

1952

Gibbons & Reed Company v. S. K. Guthrie; Adam K. Grafe and Robert I. Ludwig : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GIBBONS & REED COMPANY, a
Corporation,

Plaintiff,

— vs. —

S. E. GUTHRIE, ADAM K. GRAFE
and ROBERT I. LUDWIG,

Defendants.

Brief of Appellants

FILED

AUG 16 1952

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Attorney for Appellants

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

GIBBONS & REED COMPANY, a
Corporation,

Plaintiff,

— vs. —

S. Y. GUTHRIE, ADAM K. GRAFE
and ROBERT I. LUDWIG,

Defendants.

Case No.
7850

Brief of Appellants

STATEMENT

This is an action brought by Gibbons & Reed Company, a Utah Corporation, against S. Y. Guthrie, Adam K. Grafe and Robert I. Ludwig, to recover the sum of \$15,356.75 with interest from April 2, 1951.

The action was dismissed against the defendant, Robert I. Ludwig, and by order of Court, Thomas J. Bates & Sons were made parties to the suit. No service was made upon Thomas J. Bates & Sons, or either of them, and the judgment was entered against only the appellants S. Y. Guthrie and Adam K. Grafe.

The action is founded upon an alleged oral agreement between the parties but the facts, as shown by the evidence, is that the action arises out of a written proposal made by the plaintiff to the defendants (appellants) S. Y. Guthrie and Adam K. Grafe, to perform certain exploratory and development work on some uranium mining claims, situate in the Henry Mountain Mining District, Garfield County, Utah, held by appellants, under certain written agreements with one L. R. Weeks, Plaintiffs' Exhibit "A", Defendants' Exhibit "9". (Tr. 21)

Said proposal was prepared after plaintiff had examined the premises and pursuant thereto plaintiff moved certain heavy duty equipment upon the ground (Tr. 24) employed one Harold Ekker to be general foreman or superintendent and authorized him to hire the necessary labor to carry out said proposal. (Tr. 20)

Harold Ekker actually began his employment with Plaintiffs on or about February 9th (Tr. 202). At that time he discussed with George M. Jones, plaintiffs' agent the nature of his job and also on that occasion discussed the matter of the kind of equipment that would be necessary and told Mr. Jones it would take very good equipment in that out of the way area. Jones said they would send good equipment.

Notwithstanding plaintiff had examined the premises upon which said work was to be performed and well knew that heavy duty equipment in good repair would be required, plaintiff sent equipment to the job in bad state

of repair and failed to supply the necessary parts and facilities for putting said equipment in workable condition. Failure to properly repair and maintain said equipment caused repeated breakdowns with consequent frequent suspension of operations. (Tr. pages 203 to 210 inc.)

The unusable condition of the equipment was brought to the attention of Pat Gibbons, one of the owners of plaintiff's company on or about March 1st, 1951, who assured appellant Grafe the equipment would be remedied and the work proceed. (Tr. 224-225)

Gibbons failed to have the equipment repaired and on March 12th appellant Guthrie went down to the properties at Hanksville and found the tractor (Cat) broken down. The necessary parts for repair of the equipment were not on hand and thereupon Guthrie requested the Cat operator, Vearl Boyer, to go to Salt Lake City and have Robert I. Ludwig notify plaintiff to come get its equipment off the premises, that appellants would take over the operations. (Tr. 224-230)

Respondents' proposal Exhibit "A" provides inter alia "The number of days the operation is continued is, of course, your option". The estimated performance for the three operations is: (1) Four 20 ft. deep holes drilled and checked per day. (2) Four 6 ft. deep holes stripped per day, and (3) one ton of material drilled, shot and moved per man per day.

When respondents prepared and submitted said proposal set forth above they were aware that appellants

were depending on the faithful performance of the operations outlined in order that appellants could determine whether they would exercise a certain option with L. R. Weeks on April 15th obligating appellants to take possession of said mining claims and operate same or pay L. R. Weeks \$1,000 per month for a period of one year (Tr. 42).

Notwithstanding this knowledge of the urgency and importance of diligent and continuous work upon said mining properties respondents' own diary of performance Exhibit "F" shows a woeful disregard of the confidence placed in respondent by the appellants. This attitude is corroborated by the uncontradicted testimony of appellant Grafe on the occasion of his visit to the property when he found the equipment broken down and the chief Cat operator Boyer refused to continue operations with such equipment. (Tr. 126-127)

Coming now to a comparison of what respondent accomplished and what the proposal Exhibit "A" required respondent to do—attention is directed to appellants' Exhibits "1". The general summary and summary of work performed, prepared by Robert Deming, respondents' field supervisor. The data shown on these Exhibits is not contradicted by respondent—whereas, the proposal called for four 20 ft. deep holes drilled and checked per day, four 6 ft. deep holes stripped per day and one ton of material drilled, shot and moved per man per day, the evidence shows that in 225 man-days, Feb. 9th to March 18th, Appellants' Ex. "11", respondent

drilled a total of eleven holes with an aggregate of 250 feet drilled. For this performance the respondent billed appellant \$12,356.75, but when payment was refused, filed suit for \$15,356.75. The Court gave judgment for the amount billed, to-wit, \$12,356.75 with interest. Nowhere in the Findings of Fact is there any statement of how the Court arrived at the amount of the judgment.

