1967

M & S Construction & Engineering Company v. Clearfield State Bank and Vern M. Smith, et al.. : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

M & S CONSTRUCTION & ENGINEERING COMPANY,
Plaintiff,

vs.

CLEARFIELD STATE BANK,
Defendant

VERN M. SMITH, et al.,
Additional Defendants

Case No. 10708

BRIEF OF RESPONDENT

Appeal from the Second District Court
In and for Davis County, State of Utah
HON. THORNLEY K. SWAN, *Judge*

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TABLE OF CONTENTS

CITATION OF AUTHORITIES

TEXTS

STATUTES

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NATURE OF THE CASE

Appellant, a Utah corporation, filed suit in the Second District Court in and for Davis County, seeking to recover damages from Respondent for a claimed breach of an agreement to loan money. As a second cause of action, the suit alleged wrongful diversion of money from Appellant's payroll and equipment obligations to debts owed by Appellant to Respondent. Respondent Clearfield State Bank, filed a counterclaim (R-18) against Appellant for recovery of moneys loaned. Respondent also added additional defendants, Smith, Stoker and Mendenhall, principals of M&S, and co-signers of the notes evidencing these loans (R-27). A cross-claim against these additional defendants was filed by Clearfield State Bank (R-28), but service was obtained only on Smith as Stoker and Mendenhall were not available for service in Utah.

The trial court submitted three issues to the jury:

1. Did the defendant on or about August 23, 1963, enter into an agreement with the plaintiff to lend to plaintiff as and when required by the plaintiff, for the purpose of providing finances to carry on its work under the terms and provisions of the Sub-Contract between plaintiff and Steenberg Construction Company, an amount not to exceed $50,000.00, by lending to plaintiff the sum of $25,000.00 on August 23, 1963, to be due September 15, 1963, and to renew said loan from time to time to the date of final payment by Steenberg Construction Company?
2. Whether Respondent breached such agreement.
3. Damages resulting from the breach.

The jury answered the first two questions in the affirmative, and fixed damages at $156,000.00.

Respondent's counter-claim and cross claim were not submitted to the jury, the trial court holding there was no issue for the jury (R-81) on the question of liability on the counter-claim, and by stipulation it was agreed the court could fix attorneys fees without evidence (T-250).

Respondent timely filed its motion for judgment notwithstanding the verdict, or in the alternative for a new trial (R-97). After argument, the trial court granted Respondent's Motion for Judgment Notwithstanding the Verdict, and denied the alternative Motion for New Trial. (R-108).

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the jury verdict reinstated. Respondent seeks to have the judgment affirmed, upon the grounds set forth in the order and judgment (R-108), or upon grounds set out in the Statement of Respondent's Points on Appeal (R-122). Alternatively, if this Court reverses the Judgment, Respondent seeks a new trial upon grounds set out in the Statement of Respondent's Points on Appeal (R-122).

STATEMENT OF FACTS

In March of 1963, Vern Smith, Russel Stoker and James Mendenhall formed M&S Construction & Engineering Company, plaintiff and appellant in this case (T-77). Such Company is hereinafter sometimes referred to as M&S. M&S had no previous history and no evidence was

presented as to the net worth of the company as of any time. It had started, but not completed, two construction jobs other than the one here involved (T-77); none of these jobs were completed (T-183, 184).

Three months after coming into existence M&S signed a subcontract on the Lost Creek Dam Project with Steenberg Construction Company for a total sum of $754,579.00 (Ex. 1). Steenberg Construction Company was the low bidder on the project, having a general contract for construction of the dam in Morgan County with the Bureau of Reclamation for $2,053,000.00 (Ex. N). The cost estimate of the Bureau of Reclamation Engineers for the project was $2,794,732.00, being nearly three quarters of a million dollars higher than the Steenberg bid; the next low bidder, Morrison-Knudson, bid $2,856,-105.00—an amount in excess of the Engineer's estimate (Ex. N). The items subcontracted to M&S were mainly earth moving (T-180), and each item of work set out in the subcontract corresponded exactly to the identical item in the general contract and specifications (T-153) *except* as to price. The earth moving items were bid by Steenberg at $925,903.92 (Ex. N). Steenberg subcontracted this same work to the neophyte M&S for $754,579.00, more than $170,000.00 lower. The Bureau of Reclamation published, after the bidding, as was its custom in such projects, an abstract of bids showing the Bureau of Reclamation Engineer's estimate, made before the bidding (but not then made public), and the various bids received from contractors, both in total amount and item by item (T-147, EX. N). Of the $800,000 difference between Steenberg and the next low bidder, Morrison-Knudson, $687,000.00 was in the subcontract items alone; $925,903.92 to $1,612,430.00.

The M&S subcontract was negotiated and signed 13 days after the general bid opening (Ex. N, Ex. 1). At that time the abstract of bids (Ex. N) was available to M&S, but was not reviewed by it. (T-144, 145).

The Engineer's estimate and the various bids on the *subcontract* items, all of which were available to it at the time it signed the sub-contract, were (Ex. N):

	Subcontract Items
Engineer's official cost estimate	$1,565,848.00
(M&S)	754,579.00
Steenberg Construction Company, St. Paul, Minnesota	925,903.92
Morrison-Knudson Co., Inc., Boise, Idaho	1,612,430.00
O. K. Wittry & Sons, Gardena, California	1,782,711.00
Foley Brothers, Inc., St. Paul, Minnesota and Holland Construction Co., Billings, Montana (Joint venture)	1,718,251.00
R. A. Heintz Construction Co. Portland, Oregon	1,836,991.60
W. W. Clyde & Co., Springville, Utah	1,934,632.00
Fife Construction Co., Brigham City, Utah	1,865,048.02
Soliba-Kringlen Corp., Gardena, California	2,170,265.00
Norman T. Fadel, Inc., North Hollywood, California	2,285,819.84
Puget Sound Bridge & Dry Dock Co. Seattle, Washington	2,305,979.00
MacNamera Corp., Burlingame, California	2,503,172.00

Thus it is to be seen that the M&S bid was not only $170,000 below the Steenberg bid, but over $850,000 below the next low bidder.

One further comment on relative prices may be useful. There were six major earth moving items in the subcontract, Nos. 4, 11, 13, 15, 17 and 64. The comparison

of unit prices per cubic yard on these items reflects the following (Ex. N, Ex. 1):

Item No.	*M&S Price*	*Steenberg Price*	*Engineer's Estimate*	*Next Low Bidder (M-K)*
4	.24	.24	1.40	1.28
11	.19	.22	.40	.40
13	.11	.17	.19	.22
15	.114	.11	.15	.19
17	.11	.16	.17	.19
64	.151	.15	.80	.65
Average price per cubic yard	.152	.175	.518	.488

Only one of the above items was performed by M&S beyond the beginning stage, item 4. At times this work was costing about twenty times the bid amount. Of this, more will be said later in the damage argument.

M&S began work on the subcontract in July, 1963 (T-180). Finding itself unable to pay its bills in August, M&S asked Commercial Security Bank of Ogden, Utah, for a loan but was referred by that bank to Respondent, Clearfield State Bank (T-79). Respondent is a small state bank operating in the Clearfield area.

