

1953

# Vern B. Millard v. Jesse H. Parry et al : Brief of Appellant

Utah Supreme Court

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Paul E. Reimann; Attorney for Plaintiff and Appellant;

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# In the Supreme Court of the State of Utah

OCT 28 1953

VERN B. MILLARD,

*Plaintiff and Appellant,*

vs.

JESSE H. PARRY and ELSIE H.  
PARRY, his wife,

*Defendants and Respondents,*

STRAND ELECTRIC SERVICE COM-  
PANY, a corporation, and OTTO  
DREWS,

*Defendants.*

No. 8026

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## BRIEF OF APPELLANT

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PAUL E. REIMANN

*Attorney for Plaintiff and Appellant*

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No. 8026

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## BRIEF OF APPELLANT

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### PRELIMINARY STATEMENT

The plaintiff, Vern B. Millard, appeals from a portion of the judgment and decree entered in the District Court of Salt Lake County, State of Utah, April 23, 1953 (R. 76-81).

The action by plaintiff as general contractor was for foreclosure of a lien filed to secure payment of an alleged unpaid balance of \$24,752.91, for construction of the Parry Apart-

ments, which cost \$111,073.34 (R. 5, Exhibit P-9). The Honorable Ray Van Cott, Jr., trial judge, allowed a total of only \$92,658.30, on the theory that plaintiff was bound by a written contract for \$82,000.00 for complete construction except for items chargeable as extras, and that plaintiff did not rely on the statements of the architect in reducing his bid to \$82,000.00. The trial court not only gave defendants credit for the \$87,139.81 paid in the aggregate to plaintiff and various materialmen and subcontractors, but the court allowed defendants Jesse H. Parry and Elsie H. Parry credit for two items which the architect and agent for Mr. and Mrs. Parry instructed the plaintiff to exclude from the bid, the cost of a sewer line in the amount of \$1,215.32 not even shown on the drawings, and the difference of \$400.00 in cost of brick.

By stipulation entered into *after* the trial to enable defendants Parry to "stop the running of interest," said defendants paid \$1,963.48 to defendants Strand Electric Service Company, including \$134.25 interest and \$39.20 attorney fees and costs to satisfy said lien claimant; \$436.86 to defendant Otto Drews including \$38.36 interest and costs; and \$1,938.13 to John Lee Floor Coverings for materials and work, including \$161.77 interest and \$14.20 costs (R. 54-55). The court then credited those payments, including all of the interest and costs except \$42.75 against the principal amount which the court found to have been due and owing from defendants Parry to plaintiff, but *denied* plaintiff any interest on the amount found due from the Parrys although no payment was made until after the trial, so that plaintiff was charged with both interest and costs on indebtedness found due and owing from the

Parrys for construction, to arrive at a net balance of \$435.30 in favor of Jesse H. Parry against the plaintiff (R. 74-75). The trial court also assessed costs against the plaintiff, and denied plaintiff all costs and attorney fees, although the court charged plaintiff with the costs and attorney fees of other lien claimants who were not paid by reason of the failure of defendants Parry to pay.

The portions of the judgment and decree appealed from on May 22, 1953, (R. 80-81) relate to: (a) Denial of recovery by plaintiff of \$18,414.04 in costs of construction resulting from the acts, omissions and conduct of Jesse H. Parry and Elsie H. Parry as owners, and their architect. (b) Allowance of credit to defendant Jesse H. Parry in the amount of \$1,215.32 for construction of sewer, and \$400.00 for savings in cost of brick, notwithstanding the architect for said defendants who controlled the bidding directed the plaintiff to exclude those items in preparation of bids. (c) Disallowance of items of cost in excess of the amounts the architect instructed plaintiff to allow, such as allowance for heating; and disallowance of costs where architect instructed plaintiff not to figure any costs. (d) Denial of recovery against defendants Parry for lien costs, attorney fees and interest. (e) Charging plaintiff the interest, costs and attorney fees paid by defendants to lien claimants after trial, which items were incurred by reason of the wilful failure of defendants Parry to pay when demand was made for payment December 28, 1951, and defendants Parry were authorized to pay either jointly to subcontractors, and plaintiff or directly to subcontractors. (f) Denial to plaintiffs of his costs, notwithstanding defendants Parry refused to

pay event the amount the court found to be owing to them until after the trial. (g) The provisions of the decree ordering plaintiff to release the lien, when plaintiff was only partially paid. Plaintiff does not appeal from the portion of the judgment which dismisses the counterclaim of defendant Jesse H. Parry, but plaintiff appeals from inconsistent provisions of the judgment, in addition to portions of the judgment relating to items hereinabove enumerated.

## STATEMENT OF FACTS

### *(a) Events prior to signing of contract.*

Defendant and respondent Jesse H. Parry is a restaurant operator (R. 606). He and his wife, Elsie H. Parry, were and are the owners of real estate at 160 South 13th East in Salt Lake City, on which there was situated an apartment house. Said defendants also owned another apartment house on adjoining property to the south (R. 606). By telephone appointment Mr. Parry met the plaintiff and appellant, Vern B. Millard, on the property during the first part of November, 1950. Mr. Millard was and is a general contractor. At the time Mr. Parry met him, Mr. Parry had some plans which he had procured from Hyland Lumber Company similar to plans of a building being constructed by Mr. Millard for Mr. and Mrs. Flandro at Fourth Avenue and C Street (Exhibit 34). Mr. Parry wanted to build an apartment house to the rear of the existing structure at 160 South 13th East Street. Mr. Millard told Mr. Parry that those plans were not suitable for the construction site, and Mr. Millard suggested that Mr. Parry consult an architect (R. 607-608).



About December 1, 1950, Mr. Parry employed Mr. LeRoy W. Johnson as his architect (R. 609, 721). Exhibit 35 is a site plan prepared by the architect for an 11 unit apartment at the rear of said tract of land, dated December 2, 1950 (R. 609). They discussed various apartment houses, including the Lindsay apartments, which were then being constructed by Mr. Millard at a cost of \$78,500.00 (R. 392-393, 724-726). The yellow sheets of Exhibit D-17 were the cost figures worked out between Mr. Parry and the architect on December 14, 1950; but the white sheet, (which shows the architects's estimate of \$81,879.00, without any allowance for taxes, insurance, or any overhead costs of the general contractor or any allowance for the services of the general contractor), was presented to Mr. Parry by the architect sometime before the contract was signed (R. 736-738).

During a period of two or three weeks after Mr. Parry hired the architect, he said he had no discussion with Mr. Millard (R. 722). Mr. Parry had a discussion with Mr. Millard about what could be done to improve the appearance of the existing structure at 160 South 13th East Street. Mr. Millard told him he thought it would be more economical to build a new structure in front, rather than to remodel the old building, in addition to building an apartment house in the rear. Mr. Parry then entered into discussion with Mr. Johnson, his architect, about building a 6 unit apartment in front of the old structure. Mr. Parry said he did not have sufficient finances without mortgaging the front property, and that he had cash resources of about \$59,000.00 (R. 724-726).

Before there was any request to bid, Mr. and Mrs. Parry

had a discussion with their architect in December, 1950, about having certain items taken care of in advance, including windows, fixtures, refrigerators and ranges. Mr. Parry said he wanted materials as far as possible, at their finger tips before signing a contract (R. 722). At that time he expressed the fear that due to the Korean war, there was a possibility that the government might curtail or stop the type of construction contemplated, and Mr. Parry felt it would be advisable to purchase items which might become critical or become impossible to obtain, as he was afraid there would be a government freeze order (R. 398, 722). The Pella windows were decided on long before there was any contract (R. 733).

Mr. and Mrs. Parry went to Ludlow Plumbing Company late in December or early in January to select types of fixtures and colors for bathrooms. They had no discussion with Mr. Millard about it (R. 723, 738-739). Mr. Johnson, the architect, testified that Exhibit P-4, a bid on plumbing from Grant E. Barnes, addressed to Mr. and Mrs. Parry dated January 8, 1951, was obtained by him for the Parrys. Said bid expressly states: "This does not include sewer or water meter service." The said bid was in the amount of \$5,567.07 (R. 336-337). With respect to said plumbing bid, the same was incorporated into the architects's estimate of costs, part of Exhibit 17, prior to the date the contract was signed on January 29, 1951, "Plumbing complete. Bid by Barnes & Chase \$5567.00." Mr. Parry testified that he did not remember Mr. Johnson telling him that he had obtained a proposal from Grant E. Barnes; but that Mr. Johnson "suggested that he had talked to a man by the name of Barnes, and that the

fixtures would be bought through the Ludlow Plumbing through Mr. Barnes and we would have to select colors and that is the first time we ever seen Mr. Barnes" (R. 617-618). Mr. and Mrs. Parry went to the Ludlow Plumbing Company about the middle of January to pick out types and colors of fixtures, and they met Mr. Barnes there, the man that was going to do the plumbing (R. 758-759). Ranges, refrigerators, and windows were also purchased by Mr. and Mrs. Parry. *Thus, before there was any request for bids, the owners were procuring materials and fixtures for the construction job, items usually purchased by the general contractor.* Mr. Millard had nothing to do with the ordering of windows, plumbing fixtures, ranges, refrigerators (R. 396-397). Mrs. Elsie H. Parry testified that it was around the first part of January 1951 when she and her husband went to Ludlow Plumbing Company to select types and colors of fixtures, and also when they selected ranges, refrigerators, etc. (R. 785-786).

Mr. Parry testified that he hired the architect for his skill and know-how with respect to the type of equipment and other things which should go into the construction project, and that Mr. Johnson was hired to take care of the details of the job (R. 732). Mr. Parry said he told Mr. Johnson that it was up to Mr. Johnson to work out these problems for him (R. 733). Mr. Parry also said he had given Mr. Johnson a big retainer, and that Mr. Johnson was working for him (R. 613-614). On various matters he said he told Mr. Johnson that he would leave certain matters to his judgment (R. 733). He said he wanted to be sure that the heating systems would be adequate, and that working out the heating arrangement

was left to the architect, as that is what he was hired for (R. 732, 744). Mr. Parry also testified that he expected Mr. Millard to deal with the architect (R. 770).

Mr. Miles E. Miller, architect called to testify for defendants, *testified that the architect gives the instructions as to how to bid, and that contractors are supposed to follow the directions of the architect in bidding.* He further testified that the plaintiff, Mr. Millard, has always followed the instructions of the architect, in his experience (R. 853-855, 861). Mr. Arthur D. Taylor, a building expediter, called as a witness for defendants, testified that the architect governs the bidding (R. 905), and in the specifications submitted to contractors there is generally a sheet relating to instructions to bidders (R. 904). Such a sheet was not embodied in the documents of this case (R. 905).

When Mr. Parry obtained a copy of plans and specifications on the 11 unit apartments in January 1951, he tried to get a figure from Ellis Barker, but he was too busy (R. 766). When he received them he was not aware that sheets 37, 38 and 39 had been deleted from the specifications (R. 739-740).

Mr. Vern B. Millard, the plaintiff, was presented with a set of plans and specifications about January 20, 1951, Exhibits P-2 and P-3. Mr. Johnson, the architect, said he would have to furnish details later as the plans were incomplete because of lack of time, as the Parrys were anxious to go ahead, and time was very important to them. He said also that the Parrys had ordered ranges, refrigerators, and windows, and that the Parrys wanted to engage the men they

had contracted with, particularly the plumber. He further stated that the specifications covered the over-all picture (R. 137-140). The architect testified that he explained to Mr. and Mrs. Parry that the plans were relatively incomplete, but the Parrys were fearful of a government freeze order which would adversely affect this type of construction, so they proceeded on plans and specifications which had not been in a final sense coordinated. Mr. Johnson said he told Mr. Millard that the first contract was to cover the 11 unit apartments, and other portions of the project including a 6 unit structure to the east, as well as sewer and water lines, would come under a later contract. Exhibit P-16, the master plot plan which defendants produced upon demand, shows the sewer system from a point 5 feet outside the house out to the street, as a part of construction project No. 2. Mr. Johnson said he instructed Mr. Millard to figure on stubbing both sewer and water lines 5 feet outside the building, as both systems would be included in the second or 6 unit project. Mr. Millard was instructed to prepare his bid on that basis. He was also told to allow \$7,800 to \$8,000 for heating, as the system had not been completely worked out (R. 337-339). Mr. Millard was also told by the architect that the Pella window unit, with which Mr. Millard was unfamiliar, would be installed by the brick masons, and that he should not figure any carpenter labor for such installations (R. 141-148). When Mr. Millard asked whether the masonry walls should continue 13 inches in thickness to the roof, Mr. Johnson told him not to figure walls 13 inches at the top floor, as that was not necessary, and would take space from the apartment (R. 343). Mr. Millard excluded from his bid the

items the architect told him to delete, and nothing was allowed in his figures for anything the architect told him to omit (R. 148-149). Mr. Millard first submitted a bid for \$90,000.00 (R. 141).

When plaintiff submitted his bid, the architect showed him Exhibit P-4, which is the plumbing bid dated January 8, 1951, addressed to defendants Parry, for \$5,567.07, which specifies: "This does not include sewer or water meter service." Mr. Johnson told Mr. Millard that "This is a legitimate bid. I know this plumber. You can use it in your bid." In going over the items as to what should be excluded, Mr. Millard then submitted a bid for \$85,212.00 (R. 142). He relied on the items which Mr. Johnson told him to use in his figures, including the plumbing bid, heating, windows, brick work, and fixtures. Mr. Johnson told Mr. Millard that the Parrys were going ahead with the 6 unit apartment and would spend \$45,000.00 and Mr. Parry asked Mr. Millard to figure costs to include that price. Mr. Johnson, the architect, said that Mr. Parry would go ahead with both if Mr. Millard would reduce his bid on the 11 unit structure to \$82,000.00 (R. 142-143, 146-152). Mr. Millard was told that by building both together there would be more efficient operation with men and equipment working so close together. That is why Mr. Millard reduced his figure to \$82,000.00.

