

1959

Geneva Lumber Co. v. Payne and Day, Inc. : Brief of Appellant on Appeal

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Geneva Lumber Co. v. Payne and Day, Inc.*, No. 9075 (Utah Supreme Court, 1959).
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**In the Supreme Court of the
State of Utah**

FILED

SEP 24 1959

GENEVA LUMBER COMPANY,
Appellant,

vs.

PAYNE AND DAY, INC., a
corporation,

Respondent

Supreme Court, Utah

**CASE
NO. 9075**

APPELLANT'S BRIEF ON APPEAL

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NEW COURTESY PRINTING CO. SALT LAKE

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In the Supreme Court of the State of Utah

GENEVA LUMBER COMPANY,
Appellant,

vs.

PAYNE AND DAY, INC., a
corporation,

Respondent

**CASE
NO. 9075**

APPELLANT'S BRIEF ON APPEAL

STATEMENT OF FACTS

This case arose out of a series of contracts whereby appellant undertook to provide certain building materials to respondent in construction of sixty-one houses in Orem and Provo, Utah. (Exhibits 6 to 11). An examination of these exhibits shows that under these contracts appellant was to provide certain specified amounts of named materials. They were not contracts to provide all the materials necessary for the construction of these houses.

All contracts contain the following or similar provision: "It is mutually agreed that any additions or deletions in the materials to be furnished are to be given in writing by party of the second part (respondent) to party of the first part (appellant), and the value of the change, based upon prices quoted in the attached list, shall either be added or subtracted from the original contract."

This action was brought to recover for materials not named in the contract but delivered to the projects, and for amounts of materials delivered in excess of quantities named in those contracts. For convenience throughout the trial of the case those items delivered but not named in the contract were referred to as "extras", and those items named in the contract, but for which the appellant claims an excess over and above the amounts thus named was delivered are called "overages". This designation is followed here. It is agreed that none of these extras or overages were ordered in writing by respondent. Appellant's theory is that this provision contained in these contracts was either waived, modified, or that the defendant is estopped to assert such defense.

When the appellant rested, the respondent moved to dismiss (R. 26; Tr. 478). The trial court granted the motion and entered an order of dismissal. This appeal is taken from that order .

It is observed that in entering that order, the trial court did not make findings of fact and conclusions of law as provided by Rule 41 (b), U. R. C. P. We believe the rule in this jurisdiction to be that, in ruling upon a motion for nonsuit at the end of plaintiff's case, and in reviewing the granting of such motion, the trial court and appellate court will assume that all facts and legitimate inferences that

can be deduced therefrom arising from plaintiff's evidence will be taken as true. *Martin v. Stevens*, _____ Utah _____, 243 P. 2d 747; *William v. Z. C. M. L.*, 6 Utah 2d 283, 312 P. 2d 564; *Winchester v. Egan Farm Service, Inc.*, 4 Utah 2d 129, 288 P. 2d 790. We present our facts in light of that rule.

Appellant first engaged in transactions with respondent, through its agent, Mr. C. E. Slavens, in January, 1957 (Tr. 283). At that time Mr. Davis, through negotiations with Mr. Slavens, submitted bids for providing materials for construction of the first series of houses involved in this action (Tr. 284ff). Through these bids, the parties entered into a contract for the appellant to provide the materials named in the contract, at the prices therein specified (Exh. 6). Subsequently through the spring and summer of 1957, the parties entered into five additional contracts similar in form, to provide materials for a total of sixty-one houses (Exh.'s 7 to 11).

Early in the course of performance of the contracts appellant learned that more and different materials were being ordered and delivered than called for in the contract (Tr. 80). He took this up with respondent's superintendent, and was assured that the latter would take this up with Mr. Payne or Mr. Day, the "powers" in the corporate respondent, and that unless appellant heard otherwise, written orders would not be necessary (Tr. 299). He did not hear otherwise. Respondent's superintendent even joined in setting up the manner of keeping track of the extras and overages (Tr. 353).