At this point we are compelled to take sharp exception to Appellant's assertion in its brief that Jesse Barlow, Executive Vice President of Clearfield State Bank, solicited the making of the loans. To examine the citation given in Appellant's brief (T-23-24) discloses a vigorous denial by Barlow of any solicitation. None of Appellant's witnesses, nor any other witness, testified Barlow solicited or initiated the loan negotiations; in fact Mendenhall (Treasurer of M&S) characterized the initial approach as follows (T-78):

"Q. And where did you first meet him?

A. At his bank, sir.

Q. And when would that have been, Mr. Mendenhall?

A. That would have been in the latter part of July of 1963.

Q. And who was present?

A. Vern Smith and myself.

Q. Now, why did you appear at their bank?

A. We went over there to see if we could obtain operating capital for the Lost Creek Dam project."

After some discussions, Respondent, on August 22, 1963 loaned Appellant $25,000.00, evidenced by a note payable September 15, 1963 (Ex. D) and secured by an assignment of funds payable under the Lost Creek subcontract (Ex. 2). This initial loan, of the same date as the agreement to loan found by the jury, was made over two months *after* the subcontract was signed and one month after work under the subcontract had started.

Some 10 days later M&S was again having financial trouble (T-31, 115). On September 3, 1963, at the request of M&S the bank loaned it an additional $25,000.00, evidenced by a note (T-31) due September 15, 1963.

M&S began having troubles of a major nature in doing the subcontract work. The work was not progressing properly, the payments were not as anticipated, and the work was costing far in excess of earnings (T-116, 119).

The first monthly draw of $30,429.00 from Steenberg, received on or about September 15, 1963, was con-

siderably less than anticipated, but it nevertheless did repay the $25,000.00 borrowed on August 23rd. This left unpaid and past due the second loan of $25,000.00 made on September 3rd. More funds became immediately necessary to continue the work, and at the request of M&S the Respondent made additional loans.

As of October 23, 1963, when the second Steenberg check was received, the Respondent had made six separate loans to M&S totaling $112,000.00, of which $60,000.00 had been repaid. Of the unpaid balance of $52,000.00, $27,000.00 was represented by notes that were past due, and $25,000.00 was represented by a note that would fall due on November 15, 1963 (Ex. E). In addition M&S had an overdraft in its general checking account with Respondent. All of these obligations were secured by the Assignment. The work was following a losing pattern, T-122:

> "And all of this time we were getting paid on our draws at the rate of 24c a cubic yard, for taking this material out. But actually the draglines had to load it into scrapers, had to haul it and dump it and dry it out, and rehandle it a number of times. That material finally, as it got down in the bottom of this, with draglines having it out here 60 feet, was becoming perhaps $5.00 a yard material."

It was at this time Respondent pursuant to the terms of its assignment, applied the proceeds of the Steenberg check in large measure to obligations owed it (T-46) and refused to honor further checks of M&S that did not have funds in the account to cover them. Respondent did subsequently loan M&S an additional $11,300 (Exs. L, M) but this did not affect the Lost Creek picture as Steenberg had then defaulted M&S and had taken over performance of the subcontract (T-180).

ARGUMENT

POINT I

THE EVIDENCE IS NOT SUFFICIENT TO SUPPORT THE JURY FINDING OF AN AGREEMENT BY RESPONDENT TO FINANCE APPELLANT'S LOST CREEK SUB-CONTRACT

The jury found in response to a special verdict that Respondent, on or about August 23, 1963, agreed to lend M&S, for the purposes of the Lost Creek sub-contract, an amount not to exceed $50,000, by loaning $25,000 on August 23, 1963, to be due September 15, 1963, and to renew said loan from time to time to the date of final payment by Steenberg (R-87).

Respondent urges that the evidence, as a matter of law, was not sufficient to support this finding. The evidence on this point is entirely oral, as none of the documents contain such an undertaking by Clearfield. The testimony was received over Respondent's objections that it violated the parol evidence rule (T-60, 80). The notes involved had short term due dates exclusively. M&S asserted at trial (T-80) they were showing an agreement to finance M&S *not* contradictory to the written documents.

Promissory notes are, like any written instrument, subject to the rule as set out in Vol. 5, Utah Law Review, No. 2, at page 159:

> "Parol evidence is not admissible to vary, add to or contradict the terms of a written instrument."

The alleged agreement is that the notes were to be *renewed* from time to time (R-87) rather than being paid. The rule is amplified with particular reference to notes in 32 A, C.J.S., Evidence, Sec. 895, Page 254:

> "It cannot be shown that the time for the payment of the obligation as agreed on by the parties is different from the date of maturity as appearing in the instrument, *or that there was an agreement at the time of making the note that it would be renewed at maturity* * * *".

Confirming this rule are *Lincoln National Life Insurance Co. v. Bastian,* 31 F.2 859, *Ford vs. Southern Motor Company,* 93 S. 902. In *Garrett vs. Ellison,* 93 U. 184, 72 P.2 449, this court said:

> "The instruments involved in this action (the note and mortgage) are contracts between Mrs. Garrett and Mrs. Ellison on the one side, and the Brackens on the other. It was written to evidence the obligation of the Brackens to the payees and fix the terms of the contract as between the payors and payees. Those terms are manifest from the instruments and may not be varied by parol."

The oral testimony relied on by the jury in finding the agreement to renew the loans without question did violence to the terms of the notes, and should not have been received. Apart from parol evidence, there is the further question of whether the testimony, if properly received, is sufficient. This evidence consisted solely of the testimony of Mendenhall and Stoker, two of the M&S principals.

Stoker testified (T-113) on this matter as follows:

> "And it was discussed that the Bank would finance us, starting out with a $25,000 loan, which would *be paid* with draws from the job as time progressed, *and then* as we needed financing again there would be another $25,000 advance made, or as the need arose."

Stoker thus did *not* testify there was an agreement to loan

$50,000 but only $25,000. He said in reference to the second loan: (T-115)

> "And it was discussing the need, and explaining why *we needed the additional financing, and then obtained this additional* $25,000 *loan.*"

Mendenhall testified (T-80) the bank agreed to loan $25,000 on a "continuity" or revolving basis. His complete testimony regarding the figure of $50,000 was as follows:

> "Q. (By Mr. Elton) Was there anything said on that occasion about the amount that the Bank would advance to you?
>
> "A. I believe there was, yes.
>
> "Q. What was that?
>
> "A. Well, prior to this meeting—
>
> "Q. Yes.
>
> "A. (Continuing)—Mr. Stoker had been in and talked with Mr. Barlow. And they'd found out more about this job.
>
> "Mr. Olmstead: If the Court please—
>
> "Q. (By Mr. Elton) Well, you weren't present at this one then?
>
> "A. Well, no sir.
>
> "Q. Well, then all right.
> Now, on this one we were talking about, was anything else said?
>
> "A. This twenty-five thousand *had been* increased to fifty thousand."

This, of course, is attempted testimony by Mendenhall to something that happened, if at all, at another time

and place (when he was not present). There is a complete absence of testimony from *any* source that Barlow or any other bank officer, agreed to loan appellant $50,000 for the entire length of the Steenberg sub-contract, which is the only contract found by the jury.

In direct refutation of any commitment to loan moneys over the term of the subcontract was the testimony of Respondent's officers, Jesse Barlow (T-12, 219), Walter Steed (T-224), Harold Steed (T-232), and Claire Neilsen, M&S Accountant (T-236).

We make no claim that the jury was bound to accept the testimony of Respondent's officers. We do say that M&S had the burden of proof to show the existence of the alleged agreement, and this burden was never met by the evidence. If the parol evidnce rule is recognized, there is a complete absence of any evidence of the alleged agreement.

