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Apex Lumber Company v. Comanche Construction Company, Raymond Clark, Moroni Feed Company, D.A. Shand, Howard Willardsen, and Richard Jensen : Appellant's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

APEX LUMBER COMPANY,
Plaintiff-Appellant

— vs —

COMANCHE CONSTRUCTION COMPANY,
RAYMOND CLARK, AND MORONI FEED COMPANY,
Defendants-Respondents

APEX LUMBER COMPANY,
Plaintiff-Appellant

— vs —

COMANCHE CONSTRUCTION COMPANY,
RAYMOND CLARK, and D. A. SHAND,
Defendants-Respondents

APEX LUMBER COMPANY,
Plaintiff-Appellant

— vs —

COMANCHE CONSTRUCTION COMPANY,
RAYMOND CLARK, and HOWARD WILLARDSEN,
Defendants-Respondents

APEX LUMBER COMPANY,
Plaintiff-Appellant

— vs —

COMANCHE CONSTRUCTION COMPANY,
RAYMOND CLARK, and RICHARD JENSEN,
Defendants-Respondents

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Case No. [illegible]

FILED
DEC [illegible]
Clerk [illegible]

APPELLANT'S BRIEF

Appeal from the Judgment of the Seven[illegible]
for Sanpete County, Utah
Honorable Henry Ruggeri, Judge

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[illegible]d Willardsen and Richard Jensen

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— vs —

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APEX LUMBER COMPANY,
Plaintiff-Appellant

— vs —

COMANCHE CONSTRUCTION COMPANY,
RAYMOND CLARK, and RICHARD JENSEN,
Defendants-Respondents

Case No. 10414

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This was a civil action brought under the provisions of Sectons 14-2-1 and 14-2-2 of Utah Code Annotated, 1953, as amended, whereby the Plaintiff-Appellant, Apex Lumber Company, seeks payment for the unpaid value of materials supplied by plaintiff to the Comanche Construction Company, and used in the construction of four pole-type turkey brooding barns on land owned by the defendants-respondents, Moroni Feed Company, D. A. Shand, Howard Willardsen and Richard Jensen.

DISPOSITION IN LOWER COURT

Plaintiff, Apex Lumber Company, commenced four individual actions in the Third Judicial District Court, Salt Lake County, against Comanche Construction Company, Raymond Clark and the four defendants, Moroni Feed Company, D. A. Shand, Howard Willardsen and Richard Jensen. Comanche Construction Company and Raymond Clark were non-residents of Utah. On the defendants' motion for a change of venue, the matters were set down to the Seventh Judicial District Court, Sanpete County.

On stipulation of counsel, the four cases were joined for purposes of trial and tried before a jury. The court propounded a special verdict to the jury, containing six written interrogatories; and based upon the jury's answers to said interrogatories, the court rendered judgment against the plaintiff for no cause of action against the defendants.

Plaintiff moved for a directed verdict in favor of the plaintiff against the defendants. Motion for directed verdict was denied and overruled. Plaintiff filed a motion for a new trial, which was heard June 8, 1965. The court took the same under advisement at that time. On June 22, 1965, the court ruled on plaintiff's motion for new trial by denying same. Plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the lower court's judgment and that this court adjudicate:

1. That plaintiff never received full payment for the ma-

terials used in the construction of pole-type turkey brooder barns on land belonging to the defendants.

2. That under the provisions of 14-2-1 and 14-2-2 of Utah Code Annotated, 1953, as amended, plaintiff is entitled to hold the defendants personally liable for the unpaid value of materials used in constructing the buildings on their lands.

3. That acceptance of contractor's unsecured promissory notes did not constitute payment of the amount owing on the materials.

4. That the mere statement of plaintiff's employee that contractor was not in default with the plaintiff would not create an estoppel barring plaintiff's recovery from defendants.

5. That, as a matter of law, plaintiff is entitled to recover the amounts prayed for in its complaints, or, that failing, the cases remanded for a new trial.

STATEMENT OF FACTS

During the summer of 1960, a contractor from Minnesota by the name of Raymond Clark, and holding himself out as President of Comanche Construction Company, Inc., (T-10) contracted with several turkey farmers living in Sanpete County, Utah, to build pole-type turkey brooding barns for them. The fact that Mr. Clark at this time had not incorporated his company and did not incorporate it until after the defendants' buildings were completed was not known by either plaintiff or defendants until later. (T-56) Comanche Construction Company transferred men and equipment from Minnesota to Utah and commenced work in October of 1960. (T-9)

Plaintiff's first witness was Guy L. Pittman, an employee of Comanche Construction Company, who came to Utah as the Supervisor of Sales and Construction. (T-9) Mr. Pittman, with authority to hire and fire the men, had the responsibility to see that the buildings under contract were built and to sell other buildings. (T-10)

With the help of Exhibit 15, Mr. Pittman's undisputed testimony (T-38, T-45 through T-51) showed that Comanche Construction Company constructed pole-type barns for the fol-

lowing people, starting and finishing the jobs on the dates set opposite their names:

Jobs	Started	Finished
1. Rulon Sowby	Oct. 18, 1960	Nov. 30, 1960
2. Ray Olsen	Oct. 23, 1960	Dec. 2, 1960
3. LaMont Blackham	Oct. 24, 1960	Dec. 21, 1960
4. Cliff Blackham	Oct. 29, 1960	Dec. 14, 1960
5. Moyle Blackham	Nov. 5, 1960	Dec. 21, 1960
6. Mark Christensen	Oct. 26, 1960	Jan. 7, 1961
7. Howard Willardsen	Dec. 12, 1960	Jan. 24, 1961
8. D. A. Shand	Dec. 13, 1960	Jan. 25, 1961
9. Richard Jensen	Dec. 14, 1960	Feb. 18, 1961
10. Moroni Feed Company	Jan. 12, 1961	Mar. 1, 1961
11. Warren Goates	Feb. 8, 1961	Mar. 1, 1961
12. Bruce Barton	Feb. 8, 1961	Mar. 14, 1961
13. Dick Barker	Mar. 15, 1961	May 3, 1961

With Exhibits 1 through 6, Mr. Pittman testified that he supervised the construction of a building 76 feet wide and 200 feet long with a 30 foot addition for defendant, Moroni Feed Company. He explained in detail what the building looks like and the type and quantity of materials used in it. (T-11 through T-26) Mr. Pittman's undisputed testimony was that the material used in the construction of the building was supplied by plaintiff; that this material included poles, steel, lumber and hardware. (T-26)

Mr. Pittman further testified that the three buildings constructed for defendants, D. A. Shand, Howard Willardsen and Richard Jensen, were 76 feet by 150 feet. With the help of Exhibits 7 through 12, he detailed the type and quantity of materials which included the poles, steel, lumber and hardware; that all of this material was supplied by plaintiff. (T-27 through T-38)

Mr. Pittman sometimes signed the farmers to a contract, and regarding the procedure for ordering the materials testified:

"A: When I sold these buildings, I sent the copy of the contract to Hopkins, Minnesota to Comanche Construction Company. I gave them the size and the spe-

cifications on it, and they sent the purchase orders to my knowledge to Apex Lumber Company and from there we received the lumber.

"Q: Did you have a supervisory capacity over the purchase orders?

"A: No.

"A: It came directly from Hopkins, Minnesota, unless I had a shortage on the job I would call Apex Lumber in Salt Lake City, and they would deliver on the shortage of materials." (T-39)

Mr. Pittman's further unchallenged testimony was that they had very little material left over on the jobs, cut-offs and this type of thing. (T-39)

At the completion of the jobs the defendants, in each instance, paid Mr. Pittman in full. The checks were sent back to the head office of Comanche Construction Company at Hopkins, Minnesota. Regarding the giving of lien waivers, the procedure was not the same in all instances. On occasion he gave lien waivers to the property owners. Sometimes these lien waivers bore the signature of the suppliers and other times they were signed only by him. It would depend on what he had been supplied by Comanche Construction Company. When he gave lien waivers signed only by him, it was with the stipulation that materials were not paid for by Comanche Construction Company. (T-43)

When questioned on whether or not he had received payment from the defendants, Mr. Pittman answered:

"A: I did. The fact is we may have had a few hours work left on some of the buildings when these people paid for them. There was no argument whatsoever with anyone about paying for these buildings." (T-40)

Under cross-examination, Mr. Pittman testified that the cost of the material in these buildings was roughly between sixty and sixty-five cents a square foot. (T-76)

On redirect examination, Mr. Pittman testified all of the steel shipped into Sanpete County from Illinois was three inch corrugated steel, and this steel was used in the construction of the first six buildings. The steel was used in the four buildings of

the defendants was two and one-half inch steel. (T-78)

Questioned concerning material belonging to Comanche Construction Company that he might have sold, he was asked:

"Q: You testified some of the materials left over from the jobs were sold. Any material left over from a job in Sanpete County sold to anyone in your knowledge?

"A: Not to my knowledge. Usually we was always short of material.

"Q: And what would you do in case you were short?

"A: Call Apex Lumber Company and have it delivered out." (T-78)

When asked about the crews moving the materials from job site to job site, he responded as follows:

"Q: And was all of the material at this time being purchased from Apex Lumber?

"A: It was.

"Q: So whether it was taken from Jensen to someone else and brought back it was, all of the material was originally purchased from Apex?

"A: It all came from Apex Lumber." (T-80)

The next two witnesses were Darrell Ben Tucker and Piter VanderVaart, both employed at plaintiff's lumber yard. They testified that during January, 1961 they personally, with one other driver, delivered the lumber and steel to the sites of the Willardsen building, the Shand building, the Jensen building, and Moroni Feed Company building. (T-87 through T-95)

Plaintiff's next witness was J. W. Child, General Manager of the plaintiff. He testified that in September or October of 1960 plaintiff was requested by Raymond Clark to furnish quotations on materials. Plaintiff responded and in October, 1960 received purchase orders (Exhibit 24) from Comanche Construction Company for materials to be used in the construction of six pole-type buildings in the Sanpete County area.

Upon completion of the first six jobs, plaintiff received purchase orders from Comanche Construction Company for four additional buildings. (Exhibits 25 through 28 are these purchase orders.) It was the material supplied by plaintiff on these four purchase orders that went into the buildings owned by de-

fendants. (T-100 through T-104)

Mr. Child further testified that because material was ordered by the construction crews to make up shortages, the jobs could not be billed to Comanche Construction Company until they were completed. Prices on all materials were pre-arranged, (T-104) and as agreed with Comanche Construction Company, plaintiff was to be paid at the completion of the job. (T-105)

A summary of Comanche Construction Company's account was given by plaintiff in a letter dated January 30, 1961. (Exhibit 41) On February 14, 1961, plaintiff received a $10,000.00 payment from Comanche Construction Company, and on February 21, 1961 plaintiff again wrote Comanche Construction Company to show how the payment had been allocated and to bring the account current. (Exhibit 42) Plaintiff maintained a ledger card on Comanche Construction Company (Exhibit 29) which Mr. Child explained at T-107:

