. T. Cope filled in the date of receipt, the amount, signed the partnership name by himself, and returned it to Holmes, as the contractor (R. 33 & 34). At this time, Holmes was indebted to the defendants in excess of \$3900.00 for lumber and other materials sold and delivered to him on open account (R. 34 & 35). It had been a business practice for defendants to deliver lumber and other building materials to employees of Holmes, who would place the orders in advance, call for the merchandise at defendants' place of business, and haul it by trucks to a warehouse maintained by Holmes, for later distribution to a particular job (R. 63 & 64). The defendants had no way of knowing where the materials sold to Holmes went, other than to his warehouse, as most of the merchandise purchased from defendants was picked up at their place of business (R. 39, 63 & 64).

After Holmes received the above mentioned lien waiver from the defendants, he completed the form by typing in the plaintiffs' job location and on November 3,

1950, presented the completed lien waiver to the Union Trust Company and received a check from it in the sum of \$700.00, the amount which he had previously paid to the defendants' lumber company (R. 41 and Plaintiffs' Exhibit A).

In January, 1951, Holmes became financially involved and filed for relief in bankruptcy (R. 48 & 49). The plaintiffs' dwelling had not been completed and there were mechanic's liens against the property aggregating about \$1100.00 (R. 44, 45 & 46). Plaintiffs had not required Holmes to furnish a bond, as provided by law (R. 50), and they were obliged to employ another contractor to complete their job (R. 49, 60 & 61).

The plaintiffs then brought this action seeking to recover the \$700.00 which Holmes had paid to the defendants' Company, asserting that defendants were negligent in executing the lien waiver requested by Holmes. The plaintiffs further claimed that defendants had furnished no materials to their job. The evidence in this latter respect is vague and not supported by the record (R. 37, 56, 57 & 58). At the conclusion of the plaintiffs' evidence, counsel for defendants moved the Court for a judgment of no cause of action on the ground that plaintiffs had failed, as a matter of law, to prove a case against the defendants upon their theory of negligence (R. 59). The trial Court suggested that this case should have been pleaded upon a theory of assumpsit for money had and received, and over the objection of defendants' counsel, amended the pre-trial order to incorporate this entirely new theory (R. 60).

STATEMENT OF POINTS

POINT I

THE TRIAL COURT ERRED IN MAKING AND ENTERING FINDING OF FACT NO. 6 TO THE EFFECT THAT THE DEFENDANTS DID NOT FURNISH ANY MATERIAL OR RENDER ANY SERVICE FOR THE CONSTRUCTION OF PLAINTIFFS' HOME ON THE GROUND AND FOR THE REASON THAT SAID FINDING IS WHOLLY UNSUPPORTED BY THE EVIDENCE.

POINT II

THE TRIAL COURT ERRED IN MAKING AND ENTERING FINDING OF FACT NO. 7 TO THE EFFECT THAT THE DEFENDANTS RECEIVED THE SUM OF \$700.00 FROM FUNDS BELONGING TO PLAINTIFFS FOR WHICH DEFENDANTS FURNISHED NO MATERIAL ON THE GROUND AND FOR THE REASON THAT SAID FINDING IS WHOLLY UNSUPPORTED BY THE EVIDENCE.

POINT III

THAT THERE IS NO EVIDENCE TO SUPPORT THE CONCLUSIONS OF LAW, AND THE JUDGMENT IS CONTRARY TO LAW.

POINT IV

THAT THE TRIAL COURT ERRED IN AMENDING THE PRE-TRIAL ORDER AT THE CONCLUSION OF PLAINTIFFS' CASE ON THE GROUND AND FOR THE REASON THAT SUCH AMENDMENT CREATED AN ENTIRELY NEW THEORY OF THE CASE AND WAS FATAL TO PLAINTIFFS' CAUSE OF ACTION.