Appellant began to bill respondent for these extras and overages, but the billing was returned by respondent's superintendent, with the exhortation that this should not

be done, as it confused the corporate officers, but that the parties should keep track of such extras and overages, and that appellant and respondent's superintendent would get together at the end of the projects and settle up (Tr. 351-354).

Accordingly, at the end of construction appellant determined he was owed \$7,751.79 for these overages and extras, billed the respondent therefor, but was refused any payment at all (Tr. 356-357). This action was brought to recover such sum.

As stated, there were no findings of fact or conclusions of law, although these were not waived. The issues must, therefore, be determined from the course of the trial. Because this is an appeal from a non-suit, we believe it must be taken as fact that materials to the value stated, not included in the contracts, were delivered to respondent and were not paid for, and that they were delivered at the instance of the superintendent of the respondent.

Upon the trial it was urged frequently and vehemently that no evidence could be admitted of the deliveries of overages and extras because this violated the parole evidence rule. It was urged further that the parole evidence rule precluded such evidence because of what counsel denominated the "package method" of billing on orders such as here involved. Counsel for respondent apparently takes the view that under these contracts appellant was to provide all materials required for the houses and therefore he could not introduce such evidence because it varied the terms of the contract.

Respondent further took the view that Mr. C. E. Slavens, corporate superintendent, had no authority to waive any provision, alter, or amend the written contracts. It

was further urged that in view of the fact that lien waivers had been signed by the appellant, he could not now assert claim for any materials. That is, respondent's view was that appellant could put on no evidence calculated to explain the lien waivers. We believe this defines the issues. We shall assume that the trial court granted the nonsuit on all issues.

STATEMENT OF POINTS

POINT I

RESPONDENT BY ITS CONDUCT WAIVED THE CONTRACT REQUIREMENT THAT ADDITIONS OR DELETIONS IN THE MATERIALS TO BE FURNISHED WERE TO BE MADE IN WRITING, OR IT IS ESTOPPED TO SO ASSERT, AND EVIDENCE ON THIS POINT DOES NOT VIOLATE THE PAROLE EVIDENCE RULE.

POINT II

RESPONDENT'S AGENT, C. E. SLAVENS, HAD ACTUAL OR APPARENT AUTHORITY TO WAIVE, ALTER OR CHANGE REQUIREMENTS OF THE CONTRACTS.

POINT III

THE ORIGINAL CONTRACTS ARE FOR THE DELIVERY OF SPECIFIED AMOUNTS OF NAMED MATERIALS AND EVIDENCE OFFERED AND ADMITTED TO SHOW OTHERWISE VIOLATES THE PAROLE EVIDENCE RULE.

POINT IV

THE LIEN WAIVERS, FOR PURPOSES OF THIS ACTION, ARE MERE RECEIPTS AND EXTRINSIC EVIDENCE MAY PROPERLY BE ADMITTED IN EXPLANATION THEREOF.

ARGUMENT

POINT I

RESPONDENT BY ITS CONDUCT WAIVED THE CONTRACT REQUIREMENT THAT ADDITIONS OR DELETIONS IN THE MATERIALS TO BE FURNISHED WERE TO BE MADE IN WRITING, OR IT IS ESTOPPED TO SO ASSERT, AND EVIDENCE ON THIS POINT DOES NOT VIOLATE THE PAROLE EVIDENCE RULE.

As is shown in argument under Point II of this brief, appellant dealt with the corporate respondent solely through its agent, C. E. Slavens. The authority of this gentlemen will be assumed for purpose of argument under this point.

Concerning parole modifications in written contracts requiring that changes be in writing, the American Law Institute, Restatement of the Law of Contracts, Section 407, states:

"The fact that an agreement to rescind or modify a prior contract is oral does not render it inoperative except in the cases and to the extent that a Statute of Frauds requires, under the rules stated in sections 222-224, whether the prior contract is oral or is in a sealed or unsealed writing."