When Exhibit P-6, the contract, was presented for signature, Mr. Millard asked who would supervise the job. Mr. Johnson assured him that he would supervise and that no one else would be permitted to interfere in any respect, and that the owners would not have anything to do with super-

vision. Mr. Millard asked whether there would be any undue interference by the owners at the job site, as Mr. and Mrs. Parry were operating two existing apartment houses, and he asked if his workmen would be free to proceed with work by looking directly to the architect for instructions and any clarifications of drawings and specifications. This was important to Mr. Millard because when an owner comes on a job and talks to his men, or makes changes, or interferes in any way, it slows down the job and makes it more costly. Mr. Millard relied also on the assurances that the architect would be the supervisor, in signing the contract (R. 154-155, 344). There was no contradiction of the testimony of plaintiff that it is more economical for a contractor to have supervision of construction by an architect. Also, Mr. Miles E. Miller, witness for defendant, testified that when an architect becomes the supervisor, he is supposed to be impartial (R. 853).

Before the contract, Exhibits P-6 and D-7, were signed, dated January 29, 1951, there was a discussion at the office of the architect between the architect, Mr. Millard and Mr. Parry. Mr. Parry told Mr. Johnson to go ahead with the plans for the 6 unit apartments, and said Mr. Millard would build them in conjunction with the 11 unit apartments. He said he would spend \$45,000.00 for the 6 unit apartments, and asked Mr. Millard to figure costs to include that price. Mr. Parry stated that Mr. Millard should make money on the project, and by building both together there would be an efficient operation (R. 142-143, 146-152). Mr. Millard testified that he relied on the statements of both Mr. Parry and his architect in signing the contract.

*(b) Events from date of signing contract to date of termination of services of the architect as supervisor.*

Mr. Millard started construction of the 11 unit apartments on February 5, 1951. The architect went ahead with plans for the 6 unit apartment, Exhibit P-10. There was no delay in preparation of the plans in February, 1951. Mr. Parry said he did not have sufficient finances without mortgaging the front property (R. 725). The architect testified that some time in April Mr. Parry said the bank wanted a mortgage on the entire property, and he wanted to mortgage only the front of it, so he said he would make other financial arrangements. He said Mr. Millard could still count on proceeding with the 6 unit structure, but in the latter part of the same month he said he would have to hold off indefinitely the construction of the front unit, and he did not intend that Mr. Millard would be injured financially by the delay (R. 335-336).

Mr. Parry also testified that he told Mr. Millard and Mr. Johnson that he could not finance construction of the 6 unit apartment in front, without mortgaging it; and he told them he thought he could mortgage the front and leave the back portion of the property out of the mortgage (R. 725). While he testified that he was unable to make any financial arrangements to go ahead with the 6 unit apartment, and that he so notified Mr. Johnson in January 1951 (R. 764), he admitted that it was not inability to mortgage the property, but the fact that the bank wanted a mortgage on the entire property which he did not want to give, and that he said he would go elsewhere for the finance (R. 734).

Mr. Parry further testified that a newspaper reporter



came to him to get a cut which appeared in the Salt Lake Tribune, Sunday, February 18, 1951, (Exhibit P-21). He said that Mr. Johnson wanted that put in the paper (R. 735-736, 764). He admitted that he had the article in his possession since February 18, 1951. The article states: "Plans for \$125,000 in apartment construction . . . were announced Saturday by Jesse H. Parry . . . Plans are to add to the rear of the existing building a structure containing 11 two-bedroom units and another at the front housing six bachelor apartments. Both of the new additions will be three stories and of golden buff brick . . . Vern B. Millard has the contract. The front addition is to be started this summer and completed before winter. The rear unit . . . will cost approximately \$85,000. The front portion will cost \$40,000."

Mr. Parry also testified that "The only mistake I made, I didn't notify Mr. Johnson by letter to discontinue. He just continued on with his services which we offered to pay him at one time \$1,000.00 if he would quit his services and he wouldn't consider it for what he had done" (R. 763-764). Mr. Millard testified that it was about March, 1951 when Mr. Parry refused to go ahead with the 6 unit apartments because he was unwilling to mortgage the entire property (R. 188-189).

The electrical plans were not followed, but changed (R. 339). The heating system was also changed from the heat-pump system to a hot water boiler with individual heat coils and blowers for each individual apartment, which was approved by Mr. and Mrs. Parry. Mr. Millard had nothing to do with the selection of D. A. Olson & Company as heating

contractor. The architect handed to Mr. Millard the proposal from said company some weeks after the contract had been signed, and told Mr. Millard to go ahead with such proposal (R. 339-341). Mr. Parry said he did not notice the substitution of sheets in the specifications on heating (R. 740), and that he did not see the heating contract before Mr. Johnson told Mr. Millard to sign it (R. 743). Mr. Parry further stated that he left those matters to the architect and that was why he was hired (R. 744). The heating plans were not completed until some time after the job started (R. 732, 744).

The work progressed satisfactorily in February and March 1951. Then defendants Parry ordered the brick masons to install some ventilators which they had purchased (R. 156). At first said defendants came onto the job every two or three days, then one of them was there every day (R. 157-160). Mr. Parry admitted that he came onto the job practically every day (R. 718). His wife was there also on a number of occasions. Mr. and Mrs. Parry had disagreements with each other at the job, opposing each other as to what changes were to be made (R. 160-161, 345-347). Mr. Parry admitted that he and his wife had controversies with each other as to how they wanted things done on the job and that they each talked to Mr. Merrill, construction foreman, about it (R. 719). Mr. Parry also said he had some disputes with the architect (R. 715), and some heated discussions before the services of the architect were terminated (R. 717).

There were inconsistencies and defects in the plans, discovered after the job started. Mr. Parry testified to numerous changes, some of which were due to mistakes of the architect,

the walls not being the right measurements for the cabinets, windows, and other items of construction (R. 660, 705, 708). Also the heating plans were not completed until some time after the job started (R. 732, 744).

The Parrys began to find fault with the architect and to give their own instructions. When they talked to employees the men did no work (R. 157-159). Mr. Millard made complaints to the architect about the interference of the Parrys. Mr. Millard claimed his men were losing too much time on the job as a result. Mr. Johnson, the architect, requested the Parrys to deal with him, and not talk to workmen or sub-contractors, as it was resulting in a chaotic condition on the job. During the latter part of June or the first part of July Mr. Millard complained both to the architect and to the Parrys that their interference was costing money. It was finally a question whether the architect or Mr. Parry would supervise the job. Mr. Parry said he did not want Mr. Millard to feel that he would lose money on the project and that he would see to it that Mr. Millard was taken care of, but that they (the Parrys) wanted the structure built the way they wanted it, and that it was their money that was going into these items. Finally on July 19, 1951, Mr. Parry told the architect he no longer wanted his services on that job (R. 345-348).

Before the services of the architect were terminated, Miles E. Miller, witness for defendants, overheard Mr. Johnson say that the job would progress better if Mrs. Parry were not there (R. 848). Mr. Miller also testified that the plans in this case were not prepared in accordance with good practice (R. 861).

Although Mr. Parry by way of conclusion said he did not interfere, he admitted that he had heated controversies with the architect, particularly over changes in the heating lay-out (R. 716-717). Mr. Parry also said he had the right to make changes and that he did make changes, and he said he was willing to pay for them, too (R. 768, 771). However, he contested payment on practically every item of any consequence, including the changes necessitated in the heating arrangements, although he finally approved the architect's directions with respect thereto (R. 768-769).

Mr. Parry also testified that he had *no controversies* with either Mr. Millard or his foreman, Mr. Merrill. He testified that both were nice on the job, and both did what they were asked to do. As Mr. Millard went ahead he was very nice (R. 747). Mr. Merrill, construction foreman, never refused to do anything Mr. Parry asked him to do (R. 715). When he asked Mr. Millard why things were done in a certain way, Mr. Millard said he was following the instructions of the architect. Mr. Parry said he asked for things to be done and Mr. Millard and his foreman were willing to do anything they asked, as he told them he had the money to pay for it and he wanted things done the way he wanted as that was what he was paying for (R. 747). He testified to errors in the plans (R. 660, 705-706), and as to changes made in cabinets because of discrepancies in measurements his wife took care of that detail (R. 705-706).

Mr. Parry also testified that he expected Mr. Millard to deal with the architect (R. 771). The architect testified that Mr. Millard did not refuse to follow any instructions, and he

had no difficulty with either Mr. Millard or his construction foreman (R. 345). The architect was generally at the job site every day in person or by a representative, and he had three or four telephone conversations each week with Mr. Millard prior to the termination of his services. Mr. and Mrs. Parry generally appeared on the job after Mr. Johnson left, and talked to persons in his absence, and numerous complaints arose over interference by the owners which he tried to settle by conferences with the Parrys (R. 345-347).

The controversy between the Parrys and the architect which led up to the termination of his services arose over the changes in the heating arrangements and system. The architect had ordered Mr. Millard to fur down for airducts on the second floor, according to the version of Mr. Parry, and Mr. and Mrs. Parry objected to such change and said they would not allow it and stopped the work (R. 699, 701, 789). The heating plans were not completed until some time after the job was started, and the floor joists were laid according to plan, but that arrangement did not allow for running some of the ducts between the joists. It became necessary to build ducts over kitchen cabinets, and under ceiling joists and to lower the kitchen and hall ceilings (R. 699-701). Finally, after Mr. Parry visited the Lindsay apartments, he said that was the only way it could be done and after two days told the men to go ahead (R. 157-160, 699-701). That incident resulted in severing relations with the architect by Mr. Parry (R. 701). Termination of the services of the architect occurred on July 19, 1951 (R. 347-348, 701).

*(c) Changes and incidents from and after date of termination of services of the architect by Mr. Parry.*

A considerable amount of the changes which occurred overlapped in the two periods. The testimony of Mr. Parry is to the effect that he complained about numerous items on the job (R. 695-706, 710, 719). They were items which related to errors of the architect, the walls not being the right measurements for the cabinets, windows, and other details (R. 660, 705, 708). Mr. Parry admitted that he authorized many extras (R. 632). But he refused to sign for extras (R. 691). He also expressed the opinion that the changes which were ordered did not require as much work as Mr. Millard claimed, although he did not stay around to see what work was done or how long it took (R. 773). He said his wife is very clever with decorating and has a lot farther sight than he has, and they had disagreements as to changes to be made, and they talked to Mr. Merrill about it (R. 719). He testified that he wanted to pay Mr. Millard everything he asked him to do for him (R. 768). With respect to certain items, such as whether additional cabinets could be used because of the discrepancies in measurements in the plans, he testified that his wife took care of such detail (R. 706-707).

With respect to the conversation which occurred between Mr. Parry and Mr. Millard following termination of the services of the architect by Mr. Parry, it is undisputed that Mr. Parry did not employ a new architect. According to Mr. Millard, Mr. Parry came to the job site and said he had fired the architect, and that he would supervise the job himself, and that he would make sure that Mr. Millard would be paid

his contractor's percentage if he would continue on the job. Mr. Parry instructed him to go ahead and make various changes (R. 159-160). Mr. Parry also told him to keep a record of all costs on the job, and such statement was furnished October 30, 1951, Exhibit P-8 (R. 161).

There is no dispute as to the fact that Mr. Parry said he was going to supervise in place of the architect. Mr. Parry testified that he figured that his experience qualified him to supervise the construction, and that his money would carry him through (R. 773). His experience was very limited, although he said he had no training in engineering, he had remodeled an apartment, built a home and two restaurants. He did not testify that he had ever had any experience supervising construction, his business being a restaurant business. There was no testimony to refute the evidence that supervision by the owner is more costly to the contractor. Mr. Parry said that Mr. Millard told him he would have nothing but a shell, and that they could work together to get the building completed (R. 623). At that time Mr. Parry said he had paid Mr. Millard up to the contract price and was withholding 10% and that he told Mr. Millard he would pay him the 10% he had been withholding (R. 624). Mr. Parry did not testify that Mr. Millard consented to such a proposal. Furthermore, the documents, particularly Exhibit P-13, shows that Mr. Millard at that time had not been paid up to the contract price, and Mr. Parry did not pay the 10% being withheld. His subsequent testimony that Mr. Millard billed him on that basis is contrary to the documents which show that Mr. Millard billed on a basis of cost plus 10% (Exhibit P-13).

Mrs. Elsie H. Parry testified that Mr. Parry said to Mr. Millard: "If you continue on with the building, we will pay you the contract price and *also give you your ten per cent*" (R. 791). Upon leading questions from counsel for defendants she testified by way of conclusion that extras were to be billed as separate items on a basis of cost plus 10% (R. 791). Neither of the defendants testified to any statement which would constitute an acceptance of a proposal which the Parrys construe to mean a waiver of the right to supervision by the architect nor any willingness of the contractor to assume the additional costs incident to further owner supervision. Payments were not made on the basis testified to by Mr. Parry, as illustrated by Exhibit P-13, but the billings were computed on a basis of cost plus 10% to the contractor, although the Parrys did not always pay the full amount.

Mr. Clarence L. Merrill, a general contractor, who was construction foreman on the Parry job, testified in detail as to numerous inconsistencies in the plans, as to incompleteness of plans, numerous changes in construction both before and after July 19, 1951, and also as to interference with the work by Mr. and Mrs. Parry, which ran construction costs to more than \$111,000.00 (R. 201-328). He testified that the red pencil markings on the plans, Exhibit P-2, indicate the changes made in construction and also the alterations (R. 203-204). He conferred with the architect almost daily by reason of being foreman on the job. The architect told him they were not to follow either the heating or the electrical plans as they were to be changed (R. 207). Dispute arose between the architect and the Parrys. The architect ordered changes, which included sliding doors in closets. Then Mr. Merrill noticed



that the windows which came on the job would not fit, and they would not be in line with the basement windows, so it became necessary to fur in the outside walls to create enough room for a tile sill on the inside windows, which the architect ordered. Each window had to be furred in, and pulled in flush to the inside of the wall. Then other discrepancies were noticed in the plans. It was observed that there was not sufficient clearance between the cabinets, so it was necessary to extend the living room wall section a foot. Different apartments had different problems, which required changes (R. 210-213).

