

1962

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

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

Ur.

APR 9 1962

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

vs.

PAUL J. HENICH, d/b/a P. G. & H.
GENERAL CONTRACTORS, ELLEN
JANE HENICH, his wife,

Defendants,

MAX S. ANDREWS and NED E.
SHURTLEFF, individually and as a co-
partnership d/b/a SHURTLEFF & AN-
DREWS CONSTRUCTION COM-
PANY, and SHURTLEFF & AN-
DREWS, INC., a Utah Corporation,
Defendants-Appellants.

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pre No. 17, Utah
9596

BRIEF OF APPELLANTS

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

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JANE HENICH, his wife,
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Defendants-Appellants.

No.
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Appeal from the Judgment of the
3rd Judicial District Court for Salt Lake County
Hon. Ray Van Cott, Jr., Judge

STATEMENT OF THE KIND OF CASE

This is an action upon an Indemnity Agreement, wherein
the indemnitee insurance company seeks to recover for losses

suffered in paying obligations on a contractor's bond. The defendants defended generally on the ground that the Indemnity Agreement did not cover the bond upon which the indemnitee suffered its losses.

DISPOSITION IN LOWER COURT

The case was tried to the court, the Honorable Ray Van Cott, Jr., presiding. From Findings of Fact, Conclusions of Law and Judgment for the plaintiff in the amount of \$164,678.09, plus costs, defendants Max Andrews, Ned Shurtleff and Shurtleff & Andrews, Inc., appeal.

RELIEF SOUGHT ON APPEAL

The appealing defendants seek reversal of the Judgment, and a Judgment in their favor of no cause of action, or a new trial.

STATEMENT OF FACTS

Paul J. Henich was a contractor who constructed two different projects upon which the plaintiff furnished Payment and Performance Bonds. The first project was the St. Joseph Convent Faculty Residence at Ogden, Utah, under contract, dated December 23, 1959, and the other project was the Pacific Intermountain Express Terminal Building in Salt Lake City, Utah, under contract dated January 25, 1960. (Ex. 17).

The St. Joseph contract was awarded on or about December 23, 1959, and in connection therewith, Payment and Performance Bonds (Ex. 13) were executed and furnished by the

plaintiff. The P. I. E. contract was dated January 25, 1960, and finally executed about February 1, 1960. (R. 272). The amount of the P. I. E. contract and bonds thereon was \$271,030.00. (Exs. 17, 4).

The defendants and appellants, Ned Shurtleff and Max Andrews were organized as a partnership known as Shurtleff & Andrews Construction Company, and were also organized and doing business as a corporation known as Shurtleff & Andrews, Inc. Both organizations were engaged in the rental of heavy equipment, and defendants had known the defendant Paul J. Henich upon a business basis prior to December 23, 1959. (R. 228).

An Indemnity Agreement (Ex. 2) was dated December 23, 1959, and notarized by Doris H. Farley, an employee of the plaintiff, which notarization appears on the document as December 23, 1959. The document also bears a corporate acknowledgment on December 23, 1959. A Corporate Resolution, (Ex. 3) dated December 23, 1959, showing a Special Directors meeting on December 23, 1959, accompanied Exhibit 2. It is upon this Indemnity Agreement that the plaintiff sued the defendants and appellants for recovery of the losses incurred in connection with the P. I. E. job because of the failure of the principal Paul J. Henich to pay the outstanding bills thereon. (R. 1-10) (Exs. 2, 3).

The plaintiff contended, and the court found, that the said Indemnity Agreement and Corporate Resolution was not executed or notarized, nor was the corporate acknowledgment affixed thereto on December 23, 1959, but rather sometime during the week of January 25 through January 30, 1960.

(R. 75-87). Appellants contend that the Indemnity Agreement was executed on December 23, 1959, and only applied to the St. Joseph bond.

Paul J. Henich failed to pay the outstanding bills on the St. Joseph job, and the appellants paid for these bills only under their liability on the Indemnity Agreement for the St. Joseph bond, the total amount of \$52,625.79. (R. 240).

The plaintiff admittedly falsified the dates and individual and corporate acknowledgments on said Indemnity Agreement. (Ex. 2). (R. 289-291). The plaintiff obtained financial statements and other information during the week of January 25 through January 30 in reliance upon which the bond on the P. I. E. job was issued. (R. 202-204).

The plaintiff's employees, Dale Barton and Doris H. Farley, testified, and the Court found, that the Indemnity Agreement and the bonds issued on the P. I. E. job were executed sometime during the week of January 25 through February 1, 1960. The testimony did not show the sequence under which the bonds were issued, the financial information was obtained, the P. I. E. contract was furnished, and the Indemnity Agreement signed and issued. (R. 202-211, 290).

The defendants and appellants were never informed that the plaintiff had received, and accepted, or had relied upon the said Indemnity Agreement. The first notice that the defendants and appellants received of the plaintiff's claim that said Indemnity Agreement was in effect as to the P. I. E. job, was after the P. I. E. job was completed and the losses sustained. On December 23, 1959, when the Indemnity Agreement was

dated and executed under the contention of appellants, the P. I. E. contract had not been consummated and the contract amount thereof had not been fixed. (R. 178). The P. I. E. contract was not received from San Francisco in its completed form as to amount and final terms until January 28, 1960. (Ex. 18).

