

an implied agreement to waive the express terms of the contract and entitle the libellant to a recovery for extra work based upon a verbal agreement.

All courts treat such stipulations in building and construction contracts as valid. It does not follow, however, that a failure to comply with the requirements of such a stipulation and obtain a writing prevents a recovery in all cases, for, except in the case of sealed contracts, it is held that such stipulations may be waived or superseded by subsequent oral transactions between the parties. To hold that such a stipulation may not be waived or modified by subsequent oral transactions would be equivalent to giving it the effect of a statute of frauds, and this the courts have refused to do. It has been stated that parties to a written contract of the character of a building contract are as free to alter it after it has been made as they were to make it, and all attempts on their part by its terms to tie up their freedom of dealing with each other will be futile. Again, it has been stated that it does not stand with reason that the parties can by contract preclude themselves from subsequently contracting in any particular way.

It may be admitted that such a stipulation may be waived or superseded by subsequent oral transactions between the parties, but it should prevent any changed liabilities where the only thing that is subsequently done is the thing which by the express terms of the written contract the parties had the right to do without effecting any such change. The courts have been entirely too free in considering such stipulations waived or superseded by subsequent oral transactions between the parties.

A distinction should be drawn between the various forms of these contractual provisions in this regard. A contract providing simply that no extra work shall be done except upon a written order might be considered waived, or the contractor entitled to recover upon oral transactions subsequently taking place between the parties, when upon the same transactions there should be no recovery under a contract which provides that the owner may make any desired change without avoiding the contract and requiring the additional cost to be added to the contract price, and that no bill or account for extra work shall be allowed or paid