

1956

# M. A. Strand v. Union Pacific Railroad Company : Brief of Appellant

Utah Supreme Court

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# In the Supreme Court of the State of Utah

M. A. STRAND, doing business as Strand  
Electric Service Company,

*Plaintiff and Appellant,*

vs.

UNION PACIFIC RAILROAD COM-  
PANY, a corporation,

*Defendant and Respondent.*

Case No. 8594

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## BRIEF OF APPELLANT

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**FILED**  
NOV 23 1956

Clerk, Supreme Court, Utah

ALLAN E. MECHAM  
GROVER A. GILES and  
BRYCE E. ROE

*Attorneys for Plaintiffs  
and Appellants*

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## BRIEF OF APPELLANT

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### STATEMENT OF FACTS

This was an action for breach of contract. From a judgment dismissing the action on the ground that it was barred by the four year statute of limitations, the plaintiff has appealed.

Under date of December 10, 1943, plaintiff and defendant entered into a written contract under which the plaintiff was to construct for the defendant a signal pole line between Caliente and Rox, Nevada (Exhibit 1). The contract incorporated certain photostats and drawings and provided, generally, that

the signal pole line would consist of approximately ten wires and would be constructed along the Railroad Company's right-of-way between Caliente and Rox, a distance of approximately sixty miles. As compensation for this work, the defendant was to pay unit prices as specified in the contract. Unit prices were set out for installing poles (including crossarms and braces), "H" fixtures, guys, line wire, aerial cable, etc.; the unit prices for installing poles and guys varied, depending upon whether they were installed in loose earth or in rock (Exhibit 1, p. 2). The defendant also undertook to bear the cost of transporting persons, tools, equipment and materials required in the performance of the work. Poles and crossarms were to be distributed along the right of way by the defendant in the vicinity of points of installation (Exhibit 1, pp. 2a and 2b). The signal pole line was to run approximately 40 feet from the tracks (Exhibit 1, Specifications for Signal Pole Line, P. 1).

Among the contract provisions was one relating to adjustments in price for extra work. Section 9 (Exhibit 1, p. 4) provided:

"EXTRA WORK. It is understood and agreed that the Railroad Company shall have the right to make such changes in the amount, dimensions or character of the work to be done hereunder as, in the opinion of the Engineer, the interests of the work or of the Railroad Company may require; and if any such changes or alterations should diminish the quantity of the work to be done they shall not constitute a claim for damages for anticipated profits on the work so dispensed with. Any increase in the amount of the work to be done, that may result from such changes, shall be paid for at the same rates as similar work is herein contracted to be paid for; and, if such work is not similar to that herein

contracted for, the Contractor shall submit information concerning the nature of the same to the Engineer before such work is commenced and it shall be classified as 'extra work' and paid for at prices to be agreed upon between the Engineer and the Contractor, prior to the commencement of the same; but, if the Contractor and the Engineer are unable to agree upon a price for such extra work, the Railroad Company may enter into a contract with any other party or parties for its execution or may itself perform any and all such extra work the same as if this contract had never existed. In case the Contractor does not present a claim in writing to the Engineer on account of the dissimilarity in the work by reason of such change within ten days after such change has been explained, the Contractor shall be forever estopped from making any claim therefor.

A related provision was Section 20 (Exhibit 1, p. 9):

"It is distinctly understood and declared by the Contractor that this contract is made for the consideration herein named, solely on information derived from others than the Railroad Company, its officers, agents or employees, and that the plans and specifications governing the work are subject to change and alteration as herein provided. Any deviation from said plans and specifications will be considered as an alteration and shall be determined as provided in Section 9 hereof."

Under the terms of Section 4 of the contract (Exhibit 1, p. 3), the plaintiff was to furnish a bond in the amount of \$20,000 for the faithful performance of the contract or "any change or modification thereof or addition thereto." The plaintiff did furnish a bond as required by this Section (Exhibit 1, following p. 13).