The plaintiff was required to pay under its bond on the P. I. E. job, the total sum of \$164,678.09. (R. 84).

ARGUMENT

POINT I.

THE COURT ERRED IN NOT DISMISSING THE ACTION AT THE CLOSE OF PLAINTIFF'S CASE.

At the close of plaintiff's case, defendants and appellants moved for dismissal upon various grounds. (R. 164-166). Appellants contend that at this point, the plaintiff had not proven a prima facie case upon competent evidence. Appellants contend that the failure of the Court to grant this Motion to Dismiss was error, and submit in support thereof, the following argument:

Over appellants' objection (R. 110) the plaintiff and respondent offered Exhibit 2 dated and notarized on December 23, 1959. This was offered without any evidence to indicate the execution and dating thereof upon any date other than December 23, 1959. (R. 108-110).

The Exhibit has typed on it wording which limits its application to the Convent job and to the P. I. E. job. It

further states thereon the contract amounts of each of the two contracts. As to the P. I. E. job, the contract amount was \$271,030.00. Very obviously, the information relating to the P. I. E. contract was not available and was not even in existence on December 23, 1959. As a matter of fact, it was not actually typed onto the document until the latter part of January, 1960. (R. 145).

Therefore, the plaintiff in its short and very limited case in chief, sued upon an agreement (Ex. 2) which it immediately impeached, contradicted, varied and altered without competent evidence to explain the basis for these variations. By its own chief witness, Mr. Schalow, the competency of the alleged agreement was destroyed, and the document became inadmissible. On cross-examination, Mr. Schalow testified that the agreement had been filled in in Dale Burton's office sometime between January 25, 1960, and January 30, 1960. (R. 145). Therefore, the general validity of the alleged agreement, as well as any prima facie value it may have had was eliminated.

It is fundamental that a party offering a document as its own exhibit as a "part of its case in chief cannot thereafter impeach or contradict the terms thereof." In the case of *Davenport v. Stratton*, 149 P. 2d 4, the Court said about an exhibit which was offered by the defendant:

"This Exhibit having been introduced in evidence by the defendant, he is bound by its provisions."

The general rule is again enunciated in *Peters v. Taylor*, 251 Pac. 446, 450 (Ariz.), to-wit:

"The general rule unquestionably is that one who introduces documentary evidence to support his con-

tentions, vouches for its integrity and is conclusively bound thereby.”

The Court further indicated that only if the instrument is introduced to show part of a scheme to defraud, may the instrument be varied or impeached. Also see *Goldsworthy v. Anderson*, 21 Pac. 2d 718 (Colo.), where the Court said:

“An essential part of the proof thereof was a copy of the report which had been prepared by examiners. . . When plaintiff produced this report, he thereby vouched for its accuracy so far as the issues herein involved are concerned, and the Court in admitting the same, received it without any limitation or restriction.”

Please see 20 *Am. Jur.* 915; 17 *Annotated Cases* 381, 1; 32 *C.J.S. Para.* 1040 (d), Page 1113.

It is, of course, possible under some cases for the Notary Public to contradict the substance of the certificate which he or she has previously executed. However, the cases are clear that the evidence under which the Notary Public's certificate can be varied must be clear, convincing and without reasonable doubt. See *Northcrest v. Walker Bank & Trust Company*, 248 P. 2d 692 (Utah); *Gatewood v. Roquemore*, 118 P. 2d 1020 (Okla.); and, *Pritchett v. Brevard Naval Stores Company*, 170 Southern 610. However, the cases also reason that the party for whose benefit the notarization has been executed cannot cause the certification to be impeached. See *Gatewood v. Roquemore*, *supra*.

As the evidence shows here, the Notary Public was an employee of the plaintiff, and the plaintiff is the party who caused the notarization to be executed. Therefore, the plaintiff,

in this case, stands in the same position as does the grantor in the *Gatewood* case and other similar cases cited therein, and it cannot introduce evidence impeaching the notarization. Therefore, without competent evidence in the form of the agreement, the plaintiff has no case.

There are further inconsistencies which preclude the Court from making a clear finding to the effect that the plaintiff can recover on the Indemnity Agreement.

The Complaint (R. 2) states that the bond for the Convent job was executed on or about December 23, 1959, in reliance upon the execution of the Indemnity Agreement. (Ex. 2). Contrary to this judicial admission, the plaintiff thereafter, in trying the law suit, attempted to prove not that the Indemnity Agreement was executed on or prior to December 23, 1959, but that it was executed in January of 1960, and backdated to December 23, 1959.

The Complaint states that the Convent job bond was executed in reliance upon the Indemnity Agreement, whereas Mr. Schalow, the plaintiff's chief witness, testified that the Convent bond was not executed in reliance upon the Indemnity Agreement, but was executed sometime in February of 1960. (R. 48, 157). Mr. Schalow further testified that the Indemnity Agreement was not signed on the date that it bears, but he did not know upon which date it was executed. (R. 112, 120, 146, 154). He testified, however, that the Convent bond and the P. I. E. bond were both executed at about the same date. (R. 157, 163).

