

1962

General Insurance Company of America v. Paul J. Henich et al : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

F. Robert Bayle; Wallace R. Lauchnor; Hurd, Bayle & Hurd; Attorneys for Respondent;
Elliott Lee Pratt; Clyde & Mecham; Attorneys for Appellants;

Recommended Citation

Brief of Respondent, *General Insurance Co. of America v. Henich*, No. 9596 (Utah Supreme Court, 1962).
https://digitalcommons.law.byu.edu/uofu_sc1/3975

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

U
Y U
APR 9 196
LAW LIBRARY

**IN THE SUPREME COURT
of the
STATE OF UTAH**

GENERAL INSURANCE COMPANY OF
AMERICA, a Corporation,
Plaintiff-Respondent,

vs.

PAUL J. HENICH, dba P. G. & H. GEN-
ERAL CONTRACTORS, ELLEN JANE
HENICH, his wife, Defendants,
MAX S. ANDREWS and NED E. SHURT-
LEFF, individually and as a co-partner-
ship dba SHURTLEFF & ANDREWS
CONSTRUCTION COMPANY, and
SHURTLEFF & ANDREWS, INC., a
Utah Corporation, Defendants-Appellants.

No.
9596

BRIEF OF RESPONDENT

Appeal from the Judgment of the
3rd Judicial District for Salt Lake County
Hon. Ray Van Cott, Jr., Judge

F. ROBERT BAYLE and
WALLACE R. LAUCHNOR
Of
HURD, BAYLE & HURD
1105 Continental Bank Building
Salt Lake City 1, Utah
Attorneys for Respondent

ELLIOTT LEE PRATT
CLYDE & MECHAM
351 South State Street
Salt Lake City 11, Utah
Attorneys for Appellants

TABLE OF CONTENTS

	Page
STATEMENT OF THE KIND OF CASE	1
DISPOSITION IN LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
POINTS URGED FOR AFFIRMANCE	7
ARGUMENT	
I. THE COURT DID NOT ERR IN REFUSING TO DISMISS THE ACTION AT THE CLOSE OF RE- SPONDENT'S CASE.	9
II. THE COURT DID NOT ERR IN ADMITTING EVIDENCE THAT THE INDEMNITY AGREE- MENT WAS EXECUTED BETWEEN JANUARY 25, 1960, AND JANUARY 30, 1960.....	18
A. THE INDEMNITY AGREEMENT WAS IN WRITING AND MET THE STATUTE OF FRAUDS.	18
B. THE INDEMNITY AGREEMENT WAS NOT ALTERED UNDER THE PAROLE EVI- DENCE RULE.	18
III. THE COURT DID NOT ERR IN FINDING THAT THE INDEMNITY AGREEMENT COV- ERED THE P.I.E. BOND	32
A. THERE WAS NO ALTERATION OF THE INDEMNITY AGREEMENT.	32
B. THE DATE ON THE INSTRUMENTS WAS IMMATERIAL AS TO THE LIABILITY OF THE APPELLANTS AS INDEMNITORS.	32
C. THE COURT DID NOT ERR IN FINDING THAT THE INDEMNITY AGREEMENT WAS NOT EXECUTED DECEMBER 23, 1959..	40

IV. RESPONDENT MADE NO ADMISSIONS PRE- CLUDING THE TRIAL COURT FROM FIND- ING IN ITS FAVOR.	42
CONCLUSION	42

CASES CITED

Alvarado vs. Tucker, 2 Ut. 2d 16, 268 P. 2d 986	41
Brown vs. Merriott, 97 Ut. 65, 89 P. 2d 478	40
Child vs. Child, 8 Ut. 2d 261, 332 P. 2d 981	33
Cowles Publishing Co. vs. McMann, 167 A.L.R. 1164, 172 P. 2d 235	14
Davenport vs. Stratten, 149 P. 2d 4	10
District of Columbia vs. Camden Iron Works, 181 U.S. 453, 45 L. Ed. 948	13
Gatewood vs. Roquemore, 118 P. 2d 1020	16
Goldsworthy vs. Anderson, 21 P. 2d 718	10
Grand Junction Gospel Tabernacle vs. Arvis, 157 P. 2d 619..	19
Hewes vs. Taylor, 70 Pa. St. 387	13
Ivie vs. Richardson, 9 Ut. 2d 5, 336 P. 2d 781	41
Northcrest vs. Walker Bank & Trust Co., 122 Ut. 268, 248 P. 2d 692	14, 33
Olsen vs. Reese, 114 Ut. 411, 200 P. 2d 733	11
Peters vs. Taylor, 251 P. 446	10
Wall vs. Eccles, 61 Ut. 247, 211 P. 702	40

TEXTS CITED

American Jurisprudence, Vol. 20, p. 192, 193	39
Annotated Cases, 1913 A, p. 496	13

IN THE SUPREME COURT of the STATE OF UTAH

GENERAL INSURANCE COMPANY OF
AMERICA, a Corporation,
Plaintiff-Respondent,

vs.

PAUL J. HENICH, dba P. G. & H. GEN-
ERAL CONTRACTORS, ELLEN JANE
HENICH, his wife, Defendants,

MAX S. ANDREWS and NED E. SHURT-
LEFF, individually and as a co-partner-
ship dba SHURTLEFF & ANDREWS
CONSTRUCTION COMPANY, and
SHURTLEFF & ANDREWS, INC., a
Utah Corporation, Defendants-Appellants.

No.
9596

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

Plaintiff brought an action upon a written indemnity agree-
ment. The defendants signed the indemnity agreement and
pursuant thereto, a contractor's bond was issued. The contractor
became insolvent and the plaintiff was required to pay creditors
of the contractor by virtue of its bond. The defendants denied
liability under the indemnity agreement.

DISPOSITION IN LOWER COURT

The case was tried to the court sitting without a jury, the Honorable Ray VanCott, Jr., presiding. The trial court found in favor of the plaintiff and against the defendants and granted judgment thereon. Defendants Max Andrews and Ned E. Shurtleff individually and doing business as Shurtleff & Andrews Construction Company, a partnership, and Shurtleff & Andrews, Inc., appeal.

RELIEF SOUGHT ON APPEAL

The appealing defendants seek reversal of the judgment or a new trial. The plaintiff seeks affirmance of its judgment.

STATEMENT OF FACTS

The plaintiff is an insurance company doing business in the State of Utah. Part of its business consists of writing bonds for construction contractors through its local agents. Dale Barton is an insurance agent doing business as the Dale Barton Agency. Dale Barton represents the plaintiff and other companies in writing bonds (TR. 65 & 66). Prior to December, 1959, the Dale Barton Agency had written several bonds for Paul J. Henich, dba P. G. & H. General Contractors, on various construction jobs (TR. 217-219). The bonds were written through the plaintiff company. In 1958, the Dale Barton Agency had Henich and his wife execute a general application and agreement of indemnity for contract bonds with the plaintiff company. The agreement provided that Henich and his wife would indemnify the plaintiff company for any and all losses

suffered on bonds previously written or to be written in the future for Henich. (Ex. No. 1). In December of 1959, Henich contacted Barton at his agency and received a Bid Bond on a project known as the St. Joseph Convent job in Ogden, Utah, and stated that if he was successful on the bid he would be required to furnish a payment and performance bond (TR. 72). On December 23, 1959, the contract was awarded to Henich with the requirement of a bond in the sum of \$140,000.00 (TR. 219). When Henich was notified that he was the successful bidder, he brought the contract to the Barton agency where a bond was written in the sum of 50% of the contract figure (TR. 72). No indemnity was required on the bond other than the aforementioned general indemnity agreement given to the plaintiff by Henich and his wife. The 50% bond provided by Barton was not acceptable to the architect on the convent project and in January a new bond was executed by Barton for the full amount of the contract, or \$140,000.00. The second bond written on the convent project was pre-dated to December 23, 1959, to conform to the date shown on the contract, although the same was not executed and delivered until January of 1960 (TR. 72-73, Ex. No. 13).

