

1952

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

Utah Supreme Court

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

**GIBBONS & REED COMPANY, a**  
**Corporation,**  
*Plaintiff and Respondent,*

— vs. —

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

**BRIEF OF RESPONDENTS**

**FILED**

SEP 18 1952

**CLYDE AND MECHAM,**  
**ALLAN E. MECHAM**  
**ELLIOTT LEE PRATT**

**Clerk, Supreme Court, Utah**

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# IN THE SUPREME COURT of the STATE OF UTAH

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GIBBONS & REED COMPANY, a  
Corporation,

*Plaintiff and Respondent,*

— vs. —

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

*Defendants and Appellants.*

} Case No. 7850

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## BRIEF OF RESPONDENTS

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### STATEMENT OF THE CASE

Appellants and defendants appeal from a judgment of the Third Judicial District Court of Salt Lake County, awarding Gibbons & Reed Company, a Utah corporation, plaintiff and respondent, damages of \$12,356.75, plus interest at 6% from March 18, 1951.

The action in the lower court was founded on contract as set forth in the complaint. (R. 1)\*. Complaint alleged \$15,356.75 damages (R. 1, 2) and the evidence proved damages of \$15,383.82 (R. 285) less \$50.00 (R.

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\*Note: "R" refers to red numbers at bottom of transcript.

140) for a total of \$15,333.82. The damages consisted of expenses and costs (R. 84 & 85) incurred by the respondent in moving equipment in and out to the job in Garfield County from Salt Lake City and in furnishing supplies and materials and labor to perform said contract for the convenience of appellants (R. 69-71) for the period as set forth in the complaint. (R. 1). See exhibit B for items of expenses and costs. (R. 75, 76, 106-113, 128-145).

Respondent had the burden of proving the allegations of its complaint, all material allegations of which were admitted by appellants in its second defense with the exception of respondent's damages. (R. 5-6).

Appellants had the burden of proving the allegations of their affirmative defense. (R. 6-14).

The primary issues in the lower court were :

- a. Whether plaintiff (respondent) proved damages as set forth in the complaint.
- b. The terms of the parol agreement between the parties.
- c. Whether defendants (appellants) sustained the burden of their affirmative defense, and if so, was the affirmative defense sufficient to deny the plaintiff (respondent) recovery under the allegations, admissions and evidence supporting the proof of the complaint.

The facts as presented by appellants in their brief are not complete and accordingly respondent submits the following more complete statement of facts.



## FACTS

The respondent, Gibbons & Reed Company is a Utah corporation with 40 years experience in Utah as a heavy engineering, highway and building contractor. (R. 44, 45, 47, 48 & 180). The appellant S. Y. Guthrie is a resident of Dallas, Texas, (R. 43) with experience as a mechanical processing, piping, heating and refrigeration contractor (R. 272, 273) and knew the Gibbons & Reed Company to be a reliable general construction firm. (R. 273). The appellant Adam K. Grafe is also a resident of Dallas, Texas, also having had prior satisfactory experience with respondent (R. 180) and having had many years experience in the mining business. (R. 146).

Grafe, Guthrie and one other person, Thomas J. Bate, the latter person over whom respondent was unsuccessful in securing service of summons (R. 39, 40) were partners engaged in mining uranium in the Henry Mountain Mining District of Garfield County, Utah. (R. 39-42). This action arose over said mining venture.

The appellants entered into an agreement with respondent, which in the words of appellant Guthrie was an oral agreement (R. 43) and was neither a cost-plus, lump sum or a unit price contract (R. 44), but was an oral contract consisting of a proposal (Exhibit A), which was an estimate of ultimate costs according to appellants (Plaintiff's interrogatories, No. 4 (R. 20) and defendants' answer No. 4 in Exhibit 13). The terms of said agreement included certain preliminary road building and camp building construction in addition to an approximate schedule for drilling, drifting into ore bodies,

stripping and moving ore, (R. 196, 197 and 183, line 6, 289, 292). The ultimate objective was to enable appellants by April 15 to determine if there was sufficient ore in said claims to warrant appellants taking up an option with a Mr. L. R. Weeks for the lease and operation of said claims, (R. 153). Said proposal (Exhibit A) also listed the costs of operation for the work to be undertaken and an option allowing appellants to terminate at any time. Appellants agreed to this proposal (R. 158) without subsequent disapproval, (R. 183). Notwithstanding the absence of any reference to the production of any ore, appellants now contend that respondents are required to have produced enough ore to partly pay for the costs of the job. Even if this contention were so, respondents did produce a substantial amount of ore to partly defray the said expenses. (R. 214) (Exhibit 11).

Respondent was only interested in performing this exploratory mining work for appellants in order to put respondent in a more favored position to secure a contract for the construction of a large ore processing mill at Green River, Utah, which was being considered by appellant. (R. 52, 53, 68, 69, 70, 71, 75, 77, 78). As a matter of fact, the only motivating factor to promote respondent to such a generous offer was the prospect for additional work, from appellants. (R. 77 and 78).

Under the terms of said oral agreement, respondent, Gibbons & Reed Company, furnished the equipment for the operation, at the rental rates set forth in respondent's proposal (Exhibit A) (R. 57 and 58); said rental

rates were reasonable and below the recognized rates of the Associated Equipment Distributors, (R. 118). Respondent paid for the necessary supplies, materials and parts that went into said operation including the foodstuffs and assumed the payroll for all workmen hired by Harold Ecker. (R. 55 and 56). Appellant Grafe informed George Jones, agent for respondent, that Harold Ecker, long time resident of Wayne County, was the only really qualified person to conduct the mining operation in this Henry Mountain Uranium venture, (R. 50, 82, 83 and 84) and for this reason said Ecker was to supervise the job, hire the employees (R. 61 and 62) and all employees were carried on the payroll of respondents. Mr. Ludwig, agent of appellants instructed respondents also to place Mr. Robert Deming, a geologist, upon the payroll (R. 91 and 92). All personnel remained with appellants after the Gibbons & Reed contract terminated and its equipment removed (R. 187).

Gibbons & Reed commenced work at the request of the appellants (R. 156) on February 9, 1951. (Exhibit I). However, equipment did not move on to the job until February 19, 1951, because Gibbons & Reed was threatened with a trespass action (R. 59, 60, 233 and 234) by the Lessor of the property, L. R. Weeks. Thereafter the heavy equipment was sent to the job after having been inspected at respondent's shop at Salt Lake City, Utah, (R. 86, 103 and 104) arriving at the job on February 25, 1951. (Exhibit F).

Thereafter in accordance with said agreement the respondent, Gibbons & Reed Co. constructed, roads,

buildings, drilled test holes, ripped and stripped overburden and drifted into ore bodies, furnishing the machinery, labor and supplies therefor. That notwithstanding adverse weather and physical conditions, the respondent performed pursuant to said contract, reasonably, substantially and sufficiently to enable appellants to undertake the option with L. R. Weeks, even though appellants terminated the contract at the halfway point.

Those persons on the job from day to day all recognized that the construction of roads, buildings, stripping, drilling and production of ore was accomplished from February 9, 1951 until March 12, 1951.

Robert Deming geologist who made reports on the progress of the job stated that the work was satisfactory (Dem. dep. 62) and that respondent's equipment was appropriate, (Dem. dep. 74).

Harold Ecker, appellants' witness stated that preliminary work was accomplished including stripping, drilling and building cabins, even before the heavy D-8 cat\* of Gibbons & Reed arrived on the job. (R. 242 and 243).