ARGUMENT

POINT I

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POINT II

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The only evidence before the Court regarding whether or not defendants' lumber company had furnished any materials for use in the construction of plaintiffs' dwelling is conjectural and vague in nature, and certainly insufficient to justify the findings made by the trial Court. Plaintiff Wayne Jackson in testifying concerning this matter, said (R. 37) :

By Mr. Bayle on voir dire: "Mr. Jackson, what is the basis for your answer "yes" to that question?

A. Well, I understand the question to be yes, I know that Cope Brothers Lumber Company didn't furnish any lumber in my house.

Q. What is the basis of your knowledge?

A. Well, Mill Creek Lumber has a lien on my place for about seventeen hundred and some odd dollars which we have established the fact that that's all the lumber that could have been in there up to that point when John Holmes took out bankruptcy.

Q. Are you familiar with how much lumber as a matter of personal knowledge would go into a home the size of yours?

A. Only what I have learned from building that house and my contract with builders.

Q. You are not a building contractor, are you?

A. No.

Q. And you can't figure the number of board feet of the various types of lumber if you are given the square footage of a house, can you?

A. No."

This witness further testified that he had a conversation with one of the defendants, H. T. Cope, in the latter part of April, 1952, which was more than a year after plaintiffs' contractor had left their job (R. 38 & 39). Defendant Cope told this plaintiff that his company had not actually hauled materials to plaintiff's address but that lumber had been delivered to Holmes's warehouse during the time he was working on plaintiffs' dwelling, and that it could have gone anywhere from there (R. 39).

Nor does the testimony of witness Edwin S. Felt,

Jr., assist the plaintiffs in proving that none of the materials furnished by defendants to Holmes went into plaintiffs' home. Felt testified that as credit manager for Mill Creek Lumber and Hardware Company he was familiar with the fact that his company had delivered materials in the amount of \$2329.96 (R. 52 & 55), to plaintiffs' address. This information was gleaned from an examination of delivery tickets, but as to whether these materials actually went into plaintiffs' home was pure speculation insofar as this witness knew, for on cross-examination he testified as follows (R. 56):

By Mr. Bayle: "Did you make an inspection of the job in January of 1951?"

A. Yes. You might call it inspection. We certainly looked at the job. We didn't try and take an inventory.

Q. You don't know at that time that the lumber that was delivered to the site was actually in the job, do you?

A. Not piece for piece. I will put it that way.

Q. You made no inspection on that basis?

A. Not as an inventory basis.

Q. There could have been other materials of the type that come from a lumber yard that could have gone in the job, and some of your materials could have gone some place else. Is that correct?

A. That is a possibility. We had no indication actually, you know, of that happening, but I certainly would say it was within the realm of possibility.

Q. And did you know at that time that Mr. Holmes was constructing several houses?

A. Oh, yes. We had furnished several of his homes.

Q. And they were all going on simultaneously, weren't they?

A. A good number of them were."

This witness produced none of the delivery tickets at the trial and his testimony can shed little light on the question in issue as upon further cross-examination he proved that he did not know exactly what materials had been furnished (R. 57 & 58).

By Mr. Bayle: "It is possible that you didn't furnish the actual flooring. Is that correct?

A. That would be an item that could be very definitely ascertained. I don't have it right in my knowledge now of positively one way or another.

Q. How about the siding?

A. That I would want to refer to the tickets to give a positive answer.

Q. What about the plaster board?

A. I would have to look at my tickets for that, sir.

Q. You don't know about those items?

A. Not for certain."

Witness Felt also testified that the materials that would come from a lumber yard to construct a home

similar in size to that of plaintiffs would approximate "between twenty-five hundred and three thousand dollars" (R. 54). This was based upon a "fair estimate," to use the words of the witness (R. 54), and would have no probative value when compared to the conclusion drawn by defendant H. T. Cope who had actually been engaged in the construction of houses. Witness Cope's testimony was that materials furnished by a lumber company would run about 40% of the total construction cost of a residence such as the plaintiffs were building (R. 65), and this would be far in excess of the amounts claimed by plaintiffs to have been furnished by Mill Creek Lumber and Hardware Company and that purchased by the second contractor (R. 60 & 61).