During December, 1959, and the first part of January, 1960, Henich was negotiating with the Pacific Intermountain Express Company for a contract to build their terminal building to be located in Salt Lake City, Utah (TR. 161-162). On the 18th or 19th of January, 1960, Henich talked to Dale Barton concerning a bond on this project if he was successful in negotiating a contract (TR. 164-167, 169). At this time, the estimated cost of the project was approximately \$275,000.00, but had not been ascertained with certainty (TR. 160-161).

Sometime during the week of January 25 to January 30, 1960, Henich came to the Dale Barton Agency and informed Barton that he had been awarded the contract on the PIE job and asked Barton if he could furnish him with a bond to cover this contract (TR. 74, 75). At this time, Barton informed Henich that his financial position was not such that additional bond credit could be given to him (TR. 76). It was also pointed out to him that since the Convent project had just commenced, he would have a work load in excess of \$400,000.00 in operation at one time and that in Barton's opinion he was not of such financial stability to assure performance of both projects at the same time (TR. 75-89). At this time Barton refused Henich's request for a bond on the PIE project. A day or two later Henich contacted Barton again and asked Barton if he would be interested in having Shurtleff & Andrews indemnify him and asked if he would then write the bond (TR 76, 77). Barton suggested to Henich that a financial statement of Shurtleff & Andrews be presented for examination and the matter would be taken under consideration. A financial statement by Dun & Bradstreet on Shurtleff & Andrews, Inc., was given to Barton by telephone (TR. 80). After giving consideration to the finances of Shurtleff & Andrews, Barton informed Henich that he still could not suggest to the plaintiff that they write an additional bond for Henich (TR. 76-78). Henich then asked Barton if the plaintiff company would be interested in writing the bond on the PIE contract if Henich could secure the indemnity of not only Shurtleff & Andrews, Inc., but Ned Shurtleff and Max Andrews individually, as well as the Shurtleff & Andrews Construction Company, a partnership (TR. 77-78). At this time, Barton again told

Henich to obtain a financial statement on the partnership and present it for consideration and examination. Shurtleff and Andrews then contacted their local accountant, Wood, Child, Mann & Smith, and requested a written financial report on the construction company so that Barton could examine the same (TR. 138, 139, 144, 175). The financial report was prepared and typed by the accounting firm on January 28, 1960, and delivered to the defendants on that date (TR 203-209). The report was then brought to the office of Dale Barton and examined by him. It was then Barton's opinion that there was sufficient financial stability among all of the defendants to guarantee proper performance of the two projects and he contacted the plaintiff and received oral authority to execute the PIE bond.

A general application for contract bonds and indemnity agreement, exhibit No. 2, and a corporate resolution, exhibit No. 3, were then prepared in the Dale Barton Agency by Doris Farley, secretary, who did the typing on the documents (TR 94, 179-182). She testified that exhibits 2 and 3 were fully typed by her before they left the office and that the only part of the documents that was not fully completed was the acknowledgment forms. Henich then picked up exhibits 2 and 3 and left the Dale Barton Agency (TR. 180-183). During the time Barton was examining the financial statements of the defendants, Henich also brought to him an unsigned copy of the proposed contract with PIE wherein it stated that the contract price was to be \$271,030.00 (TR. 116, 164, 223 and 224). With this information, Doris Farley then typed exhibits 2 and 3 and included the Convent project and the PIE project therein, and limited the agreements

to these two projects and gave them to Henich (TR. 223-224). Henich then returned with exhibits 2 and 3 signed by all of the appellants (TR. 182-183). Doris Farley then notarized the appellants' signatures and in her acknowledgment placed the date of December 23, 1959, so as to conform to the date of the St. Joseph Convent project (TR. 183-184, 187).

On or about February 1, 1960, Barton prepared the bonds, dated the same to conform with the contract, and forwarded them to PIE in California (TR. 79, 89 and Exhibit 4).

During July of 1960, Barton received notice from Henich that he was in financial difficulty on the PIE job. Barton immediately notified B. E. Schalow, claims representative for the plaintiff company, and a meeting was held in Barton's office and attended by Barton, Schalow and Henich. At this time, Schalow suggested that the meeting adjourn to the offices of Shurtleff & Andrews so that they could be informed as to the developments at that time. At this point, it was not known that Henich was also defaulting on the Convent project. He represented that he was financially solvent on that project and anticipated a profit. The meeting was adjourned to the appellants' office, where a conversation was had with Shurtleff concerning the losses expected on the PIE project. Schalow informed Shurtleff that it was his suggestion that contact be made with the authorities at the St. Joseph Convent to suspend payment of any further funds to Henich in an effort to minimize the anticipated losses on the PIE project. Shurtleff stated that he would have to consult with Andrews, who was out of town at the time, before any action could be taken. At no time did Shurtleff deny respon-

sibility under the indemnity agreement for the PIE contract at this point (TR. 11-15, 155, 156).

Shortly thereafter it was learned that Henich was also defaulting on the Convent project and there would be no surplus funds to apply to the PIE losses. Shurtleff and Andrews then requested copies of exhibits 2 and 3 from the plaintiff and after reviewing the same, sent a letter to the plaintiff denying responsibility by virtue of exhibits 2 and 3 (Ex. No. 7). Thereafter, the plaintiff, with approval of Henich, paid the creditors under the PIE project and brought the present action against the defendants (TR. 22, 23). It should be noted that at no time have any of the defendants herein denied signing exhibits 2 and 3. They have maintained that since the indemnity agreement and corporate resolution are both dated December 23, 1959, and the PIE project was not awarded at that time, that therefore they are not bound by either agreement.

Appellants further admit that the reason they signed exhibits 2 and 3 was that they were friends of Henich and thought Henich was an up and coming contractor, that they had received business from him previous to this time and expected future business from him as well as from others that he would refer to them (TR. 137, 138).

POINTS URGED FOR AFFIRMANCE

POINT I

THE COURT DID NOT ERR IN REFUSING TO DISMISS THE ACTION AT THE CLOSE OF RESPONDENT'S CASE.

POINT II

THE COURT DID NOT ERR IN ADMITTING EVIDENCE THAT THE INDEMNITY AGREEMENT WAS EXECUTED BETWEEN JANUARY 25, 1960, AND JANUARY 30, 1960.

A. THE INDEMNITY AGREEMENT WAS IN WRITING AND MET THE REQUIREMENT OF THE STATUTE OF FRAUDS.

B. THE INDEMNITY AGREEMENT WAS NOT ALTERED UNDER THE PAROL EVIDENCE RULE.

POINT III

THE COURT DID NOT ERR IN FINDING THAT THE INDEMNITY AGREEMENT COVERED THE P.I.E. BOND.

A. THERE WAS NO ALTERATION OF THE INDEMNITY AGREEMENT.

B. THE DATE ON THE INSTRUMENTS WAS IM-MATERIAL AS TO THE LIABILITY OF THE APPELLANTS AS INDEMNITORS.

C. THE COURT DID NOT ERR IN FINDING THAT THE INDEMNITY AGREEMENT WAS NOT EXECUTED DECEMBER 23, 1959.

POINT IV

RESPONDENT MADE NO ADMISSIONS PRECLUDING THE TRIAL COURT FROM FINDING IN ITS FAVOR.

ARGUMENT

POINT I

THE COURT DID NOT ERR IN REFUSING TO DISMISS THE ACTION AT THE CLOSE OF RESPONDENT'S CASE.