> "A: This is a copy of the ledger card, commonly referred to as an account receivable card, between Apex Lumber and Hardware and Comanche Construction Company. The debit items show the items that were sold to Comanche Construction Company and the credit items on the ledger card show the items the Comanche Construction Company paid to Apex Lumber and Hardware Company. And beyond this we show payments received of $2,000 on October 20, and this was the beginning date, as I mentioned, on the first six jobs, and this $2,000 represented a deposit that we required of Comanche Construction Company before we began shipping to them because of their unproven credit with us and pending our credit investigation of them. On February or December 6 they paid $1,833.54, which would correspond with one of the purchase orders on those original six jobs. On December 16, they paid $3,667.08, which corresponds with two of the purchase orders on the first six jobs. And January 10 they paid $2,353.46, which again corresponds with one of the large jobs and the lumber furnished. February 15 they paid $6,628.75, which cleared these original six jobs."

The next payment was the last payment received by plaintiff from Comanche Construction Company. It was for $8,000.00, and Mr. Child testified that at Raymond Clark's direction the Bruce Barton job was given full credit and the balance of the payment was applied to the defendants' jobs:

"THE WITNESS: Thank you, sir. Mr. Clark came into my office and to me personally handed a check for $8,000, and this was the final payment I received from Comanche Construction Company. This was on the 20th day of March, just six days after Mr. Barton's job was completed. And Mr. Clark informed me to apply this eight thousand dollars to Mr. Barton's job. Therefore, the five thousand three hundred seventy-eight dollars was credited here and the balance of this money, plus the four thousand one hundred eleven dollars collected prior were prorated to the jobs of the Hatchery, Shand's, Willardsen's and Jensen's as being the only other four jobs outstanding with Apex Lumber. After receiving these payments, the amount still due from Mr. Shand's job was forty-seven hundred forty-three; Mr. Willardsen's was forty-six ninety-seven; Mr. Jensen's forty-nine forty; the Hatchery forty-six seventy-seven, and Mr. Barton's job, per the instructions of Mr. Clark, was paid in full." (T-117)

Mr. Child was questioned as to what procedure plaintiff used in deciding to sue these particular defendants, and at T-125, with the use of the blackboard, answered:

"THE WITNESS: Thank you for your diligence. According to Apex Lumber's record, and I will not start with the first jobs because they do not apply, but the later jobs were completed on the following dates. Let's start with Christensen's on January 7. Then Mr. Shand's was completed on January 25. Mr. Willardsen's on January 24. Mr. Jensen's on February 18. Moroni Hatchery was completed on March 1. Mr. Barton's job was completed on March 14. Mr. Goates, this is a Lehi, Utah, job, was completed on March 1, and Mr. Barker's, which is the Kearns job, was completed

on May 3. These are the completion dates and the dates which establishes to us the precedent as to which were materials to be billed out first and which were last. After Comanche Construction Company took out their bankruptcy, lawsuits were then instigated against Barker for his job, Mr. Goates for his job, Mr. Barton was issued full credit, as I mentioned a minute ago, so Mr. Barton's job was paid for. Now Mr. Barker and Mr. Goates both settled their lawsuit. They, with Apex Lumber got together and we settled the amount and got the money from both of these brethren, both of these gentlemen. Then we took the total amount due, which is nineteen thousand dollars, and applied it to the very next jobs, which was Moroni Hatchery, Jensen's, Willardsen's and Shand's, which left this one out because these four would satisfy the entire judgment that, excuse me, the entire liability that Apex had against Comanche. There was nothing hit or miss about it. These were settled."

(Exhibit 39 is copy of blackboard exhibit.)

Plaintiff's extended billings to Comanche Construction Company (Exhibits 30 through 33) detail the unpaid value of the materials in each of the defendants' buildings. (T-120 and T-121.)

Commenting on the figure that Mr. Pittman used in his testimony of sixty cents per square foot as the basis for figuring the cost of the material, Mr. Child diagrammed on the blackboard another method of arriving at the unpaid value for which plaintiff is suing defendants. (T-110 through T-118) (Exhibit 37 is an exact duplicate of the computations put on the blackboard.)

When Comanche Construction Company failed to send more money, Mr. Child testified of his efforts to collect it:

"A: Yes. There were several efforts made to collect this money. We contacted Mr. Clark very frequently; made telephone calls, trips, engaged a lawyer, and one trip when Mr. Clark was in Salt Lake and I got him in my office and he committed that he had coming to him

within one week five thousand dollars and within two weeks he told me he had sixteen thousand dollars coming to him. And so I asked him if he would object to giving me a promissory note promising to me that he would pay this money when he collected it. And so Mr. Clark wrote out two promissory notes, one for five thousand dollars and one for sixteen thousand, and the five thousand one was for seven days only because he said he was going to collect his money in seven days, and the other one was for seventeen days because he said he was going to collect the sixteen thousand dollars in two weeks from some other source. And I had him give me these two promissory notes which would, I felt, obligate him to give me this additional money when he got it collected. And then finally we engaged a lawyer in connection with the defendants to this trial and brought suit against Mr. Clark and Comanche Construction Company and he took out bankruptcy and went insolvent." (T-121)

When asked if he had taken the notes as satisfaction for the money owing, Mr. Child answered:

"A: Never. In no case were the notes ever credited on to Comanche Construction's account. They were taken only to secure the payment of the funds he had promised him, but I certainly did not take them in payment of the account." (T-124)