Verl Boyer, the cat operator, stated that the operations were normal for such construction work. (R. 98).

Appellant Grafe himself stated that certain preliminary work was necessary and that Gibbons and Reed had performed same. (R. 196 and 197) and (R. 183, line 6).

By appellants' Exhibit 11 some 15.5 tons of ore were shipped from the job on March 19 to March 31 and that

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\*Note: Largest Caterpillar tractor manufactured with dozer blade on front end and control unit behind.

some 37.8 tons were shipped from March 31 to April 14. Contradictory to this, however, appellant Grafe stated that all ore was merely stockpiled on job from February 15 until April 15, (R. 214) and admittedly 15 tons at least was from efforts of Gibbons and Reed. (R. 214). However, since no ore was produced by appellants before April 18 (Dem. dep. 60 and 72) all of this ore shipped, totaling some 60 tons, could only have been produced by Gibbons & Reed prior to the termination of said contract on March 12.

As conclusive evidence of the completeness of the work of Gibbons & Reed is the fact that the appellants exercised their option on April 15, (R. 192), having done little, if any, work since Gibbons and Reed were ordered from the job. As stated by appellant Grafe (R. 153):

“I told them that was the essence of our wanting any work done down on the leases at all, was to give us the required information to see whether we would, within the deadline of our option (April 15, 1951) exercise such option and take over the leases.”

During the performance of the work by Gibbons and Reed, daily and current reports of the labor, supplies and material costs were sent to Gibbons and Reed, (Dem. dep. 66-69) (R. 246) and said costs were paid by Gibbons and Reed, (R. 107-112, 131, 142-144), and currently entered in the books. (Exhibits B and C).

Notwithstanding reasonable and substantial performance of the work, appellants Grafe and Guthrie visited

the job on March 12, 1951, found the D-8 cat and the large compressor temporarily not working and summarily terminated the contract. Appellants erroneously concluded that said equipment was beyond repair. The D-8 cat had only four small bolts broken, which could have been repaired in two to four hours (R. 97 and 286), and the compressor could have been repaired in fifteen minutes by letting air out of the line (R. 286). Boyer, the D-8 cat operator, a competent heavy equipment mechanic, told appellants the cause of the breakdown and requested that parts be sent for (R. 98 and 102). Harold Ecker, Adam Grafe, and S. Y. Guthrie were not mechanics, and admittedly unqualified to judge the mechanical condition of equipment. As stated by Boyer, the usual number of parts and tools were available on the job, it not being usual to have on hand on such a job every required small part, particularly the said small bolts that caused the breakdown. (R. 101). Many parts and tools were supplied. (Dem. dep. 37).

Had the appellants been interested in continuing the job with Gibbons and Reed, they could have phoned from the C.A.A. field for the missing parts or could have instructed Boyer on his trip to Salt Lake City to procure the parts. Appellants declined to follow this approach. (R. 276 and 210).

Thereafter on the 14th day of March, 1951, Gibbons and Reed was notified that their entire operation would be discontinued as of March 18, (R. 64), and the appellants would get their own equipment to use down on the job. (R. 65). Appellants then acquired a D-6 cat from

Bates, one of the partners which arrived on the job April 8 and a traxcavator which arrived on the job April 18, both pieces of equipment being new and both pieces of equipment broke down several times delaying the job. (R. 203, 204), (Dem. dep. 63, 64). Appellants continued Ecker and all of the employees on their payroll. Appellant's expended less man hours from March 19 until April 14 than Gibbons & Reed expended from February 8 to March 12, the date of termination. As stated by Deming, (Dem dep. 60 and 72) appellants did not get into full swing until April 18, 1951, and that no ore was produced by appellants until July, 1951. Because of the great delay from March 12 to April 8, most employees thought the job was folding up. (Dem. dep. 60). However, the appellants exercised their option with L. R. Weeks on April 15, 1951, which proved the performance by Gibbons & Reed was satisfactory.

The facts may be accurately summarized as follows:

Gibbons & Reed pursuant to an agreed schedule of costs undertook at the request of appellants certain preliminary and exploratory work for appellants to enable appellants to determine the feasibility of taking up an option with L. R. Weeks on the subject mining claims. Notwithstanding inclement weather, a threat of trespass action, the necessity of building roads and buildings, respondent Gibbons & Reed Company had within one-half the allotted 60 day option time drilled, stripped and drifted sufficiently to allow appellants with very little, if any, additional work to exercise their option, thereby

accomplishing the object for which the work was undertaken.

Appellants benefited by respondent's work without one cent reimbursement to Gibbons & Reed for costs expended. Appellants terminated said contract at a point when Gibbons & Reed had substantially accomplished its purpose. Appellants then attempting to relieve themselves of their obligation to pay claimed, unjustifiably that Gibbons & Reed's equipment was no good and that respondent had failed to perform satisfactorily. As a matter of fact, appellants' new equipment which also broke down was not on the job long enough to do any good before April 15. Appellants exercised their option upon the basis of work accomplished by Gibbons & Reed.

With the foregoing factual background respondent now answers each point cited as error by appellants.

However, it is noted that appellant does not challenge the conclusions of law of the trial court, but objects only to the facts as found by the trial court. It is axiomatic in appellate practice that the province of the appellate court is not to try the facts, but rather is to test the issues of law. The general rule being stated thusly in 5 *C.J.S.* 550:

“\* \* \* questions of fact in actions at law are to be tried and determined in the court of original jurisdiction and not in an appellate court exercising strictly the functions of a court of review, which is in general limited to the correction of errors of law. The probative force of evidence is



for the consideration of the triers of the facts in the court below, and the appellate court ordinarily cannot consider the weight of the evidence. Similar expressions of the general principle stated are that questions of fact determined below will not be disturbed on appeal where the evidence is conflicting, where there was evidence sufficient to go to the jury, where the evidence supports the action of the court below in either one of two ways, and where no injustice appears, and the rule applies notwithstanding a finding of fact is apparently against the weight or preponderance of the evidence, that different minds might arrive at opposite conclusion on a consideration of the evidence or that a mere difference of opinion between the reviewing court and trial judge or the jury on the weight of the evidence exists; \* \* \* Where there is any admissible or competent substantial evidence on the whole record or reasonable inference therefrom to support the fact determined in the lower court, the fact so determined will not be disturbed on appeal."

In *Walker Bros. v. Int. Milling Co.*, 65 Utah 340, the Court stated:

"This is a proceeding at law, and therefore we can examine into the evidence only for the purpose of determining whether there is some substantial competent evidence in support of every material and controlling finding."

Other Utah cases:

*Angerman Co. v. Edgemon*, 76 Utah 394;  
*Robinson v. Thomas*, 75 Utah 446;  
*In re Yowell's Estate*, 75 Utah 312;

*Knight v. Wessler*, 67 Utah 354;  
*Sierra Nevada Mill Co. v. Keith O'Brien Co.*,  
48 Utah 12.

Respondent contends that for the most part appellant's appeal seeks to retry the facts heretofore determined by the lower court and that upon the showing of some substantial evidence supporting each of the Findings of Fact objected to by appellant, that appellant's appeal should be denied.

#### APPELLANTS POINT NO. I

#### THE SUFFICIENCY OF CONCLUSION OF LAW NO. 2, to-wit:

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).