POINT II

THE AGREEMENT FOUND BY THE JURY TO HAVE BEEN MADE BY RESPONDENT IS BARRED BY THE STATUTE OF FRAUDS

The prohibition of the statute 25-5-4 (1), U.C.A. 1953, is clear. If an agreement by its terms is not to be performed within one year, it falls within the confines of the statute. The terms of the agreement, as alleged by M&S (R-3) and found by the jury (R-87) provide in part:

> "* * * the same to be thereafter renewed from time to time *to the date of final payment by Steenberg* * * *" Exhibit B, the subcontract, states
>
> "Subcontractor agrees work must be completed and accepted before *final payment.*"
>
> Further, it provides that the work is,

"To be performed in approximate accord with final approved progress schedule. Starting time shown on Progress Schedule *for each year* to be governed by high water conditions."

The evidence of time for completion of the work was offered by Emil Walsh, Vice President of Steenberg (T-74, 75), a witness called by Appellant. He stated the time provided in the contract was 880 days, or three construction seasons. The work done by M&S was commenced in July of 1963 (T-180) and continued until November 4, 1963. Then Steenberg took over, and diligently prosecuted the sub-contract work until September of 1965 (T-75), more than 2 years, and was then unfinished. In Walsh's opinion, the fastest the work *could* have been accomplished under optimum conditions was *two years* (T-75).

No other evidence of the time required for completion of the sub-contract, the main contract, or of the time of "final payment" was adduced.

We agree with Appellant's contention that "by its terms" refers to the agreement to loan, not to the sub-contract. This does not, however, evade the barrier of the statute, because of the agreement to lend "and to renew said loan from time to time to the date of *final payment* by Steenberg Construction Company." Accordingly, the agreement to lend is co-existent with the duration of the sub-contract as both run to date of "final payment".

The evidence appears clear:

(a) The agreement to loan continued to completion and acceptance of the entire sub-contract work;

(b) The agreement to loan was *not* one that could be performed within one year, because the sub-contract could not be so performed.

Appellant suggests to this court two separate but similar avenues of escape from the statute. First, it is claimed that since M&S was not *forbidden* to complete the work within one year the contract is not within the statute. We will agree that this court, like the courts in the majority of states, has liberally construed the statute. However, this does not mean explicit terms of agreements have been ignored in an aura of "anything is possible", such as Appellant suggests.

This statute has been part of our common law heritage for several hundred years, and deserves better. The criteria is what can "fairly and reasonably be said to have been within the contemplation of the parties * * *". 37 *C.J.S. Frauds, Statute of, Sec. 50.*

A proper construction of the Statute will decide the question of length of time of performance "according to the reasonable interpretation of its terms * * *", *Warner v. Texas and Pacific R. Co.,* 164 U.S. 418, 41 L. Ed. 495, 175 Ct. 147. The test is not, as Appellant contends, whether the contract *forbids* performance within one year; the test is whether it is one of those "* * ** agreements which, *fairly and reasonably* interpreted, do not admit of a valid execution within the year * * *". *Hellings v. Wright,* 29 Cal. App. 649, 156 P. 365.

Stated another way, in 37 C.J.S. Statute of Frauds, Sec. 50,

> "The possibility of performance within one year must be such as can fairly and reasonably be said to have been within the contemplation of the parties; an unforeseen or remote possibility is not sufficient."

Williston on Contracts (cited by Appellant) Section 500, amplifies this view:

"Sec. 500. Contracts not intended to be performed within a year.

"Another fine but important distinction is between:

"1. A contract which can be performed, as the parties intend that it shall be performed, within a year, though they fully expect that performance will take a longer period and

"2. A contract which cannot be performed within a year, as the parties intend and expect that it shall be performed, though performance in a different way within that time is conceivably possible and if so made would satisfy the literal words of the contract.

"Contracts of the first sort are not within the Statute; those of the second sort are held at least by many courts to be within the Statute. The opinion of the parties as to the time which a given performance will take is immaterial, but if their mutual intentions as to the method cannot possibly be carried out within a year, the fact that another method which would satisfy the legal obligation is logically conceivable will not save the contract."

"Thus a contract to do construction or engineering work which can only be fulfilled within a year by *abnormal and unusual* methods not within the contemplation of the parties has been held within the statute." (Emphasis added)

Browne on Statute of Frauds, page 327, Sec. 273, 4th Ed. cited in *Stanley v. Levy*, Nev., 112 P. 2d 1047, states:

"The result (of decisions) seems to be that the statute does not mean to include an agreement which is simply not likely to be performed, nor yet one which is simply not expected to be performed, within the space of a year from the making; but that it means to include any agreement which, by a fair and reasonable interpretation of the terms used by the parties, and in view of all the circumstances existing at the time,

does not admit of performance according to its language and intention, within a year from the time of its making."

In this case, the Nevada Supreme Court further held:

"We think that the possibility of performance which would take an agreement out of the statute of frauds must be such as could fairly and reasonably be said to have been within the contemplation of the parties. An unforeseen or remote possibility will not rescue the agreement from invalidity."

Thus, in *Markowitz Brothers, Inc., vs. Volpe,* 209 F. Supp. 339, 1962, a factual situation similar to the instant was held within the statute:

"Performance of this sub-contract concluded, if at all, on January 18, 1962, could not even begin until some indefinite future date. The work was of a type which was to extend for nearly, if not all, of the time of the main contract. The main contract itself contemplated that completion should be within 660 days, and while it could have been possible to complete it within a year, upon a three shift priority basis, it was not contemplated by the Government, the general or the sub-contractor that it should be so completed."

The case of *Gronvald v. Whaley,* 39 Wash. 2710, 237 P. 2d 1026, relied upon by Appellant, is factually dissimilar from the present. In that case, the agreement was to continue until the enterprise was successful. Independent evidence showed the enterprise probably would not be successful until a certain dam was completed, and also affirmatively showed that the dam *could* be completed in less than one year. In such a case, the court merely held that performance was indeed possible. In our case, the uncontradicted evidence shows the project could *not* be completed within one year, the reverse of *Gronvald.*

Again, *Commercial Security Bank vs. Hodson,* 15 U. 2d 388, 393 P. 2d 482, is factually dissimilar. As quoted by Appellant (Page 15, App. Brief) "The exact length of time this loan should last is not specified * * *." In the present case the length of time is specifically set out—to "final payment"—some three years hence.

The second argument advanced by Appellant is the "as and when required" argument. It is suggested by Appellant that it is here bolstered by language contained in *Zions Service Corporation vs. Danielson,* 12 U. 2d 369, 366 P. 2d 982. In reality, the reverse is true. The distinction is covered by Williston on Contracts, Rev. Ed. Vol. 2, Sec. 498:

> "Promises subject to an express defeasance or providing for alternative performance. The distinction between an excuse for not performing and completion of performance * * * is taken in contracts requiring for their performance a period exceeding a year but which are subject to a right of defeasance, not by operation of law but by the express terms of the contract, within the period of a year, as a contract for several years' service containing a provision permitting termination by either party on a week's or month's notice. Such contracts are generally held within the Statute."