Plaintiff began work on the project on about February 15,

1944. At the outset some difficulty was experienced because of the failure of the defendant to deliver to the jobsite a railroad car containing the major basic tools and equipment of the plaintiff (R. 32). The defendant's engineering department staked out the course of the signal pole line (R. 37), but in so doing did not stake the line 40 feet from the nearest main track rail. The lines were placed about 90 to 100 feet from the track rail "pretty consistent for the first ten miles" of the signal pole line (R. 39). The poles and crossarms, contemplated by the contract to have been delivered along the right of way "at points of installation" (Exhibit 1, Specifications, General Information, p. [b]) were in fact scattered along the track from a moving car, some distance from the point of installation (R. 44). In addition, the railroad company required the plaintiff to return to some areas and install extra crossarms at an increase in costs (Exhibit 3). These changes in the performance required of the plaintiff were a major factor in his financial inability to go on with the contract (R. 44; Exhibit 3). The plaintiff spent more in bringing poles and other material to the site of construction than in actually building the line (Exhibit 3, p. 2).

In the first part of September, 1944, plaintiff met in Omaha, Nebraska, with representatives of the defendant corporation, including Mr. Dickinson, the "Engineer" under the contract (R. 66 and 67). At that meeting plaintiff explained the difficulties encountered on the job and the construction costs which had resulted from placing the line at greater distances than 40 feet from the right-of-way (R. 67). At that time the railroad company agreed, in substance, to change the method of com-

pensation in the contract from a unit price basis to a cost basis (R. 74). The railroad company also agreed with the plaintiff that the date for completion of the line would be extended to late December, 1944 (R. 763). Subsequently, a second meeting was held, this one in Salt Lake City, Utah. Present at the meeting were the plaintiff, the plaintiff's son, LeRoy Strand, and Oscar Jorgenson, accountant for the plaintiff (R. 69). Among those present on behalf of the defendant was B. H. Prater, the chief engineer for the railroad company. At this meeting the defendant again agreed with the plaintiff, this time through Mr. Prater, that the plaintiff's costs of performance would be paid for by the defendant (R. 69).

The plaintiff resumed work under the agreement; but on December 5, 1944, L. D. Dickinson, defendant's general signal engineer, wrote to both the plaintiff and the New Amsterdam Casualty Company, surety on plaintiff's performance bond, indicating that action would be taken on the bond if the job were not speeded up to the satisfaction of the Railroad Company (Exhibit 4).

It was established by the pleadings that the signal pole line was completed on or about January 7, 1945, and was at that time approved and accepted by the defendant (R. 8, 15). The complaint in the present action (R. 1) was filed on December 20, 1950. The defendant raised the affirmative defense that the claim was barred by the statute of limitations relating to an "obligation or liability not founded upon an instrument in writing" (R. 17). On July 9 and 10, 1956, a hearing was had before the Honorable Jesse R. Budge, who had been appointed a judge *pro tempore* for the purposes of this proceeding. At



the July 9 and 10 hearing the issues were confined to the applicability of the statute of limitations to the plaintiff's second cause of action (R. 80 and 81). Notwithstanding the scope of the hearing, the Court on August 2, 1956, entered Findings of Fact and Conclusions of Law to the effect that the plaintiff's claim was barred by the statute of limitations (R. 84-86). Pursuant to the Conclusions of Law, judgment was entered on August 2, 1956, dismissing the plaintiff's action (R. 87).

## STATEMENT OF POINTS

1. The Court's Findings of Fact are contrary to and not supported by the evidence.

2. The Court erred in its Conclusions of Law applicable to the facts of the case.

## ARGUMENT

### I.

THE COURT'S FINDINGS OF FACT ARE CONTRARY TO AND NOT SUPPORTED BY THE EVIDENCE.

### II.

THE COURT ERRED IN ITS CONCLUSIONS OF LAW APPLICABLE TO THE FACTS OF THE CASE.

The Findings of Fact with which appellant takes issues are Nos. 4 and 5 insofar as they find the agreement between the

parties was materially altered and modified by the agreement of September, 1944, and find that the December 10, 1943 contract, because of the agreement of September, 1944, was an agreement "partly in writing and partly oral." Inasmuch as these findings were closely connected with the conclusion of law that the action is barred by the four year statute of limitations, appellant will argue both of the points together.

It cannot be disputed that the contract of December 10, 1943, was an integrated contract containing all of the necessary and material agreements between the parties. As of that date, any action brought upon it would undoubtedly have been an action upon a "contract, obligation or liability founded upon an instrument in writing" within the meaning of 78-12-23 Utah Code Annotated 1953. It is the contention of appellant that the agreement of September, 1944, was one contemplated by the provisions of Section 9 and 20 of the contract, and was, therefore, merely one step involved in performance of the original agreement. Being this, it could be shown by parol without affecting the "character" of the original document.