While we do not wish to burden this Court with too minute of an interpretation of the foregoing evidence, we do feel that the conclusions of the Court with respect to these findings rest upon speculative evidence which is too vague to justify the conclusion that none of defendants' materials went into plaintiffs' dwelling. We therefore respectfully urge this Court to reject the trial Court's findings in this respect as being unsupported by the evidence.

POINT III

THAT THERE IS NO EVIDENCE TO SUPPORT THE CONCLUSIONS OF LAW, AND THE JUDGMENT IS CONTRARY TO LAW.

We believe the essential question to be disposed of on this appeal is whether or not the Judgment entered by the trial Court is contrary to the law.

This is not a case where the defendants are attempting to assert a lien upon plaintiffs' property for materials furnished, but conversely, plaintiffs attempt to recover money which was paid to their contractor in exchange for a lien waiver theretofore signed by defendants and delivered by them to the contractor upon receiving a payment upon his account. The question involves Title 38-1-3, Utah Code Annotated, 1953, which provides as follows:

“Contractors, subcontractors and all persons performing labor upon, or furnishing materials to be used in, the construction or alteration of, or addition to, or repairs of, any building, structure or improvement upon land; all foundry men and boiler makers; all persons performing labor or furnishing materials for the construction, repairing or carrying on of any mill, manufactory or hoisting works; all persons who shall do work or furnish materials for the prospecting, development, preservation or working of any mining claim, mine, quarry, oil or gas well, or deposit; and licensed architects and engineers and artisans who have furnished designs, plats, plans, maps, specifications, drawings, estimates of cost, surveys or superintendence, or who have rendered other like professional service, or bestowed labor, shall have a lien upon the property upon or concerning which they have rendered service, performed labor or furnished materials, for the value of the service rendered, labor performed or

materials furnished by each respectively, whether at the instance of the owner or of any other person acting by his authority as agent, contractor or otherwise. Such liens shall attach only to such interest as the owner may have in the property, but the interest of a lessee of a mining claim, mine or deposit, whether working under bond or otherwise, shall for the purposes of this chapter include products mined and excavated while the same remain upon the premises included within the lease."

Had the defendants sought to enforce a lien upon plaintiffs' property, they would have merely been required to show by a preponderance of evidence that they had sold lumber and building materials to plaintiffs' contractor Holmes, for use in their dwelling. It is not necessary that the materialman actually deliver the goods sold to the job. He can sell directly over the counter to the contractor and still enforce a lien upon the premises where the contractor intends to use them even though such goods are diverted by the contractor to another job. As the Court said in *Westinghouse Electric Supply Company vs. Hawthorne*, 150 P. 2d 55, 58:

"A portion of the wire furnished was stored for future use as needed, but this does not prevent appellant from claiming a lien therefor. Materials which are delivered in good faith by a materialman, to be incorporated into a building, are lienable, and the fact that they have not been used for the purpose for which ordered will not defeat the claim."

We believe the rule stated in Jones on Liens, 3rd Edition, paragraph 1329, page 557, is practical when applied to modern business, and is applicable here:

"In most states, the actual use of the materials is not requisite if they were furnished for a particular building or improvement. To require direct and positive testimony that as to each specific article delivered, that it was in fact used in the building, would make the mechanics' lien law more of a burden and a trap than a blessing and a help."

It must be remembered that in the instant case, the plaintiffs attempt to recover money paid to defendants by plaintiffs' contractor. The Utah lien statute above quoted, merely gives the person who furnishes materials to a contractor, an addition right in the form of a remedy against the owner of property where the materials are intended for use. By waiving this right, can it be said that the defendants acted in bad faith in signing the lien waiver in exchange for the \$700.00 paid by contractor Holmes to apply upon his open account which then reflected a balance of approximately \$3900.00. This is not a case of fraud. The plaintiffs were well aware that Holmes was a general contractor and that he had several other dwelling jobs under construction at the time plaintiffs employed him (R. 46 & 47). They trusted him as their agent to withdraw funds from their loaning institution as lien waivers were presented (Defendants' Exhibit 1). The defendants had sold building materials to Holmes to be used on the several jobs at his discretion,