Coan v. Prosinger, C.C.A. District of Columbia, 1959, 265 F. 2d 575, considers this point:

> "That contingency contemplates an annulment of the terms of the contract and would operate as a defeasance, thereby terminating and discharging the contract. Further performance under the contract would be impossible by either party. This annulment or defeasance provision does not contemplate the performance of the contract but only its termination and

cancellation. Although it could be annulled within a year, it was none the less a personal service contract to last for more than a year, e.g., until appellant completed his studies at Georgetown University Law School. Although this annulment or defeasance provision relieves the parties from further performance of the contract, it is not the type of performance that is necessary to take the case out of the operation of the statute."

Another Circuit Court case, *Blue Valley Creamery vs. Consolidated Products*, 8th C.C.A., 81 F. 2d 182, reviews this distinction:

> "It is generally held that a contract for a definite period extending over a year is not taken out of the statute by an option allowing either party to terminate it within a year. The performance contemplated by the statute is a full and complete performance and a cancellation is not such a performance. (Cases Cited)
>
> "Much of the confusion in considering the applicability of the statute apparently arises from failing to keep in mind the distinction between a contingency of such a nature as fulfills the obligation and one that defeats or prevents it from being performed. The one that depends upon the defeasance or matter of avoidance is within the statute, while the other is not."

This view is adopted by the 5th Circuit in *Stahlman v. National Lead Company*, (1963), 318 F. 2d 388:

> "Under Mississippi law and the weight of authority, an oral contract, which, *by its terms*, is not to be performed within the statutory period (here, 15 months) or where the parties intend that it shall continue in operation beyond the statutory period, is not taken without the Statute by a provision that it may be terminated by either party within such period. In Fireman's Fund Inc. Co. vs. Williams, 170 Miss. 199,

154 So. 545, 546, the court said, with respect to a contract which could be terminated on 10 days' notice by either party, 'the termination of such a contract is not performance of it, but is a mere frustration thereof.' "

Further 37 C.J.S. Statute of Frauds, Sec. 48:

"It is generally held that a contract for a definite period extending over a year is not taken out of the statute by an option allowing either party to terminate it within a year. The reasons underlying this view are that, since the performance contemplated by the statute is full and complete performance, supra Sec. 42, a rescission or cancellation of a contract is not a performance of it."

This view is set out as the ruling law by the Restatement of Contracts, Sec. 198 (specifically relied upon by this court in the Danielson decision), Comment C:

"C. A distinction must be taken between promises which can be 'fully performed' within a year and promises which though they cannot be 'fully performed' within that time may be excused within it by the happening of some event. The former class is not within Class V; the latter class is."

To illustrate this distinction, the Restatement provides two examples, Nos. 2 and 3 in Sec. 198:

"2. A orally promises to work for B, and B promises to employ A during A's life at a stated salary. The promises are not within Class V. A's life may terminate within a year.

"3. A orally promises to work for B, and B promises to employ A for thirteen months at a stated salary. The promises are within Class V. Though A may die within a year, and the duties of the parties thereby cease, he will not have performed his promise."

We submit this view is the logical interpretation of the Statute. The Utah cases cited by Appellant do no violence to this position; in *Johnson vs. Johnson,* 31 U. 408, 88 P. 230, the contract would be "fully performed" at death because the contract was to be "for life"; in *Danielson* (supra) the contract was again "fully performed" since it was a contract for an *indeterminate period,* obligating the plaintiff to pay dues only as long as he chose to remain a member of the group. There was not, *as in the present case,* an obligation on defendant extending beyond the period of one year.

The Missouri Supreme Court, in *Eastern States Refrigerating Co. vs. Teasdale,* 211 S.W. 693, found a contract obligating plaintiff to supply storage in excess of one year within the statute, although defendant may have removed the stored supplies within one year:

> "Learned counsel for appellant argues that the agreement might perhaps be performed within a year from its date, as, for instance, by the defendant having stored the apples for a period of time and having taken them out of storage within less than a year, and not having stored any supplies with the plaintiff thereafter. This, however, is not sufficient to bring the agreement within the exception, namely, that class of cases which may be performed within a year from the date thereof consistently with its terms, and not in violation thereof, and thus not be within the terms of the statute, such as a contract to support one for life, during an indefinite period, or to do any other thing possible to be done within a year, although the doing of it may continue for a period longer than a year. *We are of the opinion, and so hold, that this agreement fixes a definite period during which plaintiff was bound to furnish storage, and that such period is longer than one year, and that*

therefore the agreement requires more than a year for its performance." (Emphasis added)

Similarly, in 37 C.J.S. Frauds, Statute of, Section 46:

"* * * and where the contract imposes a continuing obligation on one party for the contractual period, of more than a year, the fact that the other party might perform his part of the contract within a year does not take the contract out of the statute."

The agreement found to exist obligated Respondent to loan up to $50,000 to appellant for a fixed term far in excess of one year. If this agreement were held without the Statute, it is difficult indeed to conceive of an agreement that would be prohibited. Any agreement can be halted by one of the parties terminating within a year, yet certainly this is not "performance" as contemplated by the statute. Accordingly, we submit the trial court did not err in granting judgment to Respondent as a matter of law.

POINT III

THE TRIAL COURT CORRECTLY HELD THE $38,852.54 STEENBERG CHECK NOT TO BE A SPECIAL DEPOSIT OR DEPOSIT IN TRUST

The letter fully set out in Appellant's Brief at Page 17 was received in evidence over Respondent's objections (T-42) that it was hearsay and immaterial. These objections were well taken, as the letter was not seen, composed or approved by either Appellant or Respondent. It was written by Walsh, an agent of Steenberg and a stranger to the lawsuit. In fact, the letter asks that Respondent not divulge the *letter* or its contents to Appellant. (Ex. 1). This letter is clearly hearsay, and as such is subject to the rule excluding the utterances of third parties as evidence. As is noted in 20 Am. Jur. Evidence, Sec. 455:

> "The general rule which excludes hearsay as evidence applies to written, as well as oral, statements. In other words, documentary evidence may be hearsay and inadmissible as such unless an exception to the hearsay rule renders the document admissible."

The letter is at most a request for the benefit of Steenberg, as Steenberg might be responsible for debts on the job unpaid by its subcontractor. But, as the authorities will show, Steenberg had no standing or legal right to make such a request. Again, it was not a request for or on behalf of M&S, as under the assignment M&S could not make such a request and was factually not even aware of it. We think clearly the letter was hearsay, immaterial and prejudicial in this case, and the trial court erred in admitting it over objection.

The endorsement placed on the check by Steenberg (Ex. H) in no way relates to a special deposit or trust fund. It may constitute a certification by *M&S* that it had paid all its *September* bills on the project. There was no evidence this was not indeed the fact, as all of the evidence on this subject relates to October bills. Accordingly, the check endorsement adds nothing to Appellant's claimed "trust fund" theory.

Further, it is obvious that the moneys owed Respondent were "bills" under the terms of the endorsement, as the moneys loaned by Respondent had paid the costs of the project to that time. (See Ex. N, bills of Lost Creek paid through Clearfield State Bank). Certainly, it is not a diversion to repay funds borrowed and used for operating costs on the project in question.

We do not quarrel with the general assertion that a deposit may, under certain circumstances, be a deposit for

a special purpose. We do say that under the subcontract and assignment, the Steenberg check to M&S and Respondent was *not* a special deposit. This factual situation has been reviewed by the courts many times, with the consistent result that progress payments made to a subcontractor are not encumbered by a trust and are available for application as the sub-contractor sees fit. Since the payment had been assigned to Respondent, it had the right to apply these funds to obligations of M&S owed the Respondent.