Therefore, Mr. Schalow's testimony—and his was the only testimony in support of the plaintiff's case—is inconsistent

with and contradictory to the allegations of the Complaint. He did not know when the Indemnity Agreement was executed, but thought it was executed sometime prior to the execution of the P. I. E. bond. He stated that the Convent job bond and the P. I. E. bond were executed about the same time. The Complaint states that the Convent bond was executed on or about December 23, 1959, and we could, therefore, assume under Mr. Schalow's testimony that the P. I. E. bond was likewise executed at about that time. All of this confused testimony, however, merely confirms the fact that the attempts to vary the date and the notarizaion of the Indemnity Agreement are confused and are without substantial support either from an evidentiary or from a reasonable point of view. It cannot, therefore, be said that the trial court had before it any clear and convincing evidence which would warrant the complete disregard of all of the dates and notarizations on the agreement in favor of a nebulous date of execution "somewhere between January 25, 1960, and January 30, 1960." The plaintiff certainly did not sustain the burden of proof required of it. As is shown hereafter in this brief, the plaintiff did not improve its position, nor clarify the evidence. It added nothing by way of competent and convincing evidence. Therefore, the defendants and appellants were entitled to have their Motion to Dismiss granted.

POINT II.

THE COURT ERRED IN ADMITTING EVIDENCE THAT THE INDEMNITY AGREEMENT WAS EXECUTED BETWEEN JANUARY 25, 1960, AND JANUARY 30, 1960.

A. THE INDEMNITY AGREEMENT MUST BE IN WRITING UNDER THE STATUTE OF FRAUDS.

Title 25-5-4, Utah Code Annotated, 1953, our Statute of Frauds, provides that "every promise to answer the debt, default or miscarriage of another," must be in writing, otherwise said agreement would be void. Indemnity Agreements are deemed to be contracts to answer for the debt of another. See *Nephi Processing Plant v. Western Cooperative*, 242 Fed. 2d 567; 27, *Am. Jur.* Para. 6; and, 49 *Am. Jur.*, Par. 146. It is generally held that if the predominant purpose of the promisor under an agreement to answer for the debt of another is to subserve or further his own interest rather than merely to underwrite the debt of another, it is an original undertaking and not within the Statute of Frauds. Where, as in this case, however, the predominant purpose is not to further the indemnitor's interest, then the agreement is within the Statute of Frauds. As is aptly stated in 2 Williston 2d Ed., Par. 452, quoting *Davis v. Patrick*, 141 U. S. 479, 487:

"The purpose of this provision was not to effectuate but to prevent wrong. It does not apply to promises in respect to debts created at the instance and for the benefit of the promisor, but only to those by which the debt of one party is sought to be charged upon and collected from another. The reason of the statute is obvious . . . when a third party is the real debtor and the party alone receiving benefit, it is impossible to solve the conflict of memory or testimony in any manner certain to accomplish justice. There is also a temptation for a promisee in the case where the real debtor has proved insolvent or unable to pay, to enlarge the scope of the promise, or to torture mere words of encouragement and confidence into an absolute

promise; and it is so obviously just that a promisor receiving no benefits should be bound only by the exact terms of this promise, that this statute requiring a memorandum in writing was enacted. Therefore, whenever the alleged promisor is an absolute stranger to the transaction and without interest in it, courts strictly uphold the obligations of this statute."

Title 25-5-6, Utah Code Annotated, enumerates those agreements to answer for the debt of another which are original transactions, and thus not under the Statute of Frauds. Indemnity or Surety Agreements are not specified therein. It thus seems clear that this Indemnity Agreement (Ex. 2) is one whereby the indemnitors agree to answer for the debts of the contractor Henich. It must therefore be in writing.

Our Statute of Frauds also provides that "every agreement that by its terms is not to be performed within one year from the making thereof," must be in writing; otherwise it is void. The Indemnity Agreement sued on herein is to answer for the debts of Henich which may be paid by the plaintiff surety company under the bond furnished for the P. I. E. job. (Exs. 2, 4). This bond was furnished under our *Utah Contractors Bond Statute, Title 14-2-1, Utah Code Annotated, 1953*, as amended. Under this statute, the right of action on the bond accrues 40 days after the completion or abandonment or default in the performance of the work provided for in the contract. The Statute of Limitations within which an action can be brought on this bond is four years under *Title 78-12-25, Utah Code Annotated*. The indemnity obligation, therefore, runs for at least as long as does the bond liability under the aforesaid statute, to-wit, four years. Furthermore, if we examine the P. I. E. construction contract (Ex. 17, Art. 20), we see

that the contractor must guarantee the work from any defects for a one-year period after completion of the work. Therefore, whether by the Statute of Limitations, or by the terms of the contract, it is apparent that the Indemnity Agreement cannot be performed within a one-year period. The fact that either of the parties may put an end to this contract does not take the agreement out of the Statute of Frauds, 49 *Am. Jur.*, Par. 33.

