

1953

# Mud Control Laboratories, Inc. v. Theron S. Covey : Brief of Respondents and Cross-Appellants

Utah Supreme Court

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Richards and Bird; Dan S. Bushnell; Attorneys for Respondents and Cross-Appellants;

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

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MUD CONTROL LABORATORIES,  
INC., A Corporation,

*Appellant,*

vs.

Case No.  
8025

THERON S. COVEY, et al,

*Respondents and  
Cross-Appellants.*

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BRIEF OF RESPONDENTS  
AND CROSS-APPELLANTS

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DAN S. BUSHNELL

*Attorneys for Respondents  
and Cross Appellants.*

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# TABLE OF CONTENTS

	Page
STATEMENT OF FACTS .....	1
FACTS ON CROSS APPEAL .....	2
POINTS RELIED ON .....	14
ARGUMENT	
Point I — Sales of goods in interstate commerce are exempt from the provisions of Sections 16-8-1 and 16-8-3, U.C.A. 1953 .....	14
Point II—All the sales concerned in this action are sales in interstate commerce under the original package doctrine.....	15
Point III—No evidence or law supports or justifies Findings of Fact No. 7, that the drilling corporation was a fraud and a fiction and a disregard of the corporate entity is not available to Appellant .....	25
Point IV—No mining partnership existed.....	32
First, there was no sharing of losses.....	32
Second, there was no joint control or operation.....	36
SUMMARY AND CONCLUSION .....	45

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## INDEX OF AUTHORITIES AND CASES CITED

Advance-Rumely Thresher Company v. Stohl, 75 Utah 124, 283 Pac. 731 .....	17
1 A. L. R. 610 .....	28
34 A. L. R. 597 .....	28
131 A. L. R. 508, 539 .....	34
13 Am. Jur., Corporations, Sections 63 and 69.....	27
13 Am. Jur., Corporations, Sections 7 and 8.....	27-28
40 Am. Jur., 153 .....	34
Ash et al, v. Mickelson, 118 Okl. 163, 247 Pac. 680.....	34, 38
Austin v. Tennessee, 179 U. S. 343 .....	16, 20
Baldwin v. Seelig, 294 U. S. 511, 79 L. ed. 1032, 55 S. Ct. 497.....	20

# INDEX—(Continued)

	Page
Bentley v. Brossard, 33 Utah 396, 94 Pac. 736.....	25, 33, 36, 42
68 C. J. S. 429-430 .....	35, 36
58 C. J. S. 688, 691 .....	34, 36, 37
Cook v. Marshall County, 196 U. S. 261 .....	16, 19, 20
Dahnke-Walker Milling Company v. C. T. Bondurant, 257 U.S. 282, 66 L. ed. 239, 42 S. Ct. 106 .....	16, 18
Dalton Adding Machine Sales Co. v. Linquist, 137 Wash. 375, 242 Pac. 643 .....	23
Department of Public Utilities v. Arkansas-Louisiana Gas Com- pany, 108 S.W. 2d 586, 194 Ark. 354, aff. 58 S. Ct. 770, 304 U. S. 71, 82 L. ed. 1149 .....	19
Farmers' and Merchants' National Bank v. Anderson, 250 N.W. 214, 216 Iowa 988 .....	34
Farmers Coop v. Farmers Union, 260 Pac. 755, 127 Okl. 275.....	34
Geary v. Cain, 79 Utah 268, 9 Pac. 2d 396 .....	29, 31
Gillespie v. Shufflin, 91 Okl. 72, Pac. 132 at page 456 of 46 Pac. 2d 38	
Hollingshead, Company v. Baker, (1926) 4 Tenn. App. 362.....	24
Jewel Tea Company v. Patillo, 50 Ga. app. 620, 178 S. E. 926.....	24
Jewel Tea Company v. Williams, (C.C.A. 10) 118 Fed. 2d 202.....	24
Johanson Brothers Builders v. Board of Review, Industrial Com- mission (Utah 1950) 222 Pac. 2d 563, 567.....	36, 41
Kansas City Wholesale v. Weber Packing Corporation, 93 Utah 414, 73 Pac. 2d 1272 .....	17
Kirmeyer v. Kansas, 236 U. S. 568 .....	19
Marchant v. National Reserve Company of America, 103 Utah 530 at 546, 137 Pac. 2d 331 at 337 and 338 .....	17
F. May & Company v. New Orleans, 178 U. S. 496, 20 S. Ct. 977, 44 L. ed. 1165 .....	20
McAnally v. Cochran, 170 Okl. 368, 46 Pac. 2d 955 .....	34, 36, 37
Meister v. Farrow, 190 Mont. 1, 93 Pac. 2d 753 .....	25
Midland Linseed Products Company v. Warren Brothers Company, (C.C.A. 6) 46 Fed. 2d 870 .....	22
Minifie v. Rowley, 187 Cal. 481, 202 Pac. 673 .....	28
National Sign Corporation v. Moccar Cleveland Sales Corporation, 33 Ohio app. 89, 168 N.E. 758 .....	23
Oregon Railroad and Navigation Company v. Campbell, 180 Fed. 253, 60 A. L. R. 1484 .....	22
Pace Manufacturing Company v. Milliken, 70 Fed. Supp. 740 .....	18