It was discovered that there were no electrical outlets provided for the heating unit for the pumps and blowers, and it became necessary to go over all of those items. The entire lighting system had to be changed from low voltage system to a standard system (R. 214-215). Cabinets of different sizes and additional cabinets were installed, and different sinks were installed because of the space problem (R. 215).

Before Mr. Johnson left the job as architect, the whole heating system was changed. The first information as to a new heating set-up was after the walls were in place, some of the partitions finished and it became necessary to remodel the closets to receive the heating units, as they had not been planned large enough. It required a lot of work and materials to change them. It was likewise necessary to fur down all of the ceiling areas in the hallways to provide the heating plan for the apartments. It was necessary to devise plans to run the heating through furring down and through the top of kitchen cabinets, and also to change a number of door head-

ings, to open them up to run vents in through the doors. The sketches on the heating system did not come from D. A. Olson Company until that stage of the work was reached. The architect instructed the witness to proceed in accordance with the Olson heating layout. Mr. and Mrs. Parry said they did not want that and would not stand for anything like that, and had the men called off, then two days later the witness was told to go ahead (R. 216-218). Then Mr. Olson said the cold-air ducts were not part of his contract, so Mr. Millard's men had to dig the trenches in the basement for forming of the cement for the pipes. Some vents in the bathroom and laundry rooms are ordinarily taken care of by the sheet metal men, but D. A. Olson Company charged all of those items as extras (R. 219).

On the paneling, a change from corrugated transite to combed plywood was made, with extra framing, not only on the new apartments, but also on the old apartment house. Other work was done in the old apartment house at the direction of Mr. Parry. It took a lot of time to install the windows which were supposed to be of a character that the brick masons could just set them in. They came as a packaged unit, and did not arrive until the job was well along (R. 220-22). Changes had to be made because of variation in sizes of openings in relation to sizes of refrigerators. The Parrys requested drawers to be put in the back of the island or fence of the dinette area to give an appearance of finish. There are about three in each of the 11 apartments (R. 23-224). An extra four-inch chase was run in the brick partition. A set of stairs was ordered by Mr. Parry, and after it was built he ordered it removed a day or two later. There were extra window wells.

There was some extra fencing, patios, and additions and changes in the sidewalk arrangement; also additional blacktop, and a retaining wall at the west end of the apartment house. Neither the plumber nor the heating people would hook up the hot water, so Mr. Millard had it done. The heating people did not figure on excavation for the oil tank. The witness did not keep on charging as extras for all of the additional work as Mr. Millard told him the cost of the building was out of proportion. Some discussions were had with the Parrys about the costs being way over what had been anticipated. The job was unusual in that the architect was released and the owner took over supervision of the job and there were more changes than usual. The owners had numerous conversations with witness and took up a good portion of his time on the job (R. 224-227).

There were many contradictions in the plans. They were not complete as to detail (R. 228). With unusual changes on the job, it becomes increasingly difficult to account for all of the costs and expenses as extras. It took time to change cabinets and sinks. In taking out the cabinets and replacing them, a man would lose at least a couple of days, at \$20 per day.

Mr. Merrill, a general contractor now, has had substantial experience in figuring jobs. He testified that overhead expense includes workmen's compensation, social security and unemployment compensation, which amounts to about 10% (R. 232).

Mr. Merrill detailed the costs and expenses to Mr. Millard if the various items of changes and delays in operations were

charged as extras. For convenience they were listed and introduced in evidence as Exhibit P-14 (R. 251). He gave the reasonable cost value of those items R. 251-328). He testified, with respect to supervision of construction, that "It is a lot cheaper to deal with an architect than it is with the owner because the architect understands more of construction" (R. 228). It took longer to build because of the separation of the architect (R. 289). There were about 300 hours of overtime, besides the excessive costs from owner interference (R. 288).

After the first two or three months the Parrys came every day. They discussed the building and methods, things being done and changes. They asked why certain things were being done. They did not like some of the men. They talked to the men some. They engaged in arguments between themselves. The additional labor which would not have been incurred if the architect had been supervising the job would amount to \$200.00 for each apartment, or a total of \$2,200.00 (R. 256-257).

Mr. Merrill testified that if the apartment house had been planned the way it was built, the reasonable cost of construction in 1951 when built, would have been \$10,000 per unit, except for the three larger units and \$12,000 per unit for the larger units, which would amount to \$116,000.00 (R. 257).

A structure similar to the Parry Apartments is the Lindsay Apartment building, except that there are about 1200 feet more of floor space in the Parry Apartments, which cost from \$9,600 to \$10,800 more than the \$78,500.00 cost of the Lindsay Apartments (R. 392-393). In addition thereto, the Parry Apartments have features not found in the Lindsay Apart-

ments. There are no special windows, but only aluminum casement sash in the Lindsay Apartments. The special windows would cost about three times the amount of the sash in the Lindsay Apartment house. There all are wooden cabinets in the Lindsay Apartments, no planter boxes nor other special items in the Lindsay Apartments, just the bare essentials (R. 393-394). Mr. Parry suggested that the location of the Parry Apartments would demand and justify a building of a more superior character and of better finish. Those were the items of extras or items added to the Parry job, especially after the architect left the job (R. 394).

The sewer was not shown on the plans Exhibit P-2, nor on the master plot plan completed in April, Exhibit 16, to be a part of the construction project for the 11 unit apartments. Mr. Parry made his own contract with Mr. Chase for the installation of the sewer (R. 694). The sewer was not in accordance with the master plot plan (R. 762-763). He had a discussion with the architect as to where the line should run, between the buildings down the driveway. Cast iron pipe was used instead of soil pipe.

Mr. Millard obtained the lien waivers as requested, when payments were made (R. 776). Mr. Parry said he could not do anything with Mr. Millard on billing, and said he told Mr. Millard if he could furnish a list of people that had not been paid they would try and pay them, and they would try to settle this in the best manner they possibly could (R. 629). Mr. Parry then verified the various claims of subcontractors and materialmen (R. 630). Mr. Millard gave Mr. Parry a statement as to total costs incurred to October 30, 1951,

Exhibit P-8 (R. 632). The Parrys received the letter from counsel for plaintiff dated December 28, 1951, together with a revised complete statement as to costs, Exhibit P-9 (R. 797). Thereafter Mr. and Mrs. Parry made payments to Johnson Supply Company, but made payments to neither Mr. Millard nor to subcontractors and materialmen. Mr. Millard filed a lien for a balance of \$24,752.91, January 8, 1952, Exhibit P-41.

(d) *Dismissal as to other claimants.*

The court consolidated with this case for purposes of trial, the case of John Lee Balmforth and Erma Balmforth, co-partners, doing business as John Lee Floor Coverings, Plaintiffs, vs. Jesse H. Parry and Elsie H. Parry, Defendants, No. 96, 104. Plaintiff herein was brought in as a third party defendant. The amounts owing to John Lee Floor Coverings, Strand Electric Service Company, and Otto Drews, defendant subcontractor and materialmen, were established by stipulation (R. 94-122). Payment was made by the defendants Parry one week *after* trial, to stop the running of interest, and the complaints, counterclaim and cross-complaints of those three claimants were dismissed with prejudice (R. 54-57). Those claimants are not parties to this appeal.

STATEMENT OF THE POINTS UPON WHICH APPELLANT RELIES FOR REVERSAL OF THE JUDGMENT OR MODIFICATION OF JUDGMENT.

1. The judgment and decree contains contradictory provisions, and dismissal of the counterclaim precluded entry of a judgment against the plaintiff.

2. The order requiring plaintiff to release his lien was contrary to law.

3. The trial court unlawfully penalized plaintiff for the defaults of defendants Parry by denying plaintiff interest on sums found to be due and owing from said defendants, and by allowing said defendants interest paid to third party obligees after trial.

4. It was error to allow the defaulting attorney fees and costs, and also error to deny the plaintiff attorney fees and costs.

5. Plaintiff reduced his bid to \$82,000 in reliance on the direction of the architect for omissions of certain items, and also on the promise of architect supervision and non-interference by owners, and on the representation that additional construction was being awarded to plaintiff; so that plaintiff was not bound when defendants disregarded the contract and deprived plaintiff of a substantial portion of the consideration for which he bargained.

6. Even if the contract were not voidable, it could not be construed to require plaintiff to furnish items in excess of those on which the architect as agent of owners instructed plaintiff to base his bid, and plaintiff is entitled to recover additional sums.

7. The purported agreement which the court found was made on July 19, 1951, is contrary to the evidence, and would deprive plaintiff of thousands of dollars without consideration.

8. Failure of the trial court to allow even as extras, thousands of dollars of costs incurred by plaintiff by the conduct

of defendants and their architect, amounts to unjust enrichment of said defendants.

## ARGUMENT

### Point I

THE JUDGMENT AND DECREE CONTAINS CONTRADICTIONARY PROVISIONS, AND DISMISSAL OF THE COUNTERCLAIM PRECLUDED ENTRY OF A JUDGMENT AGAINST THE PLAINTIFF.

The plaintiff appealed from those portions of the judgment and decree which are adverse to plaintiff. The portions of the judgment, hereinafter quoted, from which plaintiff has *not* appealed, are shown in italics:

“ \* \* \* and the evidence having closed from which it appeared that the material averments as alleged in plaintiff's complaint charging a contract on the basis of cost plus 10% contractor's fee is not true nor supported by the proof and testimony and that plaintiff's complaint is dismissed, that the contract alleged in defendant Jesse H. Parry's cross-complaint for the sum of \$82,000.00 together with all extras and charges to be billed by plaintiff at cost plus 10% contractor's fee is true and supported by proof and testimony free from legal exceptions as to the evidence admissible and sufficient in law to entitle the defendant Jesse H. Parry to a judgment on his cross-complaint and the Court having made and filed in writing its Findings of Fact and Conclusions of Law ordering and adjudging that the plaintiff's cause of action is dismissed and that defendant Jesse H. Parry have judgment



against the plaintiff on his counterclaim, according to law.

"NOW THEREFORE, on motion of W. D. Beatie, attorney for defendant, Jesse H. Parry and pursuant to said Findings of Fact and Conclusions of Law and by virtue of the power and authority of the Court, and pursuant to the statutes so made and provided,

"IT IS ORDERED, ADJUDGED AND DECREED:

"1. That the complaint of the plaintiff, Vern B. Millard be dismissed and that the plaintiff Vern B. Millard release the lien filed in Book 903, page 230 of the official records of the County Recorder of Salt Lake County, State of Utah, immediately.

"2. *IT IS FURTHER ORDERED, ADJUDGED AND DECREED: That the cross-complaints of the defendants Strand Electric Service Company and Otto Drews together with the action of John Lee Floor Covering vs. Jesse H. Parry and Elsie H. Parry, his wife, defendants, and Vern B. Millard, cross-defendant, being action No. 96104 which was consolidated with this action for trial be and the same is hereby dismissed with prejudice.*

"3. IT IS FURTHER ORDERED, ADJUDGED AND DECREED: That the defendant Jesse H. Parry, having been charged with \$92,658.30 as the incidents of an \$82,000.00 contract of January 29, 1951, together with extras on said construction work, and having paid \$93,093.60, have judgment against the plaintiff, Vern M. Millard, for the sum of \$435.30.

"4. IT IS FURTHER ORDERED, ADJUDGED AND DECREED: *That the counterclaim of the defendant Jesse H. Parry to plaintiff's complaint and the counter-claim of plaintiff to defendant's counterclaim are denied.*

"5. IT IS FURTHER ORDERED, ADJUDGED AND DECREED: That the plaintiff, Vern B. Millard having been paid by the defendants, Jesse H. Parry for all extras billed until time of trial is denied any interest on extras billed during trial and the defendant, Jesse H. Parry is to recover his costs." (R. 77-78).

By notice of appeal, the plaintiff further stated:

"Plaintiff also appeals from every part and portion of said judgment and decree adverse to the plaintiff, including the denial to plaintiff of recovery against the defendants Jesse H. Parry and Elsie H. Parry, his wife, for interest, court costs, and costs of construction for which recovery was not allowed to plaintiff, and plaintiff also appeals from the judgment and decree whereby defendants Jesse H. Parry and Elsie H. Parry, his wife, were granted credits against the claims of plaintiff whereby said defendants were unjustly enriched, and plaintiff appeals from said judgment and decree whereby plaintiff was denied judgment for counsel fees and whereby plaintiff was denied recovery against defendants Jesse H. Parry and Elsie H. Parry, his wife, for amounts justly due and owing to plaintiff" (R. 80-81).

An examination of the record discloses that the recital that plaintiff filed a counterclaim to the counterclaim of defendant Jesse H. Parry, is erroneous.

The judgment also erroneously recites a "cross-complaint" whereby defendant Jesse H. Parry is supposed to have alleged a contract for \$82,000.00 "together with all extras and changes to be billed by the plaintiff at cost plus 10% contractor's fee." The counterclaim filed by said defendant alleged a contract for \$82,000.00, but also alleged failure to follow the plans and specifications. Said defendant affirmatively alleged that

"material alterations were done by the plaintiff without the knowledge or consent of this defendant," and defendants sought to escape liability for payment when they well knew that either they or their architect had ordered all of the changes and alterations made.

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*The plaintiff did not appeal from the portion of paragraph 4 of the judgment and decree whereby the counterclaim of defendant Jesse H. Parry is dismissed or "denied."* That portion of the judgment is inexorably right. Consequently, the other provisions of the judgment whereby defendant Jesse H. Parry is declared to be entitled to "judgment on his counterclaim," are not only contradictory, but absolutely void. Likewise, by virtue of denial of his counterclaim, defendant Jesse H. Parry was not entitled to have any money judgment whatsoever against the plaintiff, and such provision in the judgment for recovery against the plaintiff in the sum of \$435.30 is utterly void. On one hand, said defendant Parry was "thrown out of court" on his specious counterclaim, while on the other hand he was granted a money judgment against the plaintiff. The two provisions are contradictory, and plaintiff has appealed only from that portion which is adverse to him, the provision dismissing the counterclaim being a judgment in favor of the plaintiff.