Mr. Child further testified that neither Raymond Clark nor Comanche Construction Company ever denied owing this money. That on March 31, 1961, an audit of Comanche Construction Company records conducted by an independent firm in Minnesota revealed only a small difference of approximately $160.00 out of a total amount owing of $24,042.00. (Exhibit 34) The Barker job which finished May 3, 1961 brought the amount owing to over $30,000.00. (T-123)

On cross-examination, Mr. Child testified that though plaintiff employed a man by the name of H. J. Rasmussen during 1961 as a bookkeeper, he did not have authority to issue lien waivers on behalf of the plaintiff. (T-149)

Defendants' first witness was Charles Devon Beck, an employee of Comanche Construction Company from November, 1960 until the spring of 1961. Mr. Beck testified that material was moved by Comanche Construction Company from job to job. On cross-examination, he testified that Comanche Construction used two small trucks, one a ton and a half and the other one a pickup, to move the material. (T-184)

Defendants' next witness was Mark Christensen. He testified that he was Assistant to the Manager of Moroni Feed Company and also a turkey raiser. That Comanche Construction Company had built a barn for him. During January and part of February, 1961 he had loaned his truck to Comanche Construction Company. Periodically he saw his truck with materials on it but did not know where the material was being taken. (T-185 and T-186)

Mr. Bruce Barton testified next for the defendants to the effect that he had Comanche Construction Company build a pole-type barn for protection for his sheep. He did not request a bond from Comanche Construction Company, did not ask for nor receive lien waivers. (T-189)

Next witness for the defendants was Clifford Blackham, a turkey grower and Manager of the Moroni Feed Company's Hatchery and Brooder Farms. Mr. Blackham negotiated with Mr. Raymond Clark for the construction of two buildings, one for himself and one for Moroni Feed Company. (T-190) On January 23, 1961, Mr. Shand and Mr. Willardsen came to his office concerned with whether or not they should pay Comanche Construction Company the final payment for their buildings. (T-192) They decided to call suppliers to find out if things were in order to make the final payment. Mr. Blackham testified:

"A: Well, I placed a call to Scherer Brothers Lumber Company in Minneapolis, Minnesota, and Apex Lumber Company in Salt Lake City to Mr. Rasmussen, because Mr. Rasmussen had signed my lien waiver from Apex on my own personal building. At the time I gave my deposition I didn't remember who I spoke to, but when I checked it out with the telephone company and got

their information I had talked to Mr. Rasmussen. And Mr. Rasmussen told us, told me that the accounts were clear and it was clear to go ahead and make the final payment to Apex Lumber Company. And on this basis of this information these men went out and paid for the buildings and we paid for our Feed Company building, the final payments." (T-195)

He testified that on the basis of this information, he advised Mr. Shand and Mr. Willardsen to make the final payments to Comanche Construction Company. He further testified that it was on the basis of this conversation with Mr. Rasmussen that Moroni Feed Company paid Comanche Construction in full. On cross-examination, he still maintained that, even though the date of the conversation with Mr. Rasmussen took place January 23rd and Moroni Feed Company's job was not completed until March 1st, (T-204) his fears had been alleviated and he made the final payments on reliance of Mr. Rasmussen's statement. He couldn't remember whether Mr. Rasmussen had informed him that all the materials that went into the jobs had been paid for. He stated that the reason they had made the phone call was for some protection; and when he was asked whether he had requested a lien waiver from Comanche Construction Company, he answered:

"A: It has been too long. I can't remember whether I made a request or not. I would assume that I may have done, but I don't know. I just don't remember that.

"Q: Would this be because you realize the importance of this lien waver?

"A: I do, yes.

"Q: But you didn't think it was important enough to get it in writing. Is that right?

"A: Yes. I think I would know to get it in writing. Maybe I would assume the telephone call from the people would be assurance to me." (T-211)

Richard Jensen testified on direct examination that Comanche Construction Company built a pole barn for him. When his building was finished, he had talked to Art Shand about whether to pay Comanche Construction. He was worried be-

cause Comanche Construction Company was behind in their labor payments. (T-220) Shand had told him that they had made an investigation and as far as he could see, it was alright to pay. (T-214) He also testified that he did not ask Mr. Pittman for a lien waiver for the materials. (T-219) He remembers also talking to Mr. Blackham. He remembered that he talked to Don Tibbs, his attorney, but could not remember what Mr. Tibbs advised him. On Shand's advice, he went ahead and made final payment.

Direct examination of defendants' witness, Howard Willardsen, revealed that he contracted with Comanche Construction Company for a pole-type turkey brooder barn; that the pole barn was built in conformity with the contract. (T-223) That he knew there was a question about some labor payments owed by Comanche Construction Company. For this reason he worried about the solvency of Comanche Construction Company, and before making final payment, he and D. A. Shand went to Mr. Blackham's office, and concerning the telephone call he said:

> "A: Well, of course I don't know, I didn't speak myself, but we received assurance from Cliff that it was all right with Comanche Construction, with Apex Lumber Company if we paid Comanche because apparently they were solvent and they had no concern about Comanche paying their bills. Certainly I wouldn't have paid it if I hadn't of had this assurance." (T-225)

He made final payment January 28, 1961.