The indemnity agreement (Ex. 2) and the Corporate Resolution (Ex. 3) were received in evidence after it was admitted that the signatures on both documents were genuine (Tr. 5, 6, 9, 10). With exhibits 2 and 3 having been received in evidence and admittedly executed by the appellants, the respondent had then proved a *prima facie* case of liability based upon the written documents which are clear and unambiguous. Subsequent to the admission of exhibits 2 and 3, the respondent then offered and the court received evidence of the respondent's damages suffered as evidenced by drafts that had been issued by the respondent to cover the various losses under the bond. Pursuant to stipulation of the appellants, the respondent's offer of proof on damages was received (Tr. 22-24, Ex. 8).

There was evidence that the indemnity agreement and corporate resolution were in fact executed subsequent to the date the instruments bear. This evidence was, however, elicited from respondent's witness by the appellants on cross-examination (Tr. 41-43). Appellants, at page 6 of their Brief, allege that the respondent impeached its own evidence by testimony that the indemnity agreement and corporate resolution had been executed at a date subsequent to the date the documents bear. It should be further noted that Mr. Schalow, upon whose

testimony appellants were relying to impeach the dates on the documents, stated at all times that he did not personally know when the documents were executed but was merely testifying from reading depositions and correspondence of other persons.

Appellants offer the cases of *Davenport vs. Stratten*, 149 Pac. 2d 4, *Peters vs. Taylor*, 251 Pac. 446, and *Goldsworthy vs. Anderson*, 21 Pac. 2d 718, as authority for the rule that a party introducing an exhibit into evidence is thereby bound by its *provisions* and *terms* and cannot later impeach the same (Appellants' Brief, pages 6 & 7). Respondent agrees that as a general statement of the rule these authorities are correct. It should be noted, however, that the cases previously mentioned say, as does the rule itself, that the party may not contradict the *terms* or *provisions* of the instrument itself, but in no way affects the right of a party offering an exhibit to show its actual date of execution. In the *Davenport* case, *supra*, an exhibit was offered showing an accounting statement of money paid and money due and the court stated that the party offering the exhibit without qualification could not then produce evidence to contradict or dispute the sums alleged in the statement. There was nothing at all to show that the exhibit had been postdated or predated. A similar situation was presented in the *Peters* case, *supra*, wherein the court stated at page 450:

"However, this rule, like all general rules, has its exceptions."

In the *Goldsworthy* case, *supra*, the plaintiff tried to show that the bank was insolvent when he made his deposit. He

introduced a bank examiner's report which in fact showed that the bank was not insolvent at that time. He later tried to impeach the contents of the report but was not permitted to do so. All of the cases previously cited by the appellants show a definite offer by the party introducing the document to materially change its terms, provisions, or contents. These cases therefore are not applicable to the present situation inasmuch as the respondent in the instant case did not and never has attempted to change the terms, or provisions, or wording, of the indemnity agreement or corporate resolution.

During respondent's case in chief, it did not offer to show that the dates on exhibits 2 and 3 were not the dates of execution as such was immaterial. This information was elicited by the appellants on cross-examination. At the time appellants' counsel asked Schalow the dates that exhibits 2 and 3 were executed, he knew that the documents were not signed on the date that they bear. When Schalow answered with the only truthful answer that could be given, that the documents were actually executed during the last week in January, 1960, counsel then complains that the respondent is trying to impeach its own evidence.

The authorities are in agreement that parole evidence may be received to show or prove the actual date of execution of a written instrument or contract. In doing so, the party offering the evidence is not altering the terms, provisions or substance of the contract but merely showing an occurrence of time and therefore there is no impeachment of the document. This court has considered the problem in the case of *Olsen vs. Reese*, 114 Utah 411, 200 Pac. 2d 733. In this case a building

contractor entered into a written agreement with the defendant to do some remodeling work. A contract was signed and the work was commenced. Plaintiff was required to sue the defendant for payment. On cross-examination of the plaintiff it was discovered that at the time the contract was dated the plaintiff did not have a contractor's license and therefore, by statute, his contract was unenforceable. He then offered to prove that the date the contract bore was not the date it was executed, that in fact it was signed at a time subsequent to the date when he was issued his contractor's license but back-dated to conform to the date on which he began his preliminary work on the job. The trial court refused plaintiff's offer of proof. On appeal this court stated:

"The authorities are practically unanimous to the effect that parole evidence is competent to establish the true date of execution and delivery of the contract regardless of the fact that it differs from the date shown in the body of the contract. While the date shown in the contract may be presumed to be the date of execution, this presumption is rebuttable and parole evidence is acceptable for this purpose. American Jurisprudence, Vol. 20, Evidence, page 977, states the general rule to be as follows: 'An exception is recognized to the parole evidence rule in the case of dates upon instruments. It is said that the rule that parole evidence cannot be received to contradict a written contract does not apply to the date, which may be contradicted *whenever it is material to the issues to do so*, or, if lacking, may be supplied by parole or other competent testimony. The true date of the execution and delivery of a contract may be shown by parole, at least where the instrument contains no date. This is true even as to instruments which are required by the statute to be in writing, such as chattel mortgages.' The evidence

being competent, the remaining question is whether or not the plaintiff proceeded properly to get the issue before the court.” (*Italics ours*).

In the case of *Hewes vs. Taylor*, 70 Pa. St. 387, wherein the date of a written guarantee had been inaccurately inserted, the court said:

“It is the agreement to guarantee the debt or default of another which the act requires to be in writing. The agreement would be good without a date, or even if it had an impossible date. The date is a circumstance of identification as to time only; proof of it does not add to, alter or change the terms of the agreement, although it might be forgery if inserted without consent or authority.”

The weight of authority supports the rule that parole evidence is competent to show that a written instrument bearing one date was executed on a different day. See an annotation on the subject at *Annotated Cases* 1913A, page 496, wherein an extensive list of jurisdictions is contained with cases in accord with this rule. See also the case of *District of Columbia vs. Camden Iron Works*, U. S. Supreme Court, 181 U.S. 453, 45 Lawyer’s Edition 948. In that case a contract bore a date previous to the day of its actual execution. The plaintiff sued on the contract and introduced parole evidence to show its execution date. The U.S. Supreme Court, speaking through Chief Justice Fuller, stated at page 953:

“The next proposition of the District, that it was not competent for plaintiff below to show by parole that the contract was finally executed and delivered by the District at a date subsequent to the date of the contract, is without merit . . . It is well settled, that, in such circumstances, it may be averred and shown that a deed,

bond, or other instrument was in fact made, executed, and delivered at a date subsequent to that stated on its face.”

See also *Cowles Publishing Co. vs. McMann*, 167 ALR 1164, 172 Pac. 2d 235, wherein the court said:

“Parol evidence is admissible to contradict the date of a written instrument. Furthermore, it is always competent to show by parol evidence that the date inserted in a written instrument was not the date of delivery. Such evidence does not contradict or vary the language of the contract. As stated in 3 *Jones Commentaries On Evidence*, 2d Edition Sec. 1511, Page 2757: The general rule that antecedent and contemporaneous oral stipulations cannot be received to alter or vary the term of a written contract has no application when the execution of the writing is the subject of inquiry. It presupposes the due execution and delivery of the writing in a way to bind both parties to its terms.’ ”

Appellants, in their Brief, then go on to challenge the respondent’s right to produce evidence to contradict the certificate of acknowledgement on exhibit 2. Respondent agrees that a certificate of acknowledgment is *prima facie* evidence of the date of execution of a document and that to vary this date the party must show by clear and convincing evidence that the certificate is inaccurate. This, however, may be done by either party to the action. See *Northcrest vs. Walker Bank & Trust Company*, 122 Utah 268, 248 Pac. 2d 692, wherein this court stated at page 273 as follows:

“Many authorities hold that where a party did not in fact appear before the notary, nor otherwise acknowledge the deed before him that the notary may testify

to such facts in impeachment of his certificate. 1 CJS, Acknowledgments, Section 139, Page 900; Peoples Gas Company vs. Fletcher, 81 Kansas 76, 105 Pac. 24, 4 LRA, NS, 1170 and 1171. 1 Am. Jur. 380, Acknowledgments, Section 154, states:

" . . . The trend of authority, however, is in favor of admitting any evidence that may have a tendency to prove the truth, and a more liberal rule permits the officer to be called as a witness and compelled under oath to state the true facts of the transaction so far as he can remember them, whether he acted under mistake, misapprehension, or in collusion with the party to be benefited by taking the acknowledgment . . ."
(Italics ours).