Respondent placed in evidence Exhibit "B" in support of its claim over the objection of the appellants, but failed to substantiate most of the items contained in the Exhibit by actual delivery of performance. See Robert Deming Deposition, admitted in evidence but not identified by Exhibit designation. Pages 43, 51, 61, 69, 70.

STATEMENT OF POINTS

Appellants rely upon the following points:

Point No. 1.

The Court erred in making and entering Conclusion of Law No. 2 to the effect that:

The defendants, in breach of said agreement have never paid plaintiff for the expenses incurred under the terms of said agreement and that by reason thereof, plaintiff has been damaged in the sum of Twelve Thousand Three Hundred Fifty-six Dollars and Seventy-five Cents (\$12,356.75) plus interest at six per cent (6%) from the termination date of said contract (March 18, 1951).

Point No. 2.

The Court erred in entering in its Findings that the plaintiff was to build certain roads and trails on the property in question as set forth in No. 2, and the Court further erred in its Findings in No. 2 wherein the Court found that the plaintiff performed the preliminary and exploratory mining work with reference to the said uranium claims held by the defendants in said area in the Henry Mountains, Garfield County, Utah.

Point No. 3.

The Court erred in entering in its Findings as set forth in No. 5 that as a further condition of said agreement, the plaintiff placed on its payroll, at the request of the defendants, the necessary workmen to conduct the preliminary and exploratory mining work, all of which was done in accordance with said agreement.

Point No. 4.

The Court erred in entering in its Findings in No. 6 that the defendants in breach of said agreement refused to pay the plaintiff for the work performed.

Point No. 5.

The Court erred in entering in its Findings in No. 6 that the plaintiff from the commencement of performance of said agreement to the termination thereof had performed bona fidedly and in reasonable and complete conformance with the terms of the said agreement.

Point No. 6.

The court erred in not entering in its Findings, Conclusions and Judgment to the effect that respondent failed, neglected and refused to perform and conform to the terms and conditions of the respondent's proposal (Exhibit "A") and that respondent's conduct of its operations under its said proposal Exhibit "A" was so inefficient and ineffective by reason of worn and broken equipment and poor management that appellants were obliged to terminate said agreement and take over the operations themselves.

Point No. 7.

The Court erred in admitting in evidence over the objections of the appellants Exhibits "B" and "C", the Operating Ledger and Payroll Journal, respectively, of the respondent.

Point No. 8.

The Court erred in making and entering its judgment herein, and the whole thereof, to the effect that:

1. That the plaintiff be awarded a judgment in the amount of \$12,356.75 with interest thereon at the rate of six per cent (6%) from March 18, 1951.

Point No. 9.

The Court erred in making and entering Conclusion of Law No. 3 to the effect that:

The defendants are not entitled to any relief on their counterclaims, and that the same should be dismissed with prejudice.

ARGUMENT

POINT NO. 1.

THE COURT ERRED IN MAKING AND ENTERING CONCLUSION OF LAW NO. 2 TO THE EFFECT THAT:

THE DEFENDANTS IN BREACH OF SAID AGREEMENT HAVE NEVER PAID PLAINTIFF FOR THE EXPENSES INCURRED UNDER THE TERMS OF SAID AGREEMENT AND THAT BY REASON THEREOF, PLAINTIFF HAS BEEN DAMAGED IN THE SUM OF TWELVE THOUSAND THREE HUNDRED FIFTY-SIX DOLLARS AND SEVENTY-FIVE CENTS (\$12,356.75) PLUS INTEREST AT SIX PERCENT (6%) FROM THE TERMINATION DATE OF SAID CONTRACT (MARCH 18th, 1951).

It is the position of the appellants that the general rule is that the parties to a contract are bound to perform it according to its terms where they are sui juris, the contract violates no rule of law or public policy and no fraud or imposition has been practiced, particularly when it has been executed by the other party, although it may be difficult to determine the rights of the parties on a breach, or although the contract operates partially

or unjustly on one of the parties or entails a loss on him.
C. J. S., Vol 17, Page 930, Sec. 451.

EXCUSES FOR NONPERFORMANCE

The general rule is that, where a person by his contract charges himself with an obligation possible to be performed, he must perform it, unless its performance is rendered impossible by the act of God, see *infra* Sec. 463, by the law, see *infra* Sec. 467, or by the other party, see *infra* Sec. 468, it being the rule that in case the party desires to be excused from performance in the event of contingencies arising, it is his duty to provide therefor in his contract. Hence, performance is not excused by subsequent inability to perform, by unforeseen difficulties, by unusual or unexpected expense, by danger, by inevitable accident, by the breaking of machinery, by strikes, by sickness, by failure of a party to avail himself of the benefits to be had under the contract, by weather conditions, by financial stringency, or by stagnation of business. Neither is performance excused by the fact that the contract turns out to be hard and improvident, unprofitable or impracticable, ill advised, or even foolish, or less profitable, or unexpectedly burdensome. Likewise, the party from whom the performance is due cannot assert that performance would be of no benefit to the other party.