Appellants predicate their case on appeal upon a lack of performance by respondent constituting such a complete breach of contract that respondent should not even recover their costs incurred. An examination of the evidence in the record shows conclusively that respondent performed in complete accordance with the agreement, up to the point when appellant abruptly and without reasonable cause terminated respondent's activities

when only one half of the 60 day option period had elapsed. The evidence further shows that the appellants exercised their option with L. R. Weeks within the 60 day period prior to April 15, 1952, notwithstanding that from March 12 until April 15, appellants accomplished little if any work. The exercise of said option was the very purpose of the exploratory work undertaken by Gibbons & Reed for appellants.

The evidence shows that Gibbons & Reed proposed to do the exploratory and preliminary work for appellants, the cost basis for which was set forth in a proposal, (Exhibit A). Said proposal included an estimated schedule for drilling, stripping and drifting into ore bodies, all of which was to be accomplished subsequent to removal of overburden, construction of roads, camp facilities, etc. This work was to determine if further production of ore would be feasible and also to determine if appellants should exercise their option with L. R. Weeks. Said work included by reason of necessity, the construction of roads and buildings on said claims. (R. 196, 197 and 183, line 6). (R. 289, 292). The workmen were hired by Harold Ecker who was recommended for employment by appellants. All workmen were paid by Gibbons & Reed as a convenience to appellants and as part of the cost of operating said project. (Dem. dep. 36) (R. 50, 56).

Work commenced on the project prior to the arrival of Gibbons & Reed's heavy equipment. (R. 242, 243). Gibbons & Reed's heavy equipment arrived on the job February 19. A threatened trespass action by L. R.

Weeks prevented earlier delivery of said heavy equipment. (R. 59, 60, 233 and 234). The work of building roads, camp buildings, drilling, drifting and stripping was carried forward until terminated March 12, 1951. (R. 242, 243, 98, 196, 197, 183 line 6, 292).

Admittedly some 15.5 tons of ore were produced by Gibbons and Reed, (R. 214) and some additional 37.8 tons were shipped off the job which could only have been produced by Gibbons and Reed, (see Exhibit 11 of appellants) (Dem. dep. 60, 72).

On April 15, 1951, appellants by reason of the work of Gibbons & Reed, exercised their option with L. R. Weeks, thereby fulfilling the object of their agreement with respondent. (R. 192, 153).

Appellants thus received the benefit of Gibbons & Reed's performance without damage. Appellants did not introduce evidence of damage sustained.

Appellants claim that Gibbons & Reed did not drill as many holes per day, as allegedly required in its proposal, *Exhibit A*. As a matter of fact, the proposal states that the number of holes and amount of drilling was only an estimate presumably to be accomplished subsequent to completion of the preliminary work. But certainly as admitted by appellant Guthrie, this was not a unit price or lump sum contract for the drilling of a certain number of holes, (R. 43) payment to be made per hole drilled. Yet appellant uses this false criteria as a means of alleging failure of respondent to perform.

Respondent went down on the job in the middle of winter, built camp buildings, and roads necessary for the

job and then commenced the moving of the ore and commenced the drilling, deriving from its efforts considerable ore and of such quality that appellants felt safe in taking up its option to further produce said ore.

Respondent undeniably performed according to the terms of the agreement, in a reasonable and bona fide manner, and by such performance did not breach its contract as alleged by appellants. The lower court so found and should only be reversed for a gross misapplication of these facts to the law.

Respondent seeks recovery only for those expenses and costs actually and reasonably incurred in the performance of the contract, all of which resulted in a benefit to appellants. No profits are claimed.

The contract is clearly one terminable at the will of appellants. However, even a contract terminable at will must be determined with reasonable cause. The law appears quite uniform in allowing recovery in a case such as this where one party may and does terminate the contract after the other party has partly performed. The element of recovery allowed is the expenditures in the preparation and in the performance of the contract or a part thereof. Respondent in seeking recovery according to the terms of the agreement is in effect merely seeking recovery for the amount under the contract, said contract being merely a cost basis upon which the actual costs were determined and incurred. Respondent worked a certain period at the rates listed in the agreement and when the contract was terminated, the costs at these rates

had accrued to a certain amount, which is the sum sought in this recovery.

The fundamental principle applicable to services rendered or the supplying of goods is stated in *Vincent v. Palmer*, 19 A. 2d 183 (Md.) :

“It is true that a hiring at will can be terminated at the pleasure of either party. But after an employee has rendered services under an express or implied contract, he is entitled to recover for the services he has rendered.”

And as stated in *Corpus Juris Secundum*, Contracts No. 404 :

“Where under the contract a party may terminate it at his option he is not liable after termination for further transactions thereunder, but obligations which have already accrued are not affected.”

Further authorities upholding respondent's position are cited as follows :

*Mile v. California Growers Wineries*, 114 P. 2d 651, (California) :

“When a contract for continuing services is terminated after they have been rendered pursuant thereto, the employer is nevertheless liable for the services already performed \* \* \*”

“A contract for services or commodities cannot be terminated so as to avoid liability for services or commodities already furnished.”

*U. S. v. Frank A. Beharn*, 110 U. S. 329 28 Law Ed. 168:

“The party who voluntarily and wrongfully puts an end to a contract and prevents the other party from performing it, is estopped from denying that the injured party has not been damaged to the extent of his actual loss and outlay fairly incurred.”

Please refer also to *Katz v. Bedford*, 19 Pac. 523, 1 L.R.A. 826 (California) wherein it was held that even where the contractor wilfully failed to perform he could recover for his expenditures upon a basis of quantum meruit since the contract was a divisible one. This case merely shows to what extent the courts will go in allowing recovery for work and expenditures already incurred. Respondent did not wilfully fail to perform, and the evidence so shows.

It is clear therefore that upon a termination of the contract under an option to terminate, the promisee must reimburse the other party for his expenditures incurred in performing to the extent performance was permitted before termination. Such is the theory of this case.

However, disregard for the moment the option to terminate and assume that respondent had breached the contract by not performing as fully as it should. The cases clearly hold that even though the party performing the construction or supplying the materials has not complied with the contract in full, but has substantially performed the contract he should be reimbursed for his contract price, less damages to the other party. Of

course these cases for the most part envisage an entire contract, not one terminable at will. But the principle is nonetheless applicable to the instant case on appeal.

The measure of damage to appellants under all available law would only be the amount of loss sustained by appellants, but in this case there is not one scintilla of evidence indicating a loss of any kind sustained by the appellant. Had respondent breached this agreement, appellant could have then completed the contract either by using their own forces or by entering into another contract with a new contractor and could have billed the respondent for the amount expended over and above the original contract price. This later alternative, customary in the construction industry and under contract law, admittedly was not done by the appellants.

Under any theory advanced by the appellants and even assuming the respondent breached its part of the agreement, the respondent is still entitled to recover the amount expended both in preparation for the contract and the amount expended in the actual performance of same, less the damage to the appellants. Since appellants omit all evidence and proof of damage, it would appear that the trial court properly ruled that the respondent was at least entitled to its costs and expenditures in conducting and promoting the work for the appellants.

The facts clearly indicate, however, a complete and substantial performance by respondent until the contract was terminated by appellants.

In *Woodward v. Fuller*, 80 N. Y. 312, the New York Court of Appeals, after pointing out that under the old



rule ordinarily a contractor who has not fully performed his contract cannot recover the compensation provided for in the contract, states at pages 315 and 316:

“That there has been a relaxation of the rule, and now on such a contract there may be a recovery without a literal or exact performance of it. It is now the rule, that where a builder has in good faith intended to comply with the contract, and has substantially complied with it, although there may be slight defects caused by inadvertence or unintentional omissions, he may recover the contract price, less the damage on account of such defects. The defects must not run through the whole nor be so essential as that the object of the parties, to have a specified amount of work done in a particular way, is not accomplished. (*Phillips v. Gallant*, 62 N.Y. 264).”