The court then went on to say:

"Wigmore in his work on evidence, Vol. 2 3rd Edition, Section 530, in discussing this problem concludes that there is really no basis for excluding the notary's testimony merely because it contradicts his previous certificate. He says: ' . . . The notion has no better grounds for support here than elsewhere. If the certificate is not absolutely conclusive and may be otherwise shown to be incorrect, then the official should be equally competent. The official doubtless should be punished, but not the party needing his testimony. The official is clearly capable of falsification, but the value of his testimony should be left to the jury.' "

The court then said:

"We are in accord with the foregoing rule as better serving the purpose of getting at the truth and doing justice between the parties."

The appellants at page 7 of their Brief, say the cases also reason that the party for whose benefit the notarization has been executed cannot cause the certification to be impeached,

and offer in support thereof, Gatewood vs. Roquemore, 118 Pac. 2d 1020. This case does not in any respect deny the right of either party to impeach an acknowledgment. The court merely stated at page 1021:

“The uncorroborated testimony of the grantor is not sufficient if the surrounding facts are as consistent with the truth of the certificate as they are with the denial of the grantor.”

Any party to an action may impeach the certificate of acknowledgment in an effort to get to the truth of the matter.

Appellants, in their Brief, constantly refer to the notary public as an employee of the respondent. This is not so. The testimony clearly shows that Doris Farley was an employee of the Dale Barton Insurance Agency and had no connection with the plaintiff (Tr. 84).

The allegation in respondent's complaint, stating that on or about December 23, 1959, an indemnity agreement was executed, (Ex. 2) is of no material bearing on the validity of the agreement.

The appellants were not in any way surprised or misled to their detriment by the pleadings. The evidence is clear that this matter was amply clarified by answers to interrogatories propounded by appellants as well as the issues set forth in the pretrial order (R. 42, 51 and Tr. 6). It should be further pointed out that when the complaint was filed it was based upon a written indemnity agreement contained in respondent's files in Denver, Colorado. As soon as the correct information was received by respondent as to the actual time of execution, it was relayed to appellants pursuant to their interrogatories.

Respondent respectfully submits that exhibits 2 and 3 are clear and unambiguous, are in writing, and admittedly signed by the appellants. The genuineness of the exhibits was conceded by appellants' counsel (Tr. 5). Respondent had sustained its burden of proof. This was ably pointed out to counsel for the appellants by the trial judge (Tr. 246).

At page 8 of appellants' Brief, they point to the fact that Schalow testified that the Convent bond was not executed until February of 1960. This statement is taken out of context from his testimony and had counsel desired to be accurate, he would have also shown in his statement that the bond referred to by Mr. Schalow at this point was a bond issued to correct the original bond that was given in an improper amount of money (Tr. 54, 55). Respondent respectfully submits that even the appellants admit in their Brief at pages 8 and 9 that Mr. Schalow, respondent's exclusive witness on its case in chief, testified that he did not know personally when the indemnity agreement (Ex. 2) was signed. This certainly could not in any way be a contradiction when a witness is asked if he knows a particular fact and he admits that he personally does not know of this fact.

Appellants have devoted considerable space in their Brief to a discussion of the bond issued on the Convent job. It should respectfully be brought to the court's attention that there is no dispute as to the applicability of the general indemnity agreement (Ex. 2) to that bond, and appellants have admitted liability for any losses under that bond. It therefore becomes unnecessary to further discuss additional testimony on this point.

The respondent offered, and the court properly received, exhibits 2 and 3 which established a prima facie case on behalf of the respondent. Appellants then had the burden of going forward to refute the documents. The documents were complete, unambiguous and admittedly signed by the appellants. Upon this basis, the court correctly ruled that the documents speak for themselves.

POINT II

THE COURT DID NOT ERR IN ADMITTING EVIDENCE THAT THE INDEMNITY AGREEMENT WAS EXECUTED BETWEEN JANUARY 25, 1960, AND JANUARY 30, 1960.

A. THE INDEMNITY AGREEMENT WAS IN WRITING AND MET THE REQUIREMENT OF THE STATUTE OF FRAUDS.

B. THE INDEMNITY AGREEMENT WAS NOT ALTERED UNDER THE PAROL EVIDENCE RULE.

Respondent shall consider together the foregoing points raised separately by appellants so as to avoid needless repetition.

Respondent has no quarrel with the authorities cited by the appellants concerning the proposition that an indemnity agreement promising to answer for the debt or default or mis-carriage of another must be in writing. Exhibits 2 and 3 are in writing, are signed by the appellants pursuant to their own admission, and are clear and unambiguous in their terms. Respondent fails to see the necessity of citing further authorities on these propositions as was done by appellants. Exception

is taken to the statements appearing on page 12 of appellants' Brief wherein they state:

"The evidence is uncontroverted that the contract amount of \$271,030.00 for the PIE job was not determined by either the contractor, Henich, or the plaintiff through its representative, Dale Barton, until sometime *after January 28, 1960.*" (Italics ours).

The record clearly shows that the contract with the amount specified therein was delivered in Salt Lake City on January 28, 1960, and at which time copies were immediately given to Henich, who on the same day delivered an unsigned copy to the Dale Barton Agency for the preparation of exhibits 2 and 3 (Tr. 116, 164, 223, 224).

Appellants also state at page 12 of their Brief that neither of the appellants, Andrews and Shurtleff, knew anything about the PIE job until July, 1960. This simply is not true, as evidenced by testimony of the appellants. Andrews, when asked by the trial judge in regard to this matter, stated that he knew of the job prior to this time and that he, as well as all of the defendants, had worked on the PIE job (Tr. 131). The evidence clearly shows that the appellants had furnished their equipment and services to Henich on the PIE job.

In reviewing the case of Grand Junction Gospel Tabernacle vs. Arvis, 157 Pac. 2d 619, as cited by appellants at page 15 of their Brief, the facts readily disclose that the rule pronounced in that case has no application to the instant case. In that case, a promissory note was given to the plaintiff and was dated on its face "October 28, 1937." The terms of the note stated that it was due 5 years from date. When the note

became due, the plaintiff brought suit to collect on the same. The defendant alleged that because of the notation on the back of the note stating that it was dated "October 28, 1938," that the note was not yet due and they should be permitted by parol evidence to show this date. The Court held, at page 620:

"Change of date would change the rights of the parties, hence parole evidence for that purpose would be inadmissible."

The court went on to say that since the changing of the due date on the face of the note was a material change of the terms of the note on its face, the proof of date of execution would not be permitted by either side.

This, of course, merely conforms to the general rule. In the instant case, the evidence clearly shows that a change of date of execution by parole testimony in no way alters or changes the terms of the indemnity agreement.