## Point 2

**THE ORDER REQUIRING PLAINTIFF TO RELEASE  
HIS LIEN WAS CONTRARY TO LAW.**

As pointed out hereinafter, the court unjustly enriched the defendants Parry by allowing them to escape payment of many thousands of dollars in cost of construction incurred by Mr. Millard by reason of their requests, in consequence of their interference with construction, and in consequence of the acts and omissions of their agent and architect. There are, however, on the face of the record a number of injustices manifested in the judgment entered.

Even if it were assumed that the defendants Parry actually owed plaintiff nothing in excess of the amount which the court found was due at the time of trial, and the amount was paid prior to entry of the judgment, *the provision of the decree requiring plaintiff to release his lien immediately was fundamentally wrong.* The dismissal of the action would fully and completely operate to extinguish the lien if such dismissal were valid and upheld on appeal. There was neither occasion nor necessity for ordering release of the lien, and the order for release required plaintiff to do a needless act if there was no longer any money owing to plaintiff, and such order required plaintiff to do an act prejudicial to his rights if there is money owing to him.

The plaintiff was placed in the unfair predicament where he either had to comply or face contempt proceedings for non-compliance and even face vexatious damage claims. Such a provision could have had no other purpose than to discourage an appeal by depriving him of his security in the event he should prevail on appeal. The cost of securing a bond to stay such a provision would have been prohibitive and such a bond would have been impossible to procure.

In compliance with such order the plaintiff stated that he did so under compulsion of said order, and that he intended to secure reversal of such judgment and said order on appeal (R. 79). The plaintiff is entitled to his lien until paid or until it is foreclosed. As pointed out later, there are additional sums owing to plaintiff.

### Point 3

THE TRIAL COURT UNLAWFULLY PENALIZED PLAINTIFF FOR THE DEFAULTS OF DEFENDANTS PARRY, BY DENYING PLAINTIFF INTEREST ON SUMS FOUND TO BE DUE AND OWING FROM SAID DEFENDANTS, AND BY ALLOWING SAID DEFENDANTS INTEREST PAID TO THIRD PARTY OBLIGEEES AFTER TRIAL.

At the time of trial, thousands of dollars were still owing from Defendants Jesse H. Parry and Elsie H. Parry for construction of their new apartment house. It is pointed out hereinafter in this brief, that there was an unpaid balance of \$23,033.53 owing from said defendants. The trial court found by implication that only \$3,803.17 was still due and owing as of the time of trial. Said indebtedness found by the court to be owing from said defendants at the time of trial, was *not* paid until *after* trial.

By paragraph 5 of the judgment and decree the trial court denied plaintiff any interest whatsoever, on the untenable theory that the unpaid balance was for "extras billed during

trial." The conclusions of law are of the same import (R. 75, 78). The plaintiff did not bill for extras during trial, and even if he had, that would not be ground for denying interest from the date when defendants obtained the full benefit. During the trial the court ruled that there was no abrogation nor rescission of the contract dated January 29, 1951, and that plaintiff would have to recover on the theory that any amounts claimed in excess of the base price of \$82,000.00 were chargeable as extras. The various items of changes were then tabulated for convenience of the court and counsel, as Exhibit P-14.

The contention of plaintiff that he is entitled to interest on all sums due and owing to him, from November 9, 1951, is not limited to the relatively small amount the trial court found to be owing to him at the close of the trial. Plaintiff claims he is entitled to interest on all sums which he is entitled to recover, and that it makes no difference whether this Honorable Court rules that plaintiff is entitled to recover only on the theory of a subsisting written contract with a right to cost plus 10% on extras, or whether the written contract is held to have been rescinded or abrogated. Plaintiff claims he is entitled to recover interest from and after the date he completed the work and when the defendants took over, which was November 9, 1951. If defendants claim the contract governs, the latest date would be December 9, 1951, or 30 days after the completion of the work, Exhibit P-6.

Assuming that the original contract dated January 29, 1951, Exhibits P-6 and D-7, were neither rescinded nor abrogated, such instruments do not stop the running of interest

until a billing is made. Such contract leaves payment in the hands of the architect, who is to determine the amounts to be paid, except that the final payment is to be made 30 days "after substantial completion of the work provided the work be then fully completed and the contract fully performed." It is not denied that the last work was done on November 9, 1951, and defendants have so admitted by their answers (R. 5, 38, 39, 65). Before Mr. Clarence L. Merrill, construction foreman, left the job on November 9, 1951, he asked Mr. Parry if there was anything else which he wanted done.

Defendant Jesse H. Parry testified that he and Mrs. Parry went to plaintiff's office about October 15, 1951, "to settle this and find out who he owed, what it was, if we could settle it in a nice manner, and Mr. Anderson (bookkeeper) couldn't come to the terms of what we had paid" (R. 628). Mr. Parry also testified that "at that time it was getting so my wife and I. we just decided we couldn't do anything with Mr. Millard on this billing. I said if he could furnish me a list of people that hadn't been paid we would try and pay them, that we would try and settle this in the best manner we possibly could ourselves and walked out of the office" (R. 629). He also said that Mr. Millard gave him a statement of total costs incurred to October 30, 1951, Exhibit P-8 (R. 632). Mr. Parry admitted that he had no difficulty verifying the amounts owing to subcontractors and materialmen on the job (R. 777-778). He also admitted that Mr. Millard obtained lien waivers when payments were made (R. 776). By answer, Mr. Parry admitted "that this defendant has failed, neglected and refused to pay said balance of \$24,752.91 due and owing to

plaintiff or any part thereof," and also "that plaintiff furnished this defendant record of the amounts owing to materialmen and subcontractors" (R. 40). Mrs. Elsie H. Parry issued a check jointly to plaintiff and to Williams Building Supply Company on November 8, 1951, to pay the balance owing to said material supplier, after verifying the amount unpaid (R. 630, Exhibit P-13).

The final statement dated December 5, 1951, covering complete costs on the job, was included in a letter written by counsel for plaintiff to Mr. and Mrs. Parry dated December 28, 1951, Exhibit P-9. Said final statement was for \$24,752.91 as the unpaid balance on a total of \$111,073.34, which is the amount stated in the notice of lien filed January 8, 1952. Said letter states in part:

"It will be necessary to have this matter settled without further delay to prevent the filing of liens. With respect to any bills outstanding which remain unpaid, it is perfectly agreeable to have them paid directly, but it would be preferable to have checks issued jointly. In any event we cannot credit you with payment on the records of Mr. Millard until we are informed of the payment transaction.

"My suggestion is that you get in touch with me so that this matter can be settled promptly and obviate the filing of liens."

It could not be argued with any semblance of candor that the plaintiff did not present a bill for the balance due and owing. It is significant that the defendants did not get in touch with the plaintiff, nor dispute the correctness of the claim until after suit was filed, and not until after the trial



was in progress did defendants indicate what or why they were attempting to dispute. After the receipt of the letter dated December 28, 1951, containing the statement showing a balance of \$24,752.91, defendants not only refrained from registering any objection or questioning the correctness of the claim, but paid directly to Johnson Supply Company the sum of \$426.89 on January 31, 1952, as the balance owing to said supply house (Exhibit P-13). There is no dispute about the fact that plaintiff allowed defendants credits for the payments they actually made.

The indebtedness owing to plaintiff was not paid prior to the filing of notice of lien. In fact, by the answer of Jesse H. Parry he expressly

“admits that this defendant has failed, neglected and refused to pay said balance of \$24,752.91 due and owing to plaintiff or any part thereof . . .” (R. 40).

All of the materials were furnished and all of the labor and services were performed on or prior to November 8, 1951. Interest began to run on November 9, 1951, at 6% per annum, and the denial to plaintiff of interest on the indebtedness was wrongful, not only as to the amounts found unpaid at the time of trial, but also as to matters and items which the trial court should have found were due and owing to plaintiff.

The defendants paid neither the subcontractors and materialmen nor plaintiff. There can be no excuse for saying defendants were ignorant as to whom payment should be paid. The letter of December 28, 1951, permitted payment either jointly to plaintiff and the subcontractors and materialmen, or directly to subcontractors or materialmen. In January,

1952 the defendants made two payments directly to materialmen, after defendants received the letter from counsel for plaintiffs.

The statute in effect when the obligation was incurred was Section 44-0-1, U. C.A. 1943:

"The legal rate of interest for . . . things in action shall be six per cent per annum . . ."

An indebtedness existed November 9, 1951, and there was a cause of action. Interest accrued from November 9, 1951, and the denial of interest was and is unlawful, and constitutes an unjust enrichment of the defendants Parry.

This is particularly true in the light of the fact that the defendants did not even pay what the court found they owed, until a week after the conclusion of the trial of this case. By that time interest had accrued for many months. The trial court penalized the plaintiff on the theory that there was no "billing" until the time of trial. The assumption was erroneous, as hereinabove pointed out, but if such assumption had been supported by competent evidence, the holding that plaintiff should not recover interest is interdicted by the express language of the statute. The court denied plaintiff a substantive right.

To make matters worse, the court not only denied plaintiff interest, but gave defendants Parry full credit for all sums paid to Otto Drews, Strand Electric Service Company, and John Lee Floor Covering, one week after the trial, which sums included interest, attorney fees and costs. By Finding of Fact No. 33 the trial court improperly and without foundation, made a finding that the aggregate sum of \$4,338.47

paid by defendants Parry after the trial, was paid pursuant to a stipulation of the parties whereby Jesse H. Parry "would be entitled to credit in this action as of the date payment of said amount is made" (R. 74). The statement in the finding is a misquotation of the stipulation entered into at the request of the defendants Parry "to stop the running of interest" (R. 55). The plaintiff did not stipulate that defendants were entitled to credit for the full amount of those payments, but only for the portions of those claims on which plaintiff is finally adjudged to be liable. Furthermore, even the statement in the finding "as of the date when payment is made," could not put the defendants in the same position as if they had paid such sums back in November, 1951, particularly when the costs, attorney fees and interest all accrued due to the wilful failure of the defendants Parry to pay.

The trial court allowed plaintiff the total of \$42.75 as "Percentage of extras to Strand Electric Service Company and John Lee Floor Covering" (R. 74). The method for computing such an allowance, defies both law and reason. Findings of Fact No. 31 and 32 are indefensible. The court arbitrarily took 14.5% of the total amount of the interest, attorney fees and costs paid on April 10, 1953, to Strand Electric Service Company, or \$25.15; and 10% of the amount of the interest and costs paid on April 10, 1953, to John Lee Floor Coverings, or \$17.60, making a total of \$42.75. This mere pittance was awarded to plaintiff in lieu of hundreds of dollars of interest, attorney fees and costs incurred by reason of the failure and refusal of the defendants to pay. In this case, the defendants Parry who were in default for nonpayment, after they had

opportunity to pay those materialmen and subcontractors direct, were permitted by the trial court to "turn their own delicts into a triumph over their adversary."

It will be pointed out in subsequent divisions of this brief that the trial court unjustly enriched the defendants Parry by denying the plaintiff recovery for thousands of dollars in costs and expenses incurred at the direction of the Parrys and their architect, and also by giving the Perrys credit for items which the plaintiff had been instructed to exclude from his bid. The plaintiff is entitled to interest from November 9, 1951, for all items recoverable on which defendants Parry did not make payment until after trial, and also on sums which they have never yet made payment and which this Honorable Court may find to be justly due and owing to the plaintiff.

#### Point 4

IT WAS ERROR TO ALLOW THE DEFAULTING DEBTORS ATTORNEY FEES AND COSTS, AND ALSO ERROR TO DENY THE PLAINTIFF ATTORNEY FEES AND COSTS.

Disregarding the claims hereinafter asserted for additional thousands of dollars indemnification for building costs incurred by plaintiff by reason of the conduct of the defendants, the fact remains that at the time the trial concluded, even the trial court found that there was a principal amount of \$3,803.17 still due and owing, after allowing every possible credit to defendants including items which plaintiff contends on this appeal were not allowable as credits to defendants at all.

The defendants Parry did not pay such amount until a week after the trial. Not only did the trial court fail to allow the plaintiff costs and attorney fees incurred up to that time, but the court erroneously assessed the costs and attorney fees of the materialmen and subcontractors and also the costs of the defendants Parry against the plaintiff! (R. 74, 75, 78).

When the final statement was mailed to defendants Parry on December 28, 1951, Exhibit P-9, counsel for plaintiff wrote a letter in which he said: "With respect to any bills outstanding which remain unpaid, it is perfectly agreeable to have them paid directly, but it would be preferable to have checks issued jointly." There was nothing to stop either Mr. or Mrs. Parry from making payment. All of the liens, attorney fees, and interest and court costs were incurred after that date. Not only did the defendants Parry fail to register any objection to the amount claimed to be due and owing to Mr. Millard at that time, or to the method of computation of the amount owing, but Mr. and Mrs. Parry did not dispute any item whatsoever until this suit was filed.

Rule 68 of Utah Rules of Civil Procedure is essentially the same as the former code sections 104-44-11 and 104-34-1:

"(a) *Tender of Money Before Suit.* When in an action for the recovery of money only, the defendant alleges in his answer that before the commencement of the action he tendered to the plaintiff the full amount to which the plaintiff was entitled, and thereupon deposits in court for the plaintiff the amount so tendered, and the allegation is found to be true, the plaintiff can not recover costs, but must pay costs to the defendant.

"(b) *Offer Before Trial.* At any time more than

10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer . . . ”

No claim could be made here that defendants made any tender to come under (a) of Rule 68 for, as admitted by answer of Jesse H. Parry they refused to pay any part of the \$24,752.91 due and owing to plaintiff.” As to (b) the plaintiff would be entitled to recover costs up to the time that an offer were made, and in this case there was no offer to pay anything until after trial when it was determined that the defendants Parry would be liable. By that time all of the costs had accrued. The making of payment after the trial, to prevent third parties from entering judgments against defendants Parry could not make the plaintiff here liable for accrued costs.

Nor does Sec. 38-1-17, U.C.A. 1953, aid the defendants:

“As between the owner and the contractor the court shall apportion the costs according to the right of the case, but in all cases each subcontractor exhibiting a lien shall have his costs awarded to him, including the costs of preparing and recording the notice of claims of lien.”