Comment (a) under this section states in part: "When-

ever two persons contract, no limitations self-imposed can destroy their power to contract again." We believe this is good law and that it prevails in this jurisdiction. **Salzner v. Jos. G. Snell Estate Corp.**, 81 Utah 111, 16 P. 2d 928.

The contracts (Exh. 6-11) contain essentially the same provision:

"It is mutually agreed that any additions or deletions in the materials to be furnished are to be given in writing by Party of the Second Part to the First Party, and the value of the changes, based upon prices quoted in the attached lists, shall either be added or subtracted from the original contract."

When appellant learned that more and different materials were being ordered and delivered than was provided in the materials lists as parts of the contracts, he immediately contacted the superintendent of respondent, Mr. C. E. Slavens (Tr. 351-3). We quote from the record:

Q. In July of 1957, you say you sent a statment to Payne & Day, Inc., through Mr. Slavens?

A. We sent it to Mr. Slavens, addressed to Payne and Day, yes.

Q. I show you what is marked as Plaintiff's Exhibit 19 and ask you if that is the statement which was sent?

A. That is the one that was sent, yes.

Q. And in response to that billing, did you have any conversation with Mr. Slavens?

A. Mr. Slavens came in the office.

(Objection and argument)

Q. Where did it take place?

A. In our office.

Q. Who was present?

A. Mrs. Davis, myself, and I am not sure whether Clyde was there or not.

Q. Tell us what was said by Mr. Slavens and what was said by you and any other persons participating in the conversation.

(Objections and argument)

A. Mr. Slavens brought in the invoice with him.

Q. You are referring to the exhibit?

A. Exhibit 19. When he came in, he showed it to me. He said, "John, if you send that to Payne and Day, they would not have anything to do with it, they would not know what the contract is and if you send them to them, it will ball them up. What we want to do is keep a record." How nice it would be, he suggested, a little record kept day by day and at the completion of the job, we would go through and take the credits and debits and come up with the difference and he would get a check and that is the reason Payne and Day was not billed by the month."

See also Transcript of Trial, 28-29, 304-5.

Appellant, when he discovered additional and different materials were being ordered, attempted to get in touch with the corporate officers, but without success (Tr. 299, 340). He was then assured by Mr. Slavens that the latter had the authority, unless Payne called Davis, and that everything was "okeh." True, the trial court ordered this stricken, on the theory that it was an attempt to prove agency by the declarations of the agent. We submit that this was error, as the agency of Slavens was never in dispute, only the extent of his authority as agent. This is treated with authorities in Point II.

After the contracts, with material lists, were entered into, the plans of the houses were changed (Tr. 61). Two

houses were increased in size without notice to appellant (Tr. 199, 201, 350). Porch columns, a substantial item not on the contract material lists, and not shown on plans, were added by Mr. Payne and Mr. Day and provided by appellant, at Mr. Slavens' order (Tr. 186-7). Window sills also were added (Tr. 187). Slavens, who had an immediate interest in keeping the prices down (See Exh.'s 20-22) even priced the cost of adding porch columns and passed this information on to Mr. Payne and Mr. Day (Tr. 187).

Many items were simply "forgotten" by Mr. Slavens when he draw the material lists, part of the contracts. Roofing felt was used for subfloors in kitchens, baths and gable ends of all frame houses, on order of Slavens, though it was not on the material lists (Tr. 166). Walls of the houses were of sheetrock, substantial quantities of sheet rock nails were ordered from appellant, yet these were left out in the material lists because Slavens "forgot" (Tr. 193). The same is true of rabbetted window sills (Tr. 181), cabinet hinges (Tr. 193), door hinges (Tr. 195), though these were on the original plans and specifications, prepared by Slavens. Exhibit 23 shows what Slavens considered as required to enlarge the two houses after commencement of the project and the execution of the contracts by appellants. This shows substantial additional materials, but appellant knew nothing of the enlargement until after the fact, when respondent ran out of roofing material (Tr. 80). After construction was under way respondent had difficulties with F.H.A. and was required to use additional steel in footings (Tr. 229ff).