# INDEX—(Continued)

	Page
Reliance Fertilizer Company v. Davis, 124 Fla. 859, 169 S. 579.....	23
Schollenberger v. Pennsylvania, 171 U.S. 1 .....	16, 19
Senaca Textile Corporation v. Missouri Flower and Feather Com- pany, (Mo. app.) 119 S.W. 2d 991 .....	23
Seidenback v. A. E. Little Company, 146 Okl. 274, 294 Pac. 126.....	24
Stanton and Sons v. Los Angeles County, 78 Cal. app. 181, 177 Pac. 2d 804 .....	20
Star Square Auto Supply Company v. Gerk, 325 Mo. 968, 30 S.W. 2d, 447 at 460 .....	23
Surgical Supply Center v. Industrial Commission (Utah 1950) 223 Pac. 2d 593 at 596 .....	29
4 Summers Oil and Gas, Sections 723, 724 .....	36
Talbot v. Smith, 227 S. W. 257 .....	18
United States v. Wholesale Oil Company (C.C.A. 10) 154 Pac. 2d 745 .....	25, 36, 39
Wallace v. Currin, 95 Fed. 2d 256 .....	18
Walling v. Jacksonville Paper Company, 317 U. S. 564, 87 L. ed. 460 .....	21
White v. Houston Lumber Company, 179 Okl. 89, 64 Pac. 2d 908.....	34

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BRIEF OF RESPONDENTS  
AND CROSS-APPELLANTS

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STATEMENT OF FACTS

The statement of facts in Appellant's brief is generally accurate and satisfactory to Respondents and Cross-Appellants. The Appellant has limited its appeal to the question of interstate commerce which makes abstracting the record almost superfluous.

The findings of Fact and Conclusions of Law were carefully considered by counsel and the trial court and we, therefore, limit our additional statement of facts on the issues raised by the Appellant to quoting from Findings of Fact 13 and 16, which are partially covered at pages 5 and 6 of Appellant's brief. In addition to the matters stated by Appellant these findings state that S. J. Putnam had authority to solicit business from new customers, subject to approval of the home office; that a quantity of supplies were kept on the L. N. Liscombe property at Vernal, Utah, from which sales were made to a large number of customers; that Putnam's office was on the same premises where he had a laboratory for doing experimental work connected with the use of Appellant's products (see Exhibit 10); that Appellant paid for a telephone in Vernal, Utah, had its sign at the entrance of the Liscombe premises and on Putnam's car; that all products sold at Vernal, Utah, were sold at the same price to each customer without discount and that billing was done from Appellant's office in Oklahoma City where the computation of prevailing market price was made and shown on the delivery ticket and invoice sent to the purchaser (R. 241). All of Appellant's products were put up in packages suitable for shipping and in appropriate size, material and shape for direct use from the packages (R. 242).

## FACTS ON CROSS APPEAL

Respondents have filed notice of Cross-Appeal (R.

249) and have designated certain points to be considered on Cross-Appeal (R. 250).

The Findings of Fact refer to the joint operating agreement and recite that the well was drilled in accordance therewith and that certain pipe was furnished by Respondents referred to in the agreement. M. E. Baird and H. L. Robbins were co-partners operating as Baird and Robbins Drilling Company and under such name jointly with Respondents the well was drilled (R. 239). The joint operating agreement authorized Baird and Robbins to utilize the services of a corporation to be wholly owned by them and on or about December 26, 1948, said persons formed "Baird and Robbins Drilling Company, Inc." the affairs of which corporation were conducted in such manner as to make it a fraud and a fiction with no separateness from the partnership or the individuals. Appellant, in selling and delivering the products involved in this lawsuit "did not rely upon the separate and independent credit of the defendants Covey" (R. 240).

Sales in Utah from the Vernal warehouse prior to qualification in Utah were substantial and numerous (R. 47).

The joint operating agreement is Exhibit C, and contains the following provisions deemed material to the Cross-Appeal on the question whether a mining partnership existed between Baird and Robbins, or their partnership, or their corporation and the Respondents.

**"THIS AGREEMENT, entered into this 5th**



day of January, 1949, by and between M. E. Baird and H. L. Robbins, a partnership, with their principal place of business in Salt Lake City, Utah, and Sybil T. Baird, wife of M. E. Baird, first parties, hereinafter called 'operator,' and S. M. Covey, A. A. Covey, H. T. Covey, S. G. Covey, T. S. Covey and F. K. Gilroy, hereinafter called 'Coveys,' second parties, hereinafter collectively called 'non-operators.'