Appellants then continue to urge the proposition that proof of the actual date of execution of the documents must of necessity substantially modify or change the agreement by oral testimony. The foregoing authorities cited by respondent do not in any way agree with appellants' proposition and it is not deemed necessary to burden this court with a further recitation of authorities on this point. Argument is also put forth that there was no evidence as to when the appellant corporation held its Board meeting wherein it passed its resolution as evidenced by exhibit 3. The testimony of the officers of appellant corporation show that no corporate records were kept concerning this resolution (Tr. 142 & 143). How, then,

does the appellant corporation expect the respondent to offer positive proof of the time of this special meeting when the corporation itself kept no record?

At this point, respondent finds it incumbent to demonstrate to this court the actual sequence of events leading up to the execution of exhibits 2 and 3 to refute many confusing and inconsistent statements of the appellants in their brief. It should also be noted that a substantial portion of the evidence offered by the respondent to prove the actual date of execution was derived primarily from the testimony of the parties appellant and witnesses called on their behalf. Lila Pugsley, a witness testifying for respondent, stated that she was formerly an employee of the accounting firm of Wood, Child, Mann & Smith, the accountants employed by the appellants (Tr. 202-203). When Andrews was asked by counsel for respondent:

“Q. And do you recall that there was some request on behalf of your company to furnish financial data *before the indemnity agreement was signed?*” (Italics ours).

“A. I believe so.” (TR. 138).

He then testified as follows:

“Q. Did you authorize Mr. Henich to go to your accountant’s office and pick up the financial statements of your companies, the partnership and the corporation, before the signing of exhibit 2 or exhibit 3?”

“A. I don’t know just when it was for positive, but I remember I had authorized that information to be given.”

“Q. And that was prior to the two exhibits being pre-

sented to you in your office for signature and that of Mr. Shurtleff, was it not?"

"A. I think it was around about that time."

"Q. And do you know whether or not Mr. Henich went to the office of your accountant and picked up that information?"

"A. No, I don't."

"Q. Now, do you recall in your deposition that . . . inviting your attention to page 19, Mr. Andrews, question at line 3 . . . Question: Did it come to your attention at that time that the Dale Barton Insurance Agency was handling and processing this application for Mr. Henich?"

"A. Yes. I knew that Paul had brought the papers from, or I assumed he had, from Dale Barton. Mr. Dale Barton's name had been mentioned"

"Q. And prior to that time that the application was brought to you, was any request made from Henich that you make available to the Dale Barton Agency, any financial statements on your company?"

"A. Yes, sir."

"Q. And when was that done?"

"A. Well, previous to the signing of these papers."

"Q. Did you so testify?"

"A. Yes, sir." (TR. 139).

Andrews testified that he talked with Mrs. Pugsley or Mr. Wood at the accounting office and requested the financial information be given (Tr. 143-144).

The appellants then called Paul J. Henich as a witness

on their behalf (Tr. 159 and 160). In answer to when exhibits 2 and 3 were actually executed, Henich had this to say on cross examination, beginning at page 175 of the transcript of testimony:

“Q. Do you recall having any conversations with Mr. Shurtleff or Mr. Andrews concerning the necessity of that financial information *before exhibit 2 was signed?*”

“A. Yes.”

“Q. What was the first contact you had with Shurtleff and Andrews concerning those?”

“A. When I was discussing the indemnity for the Convent in Mr. Barton’s office, he wanted a financial statement and I called on Mr. Max Andrews in his office and gained permission to go back to Wood, Child, Mann, & Smith for a copy, and then Mr. Barton called Dunn & Bradstreet while I was there, and the credit bureau to have a verbal rundown.”

“Q. *And that was before exhibit 2 was ever prepared, was it not?*”

“A. Yes.”

“Q. But you do recall the information was requested before any signature was placed on exhibit No. 2?”

“A. That’s correct.” (TR. 175-176). (Italics ours).

Rebuttal evidence was offered by respondent in the testimony of Mrs. Lila Pugsley previously mentioned above. In contrast to appellants’ contention that exhibits 2 and 3 were signed on December 23, 1959, but after the financial statement

(Ex. 15) was received, she stated as follows at page 203 of transcript:

“Q. And then, Mrs. Pugsley, I show you exhibit No. 15 and ask you if you can identify that exhibit?”

“A. This is a copy of the statements that were prepared by Wood, Child, Mann, & Smith for the Shurtleff & Andrews Construction Company *for the year ended December 31, 1959.*”

Transcript at page 204:

“Q. Now, making reference to exhibit 15, what period did this cover?”

“A. This is for the year ended December 31, 1959.”

Then at page 205:

“Q. Now when was exhibit No. 15 prepared in your office, do you know?”

“A. Well, it would have been prepared on January 28.”

“Q. And do you have knowledge of from what this exhibit was prepared, and how it was done?”

“A. We have a copy, or a draft copy from which this is copied.”

“Q. Now this exhibit covers the period ending when?”

“A. Dec. 31, 1959. The year ended December 31.”

“Q. And were both of exhibits 15 and 14 typed in your office?”

“A. Yes, sir.” (*Italics ours*).

Counsel for appellants then tried to shake Mrs. Pugsley's testimony concerning the preparation of their financial statement on January 28, 1960, by asking Mrs. Pugsley as follows (Tr. 205):

"Q. Do you have a notation in there as to when it was delivered for typing?"

"A. January 28. Yes, sir."

"Q. Could that have been January 18?"

"A. No, sir."

And at page 206:

"Q. Do you have any indication when the typing commenced on exhibit 15?"

"A. That is - - - that was on that day, January 28."

"Q. What is the procedure that your office went through in order to finally culminate in the delivery of this document on January 28?"

"A. Well, this is prepared by the accountant who is given the assignment and then it is given to me for processing in the typing department."

"Q. Did this record indicate when these different steps took place?"

"A. Only the date I received it and the date it goes out. In that instance it went out the same day."

"Q. And so you received it, and did you type it up?"

"A. I did not type it. One of our typists did that work."

Counsel for defendants then asked at page 207:

"Q. Does your record indicate to whom it was delivered January 28?"

"A. Oh, yes, it goes to the client."

"Q. Does your record indicate that?"

"A. No, there is no indication of it going to any specific person. That is not usually our procedure. It is delivered to the client."

"Q. Are these delivered manually or are they mailed out?"

"A. Well, it varies. Sometimes they are mailed and sometimes they are delivered."

"Q. Does that indicate whether it was mailed or delivered?"

"A. It would be delivered."

"Q. And who would have delivered it?"

"A. The client would have picked it up in this case."

"Q. Does this show that?"

"A. It does not."

"Q. And this would have been on January 28?"

"A. Yes, sir."

Appellants' counsel then asked at page 209:

"Q. *Prior to January 28, there would have been no exhibit 15 in existence, would there?*"

"A. *Not for that particular year.*" (Italics ours).

Appellants also called their office manager, Mr. Darrel S. Lester, to testify concerning the date of execution of exhibits 2 and 3. Counsel for respondent then cross-examined Mr. Lester as follows, commencing at transcript, bottom of page 148:

"Q. Has the case been discussed with you?"

"A. Yes . . . well, not the case . . . the remembrance of what took place on this."

"Q. And when was that?"

"A. At the time of the depositions."

"Q. Before the depositions were taken?"

"A. Yes."

"Q. You didn't give any deposition in the matter, did you?"

"A. I did not."

"Q. And where did this discussion take place?"

"A. At the office."

"Q. And who was present?"

"A. Mr. Andrews."

"Q. Anyone else?"

"A. No."

"Q. And what was discussed at that time?"

"A. He asked if I would please try to remember the incident and what took place. He asked if I could remember changing the document. I told him . . . yes, I could. And he asked if I could remember when."

"Q. And then what was said by you?"

"A. I told him right at the time I could remember making the change on the document, *but I couldn't remember when.*"

"The court: But you couldn't remember what?"

"A. But I couldn't remember the exact time."

“The court: Do you mean the date? Or the hour?”

“A. The date.” (TR. 148-149). Italics ours).