The trial court steadfastly refused to allow appellant to testify to a conversation with Mr. Slavens when appellant learned of the use of additional and different materials,

in which Slavens assured appellant that a written change order would not be required (See opening statement, Tr. 6-7). The court's reason stated was that we were attempting to prove agency by declarations of the agent. This, we submit, was error. Our attempt was to show the extent of authority of an admitted agent, and testimony sought was part of the *res gestae*. Slavens, respondent's agent, who profited with respondent by seeing that appellant was not paid for extras and overages, did, however, admit such conversation (Tr. 224).

The project was a large one—to build sixty-one houses in one season. We respectfully submit that the entire record shows one concern only on part of respondent, to get the job done. That it paid no attention to the contract requirement in issue. That it, through its agent, simply ordered and picked up additional materials as needed, as construction progressed and as changes in plans were made, and that it thereby waived, or is estopped to assert, the contract requirement that changes in material lists be made in writing. See *Salzner v. Jos. G. Snell Estate Corp.*, 81 Utah 111, 16 P. 2d 928; *Frank T. Hickey v. Los Angeles Jewish Community Council, et al*, 276 P. 2d 52, Cal.; *Sitkin et al v. Smith et al*, 276 Pac. 521, Ariz.

The record is replete with objections and arguments that the admission of testimony concerning transactions and conversations following the entry into the contracts and during construction was violative of the parole evidence rule. That rule precludes extrinsic evidence of transactions prior to or contemporaneous with execution of an unambiguous written contract, intended to vary its terms. We submit that we offered no such evidence, though, as argued under Point III of this brief, respondent did just that. We

have consistently admitted the delivery of and payment for the materials listed in the written contract, and make no claim therefor. We continue to maintain that a provision of those written contracts was waived, or that a separate and distinct contract or contracts were made, or that respondent, by its conduct, is estopped to deny otherwise, and that appellant is entitled to payment for overages and extras ordered by respondent.

POINT II

RESPONDENT'S AGENT, C. E. SLAVENS, HAD ACTUAL OR APPARENT AUTHORITY TO WAIVE, ALTER OR CHANGE REQUIREMENTS OF THE CONTRACTS.

Numerous and lengthy were arguments on the trial that Slavens held a position of limited authority, which did not extend to waiving a provision of the written contract, or ordering additional or different materials. He was called "construction superintendent," which, it seems was alone considered as such limitation. His contracts of employment (Exh.'s 20, 21, 22) were introduced to show such limitation, which, we submit, they do not.

Appellant and his agents dealt solely with the corporate agent Slavens, and never with the officers, Payne or Day (Tr. 77-79, 100-102, 103-104, 114, 120-21, 147-149, 283-4). Slavens drew the contracts between appellant and respondent (Tr. 388). Slavens drew or had drawn the plans and specifications for the houses (Tr. 426-27), but these were not made available to appellant prior to his bidding and signing the material contracts (Tr. 80, 178). Slavens

prepared the material lists, part of the written contracts (Tr. 178). (See also Tr. 426ff).

Appellant was never informed of Slavens' contracts of employment or any limitation on his authority (Tr. 425-6). These contracts (Exh.'s 20-22) bear examination. They recite that Slavens, called the General Construction Superintendent, "is experienced in the building of houses and in preparing the initial building program and construction estimates for the construction of numerous houses." They then provide that he will proceed to oversee and supervise construction of the houses, but will not devote his full time thereto. He "agrees to proceed expeditiously, in a workmanlike manner, to complete the construction" of the houses. A detailed statement of his compensation is then spelled out, followed by the most interesting provision—that he will participate to the amount of half the savings to the extent he can hold the prices of the houses below a named figure—he was to share in the profit made by keeping subcontractors' and materialmen's payments down. Nothing further appears defining or limiting his authority, or granting him the authority he proceeded to assume.