Page 946, C. J. S., Sec. 459.

It is the contention of the appellants that the evidence in this case clearly brings the respondent within the impact of the foregoing rule for there was no performance of respondents' proposal upon which the Court could make conclusion of law No. 2 and certainly no

performance upon which the Court could properly enter conclusion of law No. 2 to the effect that the defendants (appellants) in breach of said agreement have damaged the plaintiff (respondent) in the sum of \$12,356.75.

A cursory examination of the evidence reveals that the proposal of the respondent to give it its most favorable light was to say the least very superficially performed. This is clearly emphasized in the diary kept by Robert Deming, respondent's Field Supervisor and time-keeper, which was introduced in evidence and is a part of the record under Exhibit (not designated). Also see the testimony of appellant Adam Grafe (Tr. Pages 169 to 172, inc.).

Where one of the parties to a contract does not perform within the time specified and his performance within such time is essential, the other party is not obligated to perform his original promise and there is no right of action against such other party upon the contract, although he may be liable upon an implied promise. 12 American Jurisprudence, Page 912, Sec. 349.

The only theory upon which the trial Court could enter a judgment for the exact amount of the claim which was originally submitted by Gibbons & Reed Company to Guthrie and Grafe was full and good faith performance of the terms and conditions of the proposal. Exhibit "A" \$12,356.75 was the amount of the claim presented to Guthrie and Grafe after they had exercised their option to terminate the Company's operations at the mines.

The proposal was executed February 8, 1951. It was the first week in March before any exploration or development work was under way. The deadline at which the performance of the proposal could be of any benefit to the appellants was April 15th when appellants had to exercise or not their option with L. R. Weeks (Tr. 42). Almost 30 days had elapsed between February 15th and March 12th, the date when Guthrie and Grafe gave notice of termination of the contract. Measured in terms of tons of earth removed and footage of holes drilled by March 12th not over 10% performance of the proposal (Exhibit "A") had been accomplished yet almost 50% of the estimated cost of the 60 day operation had assertedly been expended and claim for payment submitted. It is manifest from the trial Court's findings, Conclusions and the Judgment rendered thereon that the Court would hold the appellants liable to respondent to the full extent of the estimated cost, as submitted in Exhibit "A", regardless of how much of the respondents proposal was left undone at the end of the 60 day period.

In other words the appellants as one of the parties to the contract are held and firmly bound to pay but there is no corresponding duty upon the respondent to perform in conformance with its proposal (Exhibit "A"). We have yet to find a single authority which supports the trial Court's concept of the evidence in this case or the construction given the liabilities of the parties under the contract.

Appellants submit the following authorities which without exception, emphasize the necessity of performance in contracts such as the one involved in this case.

NECESSITY OF PERFORMANCE

(Ore. 1920) Though a party cannot rescind a contract and thereafter recover damages for its breach, he can elect to treat a breach by the opposite party as terminating the contract, and thereafter recover the loss he sustained by reason of the other party's failure to perform his agreement. (Taylor v. Tripp, 191 P. 1054, 97 Ore. 611.)

(Utah, 1919) Where a contract is entire, and remains executory in whole or in part, and one party commits a breach of his duty, and the other is not in default, the latter may rescind and be relieved from further performance. (Pool v. Motter, 185 P. 714, 55 Utah, 288.)

(Cal. 1884) Where the performance of an executory contract by one party depends upon something to be previously done by the other, an action will not lie for nonperformance if default has been made in the accomplishment of the preceding act. (Peasley v. Hart, 4 P. 537, 65 Cal. 522.)

(Cal. 1905) Civ. Code Sec. 1439 declares that before any party to an obligation can require another party to perform he must fulfill the conditions precedent imposed on himself. Plaintiff and others agree to subscribe various sums to a fund to secure a lease and in pros-

pecting certain land supposed to contain mineral; it being agreed that each subscriber should own an interest proportionate to his subscription. Thereafter the owner of the land granted to plaintiff and the others the right to enter on the land to prospect and mine for a certain term, the owner to receive a royalty, or the lessees were entitled to pay a sum in cash as full consideration for their rights. Plaintiff failed to make any of his payments, and after the discovery of mineral by the others he sued for a decree declaring him to be the owner of an interest. Held, that plaintiff was not entitled to recover, he having forfeited his rights, it being immaterial whether the agreement executed by the owner was a lease or a mere mining privilege, and the statute of frauds having nothing to do with the case. (Cameron v. Burnham, 80 P. 929, 146 Cal. 580.)

(Kan. 1897) A. enters into a contract with B., by the terms of which A. agrees to furnish some new machinery and put it with the old machinery already in the mill of B., and is to remodel said mill, and agrees to change it so it will do certain things, and B. agrees to accept and settle for it when the mill fulfils the agreement of A. Held, that B. is not bound to accept and settle for it, and is not in default in the payments contracted for, until it fulfils the agreement. (1896) (Richardson v. Great Western Mfg. Co., 43 P. 809, 3 Kan. App. 445, judgment reversed Great Western Mfg. Co. v. Richardson, 47 P. 537, 57 Kan. 661.)