What constitutes substantial performance has been a fruitful source of litigation. Substantial performance is performance except as to unsubstantial omissions with compensation therefor. Where the omission is slight and unintentional, in order to prevent the hardship of a failure to recover even for that which was well done, compensation is substituted pro tanto for performance. The rule is that where a builder has in good faith intended to comply with the contract, and has substantially complied with it, although there may be slight defects caused by inadvertence or unintentional omissions, he may recover the contract price, less the damages on account of such defects. *Spence v. Ham*, 57 N.E. 412, 51 L.R.A. 238. *Crouch et al v. Gutmann*, 134 N.Y. 45, 31 N.E. 271. Slight and in-

significant imperfections or deviations may be "overlooked, on the principle of de minimis." *Van Clief v. Van Vechtem*, 29 N.E. 1017 and 1019.

While it is difficult to state what the term substantial performance or substantial compliance as applied to building construction contracts means, it seems that there is substantial performance of such a contract where all the essentials necessary to the full accomplishment of the purpose for which the thing contracted for has been constructed or performed with such an approximation to complete performance that the owner obtains substantially what is called for by the contract. Imperfection in matters of detail which do not constitute a deviation from the general plan contemplated for the work and do not enter into the substance of the contract do not prevent the performance from being regarded as substantial performance. See Section 42, *American Jurisprudence*, page 31, volume 9.

In determining whether or not the contract has been substantially performed controlling importance has in some decisions been given to the cost of remedying the omissions, defects, and deviations as compared to the contract price of the whole work. See Annotation L.R.A. 348, and 349.

The true measure of recovery is the sum stipulated in the agreement less the damages sustained by the failure strictly to perform. *Woodruff v. Hough*, 91 U.S. 596, 23 N.E. 322; *Hammaker v. Schleigh*, 147 Atlantic 790, 65 A.L.R. 1285; *Jacob and Youngs v. Kent*, 129 N.E. 889, 23 A.L.R. 1429; *Pelletier v. Masse*, 143 Atlantic 609, 38

A.L.R. 1377. Damages recoverable by the owner for delay in performance of a building contract are ordinarily the amount of earnings or rentals lost. *Hammaker v. Schleigh*, 147 Atlantic 790, 65 A.L.R. 1285. Where the defects are remedial without taking down and reconstructing any substantial portion of the building, the amount of deduction from the contract price to which the owner is entitled is the expense of making the work conform to contract requirements, *Walsh Construction Co. v. Cleveland*, 271 Fed. 701; *Havorty Co. v. Jones*, 197 P. 105; *State v. Riddle*, 184 P. 443; *Gove v. Island City Mercantile & Mill Co.*, 17 P. 740; *Edmond v. Wellings*, 110 P. 533. See 65 A.L.R. 1285, *Hammaker v. Schleigh*:

“The measure of recovery in case of substantial but not exact performance of a building contract where there has been no wilful breach going to the essence of the contract, but there have been comparatively slight omissions and defects in performance which can be readily ascertained, measured, and compensated in damages is the contract price less whatever sum shall be required to complete the work.”

A building contractor who in good faith has performed all that the contract requires although not at the time or in the manner required is entitled to compensation for the fruits of his material and labor received by the owner, *Hammaker v. Schleigh*, 147 Atlantic 790. At page 34 of volume 9, American Jurisdiction, it is quoted:

“In accordance with the general rule a party to a building and construction contract who has

performed part of it according to its terms, but is prevented by the other party from performing or completing the contract, may recover compensation for the work performed and the materials furnished, *Chicago v. Tilley*, 103 U. S. 146; *Valente v. Wineberg*, 67 Atlantic 369; *Weis v. Devlin*, 3 S.W. 726."

Forfeiture clauses in building and construction contracts are usually strictly construed against the owner and usually a mere delay in the progress of the work will not justify a forfeiture, *Brady v. Oliver*, 147 S.W. 1135. The contractor does not, under all forms of contract, forfeit his right to recover the contract price for construction of the building by the fact that the owner takes possession and completes it under the terms of the contract because of the contractors delay, Page 35 American Jurisprudence, volume 9. See also page 37 A. J., volume 9, quoted as follows:

"It appears to be a well settled rule that if a contractor agrees to do certain work within a specified time, and he is prevented from performing the contract by the act or default of the other party or by the acts of persons for whose conduct the latter is responsible, the delay thus occasioned is excused and the contractor may not be held liable under the provisions for liquidated damages or otherwise for his non-compliance with the terms of the contract."

The American courts are united in holding that a substantial performance of a building contract will support a recovery either on the contract or a quantum mer-

uit basis, *Omaha v. Hammond*, 94 U.S. 98; *Woodruff v. Hough*, 91 U.S. 596, and numerous other citations found on page 30 of volume 9, paragraph 40, A.J.P. At page 30 of volume 9, American Jurisdiction, there are apparently three reasons given for the rule that a substantial performance of a building contract will support recovery. The first is that the work on a building is such that even if rejected, the owner of the land receives the benefit of the contractor's labor and materials which is not the case where a chattel is constructed as the chattel may be returned. Since the owner receives the fruits of the builder's labor, it is deemed equitable to require the former to pay for what he gets. *Jacob and Youngs v. Kent*, 129 N.E. 889, 23 A.L.R. 1429; *Leonard v. People's Tobacco Warehouse Co.*, 122 S.E. 678. See Annotation 24 L.R.A. 327 and 328. The second reason is that it is next to impossible for a builder to comply literally with all the minute specifications in a building contract, *Glacius v. Black*, 50 N.Y. 145. The third reason is that the parties are presumed to have impliedly agreed to do what is reasonable under all circumstances with reference to the subject of performance, *Spence v. Ham*, 57 N.E. 412, 51 L.R.A. 238.

It has been generally, though not invariably, held that the rule which permits recovery in case of substantial performance applies even though the contract requires the work to be performed to the satisfaction of the owner, his architect, or other representative, since his judgment in the matter is to be exercised reasonably and not arbi-

trarily. *Erickson v. Ward*, 107 N.E. 593. Then quoting A.J. at page 31, volume 9 as follows :

“Since the rule permitting a recovery in case of substantial performance of a building contract is based on equitable considerations, it is usually stated as essential to its application that the contractor must have acted in good faith and have unintentionally failed.”

Gibbons & Reed, respondent, clearly acted in good faith and substantially performed the terms of the agreement. The foregoing cases are cited for the general principle of recovery for partial performance of the terms of a contract.

Appellant assumes a breach by respondent, when as a matter of fact the lower court found that there was no such breach. Aside from the general comment that appellants authorities are inapplicable because based upon a breach, which alleged breach is entirely lacking in the present case, respondent makes the following observations about the authorities cited by appellants:

On page 9 of appellant's brief, appellants contend that respondent falls under a quoted section of C.J.S., page 946. Respondent does fall under said rule, but only to the extent of having its performance rendered impossible '*by the other party.*' It should be noted that appellants interrupted respondent's performance at just the half way point in the proposed 60 day period, claiming that respondents could not finish the necessary work within the next 30 day period. Appellants alarm was not well founded, since appellants with the same supervisor,

Harold Ecker, with the same employees, with no large cat until 7 days before the end of the 30 day period, (said cat during said 7 days breaking down several times and delaying the job), with no traxeavator until after the April 15 deadline, with appellant Grafe's own admission that less hours were put on the job after respondent was terminated than prior thereto (R. 208) and finally with the uncontroverted evidence that appellants did not get into full swing until after April 18, and did not produce any ore on their own until July thereafter. Notwithstanding the above factors appellants determined they should accept the option on April 15.