In this case, the defendants were in no way prevented from paying Otto Drews, Strand Electric Service Company, or John Lee Floor Coverings back in 1951, but the defendant Elsie H. Parry denied all liability and defendant Jesse H. Parry alleged that all of the sums were owing from the plain-

tiff. Notwithstanding the fact that the trial court failed to award plaintiff thousands of dollars in costs of construction which he incurred at the request of the architect and the defendants Parry, the trial court did find by implication that as of the time of the completion of construction defendant Jesse H. Parry owed the principal sum of \$3,803.17, which was unpaid at the time of trial. The amount claimed by Strand Electric Service Company including \$418.83 in extras ordered by defendants Parry aggregated \$1,790.03 exclusive of interest and costs, the principal claim of Otto Drews was \$398.50, and the amount of the principal claim of John Lee Floor Coverings including several hundred dollars in extras ordered by the Parrys, was \$1,762.16. The total of these claims *including the extras ordered by defendants Parry*, aggregated \$3950.69, or only \$147.52 in excess of the amount the trial court found the defendants still owed for "extras and changes."

All of the costs incurred and charged by the third party claimants were due to the failure of the defendants to pay those claims in the first instance, even after plaintiff offered to allow them to make payments directly to the claimants rather than jointly to plaintiff and the claimants.

If this Honorable Court holds that the plaintiff is entitled to recover additional amounts on which the court below denied recovery, or on amounts credited in favor of defendants unjustly, then it is even more apparent that the court below disregarded the law. If it were assumed that the lower court had been right in holding that plaintiff had a claim remaining unpaid in the amount of only \$3,803.17, it still would have been wrong for the court below to assess approximately 90%

of the costs and attorney fees against the plaintiff, inasmuch as 96.3% of the amount necessary to pay those claims *was still owing from defendants* and defendants refused to pay the amount owing to plaintiff or any part thereof.

The trial court assessed against the plaintiff the attorney fees and court costs of the three persons who were not paid until after the trial, which was wrongful under the statute quoted. Furthermore, the court by Finding of Fact No. 18 admits that plaintiff incurred \$10.00 expense and recording fee of \$1.70 for preparation and filing notice of lien, and \$25.00 attorney fees, by reason of the refusal of defendant Jesse H. Parry to pay the claimed balance due plaintiff (R. 68). The court denied the plaintiff recovery of costs and attorney fees to which plaintiff was justly entitled. The court improperly charged the plaintiff \$145.80 costs of the defendants Parry, and attorney fees and costs paid by defendants to the three claimants after trial.

#### Point 5

PLAINTIFF REDUCED HIS BID TO \$82,000.00 IN RELIANCE ON THE DIRECTIONS OF THE ARCHITECT FOR OMISSION OF CERTAIN ITEMS, AND ALSO ON THE PROMISE OF ARCHITECT SUPERVISION AND NON-INTERFERENCE BY OWNERS, AND ON THE REPRESENTATION THAT ADDITIONAL CONSTRUCTION WAS BEING AWARDED TO PLAINTIFF, SO THAT PLAINTIFF WAS NOT BOUND WHEN DEFENDANTS DISREGARDED THE CONTRACT AND DE-



PRIVED THE PLAINTIFF OF A SUBSTANTIAL PORTION OF THE CONSIDERATION FOR WHICH HE BARGAINED.

The following portion of Finding of Fact No. 5 correctly recites:

"That the plaintiff on or about the 10th day of January, 1951 was requested by the defendants Parry agent and architect, Leroy W. Johnson, to enter into a written contract with the said defendant Jesse H. Parry to construct for defendant Jesse H. Parry an apartment house upon the land hereinbefore described . . . "

There is no question about the fact that LeRoy W. Johnson, the architect, was hired by defendant Jesse H. Parry and up to and including the time of execution of the contract dated January 29, 1951, was the agent of the owner. It was not until after the signing of such contract that his position became that of an impartial supervisor.

The appellant refers to the Statement of Fact for a detailed narration of the evidence as to events which preceded the signing of the contract. The testimony including the admissions of defendants Parry show clearly that unlike the orthodox construction project where the contractor purchases the materials within certain prescribed specifications, because of a fear of government freeze order on certain materials, the defendants Parry went out and purchased thousands of dollars in equipment and materials before any request for bid was entertained, as Mr. Parry explained that they wanted materials at their finger tips before signing a contract (R. 722). Finding of Fact No. 7 is therefore rather enlightening (R. 60):

"7. Plaintiff and defendant Jesse H. Parry contemplated that plaintiff, as a general contractor, would have complete charge and supervision of construction and be subject to the decisions of the architect, Leroy W. Johnson, as to changes which did not materially affect the structure and the interpretation of the plans and specifications and that plaintiff would have full supervision of the purchase of materials except as to Pella window units to enable plaintiff to purchase at discounts and thereby to assure himself a margin of profit on all items necessary for construction of said eleven-unit building except changes and alterations which were made by the owner which changes would be charged to the defendant Jesse H. Parry on the basis of cost plus 10%."

There can be no doubt about the fact that the plaintiff intended to do his own purchasing, as he explained that contractors purchase at a discount which assures them a margin of profit in construction (R. 199). Finding of Fact No. 7 is correct in those particulars. However, notwithstanding the finding as to the intention of the parties, long before there was any contract signed, Mr. and Mrs. Parry were making purchases, not only of Pella windows, but of various other items including refrigerators, ranges and cabinets. They were already exercising some of the functions which the findings indicate were intended to be exercised only by the general contractor, sometime before there was any contract signed. Then, too, at least through their agent and architect, they obtained a plumbing bid on January 8, 1951, Exhibit P-4. While Mr. Parry professed a lack of recollection of the plumbing deal, both he and Mrs. Parry admitted going to Ludlow Plumbing Company the early part of January, 1951, to select types and colors of fixtures (R. 723). Mr. Parry admitted that the archi-

tect "suggested that he had talked to a man by the name of Barnes and that the fixtures would be bought through the Ludlow Plumbing through Mr. Barnes and we would have to select colors and that is the first time we ever seen Mr. Barnes" R. 617-618). Defendants Parry went to Ludlow Plumbing Company and they met Mr. Barnes there, who "was the man that was going to do the plumbing (R. 758). Thus, there was a clear understanding between Mr. Parry and his architect that Barnes was to do the plumbing and that Ludlow Plumbing Company was engaged to furnish the plumbing supplies nearly three weeks before Mr. Millard signed the contract with Mr. Parry. Plaintiff had nothing to do with said transaction.

It is significant that Exhibit P-4, the plumbing bid dated January 8, 1951, addressed to "Mr. and Mrs. Parry," is for \$5,567.07, and contains the following exceptions: "*This does not include sewer or water meter service.*" The only possible reason for inserting such an exception in the bid by the plumber would have been an instruction from either the architect or the owners to omit the excepted items. Mr. Millard had nothing whatsoever to do with the plumbing bid, and he at no time entered into any contract with the plumber (R. 592).

In this case there were no written instructions to bid. Mr. Miles E. Miller, architect, testified that *the architect gives the instructions as to how to bid, and that contractors are supposed to follow the directions of the architect in bidding.* Mr. Miller further testified that in his experience, Mr. Millard has always followed the instructions of the architect (R. 853-855, 861). Mr. Arthur D. Taylor, another expert witness

called by defendants, also testified that the architect governs the bidding (R. 905). He also said that there is generally a sheet in the specifications containing the instructions to bidders, and that such a sheet was not included in any of the documents in this case (R. 904-905).

Because of the hurry of the Parrys to get started, the plans were not complete nor "fully coordinated" (R. 337-339). The testimony of plaintiff is to the effect that he did not see the plans until January 20, 1951, when he was requested by the architect to bid. There is no substantial conflict in the testimony between plaintiff and the architect as to the instructions given by the architect to plaintiff for the preparation of his bid, although the architect did not hear the testimony of Mr. Millard, having been brought in on subpoena. The testimony in reference to those instructions, which include the answers the architect gave to some inquiries of Mr. Millard, is uncontradicted.

Mr. Millard was told by the architect that the plans were for the 11-unit apartment house, and that other portions of the construction project including a six-unit structure on the east, as well as sewer and water lines, would come under a later contract. The architect told Mr. Millard that the sewer and water lines would be stubbed 5 feet out from the building, and said the project did not include sewer and water lines, and that he was to prepare his bid on that basis. He was told that he should allow \$7,800 to \$8,000 for heating, as the system originally figured was going to be changed, and the new system had not been completely worked out (R. 337-339). When discussion arose over the Pella window units,

Mr. Millard stated that he was unfamiliar with that type of window, and the architect told him that the unit would be set by the brick masons and that he should not allow anything for setting those windows (R. 141-158). When Mr. Millard asked whether the masonry walls should continue on up to the top story 13 inches in thickness, the architect told him to figure on reducing the walls at the top story (R. 343). Mr. Millard submitted his original bid in the amount of \$90,000 (R. 141).

After Mr. Millard submitted his original bid, the architect showed Mr. Millard Exhibit P-4, which is the plumbing bid addressed to Mr. and Mrs. Parry dated January 8, 1951, for \$5,567.07, which contains the statement, "This does not include sewer or water meter service." Mr. Johnson told Mr. Millard that "This is a legitimate bid. I know this plumber. You can use it in your bid" (R. 142). Mr. Millard relied on the statements of the architect, going over the items to be included and excluded and then gave a bid for \$85,212 (R. 142). The architect then asked plaintiff to reduce his figure to \$82,000.00, stating that if he would do so, Mr. Parry would go ahead and spend \$45,000 for the building of the 6 unit apartments in front and that plaintiff would do the building (R. 142-143, 146-152). The architect said that by building both structures together, there would be more efficient operation with men and equipment.

When Exhibit P-6, the contract dated January 29, 1951, was presented for signature, plaintiff asked who would supervise the job. Plaintiff asked if there would be any undue interference by the owners at the job site, as Mr. and Mrs. Parry

were operating apartment houses, and plaintiff asked if his workmen would be free to proceed with work by looking directly to the architect for instructions and any clarification of drawings and specifications. This was important to plaintiff, for when an owner comes on a job and talks to the men or makes changes or interferes in any way, it slows down the job and makes it more costly (R. 154-155, 344). It is undisputed that supervision of construction by an architect is far more economical to the contractor, for the architect knows more about construction than the owner. Furthermore, Mr. Miller, witness for defendants, testified that supervision by an architect is supposed to be impartial (R. 853).

Plaintiff testified that he relied on the statements of the architect, not only as to the items to be covered by the contract and items to be excluded, but also as to supervision by an architect and not by owners, and the assurance that he would be awarded construction of the 6 unit apartments in front (R. 142-143, 146-152, 154-155, 344). At the time of signing, Mr. Parry also instructed Mr. Johnson to go ahead with the plans on the 6 unit apartment, and said Mr. Millard would build them in conjunction with the 11 unit structure. He testified that he relied on the statements of both.

The portions of Findings of Fact No. 5 and No. 6 which recite that plaintiff did *not* rely upon the statements of Jesse H. Parry, in signing the written contract, are entirely erroneous, and contradict the undisputed evidence which requires a finding that plaintiff did rely on the statements and representations of defendant Parry and of his architect. It makes no difference whether claim is made that Mr. Parry was personally

present and participated in some of the statements made to plaintiff which included him to sign the contract. It is undisputed that the architect was the agent for Mr. Parry, and the court found in a portion of Finding of Fact No. 5 that in requesting plaintiff to enter into contract with Mr. Parry, said architect was the agent of Mr. Parry, so that it is wholly immaterial whether Mr. Parry was even present when the architect asked Mr. Millard to cut his bid to \$82,000.00.

Mr. Parry testified that the architect was hired to work out the problems for him; that the architect was hired for his skill and know-how with respect to the type of equipment and other things which should go into the projects (R. 732); that Mr. Parry directed the architect to work out those problems for him (R. 733); that Mr. Parry had given the architect a big retainer, and Mr. Johnson was working for him (Mr. Parry) (R. 613-614); that on various matters he told Mr. Johnson that he was leaving things to his own judgment (R. 733); that Mr. Parry wanted to be sure the heating would be adequate, and that working out the heating system was left to Mr. Johnson as that was what he was hired for (R. 732, 744).

Notwithstanding the architect at that time was the agent of the owners, and notwithstanding the admissions of witnesses for defendants that the architect gives directions as to bidding and governs the bidding, and that the contractor is to follow the directions of the architect, defendants Parry seek the benefits of all of the statements and representations made which induced plaintiff to sign a contract for \$82,000 which was less than even the architect's estimate of costs as hereinafter

illustrated; and at the same time the defendants Parry seek to escape all liability for such statements to insure their unjust enrichment at the expense of the plaintiff. It was intended that plaintiff should rely on the statements, directions, assurances and representations made to him by the architect. If the Parrys now claim something else was intended by them, there was no meeting of minds and no valid written contract anyway.

All of the statements and representations and assurances made to the plaintiff were and are material, and represent differences in costs and expenses to plaintiff amounting to thousands of dollars. Those statements and representations included: (a) The statement that the sewer and water lines were not a part of the construction project on which plaintiff was to bid but were to be covered by a separate contract. (b) A statement that Mr. Millard could rely on and base his bid on the plumbing bid of Grant E. Barnes for \$5,567.07, Exhibit P-4. (c) A statement that plaintiff should not figure on a 13 inch wall for the third story. (d) A statement that the Pella window units with which plaintiff was unfamiliar were the type which would be set by the brick masons, and that plaintiff should not allow any expense in his bid for setting the windows. (e) A statement that the heating was being worked out and that plaintiff should make an allowance of \$7800 to \$8000 only for the heating. (f) A statement that supervision would be by the architect and not by owners, so that plaintiff would not incur excessive costs incident to owner supervision. (g) The assurance that plaintiff would be awarded construction of the 6 unit apartment in front, to construct



simultaneously with the 11 units, at a figure of not to exceed \$45,000.

It is not necessary in this case to show that either Mr. Parry or Mr. Johnson, the architect, intended to deceive or to mislead the plaintiff. Assuming that any of the statements were false, plaintiff was misled into signing the contract, and there was no meeting of the minds. The plaintiff did not even have to show that either Mr. Parry or his agent, the architect, knew that any of the statements made were false, as plaintiff would have a right to rescind.