On his own testimony, Slavens drew or provided the plans, prepared the material lists, drew the contracts with subcontractors, negotiated the contracts, supervised construction, delivered the payments, prepared the lien waivers and collected them when signed, and generally "ran the show." (Tr. 428-30). We quote the record (Tr. 431):

"Q. As a matter of fact, you (Slavens) did all of the dealings in connection with this project with Mr. Davis on behalf of Payne and Day, did you not?

A. So far as I know, yes.

Q. Because you were in charge of the entire project, were you not?

A. I was construction superintendent.

Q. Of the entire project?

A. Of the entire project, yes.

Q. And your job was to get the houses built?

A. Yes."

As a matter of fact, Slavens was at appellant's place of business almost daily (Tr. 197, 221), at which time he would pick up or order materials (Tr. 79, 259).

During direct examination of appellant, we undertook to show that the agent, Slavens, made representations to appellant as to the extent of his authority. When appellant Davis learned that two houses had been increased in size after he had contracted with respondent, he endeavored to get in touch with Mr. Payne or Mr. Day. We quote from the transcript (Tr. 299):

"Q. (The Court) You say you called Mr. Payne for the purpose to see who was authorizing the bigger house?

A. And to get authorization.

Q. (By Mr. Ivins) to go ahead?

* * *

Q. (By Mr. Ivins) Did you get ahold of Mr. Payne?

A. No.

Q. Why did you discontinue trying to get ahold of him?

A. Mr. Slavens told me, "I have the complete authority to go ahead. If Mr. Payne don't get in touch with you in an hour, you can figure everything is okey."

Q. Did he get in touch with you?

A. I never heard from Mr. Payne at all."

The trial court ordered this stricken as an attempt to prove extent of authority of the agent by his own statement.

At the commencement of the transaction, appellant began billing Payne & Day, Inc. for extras and overages (Tr. 158). Mr. Slavens brought the billing back to appellant and a conversation was had between him and appellant, the substance of which the trial court refused to admit, on the ground it was an attempt to prove agency by statements of the agent. A proffer of proof was made (Tr. 163) that Mr. Slavens returned the billing, and instructed appellant to keep track of the extras and overages until completion of the project, at which time they would settle up as Slavens had done on prior projects, for the reason that billings as extras and overages were delivered would confuse Mr. Payne and Mr. Day. See also Transcript, 455-457.

We respectfully submit that the trial court committed error in excluding such evidence. There never was a question but that Slavens was agent of the corporation. The issue raised was the **extent** of his authority, and appellant's notice of any purported limitation. We respectfully submit that such declarations of the agent were admissible as part of the *res gestae*—they were part of the act for which he was agent of the corporate respondent. **Park v. Moorman Mfg. Co. et al.**, _____Utah_____, 241 P. 2d 914; 2 **Mecham on Agency** (2d Ed.) p. 1353, Sec. 1780; 1 **Jones on Evidence** (4th Ed.) 487, Sec. 256; **A. L. I. Restatement of the Law on Agency**, Sec. 284.

We respectfully submit that on these facts, Slavens had **apparent** authority to bind the corporate respondent, either on a theory of waiver of the requirement of the con-

tracts that changes be in writing, on a theory that the extras and overages were in fact a new contract, in the nature of an open account, or a theory that the respondent principle is estopped to deny its agent's authority to bind it. The Supreme Court of Kentucky, in the case of **Union Century Life Assurance Co. v. Glasscock**, 110 SW 2d. 681, 270 Ky. 750, 114 ALR 373, has stated well our position:

"If one puts another into, or knowingly permits him to occupy, a position in which, according to the ordinary experience and habits of mankind, it is usual for the occupant to have authority of a particular kind, anyone having occasion to deal with one in that position is justified in inferring that the person in question possesses such authority, unless the contrary is then made known."