Utah has steadfastly upheld the universal rule that payments made to a subcontractor are free of any trust or conditions. *Utah State Building Comm. vs. Great American Indemnity,* 105 U. 11, 140 P. 2d 763, is a case in point. This involved the contractor's attempt to require a materialman to use proceeds of the subcontract to pay debts incurred on the job he was paid for. This court rejected the contention, holding:

> "Most contractors and subcontractors must necessarily use some of the proceeds of current contracts in paying other obligations. It would improperly fetter business transactions unless they had the right to receive and deal with their earnings as they saw fit, and for third parties to accept their money free from hidden equities. It would be extremely impractical for the materialman dealing with a contractor to be under the necessity of inquiring into the source of the money paid him, and equally impractical to require the materialman to apply the money to any particular job, unless he knew the source of it.
>
> "In this case, Campion was, by his contract, responsible for payment of the materials purchased by Sargent, and he could with propriety, have required Sargent to furnish a bond to guarantee payment. It is

also true that when Campion paid Sargent, the latter could have spent the money for food or clothing for his family, or for an automobile for his private use, or for any other purpose, and no complaint could have been made."

In keeping with this opinion, it should be noted that under the sub-contract (Ex. 1) Steenberg had the right to require a bond from M&S, just as Campion could have required a bond from Sargent.

These moneys are distinguished from the retained proceeds of the job (which *are* subject to the claim of laborers and suppliers) as the retainage is not for the benefit of the subcontractor, but for the protection of his creditors and, concurrently, the contractor. See *Third National Bank of Miami vs. Detroit Fidelity and Surety,* 5th C.C.A., 65 F. 2d 548, *Farnsworth v. Electric Supply Company,* 5th C.C.A., 112 F. 2 150, *Town of River Junction v. Maryland Casualty Co.,* 5th C.C.A. 110 F.2, 278, and the leading case *Kane v. First National Bank,* 5th C.C.A., 56 F.2 534.

In the *Kane* case, a surety sought to recover progress payment checks deposited in the contractor's bank, which deposits the bank set off (after learning of the contractor's insolvency) against obligations owed the bank. The Court said, in holding in favor of the bank:

"Money or checks paid to him as the work progresses are the property of the contractor unencumbered by any trust, just as are payments to others for goods manufactured or services performed. The Contractor's banker may receive such checks and is not bound to see to their application, nor to ascertain the state of the contractor's account with each contract; nor, if he knows it, need he govern himself in anywise with reference thereto."

This line of authority, and the Kane case, have been recently followed and approved by the Tenth Circuit Court of Appeals in *American Casualty Company of Reading, Pennsylvania, v. Line Materials Industries,* May 1964, reported at 332 (F2)393. In this case, the surety sought to recover a payment made to a creditor of the contractor, under an assignment made by the contractor to the creditors to satisfy a *pre-existing debt.* The monies paid were from a progress payment on a project that surety was required to take over and complete at great loss to itself. The Court said:

> "This is simply a case where the owner of a project paid a sum of money due on the contract to the contractor at a time when the contractor was not in default. It was free money and the contractor had the right to use it in any way he chose without it being subject to any claim or equity of his surety. Bassick did use it to pay an obligation that did not arise from his performance of the contract in question. But, he had a legal right to do so as the Appellant surety company, at that time, was not subrogated to the rights of anyone concerned with the contract and had no valid claim to the money."

> "The rule applicable here is succinctly stated in 4 Corbin on Contracts, Section 901, p. 609: 'As long as the contractor has committed no vital breach, he has a right to payments as provided in the contract; and his assignee will have as good a right to these payments as did the contractor. As long as the contractor is performing as agreed, the owner must pay as agreed; and the surety has no right, by subrogation, that the payments shall be withheld. After breach by the contractor, the situation changes.'"

In the present case, Appellant must rest upon the premise it was not in default prior to receipt of the check. If the

opposite were true, whatever Respondent did or did not do would have no bearing on the demise of M&S. Accordingly, under the law as we have outlined it, Respondent, as assignee of M&S, had the *absolute,* not conditional, right to these funds.

Appellant now brings the "trust fund" theory to this court on its own, i.e., in the light of *no* concurrent agreement to loan of any type. It is then argued the measure and extent of damage attributable to the claimed wrongful diversion is identical with that claimed from the breach of an agreement to loan. This is equally erroneous as its initial premise that the check was a special deposit.

Appellant is complaining not of diversion of the entire check, as some $7,000.00 went into the M&S checking account; but of the $25,000.00 applied on a past due note, $2,000.00 applied on a then due note, and $4,000.00 applied on a note not by its terms due until November 15, 1963. Thus, the claimed diversion is $31,000.00 not $38,000.00.

If this $31,000.00 had not been paid upon the notes in question, it could have been used to pay other bills. But this in no manner is of aid to M&S because they are in default to the extent of $27,000.00 to Respondent, with another $25,000.00 due three weeks hence (November 15). It becomes a matter of choosing which creditor to pay, when the funds available are woefully short of meeting the current obligations. Absent an agreement to renew *all* of the loans, which is certainly *not* the agreement found by the jury to have been made, and which M&S has never heretofore asserted, M&S is in default, and insolvent, without regard to which of the creditors are paid.

We submit the evidence shows without question a

valid assignment of moneys that were not encumbered or restricted. If the reverse were true, no lender would ever advance monies on the strength of an assignment, because he would be the last person entitled to payment, following suppliers, materialmen, and anyone else dealing with his assignor on the job. The trial court correctly ruled that Respondent had the right to apply the funds in the manner it did.

POINT IV

THE EVIDENCE WAS NOT SUFFICIENT TO SUPPORT THE JURY VERDICT ON THE ISSUE OF DAMAGES

Appellant's complaint (R-1) asked damages against Respondent of $500,000 general damages for good will and reputation loss, $318,000 special damages and $100,000 exemplary damages, a total of $918,000.00. At pre-trial (R-36) the exemplary claim was eliminated, and at trial (R-92) the claim for general damages was taken out by court's instruction No. 22. The remaining claim for damage of $318,00 was submitted to the jury by instruction No. 18 solely on the question of anticipated profits (R-88). The jury found this actual damage to be $156,000. Respondent asserts it was entitled to a directed verdict, or judgment notwithstanding the verdict, on each of two facets of the damage issue:

(a) Causation, or fact of damage;

(b) Amount of damage.

(a) It is critical to keep one paramount fact in mind while looking to the damage question. The Steenberg subcontract was signed by Appellant, and work commenced thereunder, long before it approached Respondent to seek

a loan. This is not, as in *Commercial Security Bank vs. Hodson,* supra, a situation where plaintiff claims it was induced to commit itself upon the promise of financial backing. The damages recoverable in one situation are far different than in the other, i.e., a plaintiff may in the latter case be entitled to recover for moneys expended, or commitments made on the strength of an agreement to loan; whereas in the former case the moneys have been expended, and the commitments made without regard to the promise of financing.

Damages must be proven with reasonable certainty, *15 Am. Jur. Damages,* Sec. 20, *Telluride Power Company vs. Williams,* 10th C.C.A. Utah, 172 F.2 673. The burden was upon Appellant to show first, the fact of damage, and second, the amount. *Dee vs. San Pedro,* 50 U. 167, 167 P. 246.