and as previously stated, he was indebted to the defendants in excess of \$3900.00 when he made the \$700.00 payment on his account. This money came from the bank account of Holmes and not from the loan account of the plaintiffs as the Union Trust Company named Holmes only, as payee. The plaintiffs claim defendants were negligent when they executed the lien waiver, or that they were unjustly enriched and ought in good conscience, return the money. Neither of these propositions is tenable.

What did the defendants do wrong when they executed the lien waiver? This was merely the giving up of a right which was created for their benefit under the mechanics' lien statute. Waiver is the relinquishment of or refusal to accept a right. It implies an election of the party to forego some advantage which he might have had. Words and Phrases, Volume 44, Page 516. As is said by the author in 57 Corpus Juris Secundum, paragraph 222, page 793:

“The waiver of a mechanics' lien is not the giving up of a property right, but merely of an added remedy.”

Upon the theory adopted and pursued by the plaintiffs in their complaint and at the trial, and defendants are charged with negligence. Can it be said that there was a duty owing from the defendants to the plaintiffs? If so, what was that duty? Negligence is a relative term and its application depends on the situation of the parties, and the degree of care and vigilance which the

circumstances reasonably impose. The first requisite in establishing negligence is to show the existence of the duty which it is supposed has not been performed. There can be no negligence unless there is a duty which has been violated. The afore quoted mechanics' lien statute (Title 38-1-3), imposed no duty upon the defendants except to refrain from activities which would amount to collusion with plaintiffs' contractor, and hence result in fraud. As before stated, this is not a case of fraud and the plaintiffs have never so contended. The materials were furnished in good faith to Holmes. He was the agent of the plaintiffs and by the provisions of the letter of instructions given by the plaintiffs to their loaning institution (Defendants' Exhibit 1), Holmes had control of the situation and could draw funds upon the presentation of lien waivers, wholly within the discretion of the Union Trust Company. It even went so far as to release the loan company from any liability in connection with the payments. Suppose the defendants didn't keep an account of where the materials sold to Holmes were eventually used. There was no duty owing to plaintiffs in that respect and when the defendant, H. T. Cope, signed the lien waiver in blank, except for the date and amount received, and returned it by mail to Holmes, he relied wholly upon the knowledge of the contractor who was plaintiffs' agent and assumed to know the true facts of where the materials had been used. The evidence shows Holmes was commingling his building materials and even had he told defendants where the materials purchased from them were going to be used, this wouldn't

have made any difference, as the materials could have easily been moved to other jobs. Both plaintiffs and defendants lost by the bankruptcy of Holmes, but the plaintiffs could have protected themselves by insisting upon a contractors' performance bond as provided by law, or by periodic investigations to see that the materials purchased by their contractor actually went into the construction of their dwelling. Numerous cases have been decided by the courts concerning the application of statutes pertaining to mechanics' liens. However, the decisions are largely concerned with the burden of proof required on the part of a materialman to prove a claimed lien, which is not our instant case. The instant problem is considered in 57 Corpus Juris Secundum, paragraph 249, at page 827, wherein the author says:

“In the absence of fraud and collusion, a materialman receiving from a contractor money paid over by the owner may apply such payment to any debts owed him by the contractor.”

We believe the case of *Bounds vs. Nuttle*, 30 Atlantic 2d 263, 181 Maryland 400, is precisely in point. In passing upon facts similar to our instant case, the court said:

“Contractors building a number of houses frequently have separate accounts with material men. The contractor can apply his money on any bill he owes. It does not have to be applied on the bill for the materials for the house from the contract for which he obtained it. The contractor's obligation to the owner is to furnish and turn over the house without liens, but this does not prevent

him from using his receipts from one contract to pay on another. Nor does it prevent the material man from having his lien, unless he agrees that it shall be done this way, in order that he may get his other bills paid and may collect double from the owner. That, of course, would be fraud."