In the case of *Ogden Valley Trout & Resort Co. v. Lewis*, 41 *Utah* 183, 125 P. 687, this Honorable Court said:

" \* \* \* In what way does it affect the party who is deceived or misled and thereby induced to enter into a contract or assume an obligation by representations that in fact are untrue, whether he who makes them knew them to be so or not? \* \* \* In an action for a rescission, where the only consequences sought to be reached by the action is to rescind and to place the parties in status quo, a different rule prevails. Why should he who makes false representations be permitted to profit by them, whether he knew they were false or not? Upon the other hand, why should the party who is deceived be bound by a contract based upon false representations simply because he cannot prove that the other party to the contract knew the statements when made were false. We have recently passed upon this identical question in the case of *Smith v. Columbus Buggy Co. et al.*, 125 Pac. 580, and we there held that, in case of rescission, it is not necessary to prove that the party who made the false representations knew them to be false when he uttered them, if such representations were in fact material and false and induced the

other party to enter into a contract that he would not have entered into otherwise."

The foregoing case has never been overruled, and it is still sound law. In *Guaranty Mortgage Co. v. Ellison*, 239 P. 29, it was pointed out that a person induced to act by representations is not bound to make an independent investigation to determine the truth of statements in order to rely on them. In this case the witnesses for defendants testified that the architect gives the instructions on how to bid, and that contractors are supposed to follow the instructions of the architect in bidding (R. 853-855, 861). How could a contractor follow the architect's instructions if he did not rely on him? The findings of the court of non-reliance are contrary to the evidence. In fact, there is no evidence whatsoever upon which to base the findings that plaintiff did not rely upon the representations made to him.

Courts of equity have granted relief even from unilateral mistake, where a party has been misled. In *Sellers v. Grant*, 196 F. 2d 677, cancelation of an assignment of interest in an oil lease was sought on the ground defendant had misrepresented the distance of the land in question from the discovery well. The defense was that the seller did *not know*, and that the mistake was only unilateral. The United States Court of Appeals said:

"Grant believed he was bargaining for a mineral lease on lands located within a mile and a half or two miles from the Carter discovery well. Considering the purpose which Grant had in mind in acquiring the lease, the proximity of the property to the discovery well was obviously a material fact. If the appellee's

version of the transaction is to be believed and it was credited by the trial judge, who had an opportunity to hear the evidence and observe the demeanor of the witnesses, the mistake was induced by Sellars and it was induced in order that it might be acted upon. This of course, gave Grant a right to rescind the transaction. 4 Williston on Contracts, § 1487. And this is true even though the party making the misrepresentation did so innocently. See Willison on Contract § 1500. The rule is bottomed on the sound reasoning that it would be unjust to allow one who has made material false representations, however innocently, to retain the fruits of a bargain induced thereby. *Duncan v. Hogue*, 24 Miss. 671; 23 Am. Jur. 819."

In this case there was no material conflict in the evidence, for not only did the plaintiff testify to the statements made by the architect, but the architect who was compelled to testify under subpoena admitted making the statements. It is wholly immaterial whether Mr. Parry told him to make those particular representations, inasmuch as the architect was hired by Mr. Parry and the matter of bidding was left to the architect, and Mr. Millard was expected to deal with the architect (R. 770).

Exhibit D-17, last sheet, contains the architect's estimate of costs, which he gave to defendant Jesse H. Parry some time prior to January 29, 1951 (R. 736-738). The total of the figures shown on said sheet is the sum of \$81,879, or just \$121 less than the \$82,000 to which the architect asked plaintiff to reduce his bid. *It is significant that said estimate sheet which totals nearly \$82,000 shows nothing for taxes, insurance or any overhead expense of the general contractor which amounts to approximately 10% of construction costs, and nothing whatsoever for the services of the contractor.* Thus, defendant Parry

had in his possession at the time the architect asked the plaintiff to reduce his bid to \$82,000, an estimate of costs which shows on its face that it covers nothing whatsoever for overhead expenses nor any fee to the contractor. Mr. Parry as a business man could not have been unaware of these items.

It is also significant that said architect's estimate specifically refers to Exhibit P-4: "*Plumbing complete, Bid by Barnes & Chase 5567.00,*" which was the amount plaintiff was instructed by the architect to use as the plumbing figure, and also exclude the sewer and water lines. The estimate sheet also refers to "*Heating—Hotwater Radiation and Domestic Hotwater generator—Architect's Est. 8100.*" Thus, the defendants furnished the evidence which corroborates the testimony of both plaintiff and the architect. The evidence required a finding that plaintiff *did rely* on the statements of the architect.

There is still another reason why it could not be assumed that plaintiff just simply made a "mistake," or that he reduced his bid to a figure below cost without any inducement to do so. The cost of the Lindsay Apartments, which plaintiff was then constructing, was \$78,500.00. While it is true that a substantial portion of the additional costs of the Parry Apartments arose sometime later by the addition of various items not found in the Lindsay Apartments, the fact is that there was a total of 1,200 feet more floor space in the Parry apartments which would cost from \$9,600 to \$10,800. If the lower figure of \$9,600 were added to the \$78,500 cost of the Lindsay Apartments, the figure would be increased to \$88,100. In addition, there were metal cabinets, more expensive windows

and other items in the Parry Apartments, which would readily bring the cost figure to the \$90,000 originally bid by plaintiff. After Exhibit P-4 was exhibited to plaintiff, and plaintiff was told to rely on that figure of \$5,567.07, and also told not to figure more than \$7,800 to \$8,000 for heating, plaintiff reduced his bid to \$85,212. All the way along, the plaintiff relied on the statements and information given by the architect. Finally, when he was asked to cut off \$3,212 more, he did so in reliance on the promise of architect-supervision and non-interference by owners, and on the assurance that he would be awarded construction of the 6 unit apartment in front.

There is no basic contradiction in the evidence as to the promise of the defendant Parry to proceed with construction, when the evidence produced on cross-examination is taken into consideration. While Mr. Parry said he told the architect in January that he could not finance construction, he admitted that what he said was that he could not finance construction without mortgaging the entire property, and that he would have to go elsewhere for finance (R. 725, 734). It is true that Mr. Parry promised to go ahead if he could make satisfactory financial arrangements, but such a statement must be viewed from the standpoint of a person acting reasonably and in good faith. Mr. Parry admitted that he refused to mortgage the property because the loan company wanted a mortgage on the entire property, and he was willing to mortgage only the front (R. 188-189, 725, 734). The excuse for not executing a mortgage was wholly unreasonable, for as indicated by Exhibit P-10 which were in the possession of defendants, the

construction of the front units would attach to existing construction, and no reasonable lender would accept a mortgage on only a portion of a unified structure.

The fact that the architect proceeded immediately with plans on the 6 unit structure upon signing of the contract, Exhibits P-6 and D-7, indicates that the parties all contemplated that such a structure was to be built. The fact that those plans were revised in April, 1951, clearly indicates that Mr. Parry did not tell the architect to stop prior to that date, and the evidence is conclusive that the latter part of April no further work was done on the plans for the reason that Mr. Parry said he was unwilling to mortgage the entire property. Mr. Parry's admission that he made a "mistake" by not giving the architect written notice to discontinue his work on the 6 unit apartments, and the fact that Mr. Millard was asked to present cost figures in March, shows that the project was abandoned by Mr. Parry some weeks after he held it out as a definite assurance to Mr. Millard to get a low figure on the 11 unit apartments.

Exhibit P-21 is a newspaper article concerning this project published in the Salt Lake Tribune on February 18, 1951, which said defendants had in their possession. Even if the testimony of Mr. Parry were accepted as true that it was the architect who fostered the publicity (R. 735-736, 764), the cut which appears in the article was admittedly furnished by Mr. Parry himself, and it would be incredible to allow the architect to proceed with publicity on a project on which he then did not intend to proceed. The article states:

"Plans for \$125,000 in apartment construction in the university district were announced Saturday by Jesse H. Parry.

"Construction will be done on property at 160-13th East, on which there now stands an apartment house containing eight units.

"Plans are to add to the rear of the existing building a structure containing 11 two-bedroom units and another at the front housing six bachelor apartments.

"Both of the new additions will be three stories and of golden buff brick. Work on the rear addition will start immediately, with completion scheduled by Sept. 15. Vern B. Millard has the contract.

"The front addition is to be started this summer and completed before winter.

"The rear unit, which will be air conditioned and will feature garbage disposal units and other modern conveniences, will cost approximately \$85,000. The front portion will cost \$40,000."

It is not denied that when Mr. Parry informed the plaintiff in March or April that he was not going ahead with the 6 unit apartments, Mr. Millard complained that it meant greater costs to him, and that Mr. Parry said he would see to it that Mr. Millard got his contractor's percentage above the costs (R. 190). According to the architect, Mr. Parry said he did not intend that Mr. Millard would be injured financially by putting off indefinitely the construction of the 6 units (R. 335-336).

Thus, the promise of award to Mr. Millard of construction of the 6 units, which induced the signing of the contract at a figure below cost on the 11 units, was abrogated, not by

mutual agreement, but by the decision of Mr. Parry. Honest dealings would require that under the circumstances, the contractor would be paid all of his costs of construction, and Mr. Parry so indicated to Mr. Millard. Mr. Millard was deprived of consideration worth thousands of dollars by the abandonment of the other construction project.

The evidence also shows that within two months after signing of the contract, the owners not only abandoned the second construction project which was one of the major inducements for reduction of the bid on the 11 unit apartments to \$82,000 or a figure below actual costs; but the owners disregarded the written contract which guarantees architect-supervision (and which contract impliedly covenants against owner supervision and owner interference). The plaintiff was thereby deprived of additional thousands of dollars in consideration.

The plaintiff was the innocent victim of the struggle between the owners and the architect over who should boss the project. The court disregarded the undisputed evidence by Finding of Fact No. 10, for the defendants Parry did not come onto the site merely to observe the progress of construction, and they did not limit the purchase of materials to Pella windows, but they purchased numerous items. In contradiction of that finding, the testimony of the Parrys clearly shows that the plans were incomplete and insufficient, and the Parrys admitted that they had controversies with the architect and that his services were terminated on July 19, 1951. Finding of Fact No. 10 also contradicts Finding of Fact No.



9 (R. 61-62), which shows that the contract required supervision by the architect, not by the owners:

"Art. 38. *Architect's Status*.—The Architect shall have general supervision and direction of the work . . .

"As the Architect is, in the first instance, the interpreter of the conditions of the Contract and the judge of its performance, he shall side neither with the Owner nor with the Contractor, but shall use his powers under the contract to enforce the faithful performance by both.

"In case of the termination of the employment of the Architect, the Owner shall appoint a capable and reputable Architect, against whom the Contractor makes no reasonable objection, whose status under the contract shall be that of the former Architect; any dispute in connection with such appointment to be subject to arbitration.

"Art. 39. *Architect's Decisions*.—The Architect shall, within a reasonable time, make decisions on all claims of the Owner or Contractor and on all other matters relating to the execution and progress of the work or the interpretation of the Contract Documents.

"The Architect's decisions, in matters relating to artistic effect, shall be final, if within the terms of the Contract Documents."

As previously indicated, supervision by an architect is far more economical to the contractor for the reason the architect knows more about construction than the owner. It is undisputed that owner supervision is far more costly.

In this case there was no controversy between the plaintiff and the owners with respect to performance by the contractor. Mr. Parry admitted that he had no controversies with Mr.

Millard or with his foreman, Mr. Merrill. He said that both were very nice on the job and they did what they were asked to do (R. 747). Mr. Merrill never refused to do anything Mr. Parry asked him to do (R. 715). Mr. Parry further testified that he asked for various things to be done and Mr. Millard and his foreman were willing to do anything they asked, as *he told them he had the money to pay for it and he wanted things done the way he wanted them as that was what he was paying for* (R. 747). Mr. Parry also testified to errors in plans (R. 660, 705-706), and as to changes made because of discrepancies in measurements. As to changes made in cabinets, he said his wife looked after that detail (R. 705-706).

The Parrys began to find fault with the architect, and to give their own instructions. When they talked to employees the men did no work (R. 157-159). It is undisputed that Mr. Millard complained that his men were losing too much time on the job, and that it was costing him money. It is also undisputed that Mr. Johnson, the architect, requested the Parrys to deal with him, and not talk to workmen or subcontractors, as it was resulting in a chaotic condition on the job. Plaintiff complained both to the architect and to the Parrys during the latter part of June or the first part of July, that the interference of the Parrys was costing money. Mr. Parry said he did not want Mr. Millard to feel that he would lose money on the project, and that he would see to it that Mr. Millard was taken care of, but that they (the Parrys) wanted the structure built the way they wanted it, and that it was their money that was going into the building. It was finally a question whether the architect or Mr. Parry would supervise the job, and finally on July 19, 1951, Mr. Parry told the

architect he no longer wanted his services on that job (R. 345-458). Mr. Parry testified that he thought he was qualified to supervise construction, although his business is that of a restaurant operator (R. 773).

Prior to termination of the services of the architect, the defendants Parry not only engaged in heated arguments and controversies with the architect, but they quarreled with each other at the job site over which one should have his or her way as to how work was to be done or what changes were to be made (R. 160-161, 345-347, 715, 717, 719). Instead of impartial professional supervision of an architect which plaintiff bargained for, there was imposed on him owner-supervision and interference which was not even harmonious as to the owners themselves.

There was such imposition on the plaintiff that no one in good conscience could expect him to build for \$82,000 when he was deprived of thousands of dollars of consideration for which he bargained, both in the written agreement and in the inducement made for execution of the written instrument at a reduced price.