The evidence is uncontroverted that the contract amount of \$271,030.00 for the P. I. E. job was not determined by either the contractor, Henich, or the plaintiff through its representative, Dale Barton, until sometime after January 28, 1960. Dale Barton did not learn of the contract amount, and did not learn that the P. I. E. contract had actually been executed and that a bond was required until the day upon which Henich brought the P. I. E. contract to Dale Barton's office. (R. 178, 179). Neither of the appellants, Andrews and Shurtleff, knew anything about the P. I. E. job until July, 1960. (R. 230, 256).

Furthermore, it is obvious that on December 23, 1959, the P. I. E. job had not been consummated to the point where it could have been included under the Indemnity Agreement or the corporate resolution. (Exs. 2, 3 and 20).

Of necessity, therefore, the plaintiff, in bringing its suit, could not rely solely upon the written agreement (Ex. 2) without admitting the alteration thereof resulting from the addition to said agreement of the P. I. E. job. Plaintiff could only attempt to establish a new date of execution of the agreement by parol evidence. This parol evidence manifestly violates the Statute of Frauds.

The plaintiff must assert, therefore, substantial oral modifications of the Indemnity Agreement, as follows:

(a) The date of the Agreement is changed to an indefinite period sometime between January 25 and January 30, 1960.

(b) By oral agreement, the indemnity contract is not to be effective on or about January 25, 1960, the date of its execution, but is to be retroactive in its effect and in its liability to December 23, 1959.

(c) By parol evidence, the corporate resolution (Ex. 3) was to be redated as of an indefinite date between January 25 and January 30, but the special meeting of the Board of Directors allegedly held sometime during this period was to have been held instead December 23, 1959.

However, it is impossible to determine, under plaintiff's theory, just when the Special Board Meeting was held. There is absolutely no evidence that it was held in January. The Resolution, even though allegedly signed in January, would still have to state as it does that the Special Meeting was held December 23 — unless of course we completely ignore the entire resolution. If the meeting was held December 23 then there could have been no authorization to sign anything relating to the P. I. E. job.

This confusion aptly demonstrates the impossibility of an oral modification in the manner claimed by plaintiff and found by the Court. Such uncertainty should not be permitted to replace the certainty of the written document. The plaintiff's chief witness, Mr. Schalow, stated that one must resort to other discussions and agreements between the parties, since

the dates mean nothnig. (R. 157). One begins to wonder what other parol side agreements Shurtleff & Andrews entered into by affixing their signatures to a printed agreement, which supposedly was to be complete in and of itself. All of these modifications are clearly a violation of the Statute of Frauds.

B. THE INDEMNITY AGREEMENT CANNOT BE ORALLY ALTERED UNDER THE PAROL EVIDENCE RULE.

It is fundamental law that when parties enter into a written agreement, that said agreement cannot be orally modified. This Honorable Court has so stated in *Fox Film Company v. Ogden Theatre*, 17 P. 2d 294, where it stated:

“In the absence of fraud or mistake, the classical rule to the effect that parol evidence is not admissible to contradict, vary, add to, or subtract from the terms of a valid written instrument is generally applied in cases of this kind.”

This principle is reaffirmed in *Starley v. Deseret Foods Corporation*, 74 P. 2d 1224. Our Court has further stated in *Bamberger Campany, et al v. Certified Productions, Inc.*, 88 Utah 194:

“Most of the courts of this country hold as a general rule that an oral modification of a contract required by the Statute of Frauds to be in writing, will not be permitted.”

The authorities are quite uniform in holding that a guaranty contract cannot orally be extended to cover back debts. *American Security Bank v. Liberty Motor Company*, 214 P. 1062. Likewise, it is generally accepted that the rule

against parol evidence to vary or contradict written agreements applies in full force to preclude any evidence from varying the date of a written instrument where the date is a material part of the contract, or undertaking, so that to vary the date would vary the rights of the parties. *Grand Junction Gospel Tabernacle v. Arvis*, 157 P. 2d 619 (Colo.); 32 C.J.S. 963.

In our case, we are not faced with a mere oral change in the date of the contract. Rather, appellants are having imposed upon them a change in liability, a change in circumstances, a change in the actual holding of a directors' meeting, and most important, a change involving additional liability of \$271,030.00. The plaintiff seeks to invoke an oral agreement to relate the effective date of the agreement back to December 23, 1959. By relating this liability back to that date, the plaintiff requires Shurtleff & Andrews to assume debts not only on the P. I. E. job, but also on the Convent job, which under the plaintiff's theory, had not been covered previously.

Therefore, it does not solve this problem by merely citing the general proposition that under the parol evidence rule, the date of a contract can be changed. Instead, the specific circumstances surrounding the change of the date and the attempts to vary the various terms of the written contract and the effect thereof must be considered. It is certainly reasonable to argue that neither our Statute of Frauds nor our parol evidence rule permit such a substantial as well as complicated variation to a written contract. The trial court, therefore, committed prejudicial error in permitting the plaintiff to introduce evidence tending to show that the agreement was executed January 25, 1960, through January 30, 1960.

As is pointed out hereafter, it is inconceivable that a definite contract date, such as December 23, 1959, can be modified by parol to now become an indefinite contract date, the indefiniteness of which is vital to the rights of the parties involved.

POINT III.

THE COURT ERRED IN FINDING THAT THE INDEMNITY AGREEMENT COVERED THE P.I.E. BOND.