We do not quarrel with the rule relied upon by the Court below that agreements which are "partly in writing and partly oral" ordinarily come within the statute of limitations applying to oral contracts. 129 A.L.R. 603 (Annotation). The line of cases so holding, however, do not hold that the written part of the contract must contain every detail of performance. As stated by the writer of the annotation cited above:

"The necessity of introducing evidence extrinsic to a written contract to establish the amount of money to which the plaintiff is entitled under such contract, where

there appears from the written contract an obligation of the defendant to pay money of some amount, conditionally or unconditionally, does not render inapplicable a statute of limitations pertaining to written contracts or writings for the payment of money.”

The view expressed in A.L.R. finds support in a number of cases. See, for example, *Lewis v. Taylor*, 204 S.W. 383 (Tex. Civ. App., 1918), and cases therein cited. The action in *Lewis v. Taylor* was brought for the price of a carload of wheat, the written contract upon which the plaintiff relied having been composed of letters and telegrams. It appeared that after the exchange of letters and telegrams the price was changed verbally. The court held that inasmuch as the contract was in writing, a change in price would not affect the written contract, and the statute applicable to writings should govern.

In *Fabian et al. v. Lammers* (1906), 3 Cal. App. 109, 84 Pac. 432, adjoining landowners had contracts to build some levees across their respective properties as a step in reclamation of their lands from a swamp condition. The contract provided that the levees would be built “of the same size, height, width, character, and in accordance with” the decision of a named civil engineer. When the defendant failed to complete his levee at the agreed time the plaintiff completed it for him and brought an action for damages. The defendant claimed that the contract was partly written and partly oral, by virtue of the reference to a decision of the engineer, and was therefore barred by the limitation on oral contracts. The court acknowledged that the rule requires contracts to be entirely written in order to come within the statutes pertaining to written contracts but added:

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No 8594

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Peck J.

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“How could this apply to the contracts in this case? Here the thing contracted to be done is to build a levee of sufficient height and width, to be determined by the parties to the contract or by a civil engineer. We think it sufficient that the contract was certain as to the parties and their respective agreement. What the defendant agreed to do is ascertained therefrom to a common certainty.”

In *W. T. Rawleigh Company v. Graham* (1940), 4 Wash. 2d 407, 103 P. 2d 1076, the Rawleigh Company brought an action against sureties on certain contracts for the retail sale of Rawleigh products. In the agreements under which the sales were made the defendants had promised to pay the plaintiff for goods and merchandise sold to the principal buyer under the contract. The contract, however, did not set out the prices at which the sales would be made or at which merchandise would be delivered by Rawleigh to the buyer. In the present action the defendants contended that inasmuch as the amount to be paid must be proved by evidence outside the written contract, the statute of limitations governing oral contracts should be applied. The court held for the plaintiff, saying:

“The written contract relied upon by the respondent is complete and furnished an objective standard for the ascertainment of any amount due thereunder from [the principal debtor] to respondent.”

In *Lyons et al v. Moise's Executor* (1944), 298 Ky. 858, 183 S.W. 2d 493, the decedent Moise had entered into a contract with W. L. Lyons & Company, a brokerage firm, under which Moise was to have a trading account with Lyons. The agreement provided, among other things, that Moise agreed to “be bound by the rules, regulations and customs prevailing



in any market or exchange wherein you execute any orders as my agent at my direction, and to reimburse you for usual commissions and any advances made by you for my account." The brokerage firm brought an action against the executor to recover on the accounts maintained by Moise during his life time. The executor defended on the ground that the contract was executed only for the purpose of securing oral transactions and that the statute relating to oral transactions should govern. It was argued that the writing was an attempt to extend the five year statute, which was void as against public policy. The court held that the statute relating to writings was the one that governed. It said:

"If the written contract contains a definite promise to pay, but does not name the amount, the fact that the amount must be ascertained by evidence aliunde does not bring the contract into the category of one partly in writing and partly oral, but it remains a complete, written contract and is controlled by the limitation applicable to written contracts."