It appears clear from the testimony of the appellants and witnesses called on their behalf that exhibit 2 and exhibit 3 were not executed by the appellants until after their financial statement was delivered to the Dale Barton Agency for examination. The employee of appellants' accounting firm testified without qualification that the financial statement prepared on Shurtleff and Andrews Constructoin Company was not prepared or delivered until January 28, 1960. With the admissions of the appellants and their witness Henich that exhibits 2 and 3 had not been executed until after the financial statement was prepared, it appears unequivocal to us, as it did to the trial court, that exhibits 2 and 3 were signed on or after January 28, 1960.

Appellants, at page 14 of their brief, also speculate as to what other documents may have been signed by the appellants that were supposedly complete in themselves. Respondent respectfully points out the inconsistency of the statements of the appellants and their own witnesses concerning exhibits 2 and 3. Some of the witnesses claim that page one of exhibit 2 was blank when it was signed by the appellants; others claim that part of the typing was there. When Henrich was called to testify by appellants he gave the following answers to questions propounded by counsel for respondent (Tr. 170, 171):

“Q. Making reference to exhibits 2 and 3, have you ever seen those documents before?”

“A. In part, I have.”

"Q. In making reference to exhibit 2, what do you mean 'in part you have'?"

"A. By in part, I am referring to page 3, the bottom area where the signatures and typing is."

"Q. And what about that."

"A. Max S. Andrews and Ned Shurtleff and Paul Henich and Max S. Andrews."

"Q. Was typing . . . that typing on there when you took it down?"

"A. That is correct."

"Q. Was there any other typing on that document?"

"A. No, sir."

"Q. How about exhibit No. 3?"

"A. I don't recall this one at all, sir."

"Q. You don't recall ever seeing that exhibit?"

"A. No, sir."

Then at page 176:

"Q. And I think you said in reference to exhibit No. 2 that none of the names were typed on that document at the time it was taken to Shurtleff & Andrews, is that correct?"

"A. No, sir. No, sir, you misunderstood me."

"Q. What was it?"

"A. This is the exhibit No. 1, sir."

"Q. Excuse me. Exhibit No. 2 is right here."

"A. I said the only thing I acknowledged was on the bottom of page three where it was typed."

"Q. Were the names typed there?"

"A. Yes, sir."

"Q. And the check marks for the signatures?"

"A. Yes, sir."

"Q. Now, Mr. Henich, I would like to invite your attention to your deposition now, on page 18. I first asked you:

'Q. Did you sign this document down in Shurtleff & Andrews' office?'

'A. I signed that particular document in Max Andrews' office.'

My question at line 15:

'Q. I'll ask you if there was any typing on page three when you signed it?'

'A. No, sir. The only thing that was on there was the check marks.'

'Q. Just the check marks?'

'A. Yes, sir.'

'Q. And none of the names were typed on it?'

'A. No, sir. That was completely blank when I first signed it. The only thing there was the checks where they were to sign, and I was to sign.'

"Q. Do you recall so testifying?"

"A. If it is in the deposition, I must have said it."

"Q. Do you know how this exhibit 3, the resolution, got down to Shurtleff and Andrews' office?"

"A. I must have taken it, sir."

"Q. Was that taken at the same time as exhibit 2?"

"A. It must have been."

"Q. I am inviting your attention again to the deposition on page 19, commencing at the bottom of page 18, Mr. Henich:

'Q. At that time did you have a document entitled Copy of Resolution?'

'A. No, sir, I did not.'

'Q. You have never seen that document before?'

'A. This document?'

'Q. Yes.'

'A. No, sir, I haven't.'

'Q. And this was not taken by you down to Shurtleff & Andrews?'

'A. No, sir.'

"Q. Did you so testify?"

"A. I still so testified, sir." (TR. 170, 178).

This witness then went on to testify that at the time exhibit 2 was delivered to Shurtleff & Andrews there was no typing on page 1 of the document (Tr. 177-178). When Mr. Andrews was asked on cross-examination if any of the typing appeared on page 1 of exhibit 2 he stated that the exhibit was blank on page 1 when he signed it (Tr. 141). In contrast, appellants' office manager, Lester, who was present when the exhibits were executed and who admittedly changed the name of one of the corporate officers on exhibits 2 and 3 to correct the same, was asked if there was any typing other than printing on page 1 of exhibit 2, and he answered as follows (Tr. 147):

"Q. When you saw these documents, what was prepared on them . . . making reference to exhibit

2, insofar as the typing on the exhibit was concerned?”

“A. I don’t know.”

“Q. Do you know whether or not there was any typing on page 1?”

“A. *I know it wasn’t blank, yes.* I don’t know what was there. There was something on these, yes.”

“The court: Which exhibit is he referring to?”

“Q. Exhibit 2. Do you recall the names on there being typed?”

“A. Yes.”

“Q. They were there?”

“A. Yes.” (*Italics ours*).

The evidence also shows that Henich denied delivering exhibit 3 to the appellants for signature but their testimony indicates that they received it from Henich at the same time they signed exhibit 2 (Tr. 122, 150, 151 and 177).

Respondent respectfully submits that the testimony of the appellants, their witnesses, and the independent testimony of their accountants’ former employee, shows conclusively that exhibits 2 and 3 had been typed, and were then signed by the appellants during the week of January 25 through January 30, 1960. The trial court so found based upon clear and convincing evidence.

POINT III

THE COURT DID NOT ERR IN FINDING THAT THE INDEMNITY AGREEMENT COVERED THE P.I.E. BOND.

A. THERE WAS NO ALTERATION OF THE INDEMNITY AGREEMENT.

B. THE DATE ON THE INSTRUMENTS WAS IMMATERIAL AS TO THE LIABILITY OF THE APPELLANTS AS INDEMNITORS.

Appellants offered no testimony upon which the court could base a finding that exhibits 2 and 3 had been altered after they had been signed by the appellants. The trial court found that the two exhibits evidenced no indication of erasures whatsoever. There was no indication of placing additional typewritten matter on the documents after they had been originally typed and the documents contained a full description of the bonds to be indemnified. The court further pointed out to counsel for the appellants that even the appellants and their witnesses contradicted themselves as to what the documents contained when they signed them (Tr. 248-249). The trial court found the evidence to be clear and convincing in respondent's favor. This court said in the case of Northcrest, Inc. vs. Walker Bank & Trust Company, *supra*:

"His findings should not be disturbed unless we must say that no one could reasonably find the evidence to be clear and convincing."

See also *Child vs. Child*, 8 Utah 2d 261, 332 Pac. 2d 981, wherein this court recently stated:

"It is because of such areas of uncertainty and the fact that the workings of another human mind are quite impossible to measure with exactness, that it is necessary in large measure to leave the determination of what constitutes 'clear and unconvincing' evidence to the trial judge."

At page 17 of the appellants' Brief, they state that Mr. Lester corroborates the testimony of Andrews and Shurtleff that they signed the documents on December 23, 1959. As shown above, however, Lester's testimony was that he could not recall when the signing of the documents took place even though Mr. Andrews asked him to please remember. The testimony of witness Eldredge, as cited by the appellants, is of no material value to anyone as he did not hear any conversation between Henich and the appellants that is pertinent to this matter (Tr. 159). Mr. Lester also testified that exhibit 2 had typing on page 1 but he could not recall exactly what had been typed thereon. At this point, it is respectfully submitted by respondent that had exhibit 2 been signed without any typing on page 1 as to the Convent and PIE jobs, the appellants would have then become indemnitors for Henich on any and all bonds that had been, or were to be written in the future, for Henich, without regard to only these two jobs. The language of exhibit 2 so states on page one thereof, commencing at line 29, paragraph 'second.'" The appellants would still be obligated, under the terms of the agreement, on the PIE job. The limitation of indemnity specified on page 1 was placed there by the Dale Barton Agency for the sole benefit of the appellants prior to their signing the document so that they would not become general indemnitors for Henich on every job that he had undertaken or would undertake in the future. Appellants state at page 17 of their brief:

"The agreement was only signed in connection with and to indemnify the St. Joseph Convent job."