## Point 6

EVEN IF THE CONTRACT WERE NOT VOIDABLE, IT COULD NOT BE CONSTRUED TO REQUIRE PLAINTIFF TO FURNISH ITEMS IN EXCESS OF THOSE ON WHICH THE ARCHITECT AS AGENT OF OWNERS INSTRUCTED PLAINTIFF TO BASE HIS BID, AND

## PLAINTIFF IS THEREFORE ENTITLED TO RECOVER ADDITIONAL SUMS.

Appellant does not concede that he is in error in argument of Point 5, but even if he were, the trial court was in error in construing the written contract dated January 29, 1951, to require plaintiff to furnish items in excess of those on which the architect instructed the plaintiff to base his bid.

As indicated in Finding of Fact No. 9, under general conditions of the contract, Exhibit P-3, there are the following specific provisions which admittedly were in the hands of the contractor at the time he was requested to bid (R. 61):

"Art. 2. \* \* \* It is not intended, however, that materials or work not covered by or properly inferable from any heading, branch, class or trade of the specifications shall be supplied unless distinctly so noted on the drawings. \* \* \*

"Art. 3. *Detail Drawings and Instructions.* — The Architect shall furnish, with reasonable promptness, additional instructions, by means of drawings or otherwise, necessary for the proper execution of the work. All such documents and instructions shall be consistent with the Contract Documents, true developments thereof, and reasonably inferable therefrom.

"The work shall be executed in conformity therewith and the Contractor shall do no work without proper drawings and instructions. \* \* \* "

The contract documents also specify that the contractor shall not be responsible for the existence or discovery of errors, inconsistencies or omissions in the drawings, specifications and other instructions. All of the mistakes, errors, contradictions

and omissions in the plans were chargeable to defendant Jesse H. Parry as the acts of his agent. Finding of Fact No. 8 is correct only as far as it recites that defendant Jesse H. Parry engaged LeRoy W. Johnson, but it is incorrect in attempting to limit the employment of the architect to the 11 unit apartment.

The trial court by Finding of Fact No. 24 erroneously allowed the defendants credit in the sum of \$1,215.32 for construction of the sewer (R. 69-70). The defendant Jesse H. Parry himself made the contract with Mr. Chase, the plumber, for the installation of the sewer (R. 694). Defendant admitted that it was not constructed in accordance with the master plot plan (R. 762-763).

The court predicated allowance of such credit of \$1,215.32 on the theory that "the specifications under the contract of January 29, 1951, provided for connecting the sewer system of the structure to the Salt Lake City system." The "General Conditions of the Contract" to which the specifications are attached, Exhibit P-3 contain two provisions, one of which is embodied in Finding of Fact No. 9:

"Art. 2. \* \* \* It is *not intended*, however, that materials or work not covered by or properly inferable from any heading, branch, class or trade of the specifications shall be supplied *unless distinctly so noted on the drawings*" (Italics added).

It is undisputed that the sewer line is *not* shown on the drawings, Exhibit P-2. Furthermore, Exhibit D-16, the master plot plan, which had not been prepared until about April, 1951, which was in the possession of the defendants at the

time of trial, clearly shows that the sewer line was not a part of the 11-unit project, but part of Project No.2. Furthermore, the typewritten specifications, were not merely intended by the architect to cover the 11-unit apartment, but the additional 6-unit apartment structure which defendants abandoned (R. 330). The "General Conditions of the Contract," also contain the following:

"Art. 35. *Separate Contracts.*—The Owner reserves the right to let other contracts in connection with the work. The Contractor shall afford other contractors reasonable opportunity for the introduction and storage of their materials and the execution of their work, and shall properly connect and coordinate his work and theirs."

The contract documents were prepared by the architect who was the agent of the owners, and such documents would have to be construed against the owners in case of any uncertainty or ambiguity or any inconsistency. The contract reserved the right to the owners to "let other contracts in connection with the work." There is no dispute about the fact that Mr. Parry let a contract for the sewer to Mr. Chase (R. 694). The sewer was not run between the buildings down the driveway as he said the architect told him it was supposed to be run, and as shown on the plot plan, but diagonally across the portion of the property where the 6-unit apartments were to have been erected (R. 762-763). Instead of using clay pipe, cast iron pipe was used (R. 580). Cast iron pipe is considerably more expensive. The trial court allowed a credit not only for what the sewer would have cost as specified,

but the entire cost with additional length and with the use of cast iron pipe.

The trial judge ruled that plaintiff should have installed the sewer, saying that the building *could not be used without the sewer*; but *such a statement begs the question*. It is *not* a question of whether the sewer was *necessary*, but whether the architect in giving instructions on bidding, directed the contractor to include in his bid that phase of the work. The evidence is undisputed that not only did the owner reserve the right to let other contracts, but the architect expressly told plaintiff that the sewer was not a part of this particular construction project, but a part of the 6-unit apartment project (R. 146, 333). Plaintiff's version of the architect's instruction on bidding was that the owner was going to take care of the sewer. Another fallacy in the reasoning of the trial judge arises from allowing defendant Parry and his witnesses to interpret the contract documents, which is a function of the trial court. The contract does not specify that the specification shall control over the drawings, but just the opposite is true. The drawings control, for the reason that no work is required unless shown on the drawings, for as illustrated on the face of Exhibit P-6, "The Contractor shall furnish all of the materials and perform all of the work shown on the Drawings *and* described in the Specifications," and the contract provisions specifically state that "It is not intended, however, that materials or work . . . shall be supplied unless distinctly so noted on the drawings."

Thus, the credit allowed by the court for the sewer was erroneous for each of the following reasons: (a) The architect

who gave instructions on bidding specifically instructed the plaintiff not to include the sewer in his bid. (b) The contract reserves to the owner the right to let other contracts in connection with the work, and the owners did let the sewer contract. (c) The sewer is not shown on the drawings with respect to the 11-unit apartments; and even the revised plot plan, Exhibit 16, shows that the sewer was a part of the project involving the construction of the 6-unit apartments. (d) The architect, by letter to the contractor, a copy of which was delivered to the Parrys, states that the sewer was deleted from the construction project. (e) In letting the sewer contract, the owners not only had the line run diagonally to make it longer, but also of cast iron pipe to make it more expensive.

The credit of \$1,215.32 amounted to giving the defendants "something for nothing," by taking that amount away from the plaintiff unlawfully.

The trial court allowed defendants a credit of \$400.00 for the difference in the cost of the upper portion of the brick walls, on the theory that the plans called for 13-inch walls. The architect admitted that showing those walls to be 13 inches for the third story was an error, and that he instructed the plaintiff to graduate the wall (R. 343). The trial court was in error in granting defendants credit for \$400.00 when their own architect, acting as their agent in giving instructions on how to bid, expressly told the plaintiff at the outset not to bid on a 13-inch wall at the third story, but only on a 9-inch wall.

The architect also instructed the plaintiff to allow from \$7,800 to \$8,000 for heating, as the plans were not worked out at that time (R. 339). It was not until April 14, 1951,



that the architect had a heating contract worked out with D. A. Olson Company, and the architect instructed plaintiff to execute that contract for \$7,875.00 (Exhibit P-27). The contract which the architect submitted for the signature of plaintiff did not cover all of the items, for said company charged as extras \$500.00 for domestic hot water system (Exhibit 28) and Item 37 of list of extras), and \$207.23 as a charge for bathroom vents (Item 33 of list of extras). The total of the heating items thus amounted to \$8,582.23 or \$582.23 in excess of the maximum amount the architect instructed the plaintiff to allow for heating.

Likewise, with respect to the plumbing, the architect expressly instructed the plaintiff not to figure on sewer or water lines. Therefore, when the owners called on plaintiff to have the water line installed, plaintiff was entitled to be reimbursed therefor in the amount of \$294.00 paid by him (Item 34 of the list of extras).

The architect presented to plaintiff on January 28, 1951, Exhibit P-4, which is a plumbing bid addressed to Mr. and Mrs. Parry for plumbing in the amount of \$5,567.07, which bid expressly states: "This does not include sewer or water service." It is significant that Exhibit D-17, which is the architect's estimate of costs in the aggregate amount of \$81,879, which was delivered by the architect to Mr. Parry some time prior to January 29, 1951, contains no allowance for insurance, taxes, contingencies nor overhead expense, nor any allowance for the services of the contractor, but said figures show a heating estimate of \$8,100.00 and "Plumbing complete, Bid by Barns & Chase 5567.00." The actual plumbing costs, exclusive

of the sewer and water lines, amounted to \$918.43 net cost or \$1,010.61 with the 10% contractor's allowance, in excess of the \$5,567.07. The disallowance of that entire amount of excess over the \$5,567.07 was obviously a matter of just enrichment to defendants, for the plaintiff was instructed to base his figure on the \$5,567.07, and that anything above that figure would be handled on a separate basis (R. 371-374).

Another item on which the architect instructed the plaintiff to make no allowance whatsoever was for installation of the Pella windows which were purchased by the defendants Parry. Plaintiff had nothing to do with the ordering of those windows, and he told the architect he was not familiar with them, and he requested information as to cost of installation. The architect informed plaintiff that the windows would be installed by the brick masons, and that he should not figure any carpenter labor for such installations (R. 146). Plaintiff relied on the statements of the architect and agent for the Parrys. It will be noted that on Exhibit D-17, which is the architect's estimate of costs, nothing is specifically allowed for installation of the windows.

Item No. 48 on Exhibit P-14 shows that the installation of the Pella windows actually involved \$252 in materials and also \$1,800 in labor, with \$205.20 as the 10% allowable to the contractor would aggregate \$2,257.20. The cost of this additional work is due to the failure to show on the plans the necessary details, and also the instructions of the architect to allow nothing for installation because they could be set by the brick masons (R. 221-222). Those instructions proved to be misleading. The trial court disregarded the facts, and

disallowed the plaintiff recovery of any part of his costs, although it was undisputed that the mistakes were the mistakes of Mr. Parry and his architect. The windows did not arrive on the job until after the job was well along.

As illustrated in argument of Point 8 hereinafter, plaintiff was entitled to recover on the basis of cost plus 10% for additions, changes and extras, under the findings of the trial court.

Mr. Taylor, expert witness for defendants, admitted on cross-examination that it is not unusual for the specifications to cover more than the particular project contracted (R. 903). He also admitted that the architect governs the bidding (R. 905). Mr. Miller, the architect, testified that the contractor is supposed to follow the instructions of the architect in bidding (R. 853-855).

Until the architect becomes a supervisor of construction under a contract, he is the agent of the owner. Why should the contractor be penalized for any of the owner's mistakes? Why should the contractor, who is supposed to follow the instructions of the architect in excluding or limiting the items covered by a bid, be penalized for observing the directions of the architect to exclude certain items and to limit allowance for certain items to definite sums? This is not a case where the contractor miscalculates costs and in consequence thereof bids too low; but this case involves a situation where the contractor followed the instructions of the architect as to what items to exclude and what figures to allow in his bid. It would constitute a fraud on the part of the owner to enrich himself by the acts of his architect in obtaining a lower figure by in-

structions to omit certain items and to limit allowance for other items, and then to later claim that the contractor must furnish the very items which the architect induced the contractor to omit in whole or in part.

By way of recapitulation, the trial court erred in allowing credits to the Parrys, and in denying plaintiff recovery for costs in excess of the sums he was instructed by the architect to allow for specific items:

Credits unjustly allowed to defendants:

Contracts made by defendant on sewer	
line .....	\$1,215.32
Difference in cost of masonry	
walls .....	400.00
	<hr/>
	\$1,615.32

Additional costs incurred by plaintiff over amounts the architect instructed plaintiff to use or to allow:

Heating (additional costs) .....	582.23
Water line .....	294.00
Additional plumbing costs over the figure	
of \$5,567.07.....	1,010.61
Cost of installation of Pella window	
units .....	2,257.20
	<hr/>
	\$4,144.04

Total .....	\$5,759.35
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The court was clearly in error in refusing to allow plaintiff his additional costs and also in error in giving the defendant credit for items which were not allowable as credits, by reason of excluding items from his bid or restricting allowances pur-

suant to the architect's instruction. As previously indicated, plaintiff is entitled to interest on those amounts from November 9, 1951.

### Point 7

THE PURPORTED AGREEMENT WHICH THE COURT FOUND WAS MADE ON JULY 19, 1951, IS CONTRARY TO THE EVIDENCE, AND WOULD DEPRIVE PLAINTIFF OF THOUSANDS OF DOLLARS WITHOUT CONSIDERATION.

By Point 5 the appellant contends that the contract dated January 29, 1951, at the low figure of \$82,000 was induced by the directions of the architect as agent of the Parrys to omit certain items, and also by promise of architect-supervision and non-interference by the owners, and by the assurance that plaintiff would be awarded construction of the 6 unit apartments; and that by reason of non-performance on the part of defendants by failure to proceed with said additional construction, by refusing to pay for the additional costs incurred by plaintiff in excess of the figures which the architect told plaintiff to use, and by depriving plaintiff of complete architect supervision, plaintiff was denied a substantial part of the consideration for which he bargained and which induced said contract at a reduced figure. If such contract was not abrogated prior to July 19, 1951, then on July 19, 1951, said contract was repudiated by the defendant Jesse H. Parry by terminating the services of the architect, and by failure to employ another competent architect.

Finding of Fact No. 10 (R. 62-63) contradicts even the admissions of the defendants as well as the other evidence. The finding among other things is contrary to the evidence for it recites that after termination of the services of the architect, the "defendant Jesse H. Parry did agree with the plaintiff to complete said construction without the services of an architect in accordance with the terms and conditions of the contract of January 29, 1951, and in accordance with the plans and specifications on said structure and that defendant Jesse H. Parry would advance to the plaintiff upon billing by said plaintiff, the 10% being withheld under the terms of the contract until completion, and that defendant Jesse H. Parry did not, in violation of Article 38 of said specifications, fail, neglect and refuse to appoint another architect."

The court disregarded all of the evidence which shows that the defendant Jesse H. Parry terminated the services of the architect and did not even ask plaintiff whether he wanted another architect, but said he was taking over supervision. As indicated in the contract, architect supervision is required to be impartial. *Owner-supervision could not possibly be impartial.* Mr. Millard had complained about owner interference, and his complaints were based upon the fact that it was costing him money. The finding that termination of the services of the architect without appointing a new architect was not in violation of the contract, is a gross misinterpretation of the contract. No sane contractor would entertain owner supervision without some substantial consideration to compensate him for the increased costs. The evidence does not show any such agreement as the court found, when the cross-examination of

both Mr. and Mrs. Parry is taken into consideration. There is nothing in the evidence to show that Mr. Millard assented to any such proposal as even Mr. Parry testified that he made.