In the obligation assumed by a party to a contract is found his duty, and his failure to comply with the duty constitutes the breach.

Defendant was liable for breach of contract to irrigate, care for, and cultivate young pecan sprouts and trees, since such negligence was not failure to do things growing out of fiduciary relation of joint adventurers, but failure to do specific acts defendant had agreed and bound himself to do by written contract. (Lorden v. Snell, 39 Arizona 128, 4 Pac. 2d 392.)

If a contract provides for a series of acts and actual default is made in the performance of one of them, accompanied by a refusal to perform the rest, the other party need not perform, but may treat the refusal as a breach of the entire contract and may recover accordingly. It can make no difference whether a contract is partially performed. (Mobley v. New York L. Ins. Co., 295 U. S. 632, 79 L. Ed. 1621, 55 S. Ct. 876, 99 A. L. R. 1166; Roehm v. Horst, 178 U. S. 1, 44 L. Ed. 953, 20 S. Ct. 780; United Press Asso. v. National Newspaper Asso. (C. C. A. 8th) 237 F. 547, citing R. C. L.) (Lake Shore & M. S. R. Co. v. Richards, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33.)

A working contract is, in the words of Corpus Juris, "one under which work or labor is to be performed in the erection, construction or repairs of some building, edifice, structure, or other work".

The contract is to govern their respective rights, duties and liabilities, and by it these rights must be determined. (17 C. J. S. 333, Sec. 11). Utah Lumber vs. James, 71 Par. 986, 25 Ut. 434.

Contract consisted in part of certain specifications, working plans, and detail drawings.

All material was to be thoroughly kiln-dried, hand-smoothed and scraped. Was not a mere sale on inspection, was a building contract, obligating the dealer to furnish and deliver the material according to such plans and specifications.

Obligation to perform in general. (C. J. S. 930, Sec. 451.)

Performance of a contract has been defined to be such a fulfillment of its duties as puts an end to its obligation by leaving nothing more to be done. (C. J. S. 999, Sec. 494.) (McGuire vs. J. Neils Lumber Co., 107 N. W. 130, 97 Minn. 293.)

Performance of an obligation under a contract consists of the doing of the required act at the time and place and in the manner stipulated by the terms of the contract. (N. Estrada, Inc. vs. Terry Texas Civ. app. 293 S. W. 286.)

To breach a contract implies a violation of a valid and subsisting obligation. (Russel vs. Stephens, Wash. 71 Pac. 2d 30.)

Anything so material and important as to defeat the purpose of the parties is breach of contract. (J. A. D. Andrea, Inc. vs. Dodge, C. C. A. Pa. 15, Fed. 2d 1003—reversing D. C. Dodge vs. A. D. Andrea, Inc., 10 Fed. 2d 387.)

A party is guilty of the first breach who first fails to do what he is contractually bound to do. (C. J. S. 999, Sec. 494.)

Contracts for the performance of services require the exercise of good faith and integrity, and such special skill as the promisor has contracted to render. The promisor must be reasonably competent and reasonably diligent, but he is not liable for mere mistakes or errors causing incidental losses.

Where there is not a compliance as a general rule, acceptance by the owner cannot be compelled, and the builder is not entitled to recover on the contract, at least not unless there is substantial compliance, or in other words, he cannot recover where, without the consent of the owner, and to his detriment, he has substantially varied from the terms of the contract, unless there is legal excuse therefor. (Sec. 494, Page 1002.)

A builder must perform his contract according to the terms of the plans and specifications, where there are any. Ordinarily, where a contract specifically states the method of construction, type, quality and strength of materials, and goes into detail as to what is to be done and the manner of doing it, the owner is bound by what-

ever result is obtained, provided the specifications are followed. (La. Delaune vs. Granbino App., 161 So. 331 Pa.; Tate-Jones & Co. v. Union Electric Steel Co., 126 A. 813, 281 Pa. 448.)

If, however, the contract states the results to be obtained, the details and methods of construction being left to the builder's discretion, the builder is bound to produce the desired results.

POINT NO. 2.

THE COURT ERRED IN ENTERING IN ITS FINDINGS THAT THE PLAINTIFF WAS TO BUILD CERTAIN ROADS AND TRAILS ON THE PROPERTY IN QUESTION AS SET FORTH IN NO. 2, AND THE COURT FURTHER ERRED IN ITS FINDINGS IN NO. 2 WHEREIN THE COURT FOUND THAT THE PLAINTIFF PERFORMED THE PRELIMINARY AND EXPLORATORY MINING WORK WITH REFERENCE TO THE SAID URANIUM CLAIMS HELD BY THE DEFENDANTS IN SAID AREA IN THE HENRY MOUNTAINS, GARFIELD COUNTY, UTAH.

Appellants need only to refer to the language of Plaintiff's proposal in sustaining Point No. 2, for nowhere in said proposal is there a single word, phrase or clause relating to any construction of roads and trails on the property in question. Neither is there a word of testimony in the record to substantiate the finding that

plaintiff performed the preliminary and exploratory work with reference to said claims.

POINT NO. 3.