On cross-examination, Mr. Willardsen testified that he knew Comanche Construction Company was having trouble paying their bills at a lumber yard at Ephraim; that a co-op service station held a bill for oil products against Comanche Construction Company. (T-229) He also remembered being told by Mr. Pittman that Comanche Construction Company would have to have the money before he could get the lien waiver; that he understood that the money was needed to pay plaintiff before Pittman could give him the lien waivers. (T-231)

On direct examination, D. A. Shand testified that Comanche

Construction Company constructed a building on his property; that he made final payment January 28, 1961, which included the cost of some ventilation equipment. He testified that he made several inquiries into the position of Comanche Construction before making final payment, even going so far as taking a trip to Spring City to talk to Mr. Beck to find out whether or not Mr. Beck had received his wages.

When asked by his attorney:

"Q: What else did you do?

"A: Well, the word was that there was several small bills owed in Ephraim; that they had had a bank account in the Ephraim Bank and it was delinquent; their checks weren't good and there was several people owed that didn't have their money. I got in touch with Mr. Willardsen, we talked about it several days, and one day when it was right close to where we were obligated to pay these, we had signed a contract to pay these, pay for this building as soon as it was completed, because it was explained to us that they needed the money to pay for the material. They told us that before we ever signed the contract. We went up and talked it over with Cliff Blackham." (T-235 and T-236)

He further testified that he called his attorney, Don Tibbs, and asked what he should do and was told not to pay it; however, he still felt obligated to pay the bills, and after the telephone conversation in Mr. Blackham's office paid the bill. He talked to Jensen, and Jensen relied upon him to get the information because Jensen was out on the farm.

On cross-examination, when asked what his attorney's advice had been, he answered:

"A: Well, I don't know that he told me to get a lien waiver. He told me that I, that I, he must have told me that I should have some proof of payment or some release anyway.

Q: Did you request this of Mr. Pittman before you paid him?

"A: Yes, I did.

"Q: Did he give you anything at all?

"A: He gave me a lien waiver on the labor.

"Q: He did not give you any other type of lien waiver?

"A: I asked for another type of lien waiver and he informed me that he couldn't give it to me until he had paid the bill.

"Q: So in line with Mr. Pittman's testimony, you were another one that he told that, Mr. Willardsen testified also that, you were another one that he told that the materials were not paid for at the time that you gave him the money for your contract. Is that right?

"A: Well, that was the assumption.

"Q: That is correct, though, isn't it?

"A: Well, I don't know. I don't think he said that in those kind of words. No.

"Q: Well, now, are you—he told you that he could not give you the lien waivers until he paid for the material. Is that right? Is that what you testified previously?

"A: Well, I guess that is right.

"Q: So is it a logical assumption that the materials were not paid for then at the time you paid your final payment?

"A: Well, I guess so. I guess it is." (T-241)

He further testified that at the time he paid the bill he knew the materials had come from the plaintiff. (T-243)

Defendants' last witness, Lee Hermansen, testified that during 1960 and 1961 he operated a lumber company at Ephraim, Utah; that he did business with Comanche Construction Company, selling them building materials and tools. Mr. Pittman was the one who purchased from him for Comanche Construction Company. (T-251)

Comanche Construction Company became delinquent in their bill and to try to get straightened up, he testified that he went up to Draper, Utah, and picked up some steel sheets that were supposed to belong to Comanche Construction Company. (T-242 and T-253)

On cross-examination, Mr. Hermansen admitted that in fact the steel belonged to Apex Lumber Company, and that on

the advice of his attorney he paid Apex Lumber Company for it. (T-256) As to the type of business his lumber company did with Comanche Construction Company, he testified:

"Q: And what type of materials did you sell? Tools, you mentioned.

"A: Well, I sold a lot of tools.

"Q: A lot of tools?

"A: Yes, and I made a lot of tin work for them.

"Q: Manufactured stuff?

"A: Yes, and they bought a lot of plastic cement to seal their roofs. I did all their saw filing." (T-254)

On rebuttal, Mr. J. W. Child testified that on the day Mr. Blackham talked with Mr. Rasmussen, a check of Comanche Construction Company's ledger card (Exhibit 29) would have shown:

"A: On January 23, 1960, Comanche Construction had a credit balance with Apex Lumber and Hardware of sixteen thousand four hundred eighty-two dollars eighty-three cents. This means that they had paid in to the lumber company sixteen thousand dollars more than the jobs that had been completed and billed to them as of January 23.

"THE COURT: What year was that?

"THE WITNESS: 1961." (T-261)

(Exhibit 54)

He also testified that H. J. Rasmussen was only a bookkeeper; that his title and total responsibility was doing book work. As to his authority to sign lien waivers, Mr. Child said:

"A: No. As I testified before, he had no authority to sign lien waivers and he had no authority to sign checks to bind the corporation. He had no obligation from the stockholders or no authority from the stockholders to jeopardize the corporation or free the corporation from obligations or liabilities. The only possibility would have been, and I note that both of these are signed on exactly the same day, and at the same time, so the only answer is that it was done at my direction." (T-266 and T-267)

ARGUMENT

POINT I

THE UNDISPUTED EVIDENCE PROVES THAT PLAINTIFF NOT ONLY SUPPLIED THE MATERIAL USED BY THE CONTRACTOR IN CONSTRUCTING THE BUILDINGS ON DEFENDANTS' LAND, BUT RECEIVED ONLY PARTIAL PAYMENT FOR THE VALUE OF SAID MATERIALS.

The undisputed testimony of Guy L. Pittman, the General Supervisor for Comanche Construction Company in Utah at the time the pole-type turkey brooding buildings were constructed on defendants' land, is clear and unequivocal. Testifying at T-26, Mr. Pittman stated that the poles, steel, lumber and hardware materials used in constructing the Moroni Feed Company building were supplied by plaintiff. Likewise at T-33, Mr. Pittman testified that the poles, steel, lumber and hardware materials used in constructing the buildings on D. A. Shand's, Howard Willardsen's and Richard Jensen's property came from plaintiff.