The collapse of M&S was assured at the time it signed the subcontract of June 17, 1963, for no amount of financing would save a losing job of this size. To hold Respondent accountable for the default, M&S had the burden of showing, by competent evidence, that if Respondent had continued to loan it up to $50,000, M&S would have completed the contract without default.

The next payment from the job was not due until the latter part of November, and would have been in the amount of $24,832.77 (Ex. O, October earnings less 10% retainage). Could M&S survive until then? Appellant offered no evidence to show what moneys would be necessary to keep the job moving and the bills paid. However, some figures are available, such as the $14,188.69 in accrued payroll that was met by Steenberg (Ex. N). Further payroll after October 24th would have to be made, and

this was running at the rate of $4,000.00 *per week* (Ex. N).

Withholding taxes are due and payable the month following the calendar quarter in which earned, 26 U.S.-C.A. 6071 (a), and M&S would have to pay taxes on or before October 31, 1963, for the payroll of July, August and September. This payroll was roughly $43,000.00 (Ex. N). No evidence was given as to the amount of tax due, but the statute requires a deduction of 18%, 26 U.S.C.A. Sec. 3402, making a withholding tax due by M&S before the end of October, 1963, of approximately $7,800.00. To restate, over $14,000.00 was then due to workmen, and $7,800.00 to the Internal Revenue Service.

We point out that Appellant did receive a substantial part of the $38,000.00 Steenberg check (T-46); if Respondent had re-loaned up to $50,000.00 to Appellant, it would have provided only some $29,000.00 (Ex. E), the difference between $50,000.00 and the outstanding balance of loans. Of this $29,000.00, $22,000.00 was *then* due on payroll and withholding taxes. This would leave M&S $7,000.00 (less than 2 weeks payroll) to keep the company going for another month, with payroll, equipment rentals, insurance premiums, overhead, purchase contracts, supplies, and any other bills that were incurred and unpaid, together with accruing costs.

Certainly this does not meet the burden of proof to show by a preponderance of evidence that M&S could have stayed on the job and avoided default. Considering the lack of evidence, it is speculation alone that would lead to such a conclusion.

(b) The assessment of damages by the jury was based upon claimed lost profits of M&S on the Lost Creek subcontract. The law is clear on the evidenciary requirements to support an award for lost profits:

15 Am. Jur. Damages, Sec. 150:

"As in the case of damages generally to warrant a recovery for loss of profits in actions either for breach of contract or tort, they must be capable of proof with reasonable certainty, and no recovery can be had for loss of profits which are uncertain, contingent, conjectural, or speculative. Thus, no recovery can be had for loss of profits where it is uncertain whether any profit at all would have been made by the plaintiff * * *.

"It has been said that the most definite rule that can be drawn from the cases would seem to be that if by any chance or under any condition of affairs then existing the profits might not have accrued though the wrongful act had not intervened, there can be no allowance of profits lost as damages; * * *"

Van Zyverden v. Farrar, 15 U.2, 367, 393 P. 2d 468:

"But their offer of proof was not of that character. It was that they could have sold the milk base for $3,000 and have turned the money into beef cattle sufficient to operate the ranch on a profitable basis and to have paid the required payments and taxes. Under the well settled rule that damages for anticipated profits are contingent upon so many uncertainties that they are speculative and therefore not recoverable, Jenkins v. Morgan, 123 Utah 480, 260 P. 2d 532, the trial court was justified in rejecting the offer and holding that the Van Zyverdens had proved no damage."

Jenkins v. Morgan, 123 U. 480, 260 P. 532:

"* * * before special damages for loss of profits to a general business occasioned by the wrongful acts of another may be recovered, it must be made to appear that the business had been in successful operation for such a period of time as to give it permanency and recognition, and that such business was earning a profit which could be reasonably ascertained and approximated."

Wendell vs. Ross, 245 S.W. 2d 689:

"But this court and our courts of appeals have been strict in their evaluation of the sufficiency of the evidence warranting a recovery of damages for loss of profits. Beginning with the early case of Taylor v. Maguire, 12 Mo. 313, followed by the later case of Callaway Mining and Mfg. Co. vs. Clark, 32 Mo. 305, loc. cit. 310, and by Steffen v. Mississippi River & Bonne Terre Railway Co., 156 Mo. 322, 56 S.W. 1125, down to the late case of United Iron Works v. Twin City Ice & Creamery Co., 317 Mo. 125, 295 S.W. 109, this court uniformly has refused to permit a jury to speculate as to what might be probable or expected profits as an element of damages. Reference is made to the United Iron Works case, supra, 317 Mo. loc. cit. 135, et seq. 295 S.W. 109, for a review of the cases on this point. Under the facts and the rulings of those cases, anticipated profits are recoverable only when they are made reasonably certain by *proof of actual facts which present* data for a rational estimate of such profits." (Emphasis added)

The requirements are not met if a party does not present his best evidence, *Molyneaux vs. Twin Falls Canal Company, Idaho, 35 P. 2d 651, Lee v. Durango Music, 355 P. 2d 1083.* In the case of *Gilmartin v. Stevens Ins. Co., Wash. 261 P. 2d 73,* the court said:

"What is 'reasonable' certainty depends largely on the extent to which the particular damage in issue is

susceptible of accurate proof. Where, for example, the plaintiff, in attempting to prove loss of profits, fails to produce available records relevant to that question, he fails to meet this standard of reasonable certainty."

In the present case, obviously the best evidence would be the company records of costs and earnings while on the job. The earnings requirement is satisfied by Ex. O, the Bureau of Reclamation figures. This shows total earnings (*including* the retainage) of $94,798.74 at the subcontract prices. The next question is what this work cost M&S. They produced no records to show the cost of this work. We have a start from Ex. N, showing the sums *paid* by or for M&S to do this work, $114,318.60. This exhibit is entitled "Costs Advanced" and represents only that part of the costs that were actually paid, it does not purport to show the actual costs incurred. Of course, M&S paid no bills after October 22, 1963 (T-134). The Copper State Credit statement of $4,100 was never paid (T-208). Payroll withholding taxes were never paid (Ex. N, page 3). Overhead expenses attributable to Lost Creek were never set out, although total overhead costs for the Lost Creek period of time of roughly $10,000 were paid in addition to the $114,318.60 figure. $592.00 upon an equipment payment to Respondent, paid from the last check is not in Ex. N. *No effort* was made by M&S to let the jury know what costs (in addition to the bills paid) were *incurred but unpaid* during the time it earned $94,798.74 on the project. This burden of proof, to show cost of doing the work, is upon Appellant and not Respondent. *Am. Jur. Proof of Facts, Damages, Vol. 3, Page 612;* Annotation 17 A.L.R. 2d, page 968, at page 988:

"It is therefore held that in an action on such a con-

tract *it is the plaintiff's burden to give the jury the necessary data* from which they can compute damages; and that this consists of, first, the contract price, and second, the cost of performance."

Appellant's proof on the question of lost profits was solely with Stoker, who on redirect examination was allowed to testify (over objection) that *when the subcontract was signed* he *estimated* they would earn $230,000 profit on the job (T-163). Respondent's motion to strike this testimony (T-169) was denied by the trial court. The vice of this evidence is twofold.