THE COURT ERRED IN ENTERING IN ITS FINDINGS AS SET FORTH IN NO. 5 THAT AS A FURTHER CONDITION OF SAID AGREEMENT, THE PLAINTIFF PLACED ON ITS PAYROLL, AT THE REQUEST OF THE DEFENDANTS, THE NECESSARY WORKMEN TO CONDUCT THE PRELIMINARY AND EXPLORATORY MINING WORK, ALL OF WHICH WAS DONE IN ACCORDANCE WITH SAID AGREEMENT.

Appellants challenge respondent to find a single word, phrase or clause in the agreement of the parties "Exhibit A" which even hints that appellants requested respondent to place anyone on respondent's payroll—the evidence shows that appellants recommended certain persons to respondent as capable workmen but neither the written proposal nor any substantial evidence supports this finding.

POINT NO. 4.

THE COURT ERRED IN ENTERING IN ITS FINDINGS IN NO. 6, THAT THE DEFENDANTS IN BREACH OF SAID AGREEMENT REFUSED TO PAY THE PLAINTIFF FOR THE WORK PERFORMED.

The evidence shows the plaintiff has not been paid for any of the work performed but nowhere is there any evidence in the record substantiating the claim of Twelve Thousand Three Hundred Fifty-six Dollars and Seventy-five Cents (\$12,356.75) which plaintiff presented to defendants on the assumption that plaintiff had fully performed all the obligations of its contract to the date of termination, to-wit, March 18, 1951.

Defendants (Appellants) could not be guilty of breach where plaintiff (respondent) was guilty of the first breach.

The proposal (Ex. A) on its face shows performance was to be completed within sixty days (60) or by April 15th, 1951. Thirty (30) days had expired of the 60 day period when appellants discovered such superficial performance of the proposal had been done as to wholly satisfy the defendants (appellants) satisfactory performance would not be accomplished in the remaining 30 days, hence defendants (appellants) terminated the contract as provided in the contract itself.

EFFECT OF FIRST BREACH.—It has been said that a party first guilty of a breach of contract cannot complain if the other party thereafter refuses to perform. Similarly, it has been said that the party who commits the first breach of a contract cannot maintain an action against the other for a subsequent failure to perform. (*Loudenback Fertilizer Co. v. Tennessee Phosphate Co.* (C. C. A. 6th), 121 F. 298, 61 L.R.A. 402.) (One who first wrongfully violates a contract has no standing

in court to recover for a violation of the contract by the other party thereto (Yazoo & M. Valley R. Co. v. Searles, 85 Miss. 520, 37 So. 939, 68 L.R.A. 715)). It has also been said that where a contract is not performed the party who is guilty of the first breach is generally the one upon whom rests all the liability for the nonperformance. (Anvil Min. Co. v. Humble, 153 U. S. 540, 38 L. Ed. 814, 14 S. Ct. 876.) It seems clear that the party first committing a substantial breach of a contract cannot maintain an action against the other contracting party for a subsequent failure to perform if the promises are dependent. (Norrington v. Wright, 115 U. S. 188, 29 L. Ed. 366, 6 S. Ct. 12. (A. J. 12, Sec. 338, Page 894.)

NEGLIGENT OR WILFUL CONDUCT.—One of the interesting questions that have arisen is whether negligent or wilful acts of the plaintiff are available as a defense. It may be said that in an action to recover damages for the breach of a contract, the contributory negligence of the plaintiff ordinarily does not preclude his recovery, as would be the case in an action of tort. Such negligence rarely releases the defendant from the obligation to perform his contract, but is always to be considered in fixing the amount of the damages,—that is, so much of the damages as is attributable to the plaintiff's negligence should be excluded from the recovery. But although there is authority to the contrary, many decisions have affirmed the rule that a wilful breach of a stipulation in a contract bars recovery by the party guilty of the breach. (A. J. 12, Sec. 339, Page 895.)

APPROVAL OF PERFORMANCE

GENERALLY.—The question what constitutes compliance with a contract which provides that the subject matter thereof shall be satisfactory to the party who promises to make compensation therefor presents two distinct questions, one being whether the latter must act in good faith in accepting or rejecting, and the other being whether he must act reasonably. As to the first there is ordinarily little difficulty. Such a contract does not make the promisor's mere declaration of dissatisfaction conclusive. It requires an honest expression as to whether he is satisfied. He should fairly and candidly investigate and consider the matter, reach a genuine conclusion, and express the true state of his mind. He must not act arbitrarily or capriciously or merely feign dissatisfaction. He cannot avail himself of his own fraud to escape liability on his contract. It is only the actual existence, not the mere expression of dissatisfaction, regardless of its reasonableness, that can have this effect. The opposite view seems, however, to be entertained by some courts. At least, the inference that the promisor's good faith cannot be inquired into seems to be justified by statements to the effect that in cases where it is stipulated that an article to be furnished shall unqualifiedly, be satisfactory to the party to whom it is to be supplied, the right to reject the article, as not being satisfactory, cannot be inquired into; but the party's own determination must be taken as final and conclusive. In such case it is supposed and such is the construction, that the party has reserved to himself an

unqualified option, and is not willing to leave his freedom of choice to any contention or to be subject to any investigation whatever. It is said that if a promisor thinks it is proper to enter into such a conditional contract, it is not for anyone other than the promisee himself to say that he ought to be satisfied; that is a matter expressly reserved to him to decide for himself, and the motive or reasons for the decision, whether reasonable or unreasonable, good or bad, are placed by the contract beyond question or investigation. (A. J. 12, Sec. 340, Pages 340-341.)