Mr. Parry said Mr. Millard told him he would have nothing but a shell, and that they could work together to get the building completed (R. 623). Mr. Parry testified that at that time he had paid Mr. Millard up to the contract price and was withholding 10%, and that *he told* Mr. Millard he would pay him the 10% he had been withholding (R. 624). The testimony that Mr. Parry had paid Mr. Millard up to the contract price is not true, for only \$64,896.43 had been paid. Furthermore, there is no proof of any assent on the part of plaintiff, and contrary to the finding of the court, Mr. Millard did not bill Mr. Parry for the 10% withheld and the 10% was not paid as such, as shown by Exhibit P-13. The billings by Mr. Millard were on the basis of costs plus 10% from and after August 1, 1951 (See Exhibit P-13) Mrs. Elsie H. Parry, who issued all of the checks, paid on the basis of the costs at first, and then made only partial payments.

Mr. Parry testified that he felt that he was qualified to supervise and that he believed his money would carry him through (R. 773). That does not sound very much like he was claiming he was relying on any contract. Defendant Elsie H. Parry testified that Mr. Parry said to Mr. Millard: "*If you continue to go on with the building, we will pay you the contract price and also give you your ten percent*" (R. 791). By way of conclusion upon leading questions from her counsel she said that extras were to be billed as separate items on a basis of cost plus 10% (R. 791). Neither of the defendants

testified to any statement by Mr. Millard which would constitute acceptance of any proposal which the Parrys now construe to amount to a waiver of all of the benefits of architect supervision and a willingness to assume the additional costs incident to further owner supervision. The fact that Mrs. Parry said her husband mentioned, "If you continue on with the building" indicates that defendants recognized the fact he was released from his obligations to continue by terminating the services of the architect.

Mr. Millard's statement that they only had a shell indicated that the building was far from completion. Plaintiff's version of what Mr. Parry said is that Mr. Parry said he had taken over supervision, and that he would pay plaintiff his contractor's fees or percentage (R. 159-160). Furthermore, Mr. Parry did not contradict the testimony of Mr. Millard to the effect when Mr. Parry abandoned the 6-unit apartment project, he promised plaintiff that he would get his contractor's percentage above costs (R. 190). Mr. Parry told the architect that he did not intend that Mr. Millard should be injured financially (R. 335-336). Mr. Parry told Mr. Millard to keep a record of all costs on the job, and such a statement was furnished October 30, 1951, Exhibit P-8 (R. 161), and a final statement dated December 5, 1951, Exhibit P-9 was furnished.

Mr. Millard obtained the lien waivers as requested when payments were made (R. 776). Mr. Parry said that in a conversation with Mr. Millard about the middle of October, 1951, if Mr. Millard would furnish a list of people who had not been paid they would try and pay them, and try to settle this in the best manner they possibly could (R. 629). Such a state-



ment made on the witness stand by Mr. Parry indicates that he recognized that it was a cost plus operation at that time.

Finding of Fact No. 21 erroneously states that plaintiff did not furnish defendant Jesse H. Parry at any time a record of the amounts owing to materialmen and subcontractors (R. 69). Plaintiff did not introduce proof of furnishing such information for the reason that it was expressly admitted by the defendant Jesse H. Parry:

"This defendant admits that plaintiff furnished this defendant record of the amounts owing to materialmen and subcontractors, but denies he failed and neglected to pay certain of said parties, and admits that he failed to pay the plaintiff . . ." (R. 40).

Mr. Parry verified the claims of the various materialmen and subcontractors (R. 630). The Parrys not only received a statement as to total costs October 30, 1951, but thereafter they paid Ludlow Plumbing Company and other claimants.

Finding of Fact No. 30 recites that the contract was in full force and effect at all times, and utterly disregards the conduct of the defendants, and the inducement for the contract price, and holds that plaintiff is merely entitled to charge for changes and additional items as extras. As pointed out in discussion of Point 8, the court did not even allow recovery for the full amount of the costs plus 10% which the court found to be the agreement as to extras and changes.

## Point 8

**FAILURE OF THE TRIAL COURT TO ALLOW EVEN  
AS EXTRAS, THOUSANDS OF DOLLARS OF COSTS IN-**

CURRED BY PLAINTIFF THROUGH THE CONDUCT OF DEFENDANTS AND THEIR ARCHITECT, AMOUNTS TO UNJUST ENRICHMENT OF SAID DEFENDANTS.

Even if it could be argued with any semblance of candor that there was still a written contract in existence after defendant Jesse H. Parry terminated the services of the architect and took over complete supervision, the plaintiff would nevertheless be entitled to recover the amounts stated under Point 6, and plaintiff would also be entitled to recover his other costs occasioned by the errors and conduct of the architect and defendants.

It is significant that the court made findings to the effect that plaintiff should be compensated for additional work, changes and extras on the basis of *cost plus 10%*. (Findings of Fact No. 7, 10 (g), and 12). A finding of that character does not warrant scaling down recovery to a fraction of the costs actually incurred. There is no evidence in this case that plaintiff padded any costs. The defendants tried to minimize the importance of the changes and additional work involved. Their expert witness was not familiar in detail with all of the work done, and he based his figures not on actual cost incurred by plaintiff, but on the basis of what the cost might be if the items had originally been planned that way, although he limited his opinion to several items and omitted a substantial part of them.

The court not only denied plaintiff recovery for the sum of \$3,212 as the amount plaintiff was induced to lower his bid on the promise of architect supervision and the assurance

of the award of construction of the 6 unit apartments, but the court denied plaintiff recovery of the items mentioned under Point 6 as additional costs incurred in excess of those on which the architect instructed the plaintiff to figure. The items hereinafter mentioned are in addition to the items discussed under Point 6. The items on Exhibit 14 as items of expense to plaintiff are compared with the amounts actually allowed by the trial court:

Item No.	Nature of Additional Work Incurred	Cost Plus 10%	Am. Allowed By the Court
47	Re-arranging cabinets and setting up additional cabinets purchased by owners.....	\$ 532.40	\$ 131.50
49	Furring down kitchen ceilings, enclosing runs thru-out building, and installing cold air returns under basement floor, labor \$2,800, materials \$660, overhead 10% 346.....	4,186.60	998.25
51	Moving back and forth, uncrating, locating, fitting, etc., 27 refrigerators, ranges .....	242.00	60.50
60	Additoinal labor costs due to overtime, delays occasioned by changes not otherwise shown as extras, and interference by owners....	2,662.00	363.00
		\$7,623.00	\$1,603.25

The court proceeded on the theory that it could determine "reasonable value" and therefore ignore actual costs incurred by plaintiff at the request of the architect and by defendants, or

costs incurred by reason of the conduct of defendants. The finding of cost plus 10% is limited to items in addition to the contract price, whereas plaintiff contends that the finding should extend to total cost of construction. Nevertheless, the court did not adhere to its own finding, but attempted to scale down recovery to a portion of the actual costs incurred by plaintiff, on items on which the court found should be allowable as extras or additions. As pointed out by the Louisiana court in 1930, the owner is liable to the contractor for increased cost of work due to changes necessitated by errors or omissions of the architect having supervision and drafting of plans. *Bain v. Mann & Stern*, 131 So. 492. See also *Erskine v. Johnson*, 23 Neb. 261, 36 N.W. 510.

In any event the trial court did not find any agreement to pay merely the "reasonable value" of work done in excess of the items covered, but on the basis of cost plus 10%, and the court did not follow its own interpretation of the agreement.

Finding of Fact No. 10 is obviously erroneous in many particulars. Subdivision (e) which recites that defendants did not interfere with construction by entering into arguments with the architect, causing extensive delays, loss of effort and the payment of wages for employees of plaintiff without plaintiff obtaining value therefor, contradict the evidence. Subdivision (g) is also contrary to the record, for defendant Jesse H. Parry admitted that he ordered many changes (R. 632). Finding of Fact No. 11 is also contrary to the facts, for the Parrys did interfere and make construction more costly. The allowance of \$363 for item 60 on Exhibit P-14 shows that the trial judge recognized the fact that owners did interfere and that they

did make construction more costly. In fact, Mr. Parry admitted that he had heated controversies with the architect, particularly over the heating (R. 716-717). He also said he had the right to make changes and that he did make changes, and then said he was willing to pay for them, too (R. 768, 771). However, his willingness to pay was limited to a very small fraction of the expense he caused plaintiff to incur. A classic example relates to item 51 involving the moving back and forth of refrigerators, uncrating them, locating and fitting them as well as ranges. Defendant professed to know of only one, and he wanted to allow \$5 for "drayage" to compensate plaintiff for \$242 costs (R. 781). The disposition of the defendants to ignore the costs, and to get the benefit without paying therefor is the whole cause of this lawsuit.

As pointed out in 9 Am. Jur., p. 15, Sec. 19' "Where defects in the plans and specifications, the sufficiency of which is not warranted by the contractor, necessitate extra work or materials to complete the contract, the contractor may recover therefor from the owner." Obviously, plaintiff did not agree to be responsible for the mistakes of either the architect or his principal, Mr. Parry. As shown above, the contractor was put to thousands of dollars in expense, and instead of allowing plaintiff recovery for items which even the court found to be "extras" on the basis of cost plus 10%, the court allowed only a fraction of the cost and gave defendants Parry a "free ride for the balance."

Mr. Clarence L. Merrill, now a general contractor, testified to the increased costs resulting from the changes. With respect to each of the items he pointed out why the costs reached

the figures stated. Those reasons were not inefficiency on the part of plaintiff, but mistakes of the owners' architect, interference from the owners, and numerous changes on the part of the owners. He indicated that the cost of supervision by the owners, including over time amounting to approximately 300 hours at the request of Mr. Parry in his effort to have the job completed expeditiously to get the apartments rented, resulted in additional labor costs of \$200 per unit for each of the 11 units (R. 256-257, 288-289). Plaintiff is entitled to recover his total costs plus 10%, and he should not be limited to a token payment amounting to a small percentage of costs.

This is not a case where controversy has arisen between the architect and the contractor as to interpretation of plans or specifications or the instructions to bidders. This case involves controversies between the owner and the architect over the plans prepared by the architect and with respect to the corrections necessary to remedy defects. The mistakes are not chargeable to the contractor. He is the innocent victim. Part of the difficulty was the inability of the owners themselves to agree on what changes should be made and as to the method for making those changes. The trial court penalized the plaintiff for the mistakes of the architect, for the quarrels between the architect and the owners, and for the quarrels between the owners themselves, by disallowance of substantial part of the costs incurred by reason of the conduct of owners.

Inasmuch as the defendants did not proceed with construction of the 6-unit apartments, which promise was one of the chief inducements for reduction of the bid from \$85,212 to \$82,000, when plaintiff was deprived of that construction,

if rescission were not allowed, the plaintiff would be entitled to recover the sum of \$3,212 by which he was induced to lower his bid. There is a plain case of unjust enrichment of defendants, by disallowing plaintiff said sum, and also by disallowing him a substantial portion of the extra costs which he incurred on items for which the architect told him to make no allowance, and by virtue of the cast and omissions of defendants. These items are covered in part under Point 6 and in part under Point 8.

## CONCLUSION

Plaintiff has not appealed from the portion of paragraph 4 of the judgment and decree whereby the counterclaim of defendant Jesse H. Parry is dismissed, nor from paragraph 2 of the judgment. Those parts not appealed from are correct. The other portions of the judgment are erroneous: (a) In awarding a money judgment to Jesse H. Parry, (b) in denying plaintiff interest on the sums impliedly found still due and owing at the time of trial, (c) in denying plaintiff attorney fees and costs, (d) in allowing defendants Parry recovery of their costs and interest and attorney fees paid after trial to the three claimants, (e) in limiting recovery of plaintiff to a mere fraction of his extra costs.

Plaintiff claims the written contract was voidable by reason of having been induced by representations, instructions and promises which the defendants Parry failed to observe, whereby plaintiff was deprived of thousands of dollars in consideration for which he bargained in reducing his bid to \$82,000. Plain-

tiff contends that he is entitled to recover the further principal sum of \$19,982.84 in excess of the principal sum of \$3,950.69 paid by defendants after the trial, because the understanding of the parties was that plaintiff was to be paid his total costs on the project plus 10%.

The trial court found that the agreement to pay costs plus 10% was limited to changes and extras. The court, however, did not adhere to its findings, and scaled down recovery to a mere fraction of plaintiff's costs for the items which the court found to be extras, and the court gave defendants credit for items which their architect instructed plaintiff to omit from his bid, and the court denied recovery of costs incurred in excess of the amounts which the architect instructed plaintiff to allow in making up his bid. The court disregarded for the most part the fact that the errors in the plans were chargeable to defendants. The court also *assumed* that the contract required all items of construction to be performed by the general contractor, contrary to the specific terms stated in the written instruments. The court likewise disregarded the fact that there was no dispute in the evidence as to the instructions given by the architect as to what items plaintiff should omit from his bid, and the specific allowances plaintiff should make for certain items.

Even if it were held that plaintiff is not entitled to recover the entire principal balance of \$19,984.84 over and above the amount allowed by the trial judge, as indicated in the discussion of Point 6 plaintiff was entitled to recover an additional amount of \$5,759.35, and as illustrated under Point 8 the plaintiff was entitled to recover an additional sum of \$6,019.75 as the



net amount of costs for changes and extras disallowed by the court in the scaling down process, and also the further sum of \$3,212.00 by which plaintiff was induced to reduce his bid on promises which were never kept, which sums aggregate \$14,991.10 in addition to the small amount of \$3,803.17 impliedly found due and owing at the time of trial.

The plaintiff is also entitled to interest from November 9, 1951, on all sums due and owing which were unpaid at the time of trial, the trial court being in error in denying plaintiff interest. The plaintiff is also entitled to recover his costs and the statutory attorney fee.

Respectfully submitted,

PAUL E. REIMANN

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