Initially, it is nothing more than estimate, not facts. Cases uniformly hold that opinion, whether of an owner or expert, will not support a verdict for damages unless it is based upon *facts in evidence. Red-E Gas v. Meadows,* 360 S.W. 2d 236; *Yaffe v. American Fixture,* 345 S.W. 2d 195 Mo.; *White River Levee v. McWilliams,* 8th C.C.A., supra; *Bingham Coal & Lumber v. Board of Education,* Utah, 61 U. 149, 211 P. 981; *Tillis v. Calvine Cotton Mills,* N.C., 111 So. E. 2d 606; *Haddad vs. Western Contracting,* 76 F. Supp. 987; *Guidry v. Swayne & Miller,* 47 S. 2d 721, La.; *Autrey v. Williams & Dunlap,* 5th C.C.A., 343 F.2d 730; *Lockwood Grader Corp. vs. Bockhaus,* 270 P. 2d 193, Colo.; *Lee v. Durango Music,* Colo. supra; *Fireside Marshmallow Co. vs. Quinlan Construction Co.,* 8th C.C.A., 213 F.2d 16; *United States v. Griffith et al,* 210 F. 2d 11, 10th C.C.A., Utah; *National School Studios vs. Superior School Photo,* 242 P2 756; *Boggs v. Duncan,* 121 S.E. 2nd 359 Va.

The *Tillis case,* supra, held plaintiff's testimony that a certain amount would have been earned as profit but for the breach to be insufficient, saying:

"There is no evidence as to the costs and expenses involved in the hauling of the goods. In order to arrive at a reasonable conclusion, the jury must hear facts with reference to the cost of wages, equipment repair, reserve for equipment replacement, gasoline, oil, greasing and service equipment, the charge to be paid for the use of I.C.C. rights of regular carriers through which Tillis must have operated, license and property taxes, tolls, social security taxes, cargo and liability insurance, workmen's compensation insurance and other similar costs."

This rule is supported by the Utah Supreme Court in *Bingham Coal & Lumber v. Board of Education,* supra. In that case plaintiff was allowed to testify he had lost $2,000 because of defendant's breach. This court held

"A mere cursory reading, however, of Fell v. U.P.R. Co., supra, will show that the damages must be proved by a *statement of facts, and not by the mere conclusion of the witnesses, as was attempted in the case at bar.* Then again, the items of damage must be established by some substantial evidence so that the court or jury may have a basis for the amount of damages allowed, other than mere conjecture."

A Fifth Circuit case, *Autrey v. Williams & Dunlap,* supra, held

"Luther also contends that the record establishes lost profits on the uncompleted portion of the contract in the amount of $12,989.59. However, we have carefully read that portion of the record cited to us (Vol. 5, pp. 1308-13) and conclude that it does not establish that he is entitled to profits. *That testimony is in essence an estimate by Mr. Luther of what his profits would have been had he completed the contract.* In cases where damages are claimed for having been deprived of profits, the contemplated profit must be proved to be reasonably certain and not merely con-

jectural or speculative, See Mabry v. Midland Valley Lumber Co., 217 La. 877, 47 So. 2d 673, 677 (1950), *or an estimate.* Guidry & Swayne v. Miller, 217 La. 935, 47 So. 2d 721, 723-724 (1950)."

A Tenth Circuit case arising in Utah, *United States vs. Griffith,* reversed an award of loss of profits based upon the testimony of plaintiff's president that it would have earned about $5,000 profits but for the defendant's actions:

> "Actual damages only may be secured. Those that are speculative, remote, uncertain, may not form the basis of a lawful judgment. The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. The speculations, guesses, estimates of witnesses, form no better basis of recovery than the speculations of the jury themselves." Central Coal & Coke Co. v. Hartman, 8 Cir. 111 F. 96, 98.
>
> Again,
> "What the loss of profits or damages to plaintiff's business would be, if any, is pure guess work on the part of plaintiff's president and far too speculative to sustain a judgment for this claim."

The problem becomes doubly acute when, as here, the initial estimate has been proved wrong by actual experience. The matter of profits must relate to the time of the *breach,* and the conditions *then* existing. *White River Levee Dist. vs. McWilliams, 40 F. 2d 873; Fuller vs. United Electric, 273 P.2 136; Hedin Construction vs. Bowen, 273 F. 2d 511.* In the White River Levee District case, supra, the 8th Circuit Court of Appeals held:

"The claim for future profits is not allowed. The evidence falls short of 'that clear and direct proof which the law requires' of a future profit or of the amount thereof. One side of the evidence is that this contract required excavation of 80,000 cubic yards each month and completion, in thirty months, of the estimated 2,400,000 cubic yards of excavation; that at the end of fifteen months only 290,841 cubic yards had been excavated; that the new and only dredge on the work could not possibly complete the work in contract time; *that the work, up to cancellation, had been at a loss.* The other side of the evidence is that other dredges could have been put to work, and that the profit on the work to be done would have been at the various figures put by several witnesses. *In the face of the undisputed condition at the time of cancellation, we are not justified in assessing substantial damages upon the bare estimates as to future happenings.*" (Emphasis added)

What was the undisputed condition in the present case at time of cancellation? Earnings were far less than anticipated, and costs far in excess of earnings (T-116, 122).

M&S at trial attempted to rehabilitate the damage question by claiming the additional costs incurred would be paid them over the subcontract prices. This is at best pure speculation, but deserve closer examination. Such a claim if it existed, is by virtue of attachment H of the subcontract:

"(h) On Item No. 4, it is intended that this work be done with scrapers. If however, shovel or draglines are needed the extra expense is to be paid by *Steenberg Construction Co.*"

Steenberg, both before and after default, *denied M&S was entitled to any additional compensation.* (T-101, 103,

Ex. F) By endorsement of the two checks (Exs. G & H) *M&S waived any claim it may have had for extra pay.* No claim against Steenberg was ever made (T-96), the claim if made was made by Steenberg for its own account. Although two years had elapsed at time of trial, Appellant offered no evidence as to the existence of a claim, its amount, or whether it had been or would be granted. Appellant's then counsel agreed the claim was "nebulous". (T-100). If such a claim ever existed, it apparently would be limited to the cost of the "extra expense of shovels or draglines". Again, no evidence was offered as to the amount of such expense.

We respectfully urge this court the evidence is not of the quality or nature demanded on the question of profits. This is brought into sharp relief by the undisputed fact that Appellant was losing money with every shovel of dirt it moved at Lost Creek. Again, the abstract of bids is relevant (Ex. 2). We do not claim other bids are conclusive of the cost of doing work, for on every job there is a low bidder. But we do say the extreme disparity between the M&S bid and all of the other bidders, is credible and persuading evidence that M&S could never have come out whole on this job. In view of this evidence, the actual cost vs. earnings picture, and the short (3 months) existence of M&S before entering the contract, it is apparent the jury verdict was based not on facts, not on evidence, but on speculation, sympathy or prejudice.

POINT V

THE TRIAL COURT ERRED IN DENYING RESPONDENT'S MOTION FOR A NEW TRIAL

At the outset, it seems clear that if Respondent was entitled to Judgment Notwithstanding the Verdict, it was

also at least entitled to a new trial, or to have the ruling on the new trial reserved pending appeal of the judgment. Since the motion was denied, Respondent feels compelled to raise these matters to avoid being foreclosed on them in the event this Court should reverse the judgment. There are several areas involved, which we will briefly review.

(a) Error in rulings on admission of evidence.