There is no substantial compliance or performance unless the work is sufficient for the purpose stated in the contract or accomplishes such result. (Dawson vs. Myers, 26 Ohio Civ. Ct. N. S. 511, 9 C. J. Page 746, Note 63.)

Owner cannot express dissatisfaction as a matter of mere caprice. (Sec. 508, C. J. S., Page 1085.)

Strict and substantial performance. Substantial performance means not doing the exact thing promised, but doing something else that is just as good, or good enough for both obligor and obligee. (U. S. Dorrance vs. Barber & Co., C.C.A. N. Y. 262 F. 489.)

There must have been an attempt in good faith to perform. (State Bank of Monticello vs. Lauterbach, 268 N. W. 918.)

The non-performance of a material part of the contract will prevent the performance from amounting to a substantial performance. (Same case as above.)

Substantial performance is performance of all important particulars. (Tex-McBermett vs. Smith & McCallin, 9 C, J. P. 743, note 40(a)).

POINT NO. 5.

THE COURT ERRED IN ENTERING IN ITS FINDINGS IN NO. 6 THEREOF THAT THE PLAINTIFF FROM THE COMMENCEMENT OF PERFORMANCE OF SAID AGREEMENT TO THE TERMINATION THEREOF HAD PERFORMED BONA FIDELY AND IN REASONABLE AND COMPLETE CONFORMANCE WITH THE TERMS OF SAID AGREEMENT.

This finding of the court is so grossly unfounded in and unsupported by the evidence in this case that it hardly seems necessary to dwell at length in examining its incongruities. Here we have a highly specialized proposal to perform three distinct and clear-cut operations, to wit:

1. Four 20-ft. deep holes drilled and checked per day.
2. Four 6-ft. deep holes stripped per day.
3. One ton of material drilled, shot and moved per man per day.

Total cost for 60 days operation..... \$26,518.00

(See Exhibit "A")

Time was of the essence of these obligations, for the plaintiff knew at the time it executed the proposal that the defendants required the information to be gathered from such operations by April 15th, 1951 in order to exercise their judgment on the option with L. R. Weeks (Tr. 42) defendants stood to be obligated to L. R. Weeks for \$1,000.00 per month for twelve months commencing April 15th, 1951, or execute the operating agreement and lease which had then been executed by defendants with said L. R. Weeks. As shown elsewhere in this brief, 30 days had expired of the 60 day period of the contract or proposal but the record discloses not more than 10% of the above specified obligation had been performed, yet the plaintiff submitted a claim for almost half of the estimated cost of the entire undertaking. How can the respondent claim under such a record of performance that its undertaking had from the commencement of performance to the date of the termination thereof been bona fidedly and in reasonable and complete conformance with the terms of the proposal. Manifestly this finding is clearly error.

POINT NO. 6.

THE COURT ERRED IN NOT ENTERING IN ITS FINDINGS, CONCLUSIONS AND JUDGMENT TO THE EFFECT THAT RESPONDENT FAILED, NEGLECTED AND REFUSED TO PERFORM AND CONFORM TO THE TERMS AND CONDITIONS OF THE RESPONDENT'S PROPOSAL (EXHIBIT "A") AND THAT RESPONDENT'S CONDUCT OF ITS

OPERATIONS UNDER ITS SAID PROPOSAL EXHIBIT "A" WAS SO INEFFICIENT AND INEFFECTIVE BY REASON OF WORN AND BROKEN EQUIPMENT AND POOR MANAGEMENT THAT APPELLANTS WERE OBLIGED TO TERMINATE SAID AGREEMENT AND TAKE OVER THE OPERATIONS THEMSELVES.

In support of Point No. 6 the appellants respectively refer to the authorities and argument presented under Point No. 4. If appellants have any standing in this Court on Point No. 4, then it must follow that this point is tenable. If appellants were entitled to substantial performance of respondent's proposal, which of course we most emphatically maintain under the terms of the proposal and the law governing the rights and liabilities of the parties, then it must follow as night the day, from the evidence in this case, that the Court should have entered a finding as set forth in this point, for if there were ever a clean-cut demonstration of feeble effort to perform in good faith the obligations of a contract it is clear as crystal in this case. If appellants did not commit a breach in refusing to honor and pay the bill presented by the respondent it was because respondent had been guilty of the first breach in failing, neglecting and refusing to perform and conform as required by its own proposal.

OPTION TO TERMINATE CONTRACT FOR UNSATISFACTORY PERFORMANCE

When so provided by the contract, one party may terminate the contract in case performance by the other is unsatisfactory. Such a provision is analogous to a provision for performance by one party to the satisfaction of the other, considered in Sec. 495 *infra*. The option to terminate the contract can only be exercised in good faith. Where a party to a contract is given an option to terminate a contract if dissatisfied, he may exercise his option without any practical or utilitarian reason where the right involved is one which is submitted to his taste or fancies, feelings, or judgment, but when it is apparent that the question of satisfaction relates to the commercial value or quality of the subject matter of the contract, it must be shown that the dissatisfaction is reasonable and well founded. Dissatisfaction under such a contract may be predicated on delay in beginning performance as well as on matters occurring during performance.