A similar holding is found in *Brown v. Irving*, 269 S.W. 686 (Mo. App. 1925). In that case there was a contract relating to the organization of a corporation. In the contract the defendant promised, in exchange for a transfer of stock, "a sum in cash equal to the difference between \$12,500 and the cost of reorganization of said company in sale of \$90,000 par value of the preferred stock of said company." In an action on this contract the defendant contended that this provision was "merely an understanding, that if after paying the cost of reorganization, etc. . . . there was any difference . . . the defendant would account to the plaintiff for the difference." The

court held that the action was one on the contract, not for an accounting, and that the limitation relating to written contracts applied. The court said:

"It is held that if evidence aliunde of the contract is necessary in order to establish the promise, the ten year statute does not apply (citing case), but it is the promise to pay that must be provided for by the language of the writing, and such a promise cannot arise by proving extrinsic facts. However, the amount to be paid may be shown by evidence aliunde. The ten year statute of limitations applies if the cause of action is upon any writing for the payment of money or property which expressly or impliedly promises or agrees to pay money or property, whether the payment is to be certain or contingent."

The Utah territorial statute of limitations was applied in *Streeper et al v. Victor Sewing-Machine Company* (1885), 112 U.S. 676, 5 S. Ct. 327, 28 L. Ed. 852. There an action had been brought upon a bond given in connection with a contract for the retail sale of sewing machines. The bond was conditioned upon the retailer's accounting for the proceeds of sales and purchase price of attachments, of paying personal notes for goods consigned, and of guaranteeing notes of others for sewing machines sold. In this action on the bond the sureties defended, in part, on the ground that the liability of the defendant arose on the sales of goods to the consignee, and that the action was barred by the two year statute of limitations. The United States Supreme Court, in applying the territorial act, held that the four year (written) statute was applicable:

"Even as regards the consignees, an action against them, if not on the bond, would be on the written agree-



ment. The condition of the bond is, that the consignees shall pay all moneys which shall become due 'under or pursuant to the within contract, or which shall arise therefrom, whether by book accounts, notes, renewals or extensions of notes or accounts.' We are of the opinion that, this suit being on a written instrument, the limitation was four years, the action was not barred."

If the contract of December 10, 1943, had been a straight fixed-price contract with no provisions for changes in the plans and specifications and no provisions for changes in price because of such changes in the plans and specifications, the Court below might have correctly held that the September, 1944, agreement was a material modification or alteration of the earlier contract converting it into one "partly written and partly oral." But the provisions for changes and compensation for them are of vital importance. Section 9 of the contract contemplated that some extra work would be done; and some of it might be of such a character that the unit prices set out in the contract would not be applicable. The contract provided that in event work is "not similar to that herein contracted for" it would (after certain other steps were taken) be paid for "at prices to be agreed upon between the Engineer and the Contractor." And if Section 9 was not broad enough as written to include modifications of the type involved in this action, the railroad company added to its efficacy by the provisions of Section 20 which stated that "any deviation from said plans and specifications will be considered as an alteration and shall be determined as provided in Section 9 hereof."

In view of the contract provisions, we believe it must be conceded that the changes in the placement of the signal pole

line, and the requirement that the contractor retrace his steps in order to add extra crossarms, were "alterations" within the meaning of Sections 9 and 20 of the contract. We think it must be conceded, too, that the work as altered was "not similar" to the unaltered work as the phrase is used in Section 9. This being true, the prices to be fixed for the alterations were to be fixed by agreement between the contractor and the "Engineer." By the terms of Section 5 of the contract, the "Engineer" was to be the "Chief Signal Engineer." The person who signed the contract with the plaintiff as "Chief Signal Engineer" was L. D. Dickinson. At the September meeting in Omaha it was L. D. Dickinson who agreed with plaintiff that the unit price basis of payment would be changed to a cost basis (R. 66, 67).

The use of changes articles in contracts has long been recognized as a valid method of providing for future contingencies. The United States Supreme Court has characterized a contract with a changes article as one in which the compensation was to be "the contract price, reduced by damages deducted for delays and increased or reduced by the price of changes." *Crook Company v. United States* (1925) 270 U.S. 4, 70 L. Ed. 438, 46 S. Ct. 184. If, in the present case, the changes had resulted in the contractor doing work which was "similar" to the work provided in the contract (so that the unit prices would be applicable) we do not doubt that the contractor would have been able to show by parol the extra work done, and such showing would not have the effect of magically transforming the December 10, 1943, contract into one that was "partly written and partly oral." As viewed by the Court below, it made all the difference in the world to the enforceability of