The court goes on to say:

"If the failure to protect themselves against an impecunious contractor causes them to have to pay twice for materials, it is their own fault. The mechanics' lien law was passed to cover just such a situation and to protect materialmen. The theory of it is that the owner gets the benefit of the materials, and he has control of the money. If he negligently and carelessly pays the money out to the contractor without taking precautions to see that it is applied to the payment of the materials which go into the building, then he must stand the loss rather than the materialman, who has no opportunity to protect himself once he has delivered the materials."

As is said by the author in 40 Corpus Juris, paragraph 464, page 344:

"The right of a contractor, materialman, or workman to a lien is not dependent upon the state of accounts between the owner and contractor, and hence the lien is not defeated or affected by any payment to the contractor."

Even where one performs labor for part of which he is entitled to a mechanics' lien, and for part of which he is not entitled to such lien, he may, on payments being made without specifying which account they are to be credited to, appropriate them to either account. *Christnot*

vs. Montana Gold and Silver Mining Company, 1 Montana 44.

It is the duty of the owner, in paying his contractor, to see that funds are properly distributed to laborers, materialmen, and subcontractors. *General Sports Company vs. Leslie and Walter Coombs Lumber Company*, 288 Pac. 949, 143 Oklahoma 297. See also *Georgia State Savings Association vs. Sun Lumber Company*, 280 Pac. 281, 138 Oklahoma 11, wherein the court said:

“A materialman is not ordinarily required to apply payments made by owner to any specific account or debt unless so directed.”

Schwager — Nettleton Mills vs. Carstens, 180 Pac. 137, 106 Washington 392.

Bannock Lumber and Coal Company vs. Tribune Company, Ltd., et al. 4 Pac. 2d 663.

Applying the foregoing principles, we respectfully submit that the plaintiffs cannot recover the amount paid by their contractor to the defendants, neither upon the theory of negligence, as relied upon by them in their complaint, nor upon a money had and received count. The gist of an action for money had and received is that a wrongdoer has deprived a person of the possession of property or money to which he is entitled and for which recovery or compensation is sought. As is said in 7 Corpus Juris Secundum, paragraph 9, page 115:

“In one word, the gist of this kind of action is that the defendant, upon the circumstances of

the case, is obliged by the ties of natural justice and equity to refund the money.”

and in paragraph 4, page 111 of the same volume, the author further says:

“The action of assumpsit, as the derivation of the word implies, is founded on an undertaking or promise, and the courts have frequently and repeatedly stated that a contract, express or implied, is necessary to support it.”

We fail to see where the plaintiffs in our instant case could prevail even though they had set forth in their complaint an action in assumpsit for money had and received. The defendants are not wrongdoers. As previously stated, it was not plaintiffs’ money which they received from Holmes and applied to his account. The money came from Holmes on October 27, 1950, and the money paid to him from plaintiffs’ loan account was on November 3, 1950, some six days later. As is said in *Mourant vs. Pullman Trust and Savings Bank*, (Ill.) 41 N. E. 2d 1006:

“A party cannot make his own infraction of his agreement the basis of an action for money had and received against the other party who stands innocent.”

Even though the plaintiffs suffered an unfortunate loss due to the bankruptcy of Holmes, we do not believe they are entitled to recover merely because it might appear generally fair that recoupment of their money should be afforded from some source. We again quote

from 58 Corpus Juris Secundum, paragraph 5, page 915, what we believe to be the principle applicable to our instant situation:

“An action for money had and received will lie to recover money that had been paid by plaintiff to defendant for a consideration which has wholly failed *unless the failure of consideration is shown to be attributable to some fault on the part of plaintiff himself.*”

The plaintiffs by their own careless acts made it possible for Holmes to pay his creditors as he selected. There was no privity between plaintiffs and defendants and there was certainly no unjust enrichment on the part of the defendants nor was the payment received from Holmes without consideration having been given. In support of our contentions, we again quote from 58 Corpus Juris Secundum, paragraph 13, page 922:

“The action for money had and received ordinarily cannot be maintained against one who has received money under a claim of right in ignorance of its true ownership, as where money wrongfully taken or diverted from the plaintiff was received by the defendant in good faith from the wrongdoer in the ordinary course of business or for payment of an antecedent debt. *The test is honesty and good faith on the part of the receiver of the money and not his diligence.*”

and in 4 American Jurisprudence, page 512, note 9:

“To recover in an action for money had and received, there must be some privity between the

owner and receiver, or mala fides, or unjust receipt, or, at least, receipt without valuable consideration."

At the risk of being repetitions, we desire to emphasize that defendants in no way knowingly contributed to plaintiffs loss. Quite to the contrary. The defendants honestly believed their materials were used by Holmes in the plaintiff's dwelling, and there was no reason to believe or suspect that the materials hadn't been. Holmes was a reputable contractor and was trusted by the plaintiffs in the withdrawal of funds from the loaning institution. To require materialmen to follow materials after they have once been delivered to a contractor would place an unreasonable and intolerable burden and restraint upon their business. We respectfully conclude that the trial Court erred in entering judgment upon any theory in favor of the plaintiffs and that the judgment should be reversed.

POINT IV

THAT THE TRIAL COURT ERRED IN AMENDING THE PRE-TRIAL ORDER AT THE CONCLUSION OF PLAINTIFFS' CASE ON THE GROUND AND FOR THE REASON THAT SUCH AMENDMENT CREATED AN ENTIRELY NEW THEORY OF THE CASE AND WAS FATAL TO PLAINTIFFS' CAUSE OF ACTION.

While we do not believe that the plaintiffs are entitled to recover on the merits in this action, we do desire to discuss the matter of amendment of the pre-

trial order as suggested and permitted by the trial Court after the plaintiffs had rested. It is our impression that once the plaintiffs elected to proceed on the basis of negligence in tort, that even if they may have had a good cause of action in assumpsit, which in the instant case we claim they had not, their election would be binding and they could not change their position and adopt an entirely new theory after all of their evidence had been presented and they had rested. As is said in Page on The Law of Contracts, Volume 3, paragraph 1504, page 2571:

“Since the doctrine of suing in implied contract upon a tort is really a case of election of remedies, the election of one remedy when complete bars the other.”

The same rule is recognized and followed in 7 American Jurisprudence, paragraph 22, page 123:

“The general rule is that the declaration must contain a direct allegation of a promise by defendant. Either an express promise should be alleged, or the facts from which it may be implied, otherwise the complaint will be fatally defective.”

and in the same Volume, paragraph 26 c:

“*Variance* — Following the rules governing civil actions generally, in assumpsit the proof must conform to the pleadings. It is not enough that the evidence may show a cause of action; it must show the cause of action pleaded.”

The Court's attention is also respectfully invited to 58 Corpus Juris Secundum, paragraph 30 c (3):

"A material variance between pleadings and proof in an action for money had and received is fatal to a recovery. Objection that there is a variance may be raised by motion for non-suit."

While we recognize that the Utah Rules of Civil Procedure contemplate a liberal construction of pleadings and grant to the trial courts wide latitude in permitting amendments to conform to the proof, we do not believe that the fundamentals of pleading have entirely been abrogated. It is generally recognized that an amendment may not be permitted where the effect of such amendment is to state another and distinct cause of action. An amendment presupposes a change in something existing, not a substitution of something else for that which has been pleaded. We respectfully submit that the trial court should have granted defendants' motion for dismissal on this ground alone because of the variance between plaintiffs proof and pleadings and the inconsistent theory of their action.

CONCLUSION

We respectfully submit that the judgment of the trial Court should be reversed with directions to enter judgment in favor of the defendants and against the plaintiffs, no cause of action, and for costs.

Respectfully submitted,

F. ROBERT BAYLE,
*Attorney for Defendants
and Appellants.*