See also 1 **Mechem on Agency** (2d. Ed.) 174-178, Sec. 241-245, and page 215, Sec. 298; **A. L. I. Restatement of the Law of Agency** Sec. 8, 49, 50, 141.

We believe the record shows that Slavens had actual authority to thus waive the provisions of the contract and bind his corporate principal for the extras and overages. Appellant also had contracts with respondent for the roofing of the same sixty-one houses involved (Tr. 289) (Exh.'s 26-29). Two of the houses were increased in size after appellant had executed the contracts in issue, necessitating more roofing materials, which were ordered orally by Slavens, without written amendment to the contracts. The roofing was delivered by appellant, and was paid for by Payne and Day, Inc. on Slavens' authority, still without written order, though the contracts for roofing and those for other materials were identical in requiring such written authority (Tr. 289-294). What more evidence, apart

from an absolute admission by the corporation, need one have as to the extent of Slavens' authority?

POINT III

THE ORIGINAL CONTRACTS ARE FOR THE DELIVERY OF SPECIFIED AMOUNTS OF NAMED MATERIALS AND EVIDENCE OFFERED AND ADMITTED TO SHOW OTHERWISE VIOLATES THE PAROLE EVIDENCE RULE.

Throughout the trial counsel for respondent held forth extensively on what he denominated the "package" method of bidding materials for houses. Over our objection, respondent was permitted to go beyond the scope of our direct examination, and interrogate Slavens extensively on his interpretation of the contract on this point (Tr. 289ff). It seems that according to his theory, appellant was merely to furnish all materials needed for the houses, and that the material lists, part of the contracts, are a sort of guide—a sort of norm, both as to kind and amount, the only limitation being something in the nature of the ejusdem generis rule. Appellant was not to provide materials for flooring, cement work, brick, painting, and the like, but except for that he was to deliver whatever Slavens and his principal wanted, though plans could be changed from day to day.

Perhaps respondent was relying on what it considered a practice of the trade. If so, this is strange. Counsel for respondent said, "It is an explanation of a system that was used, that we don't see used very often in the business." (Tr. 389). Slavens denied knowledge of its general use

(Tr. 433). No evidence of business custom or practice was offered.

If it had been, it would be objectionable. We submit that the contracts are plain, unambiguous, and require no explanation by extrinsic evidence. Except for Exhibits 6 and 10, the contracts provide that "First Party (appellant) agrees to furnish materials" for the identified houses "as per attached lists," which become a part of this agreement." Exhibits 6 and 10 add the following: "It is understood that this is an average price, and the fact is taken into consideration that scheme 2 has one more truss than the other schemes, and that scheme 1 and 2 do not have 20x10x16 or 2 pieces 2x4x10 barge rafters that are on the lists." That is, in those instances where there is a variation in construction from the general plan, this is covered in the contracts themselves.

The lists are broken into two sections, denominated package 1 and package 2. The record shows that package 1 was supposed to be what was required from appellant to take the houses to an inspection stage, and package 2 was supposed to be what was required from appellant to take the houses to final inspection. The only other use of the term package in the contracts is: "It is understood that delivery will be made and billed by package number per attached lists." (emphasis added) That is, the term "package" was used in the contract simply to control delivery and billing. We see no ambiguity.

The material lists specify fixed quantities of named materials. Appellant did not contract to provide **all** materials needed to build the houses, or **all** materials needed to bring them to any inspection stage. Had the materials been destroyed, stolen, or otherwise disposed of after de-

livery, that was no concern of appellant. We submit that the contracts are clear and unambiguous. No explanation of what was meant was needed, none should have been admitted, and the court erred in permitting Slavens to go on extensively about his own peculiar "package" theory, thought up, we suspect, after the fact. It was error to permit Slavens to testify as to his intentions. **Continental Bank & Trust Co. v Bybee et al.** 6 Utah 2d. 98, 306 P2d. 773; **Last Chance Ranch Co. v. Erickson**, 82 Utah 475, 25 P2d. 952; 2 **Jones on Evidence** (4th Ed.) 869, Sec. 454, 460, 462-6.