Where the contract provides that the work must be done to the satisfaction of the owner, and gives him a right to rescind if it is not done so, he cannot withhold his satisfaction unreasonably, and arbitrarily rescind the contract. An option given to the owner to discontinue the contract if he should deem that it would prove unprofitable entitles him to the untrammelled exercise of his judgment so long as he acts in good faith and with reasonable basis for his belief. (17 C.J.S., Pages 890-1, Sec. 399).

Where there is nothing to justify the contrary construction, the general rule in regard to contracts wherein one party has the right to rescind if dissatisfied is that the party to be satisfied is the judge of his own satisfaction, subject only to the limitation that he must act in good faith. (See *Van Denmark vs. California Home Extension Ass'n.*, 185 Pac. 866, 43 Cal. App. 685.

(Kan. 1898) Where an agreement requires a daily and continuous performance of the conditions of one party, and when he performs such condition he is entitled to the compensation at the end of each month, the performance of each stipulation is a condition precedent to the continuing obligation of the contract.—(1896) (*City of Osawatomie v. Mills*, 45 P. 937, 4 Kan. App. 299, judgment reversed *Mills v. City of Osawatomie*, 53 P. 470, 59 Kan. 463.).

(Nev. 1919) A party who commits the first breach of a contract cannot maintain an action against the other for a subsequent failure to perform. (*Bradley v. Nevada-California-Oregon Ry.*, 178 P. 906, 42 Nev. 411.)

(Ore. 1921) One who would recover on a contract must first show performance on his part. (*Anderson v. Wallowa Nat. Bank*, 198 P. 560, 100 Ore. 679.)

(Wash. 1901) In an action on a special contract, the plaintiff cannot recover without showing performance. (*Ingram v. Golden Tunnel Min. Co.*, 65 P. 549, 25 Wash. 318.)

MEMORANDUM—Gibbons & Reed vs. Guthrie, et al.

This memorandum is written with reference to the business records of Gibbons and Reed, and introduced in evidence at the trial.

Exhibit B pertains to what the plaintiff denominated as supervision and overhead expenses. Exhibit C is their payroll journal. Exhibit 10 is their labor summary, and Exhibit 3, a rental. Exhibits B and C were admitted at page 108 of record. My notes do not now reflect the point at which Exhibits 10 and 3 were admitted. I find no objections in the record to the introduction in evidence.

POINT NO. 7.

THE COURT ERRED IN ADMITTING IN EVIDENCE OVER THE OBJECTIONS OF THE APPELLANTS EXHIBITS "B" AND "C", THE OPERATING LEDGER AND PAYROLL JOURNAL, RESPECTIVELY, OF THE RESPONDENT.

The plaintiff brought this suit to recover money expended by it in the performance of a contract which is characterized in plaintiff's pleadings, and in remarks of counsel as an oral contract. At page 56 the plaintiff introduced in evidence a written proposal made by it to the defendants to do and perform certain types of work on certain mining claims. The proposal which is dated February 8, 1951, and which is Exhibit 9, was

that the plaintiff would do and perform three things or types of operations:

1. Drill the flat areas.
2. Ripping and stripping overburden.
3. Drifting into ore bodies.

The total cost for the performance of these three items or types of operation was put by the plaintiff in its proposal at \$26,518. In view of the position taken by plaintiff's counsel at the trial, it may be well to state in negative terms the defendants' attitude or position regarding his contract. The proposal was not that the plaintiff would rent the defendants equipment or provide them with labor and carry the labor on plaintiff's payroll, but that as stated in the proposal, which is the only evidence in the record as to the terms of the contract, to do and perform within a 60-day period the three operations set out by it in detail in its proposal of February 8, 1951, Exhibit 9. Whether the contract is, strictly speaking, an oral or written contract is immaterial. The proposal, Exhibit 9, offered and introduced by plaintiff, is the only evidence of the contract, and the case was presented and tried to the trial court on the premise that the proposal was in fact the contract between plaintiff and defendants.

In the light of the foregoing, the defendants now address themselves to the question of proof of performance by the plaintiff, of the contract—for without proof

of performance, or ability to perform, it is fundamental that the plaintiff may not recover a judgment against the defendants. The plaintiff introduced certain of its records and books of account in evidence. Counsel for plaintiff and the trial court both appeared to have assumed that the entries on the books of the plaintiff, and on other of plaintiff's business records constitute proof that the plaintiff performed the proposals set forth by it in its proposal of February 8, 1951.