This, of course, is parole evidence of a self-serving nature which alters the terms of a written document and is in violation

of the parole evidence rule. The appellants also agree that at no time did they ever discuss their liability or limitation thereof with Dale Barton, anyone from the Dale Barton Agency, or the respondent (Tr. 140-141 & 144). There was absolutely no corroboration of any of appellants' evidence concerning the dates on exhibit 2 or exhibit 3. As previously shown, the appellant corporation's officers could not state when the corporate meeting approving exhibit 3 was held as they kept no corporate minutes of the meeting. It is maintained by the appellants that the date of execution of the contract must be definite. The evidence shows with reasonable certainty that the indemnity agreement and corporate resolution, exhibits 2 and 3, were signed sometime between January 25 and January 30, 1960. Respondent also submits that the indemnity agreement and corporate resolution (exhibits 2 and 3) speak for themselves and the date they bear is not material in and of itself. Appellants further rely on the rather extensive testimony of Mr. Schalow, as quoted in their brief commencing on page 19. It has been previously shown that Mr. Schalow was an administrative employee of the respondent and had no personal first-hand knowledge of the facts surrounding the execution of exhibits 2 and 3. However, witness Schalow testified that it was his information exhibit 2 had been signed after December 23, 1959, and sometime near the end of January, 1960, to the best of his knowledge and information (Tr. 41 & 42). The testimony of Mrs. Farley, the person who typed exhibits 2 and 3 and later acknowledged them, was specific to the effect that the documents were executed during the week of January 25 to January 30, 1960. As previously shown, even the appellants and their witnesses indicate

that this must be true. The documents could only have been executed on or after January 28, 1960, as indicated by the testimony of Mrs. Pugsley, who prepared the financial statement of the partnership, and the testimony of witness Lifferth, who delivered the PIE contract to Henich on that date. It would be incredible to expect Mrs. Farley to remember the exact date of execution of the documents, based on her affixing her notary seal, after one and a half years had elapsed.

The testimony of Lloyd S. Foote, a former employee of the Dale Barton Agency, shows that *he called the accounting firm of Wood, Child, Mann & Smith by telephone* and obtained the names of the officers of Shurtleff & Andrews, Inc. This was done on the day exhibits 2 and 3 were prepared and this information was given to Mrs. Farley to prepare these documents (Tr. 196 and 197). He also stated, as shown on page 21 of appellants' brief, that he was sure the documents were prepared at the same time the PIE contract was received in the Dale Barton offices.

Again at page 21, counsel for appellants tries to confuse the evidence by saying:

“Exhibit 14 had been delivered October 12, 1959, and covered only the Shurtleff & Andrews, Inc., corporation up to the end of July, 1959.”

This was taken from the testimony of Mrs. Pugsley to the effect that the appellants' accounting firm had prepared a financial statement on the corporation and delivered the same, but she did not testify where it was delivered. Obviously, this statement was delivered to the appellant corporation for other purposes. There is no conflict in the evidence in regard to

when the financial statements were delivered to the Barton Agency. Appellants also state that Barton did not testify as to how long it was after he received the financial statements before exhibits 2 and 3 were prepared. This, of course, indicates nothing more than the fact that Barton did not personally type the agreements. Mrs. Farley stated that she typed the agreements and gave them to Henich to obtain the appellants' signatures. She also stated that this was done sometime during the week of January 25 through January 30, 1960. This corresponds to the time in which the financial statements were received by the Dale Barton Agency. It must be remembered that the financial statement covering the partnership, Shurtleff and Andrews Construction Company, covered the period ending on December 31, 1959, and wasn't even in existence until January 28, 1960 (Tr. 209).

Counsel for the appellants, for lack of facts or legal authorities to sustain their position, makes reckless statements alleging contradictions in respondent's evidence and in doing so, contradicts himself. He states at the top of page 22 in his Brief that Barton never testified as to how long it was after he received the financial information on the appellants before exhibits 2 and 3 were prepared, and then accuses Mrs. Farley of contradicting Barton's testimony by stating when she in fact typed the documents. The testimony clearly shows that the financial information and the PIE contract were received before exhibits 2 and 3 were prepared and that exhibits 2 and 3 were signed sometime during the latter part of the week, January 25-January 30, 1960. Respondent fails to see anything contradictory about this testimony. Appellants then go on to state that the Dun & Bradstreet report, exhibit 16,

was not received by Barton until February 11, 1960. They again attempt to cloud the issues. The testimony was very clear that an oral Dun & Bradstreet report was received prior to exhibit 16 and the exhibit was merely sent to the Dale Barton Agency to confirm the oral report (Tr. 105-106 & 175).

Appellants again misconstrue the evidence cited in their Brief at page 22. Mr. Foote testified that he saw the financial statement on the appellant corporation and therefore, knowing who its accountants were, made a telephone call (Tr. 197). No where in his testimony does he state that it was from the financial statement that he obtained the names of the parties placed on exhibits 2 and 3.

The second paragraph on page 23 of appellants' Brief is also a misconstruction of the facts. The testimony clearly shows that on January 28th, Henich received the PIE contract and delivered a copy thereof to the Barton Agency (Tr. 116, 164, 223). Barton testified that when he was first contacted by Henich concerning a bond, he told Henich he would not write the bond with only the indemnity of the appellant corporation, and it was two days after this that Henich secured the partnership financial statement and the contract, and brought them to Barton for consideration. It was at this time, January 28th, that Barton had exhibits 2 and 3 prepared and delivered to Henich for the appellants' signatures. Shurtleff testified that he was in Gabbs, Nevada, during the week in question and stated that he had partied with three persons on the night of January 27, 1960, at a party given by an engineering company. He also gave the names of those persons but never called any of them to testify on his behalf concerning

his presence in Nevada, nor did he give any reason for failing to do so (Tr. 152).

The rule is correctly stated in 20 Am. Jur., Evidence, p. 192, Sec. 187, as follows:

"It is well settled that if a party fails to produce the testimony of an available witness on a material issue in the cause, it may be inferred that his testimony, if presented, would be adverse to the party who fails to call the witness."

The author also states at page 193, Sec. 188:

"But if an interested party tells an improbable story, the absence of the corroborating testimony of witnesses who, it appears, were cognizant of the facts, will weigh heavily against him."

Appellants introduced into evidence exhibit 19, which is a group of alleged receipts given to Shurtleff while on this purported trip to Nevada. It is respectfully pointed out that the receipts clearly show they were written by this witness personally and are not worthy of belief (Tr. 156). It should be noted that the signature appearing on the purported expense account submitted by Mr. Shurtleff is also the very same signature appearing at the top of the receipt from the Gabbs Valley Inn as well as that on the Hotel Nevada receipt (Ex. 19). The exhibit also shows an adding machine tape dated *February 2, 1960*, and includes a guest check from the Gabbs Coffee Shop in the sum of \$2.45 which bears the date of *January 27, 1961*, a year later. The entire exhibit appears tainted by false testimony. Mr. Shurtleff was very careful not to place the names of any persons allegedly making these receipts upon the receipt so that they could be verified. If

Shurtleff had in fact made this trip to Nevada as he testified, in view of the magnitude of this case, it seems incredible that he didn't bring at least one live witness to Salt Lake City to testify in his behalf. The conclusion is inescapable, he never made the trip at the time he claims.