There could not as a matter of law have been an actual breach until after the 60 day period had elapsed and appellants had determined that respondent's performance at that time was insufficient. Nor could there have been an anticipatory breach at the time of termination, since such a breach must be by affirmative acts of performer indicating clear intention to renunciate or indicating substantial performance of his contractual duties impossible, or apparently impossible. (Restatement of Contract, Vol. 1, Section 318 (c) .) Assuming without basis of fact, that respondents did not completely perform:

“It is not every partial neglect or refusal to comply with the terms of the contract by the builder which will entitle the owner to rescind, but the default must be substantial, and of such a character as indicates an intention on the part of the builder to abandon the contract; there must be an actual default, unequivocal renunciation, or legal

disability to perform on his part." 17 *C.J.S. Contracts* 908.

Appellant's reference on page 10 of his brief to 12 Am. Jur. 912, is not applicable, since respondent was not given the opportunity to perform the full sixty days.

The cases cited on pages 12, 13, 14, 15 and 16 of appellants' brief it is true probably state adequate general rules of law, yet said authorities do not assist in the determination of the rights under appeal in this case, either because they are not in point factually or on principle of law.

By way of summary therefore of respondent's answer to appellant's point No. 1, respondent alleges that the evidence shows that respondent pursuant to an agreement with appellants, arising out of respondent's proposal, performed the preliminary work of building camp roads and buildings, stripping, drilling and removing of ore at the Henry mountain claims; that appellant had the option of terminating said agreement at any time; that appellants did so terminate and are liable to respondent for the expenditures of respondent, incurred in its performance; that respondent did not breach the agreement since respondent was not given time to finish the work; that appellants did not have cause to terminate said contract on grounds of failure of the performance of respondent, since the purpose of exploratory work was easily ascertainable upon the work of respondent up to the time of termination or shortly thereafter with little if any additional work, and was therefore not an impossibility as is re-



quired for rescission or a claim of anticipatory breach. Therefore Conclusion of Law No. 2 as determined by the trial court is not reversible, nor is the findings of fact supporting said conclusion reversible.

## APPELLANT'S POINT NO 2

THE SUFFICIENCY OF FINDINGS OF FACT NO. 2, to-wit:

(THAT THE PLAINTIFF) WAS TO BUILD CERTAIN ROADS AND TRAILS (ON THE PROPERTY), (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.

In answer to appellant's Point No. 2, it is well to again note, that it is the province of the trial court to determine the facts, their probative value and their sufficiency. It is not the province of the appellate court to retry the case, but merely to determine if there is substantial evidence, whether conflicting or not, to support every material and controlling finding. Therefore respondent in answer to this point respectfully refers to the record replete with evidence supporting this Finding of Fact.

The following testimony by appellant Grafe is substantial evidence supporting this Finding of Fact: Pertinent portions from the record, (R. 196-198):

Mr. Meeham

"Q. Now, you knew when you came to Utah, that there was certain preliminary work that

would have to be done with reference to this operation down there, didn't you?

A. Yes, sir.

Q. And you asked the Gibbons and Reed Company to do this preliminary work for you, didn't you?

A. Well, I would like to have that made a little more clear.

Q. Did they do any preliminary work with reference to that operation down there?

A. To the mining claims?

Q. Yes.

Q. They did the preliminary work on the laboratory tests for you?

A. Yes.

Q. Let me rephrase that question for you; see if I can make it a little more clear: Now, you knew before the actual production of ore took place down there that there would have to be some preliminary work done in that area; perhaps building of bunkhouses and roads, maybe, into certain claims, and so forth; you knew that type of preliminary work had to be done, didn't you?

A. Yes.

Q. Just answer the question: Do you know whether or not the Gibbons and Reed Company did that preliminary work for you?

A. They did some.

Q. That's what I wanted; you knew bunkhouses had to be built, didn't you, or did you?

A. Well, I assume so, yes.

Q. Would this refresh your memory—this agreement of March 8, indicating the building and equipping bunkhouses and equipping 'chow-

house.' Did you have that understanding with Gibbons and Reed?

A. Yes."

Please refer to the following additional evidence in this regard:

Appellant Grafe's testimony, (R. 208 and 183);

Harold Ecker, the supervisor on the job, (R. 242, 243).

Appellant's agent Ludwig, (R. 289).

Appellant Guthrie stated that said contract was an oral contract, (R. 43).

Mr. Jones was sent on a preliminary trip down to the claims at the request of appellant Grafe, (R. 54).

Engineer Robert Deming, who was on the job all of the time testified as to the preliminary work, (Dem. dep. 62).

It is apparent from the above evidence that the oral agreement the subject of this case included the construction of the necessary roads and campbuildings, and that therefore the trial court's finding in this regard is not so grossly erroneous as is necessary before the appellate court can assume the burden of determining the facts.

### APPELLANT'S POINT NO. 3

THE SUFFICIENCY OF FINDINGS OF FACT  
No. 5, to-wit:

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 EX-

PLORATORY MINING WORK, ALL OF WHICH WAS DONE IN ACCORDANCE WITH SAID AGREEMENT.

Answer to appellants point No. III is found in appellants answer, paragraph four (R. 5) wherein they admit the allegations of respondents complaint, paragraph three (R. 1).

#### APPELLANT'S POINT NO. 4

THE SUFFICIENCY OF FINDINGS OF FACT  
No. 6, to-wit:

THAT THE DEFENDANTS IN BREACH OF SAID AGREEMENT REFUSED TO PAY THE PLAINTIFF FOR THE WORK PERFORMED.

Appellant complains that respondent breached the contract first and that appellants could not thereafter be guilty of a breach. As pointed out under respondent's argument under Point I, appellants cannot claim a breach of the agreement by respondent since appellants, 30 days before completion time, prevented respondent from continuing performance. Appellants cannot claim an anticipatory breach as shown under Point No. I. Appellants cannot claim an abandonment of the performance by respondent since the very elements thereof are lacking.

"To permit an abandonment, it is necessary that the failure of performance go to the substance of the contract, and it would seem that, where there is no distinct refusal by the party in default to be bound by the contract in the

future, his conduct must be such as to show that he does not intend to fulfill its obligations. However, the default need not be such as to defeat the whole purpose of the contract." 17 C.J.S. 980.

"Strictly an "anticipatory breach" of a contract is one committed before the time has come when there is a present duty of performance, and it is the outcome of words or acts evincing an intention to refuse performance in the future." 17 C.J.S. 973.

See also *Sinclair Refining Co. v. Costin*, 116 S.W. 2d 894.

Prior to the end of the 60 day period, i.e., April 15, there could have been no breach of the contract. "*A contract may be conditioned to be executed or a debt may be made payable at a future time, and here the specified time must elapse before the performance of the contract or the debt becomes absolutely due.*" 17 C.J.S. 938.

It is uniformly held that where performance is to be done by a certain time, the performance need not be apportioned equally over the whole period, just so the performance is complete on the last day, hour or minute, set as the time limit. See *Hale v. Trout*, 35 Cal. 229 and *Lone Star Salt Co. v. Texas Short Line R. Co.*, 90 S.W. 863, 3 L.R.A.N.S. 828, and *Oriental Trading Co. v. Houser*, 151 P. 242, 87 Wash. 184.