The defendant not only failed to challenge Mr. Pittman's testimony on this point; they did not attempt to establish another source for the materials. Their witness, Mr. Hermansen, the only materialman besides plaintiff who testified, admitted that his business with Comanche Construction Company was mostly in supplying tools and doing tin work. (T-254)

Mr. J. W. Child, General Manager of plaintiff, testified that the last payment received by plaintiff from Comanche Construction Company was $8,000.00 on March 20, 1961. Defendants did not attempt to show that plaintiff received payment in cash from Comanche Construction Company at any later date.

Defendants did not attempt to show that the materials shown on Exhibits 30 through 33 were not of the value claimed.

Rule 49(a) of the Utah Rules of Civil Procedure provides:

> "SPECIAL VERDICTS AND INTERROGATORIES—(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written find-

ing upon each issue of fact. In that event the court may submit to the jury written interrogatories susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."

The defendants requested the trial court to propound a question to the jury of whether or not more money was claimed by the plaintiff from the defendants than was actually due the plaintiff for materials sold to Comanche Construction Company. (R-33) Since the defendants introduced no evidence of any kind to create a basis for such a question the trial court refused to direct the question to the jury. When the defendants failed to raise an objection, it is clear that under Rule 49(a) the defendants had abandoned any doubt they might have had that the value of the materials claimed by plaintiff was unreasonable.

POINT II

THE UNDISPUTED EVIDENCE PROVES THAT UNDER THE PROVISIONS OF 14-2-1 AND 14-2-2 OF UTAH CODE ANNOTATED, 1953, AS AMENDED, PLAINTIFF HAS A CAUSE OF ACTION AGAINST DEFENDANTS FOR THE UNPAID VALUE OF MATERIALS SUPPLIED BY PLAINTIFF AND USED IN THE CONSTRUCTION OF BUILDINGS ON DEFENDANTS' LAND.

Sections 14-2-1 and 14-2-2 of the Utah Code Annotated, 1953, as amended, provides:

"14-2-1. The owner of any interest in land entering into a contract, involving $500 or more, for the construction, addition to, or alteration or repair of, any building, structure or improvement upon land shall, before any such work is commenced, obtain from the contractor a bond in a sum equal to the contract price, with good and sufficient sureties, conditioned for the faithful performance of the contract and prompt payment for material furnished and labor performed under the contract. Such bond shall run to the owner and to all other persons as their interest may appear; and any person who has furnished materials or performed labor for or upon any such building, structure or improvement, payment for which has not been made, shall have a direct right of action against the sureties upon such bond for the reasonable value of the materials furnished or labor performed, not exceeding, however, in any case the prices agreed upon; which right of action shall accrue forty days after the completion, or abandonment, or default in the performance, of the work provided for in the contract.

"The bond herein provided shall be exhibited to any person interested, upon request.

"14-2-2. Any person subject to the provisions of this chapter, who shall fail to obtain such good and sufficient bond, or to exhibit the same, as herein required, shall be personally liable to all persons who have furnished materials or performed labor under the contract for the reasonable value of such materials furnished or labor performed, not exceeding, however, in any case the prices agreed upon."

At the pretrial it was stipulated that buildings had been built upon property owned by the defendants. It was further stipulated that none of the defendants had requested nor required the Comanche Construction Company to provide a bond. (R-28)

The statutes in question were first passed by the Utah Legislature in 1915. Their constitutionality was upheld in 1917 in Rio Grande Lumber Company vs. Darke, 50 Utah 114, 167 P.

241, L.R.A. 1918A, 1193. They have been an integral part of law in the State of Utah since said date.

The Liberty Coal and Lumber Company vs. Snow (1919), 53 Utah 278, 178 P. 341, an action against property owner for the value of materials used in the building constructed on owner's land, this court held the terms of the statute very broad and sweeping, saying:

> "If the owner of the land contracts for construction of the building on his land, the statute makes it his duty to comply with the terms if he desires to escape personal liability. The purpose of the statute is to prevent the owners of land from having their lands improved with materials and labor furnished and performed by third persons, and thus to enhance the value of such lands without becoming personally responsible for their reasonable value."

History has shown that often juries and courts find it extremely hard to require property owners to pay a second time for the value of materials after once paying the contractor. Plaintiff knew it would have to face this feeling when it realized it would have to present its claim before a jury composed of friends and fellow-tradesmen of the defendants; and maybe in no other case has the following admonition been more applicable, when in Kings Bros., Inc. vs. Utah Dry Kiln Company, Inc. (1962) 13 Utah 2d 339, 374 P. 2d 254, this court in remanding the case back to the trial court, commented on the written memorandum of the trial judge, stating:

> "It made unmistakably clear his disdain for the statute just quoted and that he regarded them as conferring an unjustified privilege upon one class and a penalty upon another. It appears most likely that this idea was largely responsible for his ruling dismissing the action; that question was given quite thorough consideration by this court in the case of Rio Grande Lumber Company vs. Darke; without belaboring the matter here we refer to that decision and the reasoning given therein upon which the statute was held to be valid. Nothing has been suggested to persuade us that we should reconsider the latter."