The law, however, is to the contrary. We admit that books of account and business records are admissible in evidence if a proper foundation is laid. The probative value of such records is indeed another matter. The books of account and the records introduced by the plaintiff were supported only by the testimony of plaintiff's witness, Ed M. Shea, assistant secretary-treasurer of the plaintiff corporation. Mr. Shea did not testify as to the performance of work by the plaintiff, but only that he was in charge of the keeping of the records. His knowledge, so far as the record is concerned, is confined solely to the maintenance of records in the office of plaintiff, and not as to the performance or non-performance of any work in compliance with the proposal, under which the plaintiff offered to do the three matters above specified for the defendants. Whether these records were properly qualified for admission in evidence in the absence of a showing by the witness that he had knowledge that the things and matters referred to in the records were actually done and performed, is for the Court to determine. It is stated in Jones Commentaries

on Evidence, Second Edition, Vol. 4, Page 3330, Par. 1801, as follows:

“The courts have frequently expressed the opinion that shop books are quite unsatisfactory as evidence and should be subjected to close scrutiny. It has been said that books of account are received only upon the presumption that no other proof exists; that they are the weakest and most suspicious kind of evidence, and that admission of such matter is a violation of one of the first principles of the law of evidence, which is that a party shall not, himself, make evidence in his own favor.”

What is the plaintiff's evidence that within sixty days from the time that the plaintiff undertook to carry out the proposal it diligently prosecuted the drilling of the flat areas, or the ripping or stripping of the overburden, or the drifting into ore bodies? There is no evidence of due performance of the contract by the plaintiff. On the other hand, the record is replete with references to a D Cat, where it came from, the freight involving transportation, whether it would or wouldn't work, of airplane rides for which plaintiff appears to have charged defendants \$300 or \$400, and which item seems to be included in the judgment of plaintiff recovered in the trial court, even though the trial judge, at page, held that plaintiff could not recover this item.

There is other evidence as to who was bossing the job, but where is the evidence as to the amount of drilling done on flat areas, or the stripping off of the over-

burden, or the drifting into ore bodies, which were the things that the plaintiff contracted to do for defendants? There is no evidence of this in the record and the lack thereof cannot be overcome by the office records of plaintiff.

POINT NO. 8.

THE COURT ERRED IN MAKING AND ENTERING ITS JUDGMENT HEREIN, AND THE WHOLE THEREOF, TO THE EFFECT THAT:

1. THAT THE PLAINTIFF BE AWARDED A JUDGMENT IN THE AMOUNT OF \$12,356.75 WITH INTEREST THEREON AT THE RATE OF SIX PER CENT (6%) FROM MARCH 18, 1951.

In support of this Point appellants are content to refer to and request the Court to consider the argument and authorities presented in this brief under points 1, 4, 5 and 6. If, however, this Court should determine under the law and the evidence applicable to the case at bar, that the respondent is entitled to some relief it is the position of appellants under all the authority that respondent is not entitled to the amount of the judgment entered in this case, but must be content to rest its case on the principal of quantum meruit or the reasonable value of the benefits which came to appellants by reason of the operation of respondent in its effort to comply with its covenants under the proposal (Exhibit "A"). Under this theory it was the duty of the trial Court to make a finding clearly appraising

and defining the value of the benefits conferred upon the appellants arising out of the operations of the respondent from the day respondent undertook to perform to the day when appellants saw fit to terminate such operations.

POINT NO. 9.

THE COURT ERRED IN MAKING AND ENTERING CONCLUSION OF LAW NO. 3 TO THE EFFECT THAT:

THE DEFENDANTS ARE NOT ENTITLED TO ANY RELIEF ON THEIR COUNTERCLAIM AND THAT THE SAME SHOULD BE DISMISSED WITHOUT PREJUDICE.

The appellants were entitled to terminate the operations of respondent for lack of diligence and for shawdy performance. The proposal provided an option to appellants to take over any time they desired to do so, but the law requires dissatisfaction with performance to be founded in good reason and not caprice. We submit there was ample good reason for appellants to terminate respondent's operations and take charge themselves. If this be so, it follows that any damage sustained by appellants on account of respondent's failure to perform should be recouped. If the law requires appellants to pay any part of the claim of respondent the appellants should be entitled to recoup their damages as set forth in their counterclaim, and the Court erred in dismissing same. See 12 Am. Juris., Sec. 353.

SUBSTANTIAL COMPLIANCE OF PERFORMANCE

(Utah, 1908) Though a building contractor may not depart from the terms of a contract and recover as upon a quantum meruit, a substantial compliance therewith in good faith entitles the contractor to recover on the contract, with a right to the owner to recoup any damages sustained through the contractor's failure to literally comply with the contract. (Foulger v. McGrath, 95 P. 1004, 34 Utah 86.)

(Utah, 1921) Under a contract for the erection of a building according to agreed plans and specifications, the law contemplates a substantial, but not punctilious, compliance therewith; the contractor not being permitted to profit by noncompliance with the contract, nor the owner to reap the benefits of the added value to his property by reason of labor performed and materials furnished by the contractor. (Stephens v. Doxey, 198 P. 261, 58 Utah 196.)

CONCLUSION

On the basis of the points discussed herein, appellants submit that the judgment of the trial court awarding damages favor of respondent in the sum of \$12,356.75, with interest at 6% from March 18th, 1951, together with costs, is in error and should be reversed.

Respectfully submitted,

GROVER A. GILES

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