In view of the above argument and authorities, it is readily apparent that respondent committed neither a breach nor anticipatory breach at any time. Time for

payment in a contract where the time is not specifically designated is legally inferred to be at the completion of the work. *Lavan v. Cowan*, 291 P. 877, *Gustafson v. Cullen*, 283 P. 1087. Therefore, since payment has not been received (R. 67) appellants are in breach of their implied agreement to pay for the services rendered by Gibbons & Reed.

Appellants on page 20 of their brief make reference to negligent and wilful conduct. In as much as there is nothing in this case concerning either negligence or wilful breach, said reference is not in point.

Appellant makes reference on page 21 to approval of performance. Respondent does not question the right of appellant to terminate the contract. The contract was so entered into with that understanding. The agreement was entered into with the express option that appellants could at any time stop performance by Gibbons & Reed. Appellants, however, cannot terminate said contract and then unjustifiably claim that Gibbons & Reed breached the contract, and thus should not be paid for their expenses.

Therefore, appellants argument on page 21 does not have any particular application to the instant problem.

In summary therefore it may be stated that the lower court was clearly justified in law and fact in entering its findings of Fact No. 6.

## APPELLANT'S POINT NO. 5

THE SUFFICIENCY OF FINDINGS OF FACT  
No. 6, to-wit:

"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."

For the most part the answer to appellants point No. 5 is found in respondents answer to appellants point No. 1. However, brief comment should be made upon counsel for appellants statement: "Here we have a highly specialized proposal to perform three distinct and clear-cut operations, to-wit:" \* \* \* This statement does not conform to appellants testimony and answers to interrogatories set forth in the record.

Appellant Guthrie stated that the contract was an oral agreement (R. 43) and it was not a unit price or lump sum contract. Further, appellants in their answers to plaintiff's interrogatories, claimed said proposal was an estimate, question 19:

- "Q. Was there any item listed in your Exhibit A to which defendants did not agree? (R. 21).  
A. Defendants did not agree on any item in the proposal but merely relied upon the proposal as an estimate of ultimate costs." Exhibit 13.

The wording of the written proposal itself, shows that the number of holes, etc., is an estimated perform-

ance (Exhibit A). Notwithstanding the above facts, appellant now attempts to make this Exhibit A the only part of the contract, and in direct contradiction to its terms attempts to make this a contract for a certain sum of money for the drilling of a certain number of holes. Appellants' position in regard to the contract appears to vacillate at will and in accordance with the desired result of the minute.

Proposal Exhibit A, as has been heretofore shown by the evidence, was a cost basis upon which the costs of the operation could be predicated. Respondent commenced such operation, incurred costs such as rental rates and labor and material costs before being terminated by appellants, and now makes demand upon appellants for its costs incurred in accordance with the agreement and the rates included therein.

There is no question but that all parties concerned knew of the purpose of the agreement between appellant and respondents; that purpose being the determination of the advisability of exercising an option concerning said claims on the 15th day of April. As heretofore pointed out under the answer to point No. 1 and point No. 4, appellants determined the advisability of exercising the option, almost entirely upon the results of the work done by Gibbons & Reed. There is substantial evidence supporting this Finding of Fact and under the law heretofore cited under respondent's answer to points 1 and 4, appellants position under this point is not tenable.



## APPELLANT'S POINT NO. 6

"THE ALLEGED ERROR OF THE TRIAL COURT IN NOT ENTERING A FINDINGS OF FACT, CONCLUSION AND JUDGMENT TO THE EFFECT THAT RESPONDENT FAILED, NEGLECTED AND REFUSED TO PERFORM UNDER PROPOSAL (EXHIBIT A) AND THAT RESPONDENTS CONDUCT OF ITS OPERATIONS WAS SO INEFFICIENT AND INEFFECTIVE BY REASON OF WORN AND BROKEN EQUIPMENT AND POOR MANAGEMENT THAT APPELLANTS WERE OBLIGED TO TERMINATE."

In answer to appellants point No. 6, respondent contends that this alleged finding which appellants desire the Supreme Court to insert is not within the province of an appellate court but rather is a matter for the trial court. Further, this alleged finding is obviously in direct contradiction to those Findings of Fact which the lower court did find in the trial of this case to be substantially supported by sufficient evidence and which findings respondent has discussed previously in this brief. Therefore the requested Finding under this point No. 6 is without basis unless all of the Findings of the lower court are reversed.

However, brief answer, at the risk of repetition, shall be made concerning appellants reference to worn and broken equipment and poor management. It is believed that ample answer has heretofore been made to that portion of appellants' point referring to failure, neglect and refusal to perform.

Appellant has attempted to use for an excuse for terminating the contract and taking it over themselves, the fact that on March 12, when appellant visited the

job, the D-8 cat and the air compressor were broken. Appellants predicate their position on the false assumption that equipment should not break down at all on such an operation as this. Respondent, however, contends that on all jobs there is the probability that the equipment shall need repairs. This is borne out by the fact that even the new equipment which appellants brought onto the job broke down several times in the short week it was on the job prior to April 15 (Dem. dep. 63). When the cat and compressor broke down on March 12, Mr. Boyer, the heavy duty equipment mechanic asked for permission to procure the parts (R. 102), knowing that it would only take a short time with the parts and to repair the cat (R. 115, 116). Appellants refused to send for the parts (R. 114), or to request Gibbons & Reed to make the repair. The air compressor only required fifteen minutes to repair (R. 286). The usual parts were on hand for such a construction job, according to the testimony of said mechanic and according to Mr. Deming. (R. 101, 115, 116) (Dem. dep. 37).

Apparently Mr. Ecker, who as is evident, was not familiar with a D-8 cat nor who was not a mechanic (R. 249, 250), Mr. Guthrie, who admittedly was a refrigeration engineer (R. 273) and apparently was not familiar with the cat (R. 275), and had not been on the job before (R. 274), and Mr. Grafe, who did not know the necessary parts (R. 175), all were on the job March 12 and seeing the cat broken down, ordered the job stopped, not knowing the extent of the repairs needed and not being concerned therewith. Both Mr. Boyer

and Mr. Deming testified that the operations with Gibbons & Reed equipment were normal for such a job. (R. 98, 115) (Dem. dep. 62).

The D-S cat had been inspected at the Salt Lake shops of Gibbons & Reed, having just come from a job where it was being used in Washington. (R. 104).

From the above evidence the lower court correctly found that the respondent supplied proper equipment for the job and in so doing performed the contract bona fidedly until stopped by appellants.

Appellants contention of poor management is entirely inconsistent with the facts in the case and in particularly with the testimony of appellants themselves, and therefore said contention is without any basis whatsoever, either factual or inferential.

Appellant Grafe himself testified that appellants had no complaint with the personnel (R. 188) and in fact retained all personnel, including the Eckers, Deming and laborers on the job. (R. 244, 158, 184), (Dem. dep. 37). The supervision of the job was in the hands of Mr. Ecker, to whom appellants had no objection. After the termination of March 12, the very same employees and supervision stayed on the job doing the same work, but using some different pieces of equipment when said equipment ultimately arrived.

Therefore, it cannot be the prerogative of the appellants to now complain of the management, even if they had cause therefor. Such a claim is as superficial as appellants alleged grounds for terminating the contract.

The cases cited by appellant under this point all appear to go the point that parties must show performance in order to recover on the contract. The answer to all such cases is found in the Findings of Fact, determined by the lower court, to the effect that respondent did perform. Unless such findings are entirely unsupported by evidence in the lower court the findings will stand. Such evidence has been pointed out in respondent's previous answers in this brief.