Here the burden was completely upon the defendants to

see that Comanche Construction Company was bonded before construction ever was commenced on their property. Since the land owner is the one who controls the money, he is the only one who can exercise the necessary control over the contractor that would force him into obtaining the bond. If a materialman or laborer tried to insist upon such terms, the contractor would merely hire new employees or move to different suppliers.

POINT III

THE COURT ERRED IN ACCEPTING THE JURY'S ANSWER TO QUESTION THREE OF THE SPECIAL VERDICT, WHEREIN THE JURY FOUND THAT ACCEPTANCE BY PLAINTIFF OF CONTRACTOR'S UNSECURED PROMISSORY NOTES CONSTITUTED PAYMENT IN FULL.

The general rule of law is clearly stated, that the taking of a bill, note or check is not payment unless it is agreed to be taken as such. In the absence of such an agreement, it is only conditional payment dependent upon the payment of the paper; and if the paper is dishonored, an action may be maintained on the original indebtedness. Ellison vs. Henion (1920), 183 Cal. 171, 190 P. 798, 11 A. L. R. 444.

In First National Bank of Portland vs. Noble et al. (1946) 179 Or. 26, 168 P. 2d 354, 169 A. L. R. 1426, the court said,

> "When a debtor gives his own check or promissory note to a creditor, prima facie the transaction is conditional payment only. But even in such a case the ultimate question is one of intention of the parties to the transaction."

In Farmers and Merchants Bank vs. Universal C. I. T. (1955) 4 Utah 2d 155, 289 P. 2d 1045, this court stated:

> "A great deal of argument is devoted to the question of whether or not the bank intended to accept the $21,000 note as payment from Parsley, thus discharging appellant from the obligation. However, the trial court found that there was no agreement to that effect and the finding is supported by competent evidence. In the absence of such an agreement, the rule as set out in 40 Am. Jur, Payment, sec. 87, is:

" 'The general rule is that a note given by a debtor for a precedent debt will not be held to extinguish the debt, in effect, but will be considered as conditional payment or as collateral security, or as an acknowledgement or memorandum of the amount ascertained to be due. The doctrine proceeds on the obvious ground that nothing can be justly considered as payment in fact but that which is in truth such, unless something else is expressly agreed to be received in its place. That a mere promise to pay cannot of itself be regarded as an effective payment is manifest.' "

The defendants clearly fail in their burden of showing an agreement between plaintiff and Comanche Construction Company that acceptance by plaintiff of the two unsecured promissory notes would be payment in full. Mr. J. W. Child testified it was never agreed that the notes would be satisfaction for the full accounts receivable. At T-121, Mr. Child said, " . . . And I had him give me these two promissory notes which would, I felt, obligate him to give me this additional money when he got it collected." At T-124, again Mr. Child stated, " . . . I certainly did not take them in payment of the account."

It is significant to note, that the trial court, after hearing all the evidence, ruled as a matter of law that the notes were **not taken in satisfaction** of Comanche Construction Company's account, and refused to propound the defendants' requested questions which set out the notes as a defense. (R-36)

The defendants also clearly failed to show any dispute between plaintiff and Comanche Construction Company as to the balance of the accounts receivable.

The Re-statement of Contracts, Sec. 419, says:

"When a contract is made for the satisfaction of a pre-existing contractural duty or duty to make compensation, the interpretation is assumed in case of doubt, if the pre-existing duty is an undisputed duty, either to make compensation or to pay a liquified sum of money, that only performance of the subsequent contract will discharge the pre-existing debt; but if the pre-existing duty is of another

kind that the subsequent contract shall immediately discharge the pre-existing duty and be substituted for it."

If a dispute had existed between plaintiff and Comanche Construction Company over the amount of the account, it might be argued that the law of "Accord and Satisfaction" would apply. But, here again, the defendants would fail. No matter what agreement was reached for an "accord", the defendants failed to show any performance by Comanche Construction that would constitute a "satisfaction". 1 Am. Jur. 2d 344, Sec. 47, summarizes the law exactly when it states:

> "The accord is the agreement, the satisfaction is the execution or performance of such agreement. When an accord is followed by a satisfaction, it is a bar to the assertion of the original claim, but until so followed, it has no effect."

See Browning vs. Equitable Life Assurance Society, 94 Utah 532, 72 P. 2d 1060, Rehearing denied 94 Utah 570, 80 P. 2d 348. Also see 66 A. L. R. 352, for many citations in support of the general rule under mechanics' lien law that the acceptance of the written obligations of the contractor or a third person, from the contractor, by one who has furnished him with labor or materials, is not of itself sufficient to preclude him from claiming a lien on the improved or newly constructed property.

POINT IV

THE COURT ERRED IN ACCEPTING THE JURY'S ANSWER TO QUESTION THREE OF THE SPECIAL VERDICT, WHEREIN THE COURT FOUND THAT PLAINTIFF'S RECOVERY FROM THE DEFENDANTS WAS BARRED BY ESTOPPEL.

Each defendant testified personally that it was the assurance given by plaintiff's employee, H. J. Rasmussen, to Mr. Clifford Blackham, during a telephone conversation on January 23, 1961, that Comanche Construction Company's accounts were clear and that it was clear to go ahead and make final payment, that caused them to make the final payment to Comanche Construction for their buildings.

Plaintiff submits that neither in fact, nor in law, can the

defendants claim the defense of estoppel against plaintiff.