the contract that the work was not "similar," and that as a consequence the contractor and the engineer reached an agreement, pursuant to Section 9, on the prices to be paid. We believe it was permissible for the contractor and engineer to agree to change the basis of compensation for performing the changed work, just as it would have been permissible for them to agree to increase unit prices sufficiently to compensate the contractor for the changes. Nor do we regard as of any significance the question of whether the agreement between the contractor and the Chief Engineer was reached prior to or after the work was begun. That technical provisions such as those relating to orders in writing, time for making claims for extras, and procedures for determining the amount of price adjustment can be waived is well settled. 9 Am. Jur., Building and Construction Contracts, § 23. The railroad company continued to act as if the September agreement between the contractor and the Chief Engineer was within the scope of the original contract. The letter of December 5, 1944 (Exhibit 4) and the letter of February 16, 1945 (Exhibit 6) show that the defendant considered the alterations to be of such a nature, within the scope of the original contract or bond, that the surety was not discharged by the extension of time and agreement for change in the basis of compensation.

Although this Court has not ruled directly upon the effect of changes in applying the statute of limitations, a recent case has recognized that changes made under contracts are merely part of the performance and can be shown by evidence outside the original contract. *Hardinge Company v. Eimco Corporation* (1954), 1 Utah 2d 320, 266 P. 2d 494, involved

a contract for the sale of merchandise. Under the terms of the original contract the seller, Eimco, was to pay the freight from Salt Lake City to York, Pennsylvania. By plaintiff's "Alteration B" the price was reduced. Later an "Alteration E" was issued by the plaintiff to the defendant directing shipment by government bill of lading to Marietta, Pennsylvania, about twenty miles from York. The alterations issued were brief and apparently were signed by buyer only; they did not themselves contain all of the elements of a contract. The alteration requiring shipment to Marietta made no mention of the payment of freight, but only that the shipment would be by government bill of lading "collect." Thereafter, Hardinge Company, the buyer, was required to pay the freight costs to the Government and sought to recover from Eimco. In defending the action, Eimco contended that it was not based upon an instrument in writing but was for money paid by mistake and was governed by the four year statute of limitations. In affirming a judgment for the plaintiff, the Court said:

"The effect of Alteration E was to provide shipping instructions under an agreement already determined. It is fundamental that if effect can be given to both of two apparently conflicting provisions in a reasonable reconciliation that interpretation will control.

\* \* \* \*

"The rights of the Hardinge Company arose under the contract regardless of the fact the money was in the hands of Eimco at the time the suit was brought; if the price had not been stated in the contract, Hardinge would have no right to recover. Therefore, the promise was express and the action was founded upon a contract in writing and brought within the limitation period set forth in U.C.A. 1953, 78-12-23."

The Court went on to cite the general rule that "if a substantial doubt exists as to which is the applicable statute of limitations, the longer rather than the shorter period of limitation is to be preferred."

## CONCLUSION

Under construction contracts such as the one involved in this case, in which contracts the parties have included provisions for changes in the details of performance and correlative provisions for adjustments in price because of such changes, parol evidence relating to the changes made and the correct resultant price adjustment may be introduced without reducing the written contract to the status of one "partly written and partly oral." It is submitted that the case is no different because of the circumstance that the contract provides for agreement as to the adjusted price with reference to certain types of extras or changes. Action taken by the parties in agreeing to a price change for alterations in the plans and specifications is taken under the terms of the original written contract.

Provisions for making changes in plans and specifications, and for making price adjustments for them, are a necessity in a world in which complex building projects require a degree of flexibility in contracting. The needs of the construction industry would be hampered and the parties reduced to head-butting if it were consistently held that their attempts at harmonious settlements of questions arising under contracts would ultimately prejudice their chances of recovering under the contract.

It is submitted that the agreement between the contractor and the engineer to change the compensation from a unit price to a cost basis was not a modification of the original contract, that it was an "alteration" within the terms of the contract, and that the "alteration" does not make the contract "partly written and partly oral" as ruled by the trial court. The contractor should be permitted to recover on the written contract, as changed. Certainly the attempt to proceed under the contract terms should not be given the effect of not only depriving the plaintiff of its provisions but of destroying his right to damages for any breach of the original contract by the defendant.

The trial court having properly found that defendant agreed to pay on a cost basis, the judgment should be reversed and the case remanded to the District Court for determination of the amount due from defendant to plaintiff under the contract as changed by the parties pursuant to Section 9 and 20.

Respectfully submitted

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