#### APPELLANT'S POINT NO. 7 AND 8

"THE ALLEGED ERROR IN ADMITTING EXHIBITS "B" AND "C", THE OPERATING LEDGER AND PAYROLL JOURNAL OF RESPONDENT."

Again, under this point, appellant is under a misapprehension as to the nature of the agreement entered into. Appellants apparently contend that the agreement was a unit price or lump sum contract for the performance of three distinct operations and no more. As heretofore pointed out under respondent's answer to previous points, the proposal was for a continuing performance at a certain proposed cost, the basis of which cost was set forth in the written proposal, but that the contract was an oral agreement encompassing other elements than the mere cost basis of the proposal (Exhibit A).

Respondent did not make this proposal upon the unit cost which appellant seems to argue, i.e., the work was not undertaken at so many dollars per hole drilled, at so many dollars per tons acquired from drifting, etc. The proposal does not so state. The terms of the cost

basis are stated on the proposal and it is clearly evident that it is a cost basis for the use and rental of equipment and carrying the payroll of the workmen.

Appellants in point No. 7 contend that respondents have not proven their damages, i.e., the expenditures incurred on this job. Appellants by their argument would seem to require that one person be on the job, check on the performance, prepare the time cards, pay the men, receive the invoices, pay for the materials, then prepare and keep the daily ledger sheets for the corporation itself. Such a position is not logical nor in any respects reasonable, nor does such a position conform to the accepted practice in our modern society or to the law governing the same.

Respondent proved the performance of the contract. See the statement of facts and references to record at the beginning of this brief. The trial court so determined in its Findings of Fact. As shown by Mr. Deming, who was hired and stayed on the job to keep account of the expenses, the expenses from the field for said performance, were currently and daily sent into the office of Gibbons & Reed, (Dem. dep. 66-69) as were the costs incurred by Mr. Ecker for materials (R. 246). Thereafter Mr. Ed. Shea, Assistant Secretary Treasurer of Gibbons & Reed, testified concerning the original ledger sheet and the original payroll, that said documents were prepared currently with the receipt of the invoice or statement of account. (R. 107-112). Thus documentary evidence was admitted in evidence by the Court in the form of the original Ledger sheets showing the payment of all ac-

counts payable to said project (Exhibit B), and the original company payrolls covering salaries of the workmen on the project (Exhibit C). Appellants subjected the witness to cross examination on both documents, raising three questions with reference to the general ledger sheets, concerning (a) The item of \$50.00 paid for serving an attachment, which item respondent agreed to strike from the costs, (b) Rental of certain equipment from the Folger Equipment, and (c) Two items of salaries and expense of George Jones and Pat Gibbons. These items were identified by Mr. Jones. (R. 142, 143).

It is conclusively shown by the above evidence, contrary to appellants' contention, that respondent proved performance of the contract, proved the expenditures incurred and the transmittal of same to the office and proved the daily tabulation of said costs to determine the total expenditure for the job.

Having established the factual support for the damages incurred, respondent respectfully submits the following authorities, supporting the admissibility of the records as submitted by respondent for the proof of the expenditures incurred:

LEDGER SHEETS ARE ADMISSIBLE IN EVIDENCE AS ORIGINAL ENTRIES OF BOOK ACCOUNTS UNDER SHOP-BOOK RULE. On Page 1072, Paragraph 567a of *Jones on Evidence*, Civil Cases, Fourth Edition, it is quoted as follows:

“\* \* \* This rule has been extended so as to admit proof of such books and entries after a

showing of authenticity, where the person who made the entry although still alive appears not to be available as a witness. And books are held to be admissible where the entries have been made in the regular course of business by the shopkeeper himself. *Accordingly, it has become the established rule that books or entries therein which have been kept or made by the shopkeeper himself or by his clerk or agent in the regular course of business are admissible to prove the sale, delivery, or price of goods, performance of work, labor or services, or in some instances even other matters than accounts which are shown by such entries.*

“While in some of the States the old Shop-Book Rule has been enlarged and extended without the enactment of any statute, Legislatures have very generally enacted laws under which business records and contemporaneous entries therein are admissible. Many of the statutes not being limited to books of account and entries therefrom extended to records and entries generally which are made in the regular course of business. In view of the fact that the purpose of such legislation is to afford a more workable rule of evidence in the proof of business transactions under existing business conditions, it has been held that the statute should be construed liberally \* \* \*.”

On Page 1077 of *Jones on Evidence* :

“Account books are properly used for the purpose of showing contemporaneous charges for goods or materials furnished or services rendered in the course of dealing between the parties, and

also to serve as evidence of such facts, and of the promise implied by law to pay therefor \* \* \*."

On Page 1078 of *Jones on Evidence*:

"Although books are admittedly more satisfactory where it appears that they have been kept in the form of daily entries or debits and credits in a day book or journal, this is not essential; they may have been kept in the form of a ledger, if this is the general mode, in which the party keeps his books—provided that the entries are original entries. The book may take the form of a timebook evidencing, not only the labor of the Plaintiff, but that of his apprentice or assistant as well.

"But the book should be a regular and usual account book such as explains itself and appears on its face to create a liability by reason of an account with the party against whom it is offered and not a mere memorandum for some other purpose \* \* \*."

On Page 1079 of *Jones on Evidence*:

"\* \* \* While mere loose sheets of paper have been held not to be admissible, a different case is presented where it appears that the disputed account was kept in accordance with modern business practices, including the use of loose-leaf business books as books of original entry \* \* \*."

On Page 1082 of *Jones on Evidence*:

"\* \* \* Much must be left to the discretion of the judge who presides at the trial because having the books before him and understanding all



the circumstances of the case, he is best able to decide upon all questions involving the fairness and regularity of the entries sought to be proved \* \* \*.”

At the bottom of Page 1082 of *Jones on Evidence*:

“Entries in books are not ordinarily admissible in evidence unless they appear to have been made in the regular course of business or as an incident of the party’s system of keeping his accounts \* \* \*.”

On Page 1089 of *Jones on Evidence*:

“\* \* \* The books must be produced in Court so as to be available for inspection by the adverse party, and in order that their credibility may be tested by their appearance or by the cross-examination of the party.”

The case of *Corkan vs. Rutter*, 69 Atlantic 954 was an action for work and material upon repairs performed for the defendant, it appeared that the workmen were required to enter upon blank forms the amount of work and material consumed during specific periods of time, such slips constituting the basis for day book entries. It was held that the books of account made upon the basis of such slips were admissible in evidence without extraneous evidence to support them.

The reasoning of the Court in arriving at this conclusion is expressed in the following summary of the rule applicable to such situations:

"We think it clear that if *no slips at all had been used*, these books would be entirely competent upon a system of workmen reporting orally to the bookkeeper the number of hours consumed and materials used. Business could not go on unless the employer could rely on the statements of employees in such matters; and every book account in a business of any magnitude is necessarily made up in large measure of entries based on reports of employees. The system of making such reports in writing has the manifest advantages, among many of keeping check on the workmen, avoiding disputes between them and the employer by making a permanent record of the work and facilitating the work of the office clerks, *but we fail to see that the adoption of such a system requires the production and offer of slips as imparting any competency to the books or limiting their availability as evidence \* \* \*.*"

"The fact that a party's books of account are kept in loose-leaf form or on card index files, will not necessarily operate to exclude same from use at the trial; provided it appears that the books contain original entries and are contemporaneous with the transaction to which they relate. *Douglas vs. Parker*, 235 Pacific 148; *Polus vs. Conner*, 176 N.E. 234; *New York Motor Car Company vs. Greenfield*, 145 New York Supp. 33."