POINT IV

THE LIEN WAIVERS, FOR PURPOSES OF THIS ACTION, ARE MERE RECEIPTS AND EXTRINSIC EVIDENCE MAY PROPERLY BE ADMITTED IN EXPLANATION THEREOF.

It is remembered that the contracts, Exhibits 6 to 11, contained material lists, setting forth specific quantities of specific items, broken into two groups, denominated package one and package two. These materials listed in the written contracts were to be billed for according to this division. That is, when the materials listed in what is called package one were delivered, they were to be billed for as a unit, and were to be paid for as such. This was followed, and no question arises thereon.

At the time of payment lien waivers were signed by appellants (Exhibits 12-16). These lien waivers were prepared by Mr. Slavens, and insisted on by him before payment, in order to continue with the bank financing (Tr. 430-31). Mr. Clyde Davis testified to executing these, and

explained that they were for the materials listed on the written contracts only (Tr. 91).

One of the grounds for the motion for non-suit was that the appellant "has receipted the defendant (respondent) as having been paid in full." (Tr. 478; R. 26). We take it that this is based upon these lien waivers,

This is **not** a lien foreclosure action. It is brought to recover for materials delivered for which appellant has not been paid. The record amply shows that the overages and extras were in fact delivered, and that they were not paid for. Davis has brought suit for the extras and overages, and Slavens testified that appellant has been paid nothing but the contract sums (Tr. 451). On motion for non-suit these facts should be deemed true. For purposes of this action, the lien waivers are a receipt merely, and they are explained as a receipt for the materials called for in the material lists, part of the written contract—materials for which we have never sought payment in this action. Most of them recite: "This Payment Covers Material, Package No. 1 (or No. 2, as the case may be)," thus being expressly restricted to the material lists, although some recite merely: "This Payment Covers Material, Payment in Full." On these latter it is noted that there is only one lien release, though the contract calls for delivery in two separate packages, to be billed separately.

We quote from 2 **Jones on Evidence** (4th Ed.) p. 936, Sec. 491:

"The rule excluding testimony which is offered for the purpose of contradicting, varying or explaining the terms of a written instrument may not be successfully invoked where the writing in dispute constitutes

a mere receipt which does not embody or set forth the terms of a contract."

This court has so held in the case of **Brixen v. Jorgensen et al.**, 33 Utah 97, 92 Pac. 1004, wherein it was held that the contract to sell realty, in so far as it recited the amount remaining unpaid upon its execution, was only a receipt, and that parole vidence was admissible to show that the amount actually received was less than that stated.

If the trial court relied on these lien leases as the basis for the non-suit, we respectfully submit that it committed error.

CONCLUSION

On the record as it now stands there can be no question but that appellant delivered to respondent materials in addition to and different from that called for in the contracts, to the value of \$7,751.79, for which he has not been paid. He did so in good faith, on the representations of the only agent of respondent with whom he ever dealt that he would be paid.

Apparently no one gave any attention to the provision in the contract that changes must be in writing. Plans were changed from time to time, as the occasion arose, without consulting or even informing appellant. Because of the manner of delivery in bulk, with numerous houses going up at once, appellant had no way of knowing what was being used until after the fact.

We submit that the corporate agent Slavens had actual authority to waive the provisions requiring written changes in material lists, that if he did not, the corporation, by placing him in full command, clothed him with apparent authority, that he by his declarations and conduct waived

the requirement, and that the corporation is estopped to deny such fact. The corporation entered into a profit sharing arrangement with Slavens and turned him loose to hold payments to those in appellant's position to a minimum. It does not now lie in the corporate mouth to deny his acts. It is unconscionable that the corporation thus profit. We respectfully submit that the trial court erred in granting the non-suit, and should be reversed.

Respectfully submitted,

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