In Farmers and Merchants Bank vs. Universal C. I. T., (Cited Supra) this court said:

"As stated in J. T. Fargason Co. vs. Furst, 8 Cir., 287 F. 306, 310:

" 'Equitable estoppel is bottomed upon the notion that when one person makes representations to another which warrant the latter in acting in a given way, the one making such representations will not be permitted to change his position when such change would bring about inequitable consequences to the other person, who relied on the representations and acted thereon in good faith. * * * * *The representations made must be in themselves sufficient to warrant the action taken, and their sufficiency is a judicial question. It is not enough that the person who heard them deemed that he was warranted in acting as he did; the language used ought of itself to furnish the warrant. One man might consider himself warranted in acting upon representations wholly insufficient to move a more careful and prudent person.*' " (emphasis added)

Mr. Clifford Blackham has been Manager of the Hatchery and Brooder Divisions of Moroni Feed Company for fifteen years, a trained businessman. Comanche Construction Company had built a pole-type building for him personally and had given him written lien waivers on the materials when Mr. Blackham made his final payment.

After talking to the other defendants, Mr. Blackham was aware of the delinquent labor payments, overdrafts at the bank, unpaid oil and lumber bills of Comanche Construction Company. He made the telephone call because he was concerned with the financial status of Comanche Construction Company. Mr. Blackham was, in fact, in a much better position than plaintiff to know about Comanche Construction Company's financial status. Under cross-examination, Mr. Blackham admitted that in substance his question to Mr. Rasmussen was not whether all the materials were paid for but whether Comanche Construction Company was in default with plaintiff. (T-207)

The Moroni Feed Company building was not finished until March 1, 1961. It is hard to believe that a businessman would not expect circumstances to have changed materially between January 23rd and when final payment for the Moroni Feed Company building was made following its completion. Mr. Blackham did not make more inquiries.

Defendants, D. A. Shand and Howard Willardsen, should look to Mr. Blackham for help since he is the one that mislead them, if anyone did. They, in fact, knew from Mr. Guy L. Pittman that the materials in their buildings were not paid for. Mr. Shand even made the final payment against the advice of his attorney.

Defendant, Richard Jensen, must be charged with the same knowledge, not only from what Mr. Pittman told him but he stated he acted on what he was told by Mr. Shand.

The fact is, that all the defendants from one source or another knew that plaintiff had not received payment for the materials in their buildings. It cannot follow that legally they can place the burden of their actions on the plaintiff. Mr. Rasmussen did nothing more than report to Mr. Blackham the present status of Comanche Construction Company as reflected by plaintiff's ledger card, which showed a credit balance on January 23, 1961.

19 Am. Jur, Sec. 42, at page 640, says:

> "General principles: The doctrine of estoppel in pais is founded upon the principles of morality and fair dealing and is intended to subserve the ends of justice. It always presupposes error on one side and fault or fraud upon the other and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage. The essential elements of an equitable estoppel as related to the party estopped are:
>
> "(1) Conduct which amounts to a false representation or concealment of the material facts, or, at least which is calculated to convey the impression that facts are otherwise than and inconsistent with those which the party subsequently attempts to assert;
>
> "(2) Intention or at least expectation that such conduct

will be acted upon by the other party;

"(3) Knowledge, actual or constructive, of the real facts.

"As related to the party claiming the estoppel, they are:

"(1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question;

"(2) Reliance upon the conduct of the party estopped; and

"(3) Action based thereon of such a character as to change his position prejudicially."

The plaintiff never falsely represented. The defendants never suffered from lack of knowledge or the means of gaining knowledge. In fact, they merely had to follow the advice of their attorney after asking for it. All of the defendants had knowledge that at the time final payment was made the full value of the materials had not been paid.

POINT V

THE JURY'S ANSWERS TO THE INTERROGATORIES OF THE SPECIAL VERDICT ARE NOT SUPPORTED BY THE EVIDENCE, AND THE COURT ERRED IN FAILING TO DIRECT A VERDICT FOR THE PLAINTIFF NOTWITHSTANDING THE SPECIAL VERDICT.

Under Rule 49(a) of the Utah Rules of Civil Procedure, the trial court presented a special verdict with six written interrogatories to the jury. Questions one, two, three and four were concerned with whether or not materials supplied by plaintiff had been used in constructing defendants' buildings and what the unpaid value of said materials might be. Questions five and six were directed to the telephone call.

The jury, however, ignored their instructions and deciding law instead of facts, found for the defendants, in essence on the grounds of estoppel and by applying a rule of law that the trial court had refused to propound to them; i.e., acceptance of the notes by plaintiff constituted payment.

On question one, the jury found that materials purchased by Comanche Construction Company from plaintiff were used in constructing the defendants' buildings.

On question two, the jury was asked to determine the unpaid value of said material. The jury answered, "none." The evidence will not support the determination. The trial court had ruled as a matter of law on the question of the notes, and a telephone call does not pay a debt. The telephone call may create a situation that would bar collection under estoppel, but as this court said in Farmers and Merchants Bank vs. Universal C. I. T. (Cited Supra), estoppel is a judicial question and not within the jury's jurisdiction.

Plaintiff introduced undisputed evidence that the materials were of the value claimed. There is no other evidence to explain the jury's answer, except the notes.

Questions three and four were propounded by the trial court so that the jury could determine the facts necessary for granting a money judgment if the court should so decide. The jury's answers to both questions were unresponsive.

Questions five and six went to validity of the telephone call between Clifford Blackham and plaintiff's employee, H. J. Rasmussen. Plaintiff submits that the evidence does not substantiate the jury's answers.

Therefore, based on the jury's failure to follow the court's directions and their answers which are not supported by the evidence, the trial court erred in denying plaintiff's motion for verdict notwithstanding the special verdict.

Respectfully submitted,

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