In *Wylie vs. Bushnell*, 115 N.E. 618, the Supreme Court of Illinois stated:

"No special form \* \* \* of keeping books is required. The question of their competency and sufficiency must be determined by the appearance and character of the account, regard being had to the character of the work and the qualifications

ordinarily required in keeping books of account as to such business. Separate scraps of paper have been admitted in evidence as books when sworn to as such. A notched stick has been held to be admissible as a book of original entries where the accuracies of the entries was satisfactorily tested by comparison with an account with notched sticks some time previous. *Sheets from a looseleaf ledger system accounts, containing the original entries are when properly identified, admissible in evidence. The material, form, or construction of the book offered in evidence as a book of original entries, is unimportant. The manner of keeping accounts is the important consideration.* If they are in such form and so preserved as to fairly show the true statement of the accounts between the parties, and can, under the rules governing the making of such entries, be fairly held to be original entries, that is all that is required. To hold that they must be in a bound book form, all in cases is giving more importance to form than to substance. The vital question in such cases is whether the entries offered are original charges, are true, and have been made at or about the time of transaction."

Similarly, it was held in *Lewis vs. England*, 14 Wyoming 128, 82 Pacific 869, that:

*"The law prescribes no regular mode or method in which accounts must be kept in order to make them competent as evidence. The question of competency must be determined by the appearance and character of the book, regard being had to the degree of education of the party, the nature of his business, the manner of his charges against other people, and all other sur-*

*rounding circumstances. The material, form, construction of the book offered in evidence as the book of original entry are unimportant, provided such book be capable of perpetuating a record of events, and the entries are made in conformity with the general rules governing the admissibility of such entries."*

The prevailing view is to admit looseleaf records when properly identified and authenticated and when shown to be a part of a ledger which conforms to the broad rules of books of accounts kept in the regular course of business. *Wyle vs. Bushnell*, 115 N.E. 618. In the case of *Crump vs. Bank of Toccoa*, 153 S.E. 531, the court pointed out in discussing the admissibility of ledger sheets:

"What was introduced was not really a book in the ordinary sense, but consisted of detachable sheets taken from a looseleaf ledger, and contained a record of the account between the parties. These documents, however, will be treated as a book and for the convenience herein will be called a book since such leaves or sheets may be removed from the ledger containing them and introduced in evidence upon the same footing and under the same principles as are applicable to the introduction of books of account, where the proper foundation of such evidence is otherwise laid. It is immaterial whether the original entries of the account be made in a book or on separate sheets of paper, the requirement to this matter being that the documents shall comprise an account of the dealings between the parties and shall be primary and original."

In the case of *Graham vs. Work*, reported at 141 N.W. 428, the Supreme Court of Iowa, held as follows:

“The manner of keeping the accounts is the important consideration. If they are in such form and so preserved as to identify as to carry to the mind the conclusion that the true state of accounts between the parties is therein shown from the original entries, to hold that they must be in bound book form is giving importance to form rather than to substance. The vital question in such cases is whether the entries offered are the original charges, are true, and proven to have been made at or near the time of transaction.”

The evidence clearly discloses:

(1) The books of account admitted in evidence were honestly kept.

(2) The ledger sheets and the payroll sheets are books of original entry.

(3) The entries on the payroll sheets were made in the regular course of business or employment.

(4) The entries on the payroll sheets and ledger sheets were made contemporaneously with the transactions.

(5) The entrant and the person supervising the entries was called as a witness and testified as to the original entries and the time which the entries were made.

(6) The entrant testified that the books were correctly kept.

With further reference to Appellant's contention that Respondent was to perform on actual cost basis and

that the ledger sheets might have included items of profit, we respectfully submit that the testimony and evidence in the record shows that the parties entered into the instant agreement and that included therein were certain figures on the cost which Gibbons & Reed Company would incur in doing the work. The testimony shows that no profit was included therein, since profits were anticipated from future work to be performed subsequent to this contract. Appellants agreed to these rates from the very inception of the contract and the evidence so shows. The Appellants, did not at any time object to these rates or notify Gibbons & Reed that the rates were not satisfactory. The charges for this work were based upon the agreed rates, and the record adequately shows the ledger sheets to be evidence of the agreed costs of this job.

In conclusion therefore, respondent believes that Appellants contention as to the admissibility of the ledger sheets and the payroll and as to the probative value of same is founded upon a misinterpretation of the facts as shown in the record. Respondent maintains that the facts and authorities cited show more than an adequate foundation for the admissibility of the ledger sheets and payrolls. Respondent further believes that the probative value of said documents cannot be seriously questioned, inasmuch as they are evidence of the amount

of costs, at the rate agreed upon by appellants and respondents, which respondent incurred in the performance of the exploratory work for appellants and were all subjected to inspection and cross-examination.

### APPELLANT'S POINT NO. 9

"THE SUFFICIENCY OF CONCLUSION OF LAW No. 3, TO-WIT: THAT DEFENDANTS ARE NOT ENTITLED TO ANY RELIEF ON THEIR COUNTER-CLAIM AND THAT THE SAME SHOULD BE DISMISSED WITH PREJUDICE."

In answer to appellants point No. 9, it is sufficient to state that the lower court properly ruled that appellants were not entitled to recover on their counterclaim. Appellants submitted no evidence upon which recovery could be granted and failed to offer any evidence of damage, and failed in all other particulars to sustain their burden of proof. Appellants' failure to show damages obviously results from the fact that appellants suffered no damage. Appellants exercised their option, with very little, if any, work required after respondent was ordered off the job. Appellants received the benefit of said option, of the ore produced by respondents, of the roads constructed and of the camp buildings built. As a matter of fact appellants received only benefits from this agreement.

### CONCLUSION

Appellants and respondent entered into an oral sixty day agreement based upon certain cost rates, the purpose

of which was to permit appellants to determine if they should enter into an operating agreement on said properties with a Mr. Weeks. Appellants in accordance with their right to terminate the agreement, did so, at the half way point. Appellants could not have terminated on the grounds of respondent's breach, since respondent still had half of the time left in which to perform. Appellants could not have terminated upon the theory of anticipatory breach, since from the facts it is evident that respondent's performance was nearly complete and could have been completed shortly thereafter and within the time limit of the sixty day option. The only theory upon which appellants could terminate was merely upon their right to do so as set forth in the proposal, Exhibit "A." Upon such a termination the law is uniform that respondents are entitled to their costs expended to that point of termination. Respondent performed in a bona fide manner the work agreed upon and did so in accordance with the proposed rates and procedures. The benefits of respondent's efforts have been accepted and retained by appellants. Respondent's, by the very terms of the agreement, are not seeking profits but merely demand to be made whole, for work and service rendered.

Appellants in this appeal have raised no issues of law, but have predicated their appeal entirely upon an alleged failure of the facts in the case. It is believed that upon the showing of substantial evidence supporting



the lower court's findings that appellants' appeal is rendered nugatory. Respondent has pointed out the evidence upon which the lower court based its judgment and appellant has entirely failed to show any lack of such evidence. Therefore respondent respectfully submits that the judgment of the lower court be affirmed.

Respectfully submitted,

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*Attorneys for Respondent*

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ALLAN E. MECHAM

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ELLIOTT LEE PRATT