Appellants continually try to shift their burden of proof to the respondent by completely ignoring the terms of the written contract. It is respectfully submitted that the burden was theirs and they failed in their proof. Their evidence was neither clear nor convincing, and the trial court so found.

C. THE COURT DID NOT ERR IN FINDING THAT THE INDEMNITY AGREEMENT WAS NOT EXECUTED DECEMBER 23, 1959.

There is no dispute by any of the parties or witnesses that Doris Farley notarized exhibits 2 and 3. Appellants state at page 26 of their Brief that respondent never gave them notice of its acceptance of the indemnity agreement they had signed. As the indemnity agreement was a clear and unequivocal contract to indemnify with an absolute guarantee, notice of acceptance by the plaintiff was unnecessary. *Wall vs. Eccles*, 61 Utah 247, 211 Pac. 702, *Brown vs. Merriott*, 97 Utah 65, 89 P. 2d 478.

The testimony cited by appellants and their argument commencing on page 25 of their Brief, and continuing through page 28 thereof, is nothing more than a restatement of what has already been discussed. It constitutes a series of misstatements, statements taken out of context, and assumptions not based upon evidence. Accordingly, respondent will not burden

this court with further repetition of argument pertaining thereto, as the trial court's findings are amply supported by evidence against the appellants on those matters.

Suffice it to again say, that Mr. Lester's testimony on cross-examination, as to the date of execution of the indemnity agreement and corporate resolution (exhibits 2 and 3) was to the effect that he couldn't remember the date even though Andrews, his employer, asked him to please try and remember (Tr. 149). Lester's testimony is no stronger than that given on cross-examination. In support of that doctrine, this court's attention is respectfully invited to the cases of Alvarado vs. Tucker, 2 Utah 2d 16, 268 Pac. 2d 986, and Ivie vs. Richardson, 9 Utah 2d 5, 336 Pac. 2d 781 (1959).

It should also be said in conclusion on this point, that appellants' contention on the top of page 28 in their brief that it is uncontroverted that the indemnity agreement only applied to the Convent job, and that plaintiff added the PIE job to the agreement, is wholly unsupported by any evidence adduced by them during the trial of this case. There was absolutely no testimony during the trial of any alteration of this instrument done by respondent, and even the witnesses testifying on behalf of appellants were in conflict as to the typewritten portion appearing on this indemnity agreement (Exhibit 2), at the time they executed the same. We have heretofore fully covered this element of the case, and this appears to be another statement by appellants' counsel calculated to mislead this Court as to actually what occurred under the circumstances.

POINT IV

RESPONDENT MADE NO ADMISSIONS PRECLUDING THE TRIAL COURT FROM FINDING IN ITS FAVOR.

The answers to interrogatories served by appellants were unequivocal as to the position to be taken by the respondent, and the same were made a part of the pretrial order as previously stated (R. 51 to 57). It is also perfectly clear from the record that appellants sought to alter the provisions of exhibits 2 and 3 by parol testimony, and of course they had no evidence in that respect. Counsel was aware of respondent's position at the time of trial (Tr. 6 & 7).

In reference to their claim that respondent's proof was a material deviation from the allegations set forth in its complaint, this is wholly without merit because the pre-trial order clearly stated the issues to be determined by the trial court. The evidence adduced at trial fully supports the Findings of Fact and Conclusions of Law as entered by the trial judge, and the cases heretofore cited are in accord with the law as applied thereto by the trial court.

CONCLUSION

The appellants admit signing exhibits 2 and 3. They also agree that the respondent suffered a loss by virtue of its executing the bond on the PIE job. The testimony is clear that exhibits 2 and 3 were typed, signed, and acknowledged during the week commencing January 25, 1960. The terms of both exhibits are clear and unambiguous. The respondent

presented a prima facie case against the appellants and they were unable to overcome respondent's proof. The testimony of the appellants and their witnesses clearly shows that exhibits 2 and 3 were executed at the time and for the purpose alleged by respondent. It is the appellants and not the respondent who are attempting to alter the terms of the written instruments by parol evidence. The evidence further shows that the bonds on both the Convent job and the PIE job were dated to conform to the date of the contracts, and that the same were not in fact executed on the dates they bear, nor was the contract on the PIE job executed on the date that it bears of January 25, 1960. See the testimony of witness Lifferth (Tr. 112 to 119). This demonstrates the usual practice in business matters of this nature requiring the bonds to be dated and effective on the same dates as the contracts bear. Many instruments are given a date and mailed to various places for signature and execution. If such documents can be modified or nullified by showing that they were not signed on the date contained therein it would become in many instances virtually impossible to do business. After appellants raised the issue of the date of execution in reference to the indemnity agreement signed by them, and the corporate resolution (Exhibits 2 and 3), the respondent had every right to show the true date of execution of such documents, and this in no way altered the terms or provisions thereof. The lower court found the evidence to be clearly in favor of the respondent and so stated in its partial summary of the evidence commencing on page 241 of the transcript. The summary contained in the Brief of appellants is apparently designed to influence this Court's review of this case by appealing to its sympathy and attempting

to rest upon the virtuous conduct of appellants. It is they who came into court with un-clean hands and their testimony is replete with inconsistencies, coupled with evidence fabricated to meet the exigencies of the situation. This approach was apparent as the trial court, as indicated in part by his summation, at the conclusion of the trial, wherein he said (Tr. 248 & 249):

“THE COURT: Now on that, Mr. Pratt, they are not even consistent on their testimony. Mr. Andrews, he said the contract was filled out with the exception of the P.I.E. provision which was not in there; his partner, Mr. Shurtleff, says it was a complete blank. And Mr. Henich says it was a complete blank. But their office manager says it was not a blank but he doesn't remember what was in it. Then they are contradicting each other, you see, in their own area so to speak, and then, of course, as I said to Mr. Bayle, that it was in their is confirmed by independent people, such as Mrs. Pugsley.

Now I have seen men, and men that sometimes make lots of money. They win big and they lose big by this kind of conduct. They are reckless and they don't anticipate or foresee or pay attention to the ultimate possible dire results; the very thing that you have here.

Now here this loss to them is \$140,000.00 plus these extras, attorney fees in these lawsuits, which is a fortune. I don't know what it will do to them. It may even bankrupt them. But they did it and they should have anticipated if this contractor turned out to be less than what they thought he was their loss could have been, of course, to the ultimate end of \$270,000.00. As it turns out it is \$145,000.00 plus these other things. And I don't just see any escape from it, myself, and, as I say, this matter of date is not important. They

are not in or they are not out by virtue of the change of the date, except the opposite way for them to contradict or modify the written contract that is here.

I am satisfied that this contract was, on its face, like it is today. There is no indication of erasures; there is no indication of putting it again in a typewriter where they might vary the line or vary the spacing between words. There is a bracket mark that encompasses this full limitation. Of course that could have been put on if it were a blank. But then what business have men signing blank instruments. I'm not sure that that would even avail them of anything. They would still have to convince the tryer of facts that they didn't intend to be bound by the P.I.E. job and the Convent job, even if it were in blank. But they contradict themselves on that, you see.

I just think it is one of those sad situations and it really is. It is deplorable that men should take a loss like this. But then, after all, they contracted to do that and they contracted with this insurance company and they relied on it. Otherwise, they wouldn't have issued the bond, and I regret it. I feel sorry for them. I think it is just pathetic that men get into situations like this. It really kind of hurts me to see the case come out as I think the evidence absolutely points it must.

I think if I close my eyes to the fact that they are going to lose all of this money I would be violating my duty here. The chips will just have to fall where they may, but that is the way I see it."

Justice dictates that the judgment of the lower court should be affirmed, with costs to respondent.

F. ROBERT BAYLE and
WALLACE R. LAUCHNOR of
HURD, BAYLE & HURD

Attorneys for Plaintiff and
Respondent