The trial Court's findings must be based upon a preponderance of the evidence. The evidence must be competent evidence, it must be worthy of a reasonable construction, and, where possible, it must be logical. The evidence upon which the Court has made its findings in support of plaintiff's case does not meet the standards so required.

Our Supreme Court has found, and in so doing, sustains the general principle of law, that findings by a trial court are not ordinarily overruled, but if it is clear from the evidence that the Court's Findings are wrong, the Supreme Court can review and reverse the Findings of the trial court. *Smoot v. Checketts*, 125 P. 412 (Utah).

A. ALTERATION OF THE INDEMNITY AGREEMENT.

Obviously the Indemnity instrument, as well as the corporate resolution (Exs. 2 and 3) in their present form could not have been signed and executed on December 23, 1959.

Any reference to the P.I.E. Terminal job was impossible at that time, since the job did not exist. (R. 264, 265, 272) (Ex. 20)

Max Andrews and Ned Shurtleff both testified that they signed both of the instruments on December 23, 1959. (R. 226-228, 255, 256). This evidence was corroborated by Mr. Lester, who actually typed in some of the typing on the documents, (R. 249, 250) and also to some extent by Mr. Eldredge, who testified that Mr. Henich came to the office December 23, 1959. (R. 261, 262).

On the date which appellants' evidence shows the documents were signed, to-wit, December 23, 1959, the corporate resolution (Ex. 3) stated only that it covered the St. Joseph Convent job. The words, *construction of P.I.E. Truck Terminal*, \$271,030.00 were not on the document. The front page of Exhibit 2 was, so far as the parties could recollect, in blank. The agreement was only signed in connection with and to indemnify the St. Joseph Convent job. (R. 244).

Defendant's evidence logically corroborates the dates on Exhibit 2, the notarization thereof, the date of the Special Stockholders' Meeting on Exhibit 3, and the date of certification thereof. It should be kept in mind that these two documents were executed and notarized in the manner which is most solemn and most reliable in establishing truthfulness of the facts of the agreement. Our statute makes the acknowledgment prima facie evidence of the date of execution. *Tarpey v. Deseret Salt Company*, 14 Pac. 338 (Utah).

The plaintiff, in suing on this agreement either had to sue on the December 23, 1959 date, which would then admit the

written alteration of the instrument; or, had to sue claiming execution of the document subsequent to January 25, claiming the oral alteration and modification of the agreement. In either event, the agreement is materially and substantially altered, destroying its validity.

Without conceding that the written agreement can be altered by parol evidence, let us examine that actual date which the Court has determined to exist as an execution date in lieu of December 23, 1959.

B. LACK OF A DEFINITE DATE FOR THE INSTRUMENTS.

Having disregarded the exact terms and dates of the written contract, acknowledgments and corporate resolutions, the plaintiff must establish a new date for these documents at least as definite as was the old date. It is axiomatic under contract law that a contract document must be definite in its composition, otherwise it lacks an important contract element.

Significantly, the plaintiff did not establish any definite date of execution under his parol evidence. Repeatedly, all of the plaintiff's witnesses were indefinite in their evasive answers, testifying without contradiction that all of the events transpired sometime during the week of January 25 through January 30. A brief summary of the applicable testimony of these witnesses is as follows:

MR. SCHALOW:

As the only witness on plaintiff's case in chief, stated that on the basis of statements made to him in the form of hearsay evidence, he concluded that the agree-

ment was typed sometime between January 25 and January 30, 1960. (R. 145, 146, 153).

MR. BARTON:

When asked when Henich brought the P.I.E. contract into his office, Barton stated, "it was during the last week of January through January 30th. During that period of time." (R. 179).

In testifying about the receipt of a financial statement on Shurtleff & Andrews, he stated, "We received these statements the latter part of the week of January 25 through January 30." (R. 182).

He again stated: "I had taken a verbal report from Dun & Bradstreet, as I indicated, during the week from January 25 through January 30th." (R. 184).

In answer to a question concerning his knowledge as to when Exhibit 2 was prepared, he stated: "It was prepared in the latter part of the week of January 25 to January 30." (R. 196).

In testifying concerning the execution of the corporate resolutions (Ex. 3), he stated: "That was the latter part of the week of January 25 through January 30."

Again, in testifying about the receipt of Exhibit 15, he said he received it "during the week of January 25 through January 30th." (R. 202).

He further stated that he had in his possession Exhibits 14 and 15 prior to the preparation of Exhibits 2 and 3. (R. 203).

In answer to this question by Mr. Bayle, "Other than being able to say that the typing was done sometime during the week of January 25 to January 30, you don't know the day upon which the typing was done, do you?" He answered: "Not the exact date." (R. 208).

Again, he stated that he did not know when any documents were dated or received. (R. 211).

MRS. FARLEY:

In answer to the question as to when pages 1 and 3 were typed, she stated: "It would have been during the week from January 25th to 30th, 1960." (R. 284).

She further stated that the documents were brought back and notarized during the same week. (R. 287).

At Page 290 of the record appear the following questions and answers:

"Q. You testified that these documents were prepared during the week of January 25th through January 30th?

"A. Yes.

"Q. You cannot be more explicit than that as to what date these were prepared on, can you?