(1) The admission of Stoker's testimony regarding anticipated profits. This was error because there was no proper foundation (prices of equipment, interest, wages, taxes etc.) and further because the estimate had been proven wrong by actual experience. Timely objections (T-163, 164) were made to the testimony.

(2) Admission of oral testimony to show an agreement to loan that was at variance with the terms of the notes.

(3) Admission into evidence of Ex. 1, the Steenberg letter.

These matters have all been previously considered under separate headings.

(b) Failure to submit the issue of the Statute of Frauds to the jury. Respondent requested the issue be submitted (R-71) and took exception to the trial court's refusal. (T-246). Our position is that the trial court in its judgment correctly ruled as a matter of law the Statute did apply; however, and again in the event of reversal of the judgment, Respondent was clearly entitled to have the jury pass upon whether the agreement found was an agreement not to be performed within one year, as it was

an issue in the case upon which evidence that it was such an agreement had been received.

(c) Excessive damages appearing to have been given under the influence of passion and prejudice. It will be recalled the testimony of Stoker as to anticipated profits related to the time of signing the subcontract, not the time of breach. *No* evidence as to anticipated profits at time of breach was given. It is significant that Pritchett, Attorney for M&S at the time of the breach of the subcontract, said in regard to profits: (T-89)

> "* * * and that we felt that we would be able to continue our operations, and perhaps turn a profit, and at least come out on the deal, if they could continue to work with us."

We believe this jury verdict of $156,000 was necessarily the result of passion or prejudice against Respondent. Without again reviewing the damage evidence, or lack of it, it should be recalled that M&S had a three month existence prior to signing the Steenberg sub-contract, and no history of successful operation. Its ability to survive and prosper in the construction world were untested. The profit figure put forward by Stoker, $230,000, is nearly one-third of the total bid. The jury reduced this figure to $156,000, two-thirds of the claim. To accept this figure would mean Appellant could do this work for roughly $600,000; yet this *same* work was bid by the other ten bidders on the project from a low of $1,612,430.00 to a high of $2,503,172.00, from one to two *million dollars* more than the figures apparently accepted by this jury.

Perhaps these other bids would not be conclusive in the face of actual performance that supported the M&S bid; but in light of the actual experience of costs over earn-

ings, the lack of history of M&S, the lack of *any* credible evidence the sub-contract could have been completed at a profit, we submit this 6-2 verdict (T-249) could have been only the result of passion, sympathy, or prejudice against the Respondent bank.

POINT VI

THE TRIAL COURT CORRECTLY AWARDED DEFENDANT JUDGMENT AGAINST APPELLANTS ON ITS COUNTERCLAIM AND CROSS CLAIM

The lower court entered judgment against Appellant M&S, and Appellant Smith, the signers of the notes evidencing the loans made by defendant to M&S, for the unpaid balances of such loans. By its Point 3 appellants now argue that the entry of such judgment was in error because the defendant had either "intentionally or negligently destroyed" the security that defendant held for such loans.

The premise of the argument is that a pledgee of property held as collateral security for a loan has a duty to use reasonable care to protect the security, and, failing therein, is liable in damages to the pledgor for the damage. Accepting *arguendo* the premise as constituting a fair statement of law, namely, that a pledgor of security negligently damaged or destroyed by the pledgee, may set off its value in an action on the debt, it is obvious that this asserted defense has no relevance in the instant case, as it was never raised as an issue in the lower Court. Neither by way of pleading, pre-trial, motion during or at conclusion of trial, or even by way of argument to the lower court, was it ever suggested that appellants were relying on a claim of damages for negligent destruction of property as an offset to their liability on the notes. That a defense such as this requires affirmative presentation in the lower

court is elementary, and we submit that it cannot now be raised for the first time.

Appellants' argument in support of the defense confirms, however, the point we have heretofore been urging, namely, that defendant had the right under its assignment to receive and apply as it did the October Steenberg check. Let's examine closely the statement of Appellants in this connection in their brief (Pg. 25):

> "The *uncontradicted evidence* shows that these alleged causes of action were secured by the assignment, Exhibit 'B', and that *pursuant to that assignment defendant held as security all of the right of plaintiff to receive from Steenberg payment for its October, 1963 estimate,* plus the 10% retained on prior estimates, plus the additional claim for additional work on the core trench, in addition to its estimated profits on the job, all as referred to by Mr. Pritchett (R-87). This security was placed by the assignment in the name of the Bank to be held by it as collateral security, *and it had the exclusive right to have and receive the same.*" (Underscoring added)

No clearer statement of defendant's position in this whole case is possible than the foregoing statement by appellants themselves. The *uncontradicted evidence* shows that defendant had the right under its assignment to receive the October Steenberg payment; that it had a security interest in that payment; and it had the *exclusive right* to have and receive the same.

The October payment was for September work, and once that work was performed M&S under its subcontract had the unconditional right of payment from Steenberg, which right defendant succeeded to under its assignment.

Neither appellants nor Steenberg could thereafter condition defendant's right to the payment, for as appellants themselves so aptly phrase it, defendant "had the exclusive right to have and receive the same."

Having under its assignment the exclusive right to the payment, it follows that defendant did not receive the same as a "special deposit", and the only question is whether defendant's application of the proceeds as it did was in accord with the terms of the assignment.

By the assignment defendant held the proceeds of the check as collateral security for obligations owing defendant. Certainly the application of a portion of the funds to payment of the overdraft and the past due note was proper. The further application of a portion to the account of a note not due for another three weeks was likewise in order, although the alternative of continuing to hold the dollars until the note matured, rather than applying them immediately, might likewise have been proper. In either event, and as appellants have acknowledged, no one had a greater or prior right than the Bank.

We submit, accordingly, that there is no merit to appellants' contention that it is now entitled to a set off as against defendant's judgment, however, in urging it they have simply confirmed that defendant's receipt and application of the Steenberg October check was in all respects proper.

CONCLUSION

Respondent urges the trial court did not err in ordering judgment in favor of Respondent and against Appellant despite the verdict of the jury. Such judgment should

be affirmed on the clear basis that the alleged agreement violated the terms of the Statute of Frauds. In addition, the evidence as a matter of law was not sufficient to sustain the verdict either as to the existence of the claimed agreement, or damage resulting from a breach thereof.

Alternatively, as we have set out in the brief, if the trial court was in error in granting judgment to Respondent, Respondent is clearly entitled to a new trial on all of the issues.

The case of Appellant, if it is to succeed, is dependent upon avoiding established rules of evidence and law. Initially, it is the question of showing an oral agreement to renew notes that are conclusive on their face as to the time for payment. Next, it seeks to sustain the burden of proof of an agreement by the testimony of a single witness concerning matters that happened in his absence; this in the face of four denials under oath of the existence of any such agreement.

Next the Statute of Frauds, wherein it is sought to avoid the clear prohibition of this Statute by non-existent evidence that the claimed agreement could have been performed in one year. Finally, on to the question of damage; wherein appellant sought to prove damage by using an *estimate* made 60 days before the claimed breach and proven wrong almost as soon as it was made.

To allow the verdict to stand is to make vulnerable any defendant upon nothing more substantive than the conclusions of the other party. This defendant is entitled to the safeguards of the law, and to the application of

traditional rules that require the plaintiff, before recovering judgment, to prove his case by these standards.

We respectfully submit this Court should affirm the judgment of the trial court.

Respectfully submitted,

OLMSTEAD, STINE AND CAMPBELL

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