"A. I'm sorry, I cannot.

"Q. Is it possible they were prepared on Saturday?

"A. I cannot be more specific than that, it was during that week."

At page 291 of the record, appear the following questions and answers:

"Q. You don't recall the date the documents were returned to you by Mr. Henich, do you?

"A. No, I do not.

"Q. Was that also during this week of from January 25th to January 30th?

"A. To the best of my knowledge.

"Q. It was?

"A. It was during this week.

"Q. Everything happened during this week?

"A. It appears so."

In answer to the question as to when the P.I.E. bond was prepared, she stated:

"That would have been prepared during this same week."

MR. DALE FOOTE:

Mr. Foote was unable to fix any date that the documents were prepared or signed, but stated that the P.I.E. contract (Ex. 17) was brought into the office on the same day that Exhibits 2 and 3 were prepared. (R. 306).

A closer examination of the alleged sequence of events found in the testimony of the plaintiffs, and compared to the uncontroverted facts, indicates that the events as testified to could not have happened in the manner claimed by the plaintiff.

Mr. Barton testified that the first contact he had with Mr. Henich was the day Henich brought in the P.I.E. contract, which was during Monday or Tuesday, January 25 or 26. At this time, Barton told Henich that Henich could not have a bond. (R. 178, 179). Two days later, Henich came back, at which time Mr. Barton claims that Henich asked if Shurtleff & Andrews could be indemnitors on the bond. At this time, Mr. Barton indicated that they could not be indemnitors because the financial statement which he had on the corporation (Shurtleff & Andrews, Inc.) (Ex. 14) was insufficient. (R. 181). Exhibit 14 had been delivered October 12, 1959, and

covered only the Shurtleff & Andrews, Inc. corporation up to the end of July of 1959. (R. 309).

Apparently thereafter, Mr. Henich and Mr. Barton obtained the financial statement of Shurtleff & Andrews Construction Company, the partnership, and made various calls relating to the financial stability of the partnership. There is no testimony from Mr. Barton as to how long thereafter it was before the alleged Exhibits 2 and 3 were prepared and delivered to Mr. Henich. He states, however, that they were returned February 1, 1961, at which time they were notarized. (R. 328).

Mrs. Farley, however, in complete contradiction to Mr. Barton, states that the documents were prepared sometime between January 25th and January 30th, and "were returned to her no later than January 30, 1961." (R. 287-291). In further contradiction to both Mr. Barton and Mrs. Farley, Dale Foote testified that Exhibit 17, the P.I.E. contract, was brought in on the *same day* that Exhibits 2 and 3 were prepared. All of this oral testimony indicates conclusively that there is no definite date upon which we can rely as the date of the contract.

Under plaintiff's evidence, the Dun & Bradstreet report (Ex. 16) was not received by Dale Barton until February 11. This coincidentally is the same date that Mr. Schalow stated was the issuance date for the P.I.E. bond. (R. 158).

Mr. Foote gave Doris Farley the information on the officers of Shurtleff & Andrews. He allegedly gave this to her based upon information from the financial reports received from the accounting firm. (R. 301, 305). These reports, however, do not give the names of any officers. (Exs. 14 and 15). He stated

that he did see Exhibit 16, the Dun & Bradstreet report, in Mr. Henich's financial file. (R. 302). This is the only report from which he could have obtained the erroneous designation that Mirian Andrews was secretary of the corporation, since this name appears in the upper-left-hand corner of Exhibit 16. Therefore, Mr. Foote could not have given this information to Doris Farley until after February 11, when the report supposedly was received; unless he gave it to her beforehand in October, the date which the Dun & Bradstreet report bears. This latter supposition is entirely consistent with the date of the corporation financial report (Ex. 14) and with the use of these two reports in connection with the execution of the St. Joseph Convent bond. Another instance of the confusing evidence adduced by plaintiff in support of the alleged execution date of Exhibits 2 and 3.

The following uncontradicted facts show the impossibility of the events happening as testified to above. Mr. Liffereth, a representative of the P.I.E. Company, was mailed the P.I.E. contracts under date of January 27, 1961, from Oakland, California. (Ex. 18). He testified that he did not receive these documents until January 28th, and that Mr. Henich could not have possibly obtained them from him until at least the 28th. (R. 218, 219, 267). Therefore, assuming, in accordance with Mr. Barton's testimony, that Mr. Henich immediately brought the contract to Mr. Barton, this would not have been until Thursday, January 28th, at the very earliest. Mr. Barton testified that Mr. Henich did not come back until two days later, which would have put the time at Saturday, January 30th. Thereafter, according to Mr. Barton's testimony, investigation was made concerning the financial status of the defendants

Shurtleff & Andrews Construction Company as a partnership, and calls were made to Dun & Bradstreet to satisfy Mr. Barton concerning the credit rating.

Therefore, if prepared in January at all, Exhibits 2 and 3 would have had to have been prepared apparently Saturday or Sunday, the 30th and 31st. The Court can, of course, take judicial notice of the fact that these are not regular business days, and that consummation of these transactions on Saturday and Sunday, or thereafter, are to say the least, unreasonable. In any event, the testimony of Mr. Barton and Mrs. Farley is completely discredited because of their own confused concept of the claim of the plaintiff and of the sequence of events.

Mr. Henich testified that after delivering a copy of the contract to Mr. Barton, he went to San Francisco and did not return until February 1, or after. (R. 267). There was no evidence to contradict this testimony, and the absence of Mr. Henich over the weekend would further preclude the preparation and signature of Exhibits 2 and 3 at that time.

Furthermore, Ned Shurtleff testified, supporting his testimony with corporation memorandums and actual receipts, that on January 25, he was in Ely, Nevada; January 26, he was in Gabbs, Nevada; on January 27, he was in Gabbs, Nevada; and, on January 28th and 29th, he was on his way home, driving from Gabbs, Nevada. (Ex. 19).

Appellants submit that the foregoing evidence conclusively precludes the Court from finding that the agreement was executed sometime between January 25 and January 30. Mr. Barton himself testified that it could not have been executed until February 1 or after. Even if the Court was warranted in making

such a finding, this finding is insufficient as a matter of law to support the execution date of the contract. There is no evidence whatsoever to indicate whether or not the Indemnity Agreement, if executed at all during that period, was executed before or after the execution of the bonds for the P.I.E. project.

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

In contrast to the confusing and inconclusive facts used by the Court as a basis for its finding, we have the reasonable, definite and specific evidence to support the finding that the defendants signed the Indemnity Agreement December 23, 1959 to indemnify the plaintiff on the St. Joseph Convent job. The facts presented by the defendants are consistent with common sense and are unclouded by the deliberate falsification and backdating upon which the plaintiff must rely.

First and foremost are the documents themselves. They are presumed at law to have been dated and executed December 23, 1959. (Exs. 2 and 3). This date is consistent with the date of the execution of the St. Joseph Convent bond, which bond was issued in late December or early January, according to Mr. Barton. (R. 176-178, 323) (Ex. 13).

Mr. Barton admitted, when called as an adverse witness, that Doris Farley notarized the document after it was signed. At Page 189 of the record are the following questions and answers:

“Q. Is it true that she notarized that document after the signatures were affixed to it, isn't it?

"A. Yes, sir.

"Q. How do you know that?

"A. Well, you can tell—

"Q. By the date?

"A. Yes. It was brought in and then it was notarized.

"Q. You can tell by the date of the notarization, isn't that true?

"A. Yes, sir.

"Q. And what date is that?

"A. That date is December 23, 1959, is it not?"

Max Andrews was able to fix the signing of Exhibits 2 and 3 as occurring on December 23 because of his recollection of the Christmas open house held at his office that day. He further recalled having just returned from a trip to Idaho, bringing back Christmas hams for his employees and friends. (R. 226-230). He definitely did not see the documents after the 23rd.

At the time Mr. Andrews signed, Exhibit 2 had no typing on the first page. There was nothing on the corporate resolution relating to the P.I.E. Truck Terminal contract. (R. 236-238). At the time he and Mr. Shurtleff signed the Indemnity Agreement, it was for the purpose of indemnifying the St. Joseph Convent job only. (R. 237-238). Mr. Henich also so testified in answer to Mr. Bayle's questions on cross-examination. (R. 275). Henich had also told and agreed with Mr. Barton that this Indemnity Agreement was to apply only to the Convent job. (R. 276).

No one ever informed the defendants that this Indemnity

Agreement had ever been accepted and they heard nothing more about it until July of 1960. (R. 190, 206).

Mr. Lester, the office manager for Shurtleff & Andrews, had a distinct recollection that these exhibits were executed December 23, 1959. He recalled typing the name of Ned E. Shurtleff in lieu of the name of "Mirian Andrews" which appeared on both Exhibits 2 and 3. (R. 249, 250).

The execution and furnishing of the financial statements from Wood, Child, Mann & Smith are not inconsistent with the defendants' testimony. The plaintiff's own witness, Mrs. Pugsley, stated that the financial statement for the corporation (Ex. 14) covered a period up to July 31, 1959, and was delivered out of her office October 12, 1959, long before either of the two contracts were let. (R. 308, 312). The other financial statement was delivered out of her office January 28, and she assumed it was delivered to the client. The financial statement of October 12 was used for the Convent job (R. 248), and Mr. Andrews assumed that the latter financial statement was also used in connection with that job.

There seems little doubt that Henich obtained a bond on the P.I.E. job sometime in February—presumably on February 1. Likewise, there appears to be little doubt that financial statements of the defendants were obtained sometime, and together with a Dun & Bradstreet report (Ex. 16) were considered and filed with the plaintiff in connection with the P.I.E. bond. These facts are not at all inconsistent with the defendant's concept of the facts pointing to the execution of Exhibits 2 and 3 on December 23, 1959. It could be reasonably argued that the plaintiff would have wanted further financial information con-

cerning the indemnitors before issuing another bond. However, it is uncontroverted that after the defendants had signed the Indemnity Agreement, it only applied to the Convent job, and that no further contact was ever had between them and the plaintiff. It likewise appears evident from the evidence that the plaintiff merely added the P.I.E. job under the coverage of the already existing Indemnity Agreement.

POINT IV.

PLAINTIFF'S ADMISSIONS PRECLUDE THE TRIAL COURT FROM FINDING IN PLAINTIFF'S FAVOR.

The plaintiff apparently did not develop the theory of relying upon a parol January date in contradiction to the express December date until after the Complaint was filed. The Complaint, in Paragraph 4, alleges in essence (R. 2) that the defendants and the plaintiff, on or about December 23, 1959, entered into the Indemnity Agreement to indemnify the plaintiff for any losses which the plaintiff "*might incur* or sustain by reason of it becoming a surety" on the St. Joseph job. (Italics added). In Paragraph 5 of the Complaint, the plaintiff states that in reliance upon the execution of the said Indemnity Agreement, and as an inducement for so doing, the plaintiff executed and delivered a Performance and Payment Bond for the Convent job. (R. 3). It could not be stated more clearly that the Indemnity Agreement was executed before the bond was executed, and that the bond was executed in reliance upon the Indemnity Agreement.

Mr. Schalow, at the trial, had read to him this portion of the Complaint, and left no doubt at all but what he agreed

with the language of the Complaint. (R. 154, 155). Mr. Barton conclusively confirmed the fact that the Convent bond was executed and delivered in the latter part of December, or the early part of January, long before the P.I.E. job and P.I.E. bond were executed. (R. 175, 176).

There can be no doubt that the plaintiff by judicial admission in the pleadings and by admission in its testimony confirmed the fact that the Indemnity Agreement (designated as Exhibit "A" attached to the Complaint, and as Exhibit 2 in the trial) was executed and delivered prior to January 25, and was in fact executed in connection with and prior to the execution, delivery and issuance of the Convent bond. Such judicial admissions are conclusively binding upon the party making them, and preclude the trial court from making a finding inconsistent therewith. The plaintiff is estopped from claiming in contradiction to said admissions. The Court, in finding facts contrary thereto, has sustained a material deviation in the plaintiff's proof from the allegations set forth in the pleadings. The fact that the plaintiff's witnesses at the trial confirmed this allegation in the Complaint, gives it further conclusiveness as a judicial admission against the interest of the plaintiff.

SUMMARY

Were this an equity case, the defendants and appellants might reasonably invoke the "clean hands" doctrine. In other words, can the plaintiff come into court, suing upon a written contract, then offer it in evidence, attempt to show that the plaintiff deliberately and intentionally falsified the date thereon, that the plaintiff's Notary Public had deliberately falsified her

notarization, that the plaintiff had intentionally and deliberately backdated the documents in order to give them meaning beyond the written terms thereof, and had thus wilfully rendered the documents false—all of this in order to then establish an indefinite date by parol evidence, thereby imposing additional liability of \$271,030.00 on the indemnitors? We think not.

Should this loose practice be permitted in the surety business, where the plaintiff is handling and is writing hundreds of thousands of such agreements, where the liability amounts are large, in which business the defendants are complete strangers, where the documents are not prepared in duplicate and the original is kept within the complete control of the surety, and where there is no notification to the indemnitors of acceptance, review or other use whatsoever of the agreement? (R. 206).

The statement, "sometime during the week of January 25 through January 30" was the plaintiff's magic cure-all. In answer to every question regarding the happening of any event, plaintiff and all of its witnesses gave this very handy answer. Why? Simply because the Indemnity Agreement *under the plaintiff's theory* had to be signed after the P.I.E. contract date (to fix the amount of \$271,030.00), January 25, and before the P.I.E. bond was allegedly executed on February 1 (to show reliance thereon). (R. 183). The whole series of events, Mr. Barton stated, took a week, beginning on Monday or Tuesday thereof. However, the actual facts show that the P.I.E. contract did not arrive in Salt Lake until Thursday, the 28th; that Mr. Henich, assuming he delivered it immediately to Mr. Barton, did not again come back to Mr. Barton until Saturday, two days later. After

his second visit, all of the events apparently transpired, which Mr. Barton and all of the other witnesses testified were happening during the week. If this had been the case, and since the court will judicially notice the fact that most businesses are closed Saturdays and Sundays, all of these events crammed into one day should have made quite an impression upon everyone concerned. There shouldn't have been much doubt in the plaintiff's witnesses' minds as to when the alleged signing and preparation of the documents occurred. However, there evidently was no such impression created, understandably so because Exhibits 2 and 3 had been signed earlier, notarized earlier, and relied upon earlier, as Mr. Barton and Mr. Schalow admitted in confirming the allegations of the Complaint and the notarization of the document. (R. 154, 189). Henich apparently merely obtained the new P.I.E. bond on or after February 1, 1960, without further signing of Exhibits 2 and 3.

Defendants and appellants have objected throughout the proceedings to varying the date of execution of the Indemnity Agreement. This is found first in the Motion to Dismiss (R. 16), throughout the trial, (R. 51, 69, 110, 111, 164-166, 195, 283, 302, 347-362) and, finally in the Motion for New Trial. (R. 88). The trial Court has consistently committed prejudicial error in admitting the evidence varying the agreement date, in finally finding that the Indemnity Agreement covered the P.I.E. job, and was executed during the week of January 25-30. The Judgment should be reversed.

Respectfully submitted,

ELLIOTT LEE PRATT
CLYDE & MECHAM