## I. CONSIDERATION

- A. Non-operators agree to pay first parties the sum of Sixteen Thousand Dollars (\$16,000.00) as follows: Eight Thousand Dollars (\$8,000.00) concurrently with the following and Eight Thousand Dollars (\$8,000.00) upon the commencement of the drilling the first well as described in paragraph IV herein:
  
- C. Non-operators further agree to purchase pipe of a description hereafter to be agreed upon by the parties at a cost of not to exceed Seven Thousand, Five Hundred Dollars (\$7,500.00), which pipe shall be owned by Coveys and available subject to the conditions hereinafter set forth. Coveys agree to deliver their checks, payable to owner and seller of said pipe, from whom operator agrees to obtain bill of sale to said pipe, in favor of the second parties.

## II. EFFECTIVE PERIOD

This agreement is to remain in force for the full term of any and all of the leases or agreements as heretofore described and of any renewals or extensions thereof, whether by production or otherwise. It is expressly understood and agreed between the parties hereto that by these presents the first parties have transferred to the Second parties twelve per cent (12%) of the one hundred per cent (100%) interest.

## III. POSSESSION OF OPERATOR

- A. Operator shall have the sole right of prospecting and exploring the lands, subject to this agreement, and drilling for, producing, storing, transporting and removing oil, gas and other hydro-carbon substances, from the lands, subject to this agreement, and the injection of water, other fluids or gas into the lands, subject to this agreement, together with the right, subject to the terms of the several leases herein described, to establish, maintain and repair on the lands or to remove therefrom tanks, boilers, buildings, machinery and other apparatus or equipment, pipe lines, pole lines, power lines, telephone and telegraph lines, rods and other appurtenances which may be necessary or convenient in the production, treatment, storage or transportation of oil, gas or other hydro-carbon substances on or from the

lands as may be necessary for the purposes of operating and carrying out the terms, provisions and purposes of this agreement.

- B. The number of employees, the selection of such employees, the hours of labor and compensation for services to be paid any and all such employees shall be solely at the discretion and determination of the operator and such employees shall be the employees of the operator and under its sole direction and orders.

#### IV. DEVELOPMENT OF WELL ONE

- A. Operator agrees to drill a well on the land described in paragraph 1 of 'Descriptions' and at a location on said land determined by the operator and to commence the drilling of said well on or before the first day of February, 1949. The Sixteen Thousand Dollars (\$16,000) hereinbefore named and paid to the first parties shall be used by the operator for payment of drilling and development charges in connection with the drilling of said well and no part of any costs or expenses for the drilling of said well or the maintenance of this lease, such as the payment of Two Thousand Dollars (\$2,000) as rental charge (should the payment of the same be necessary to continue said lease in full force and effect) shall be charged or be a claim

upon the second parties. In the event said well shall be a dry hole, no costs, including costs of abandonment, shall be a claim against second parties. If said well produces oil or gas in commercial quantities, all of the development costs and expenses, including but not limited to, drilling, casing, tubing, rods, pumping equipment, well head connections, separators and tanks, incurred by operator in connection with the drilling and equipment of said well for production, shall be borne and paid for exclusively by operator.

- B. Operator shall conduct its operation in a good and workmanlike manner and in accordance with good oil field practice. If operator so desires it may employ its own tools and equipment in the drilling of said well or it may employ the services of a corporation wholly owned by operator in which event it is understood said corporation shall have no claim against the second parties, nor any lien against said leasehold or any oil, gas or other hydrocarbon substances produced on or from the lands.
- C. Operator hereby agrees and undertakes to provide a corporate surety bond in the sum of not less than Ten Thousand Dollars (\$10,000.00), pro-

testing, holding harmless and indemnifying the second parties from all acts or failures to act in connection with first parties' operations or its contracting parties under this agreement, which bond shall be filed with second parties.

## VI. DEVELOPMENT AND DISCOVERY

All drilling and development by the operator shall be conducted in a good and workmanlike manner, in accordance with good oil field practice. All drilling and development charges, except for the first well as hereinbefore described, shall be charged to the joint account of the parties hereto under the terms and conditions described herein and as described in the accounting procedure attached hereto and marked 'Exhibit B' and hereby made a part hereof, on the basis of two per cent (2%) to each of the Coveys, constituting twelve per cent (12%) as non-operators and eighty-eight per cent (88%) to operator.

## VII. APPROVAL OF OPERATIONS BY NON-OPERATORS.

- A. The written approval of non-operators shall be required
  - 1. For the abandonment of any well which has produced oil or gas in commercial quantities for a period of thirty (30) days.

2. For any capital expenditure of operator in any sum in excess of Five Thousand Dollars (\$5,000.-00) for which non-operators will be expected to pay their share of the costs in cash, except that the written consent by non-operators of the drilling of any well shall be construed to mean approval of all necessary expenditures in drilling, completing and equipping such well, including the necessary lease tankage.
3. For the sale and disposition of surplus materials and equipment by operator, it being understood that all equipment, facilities and structures purchased on account of the joint operation of the parties hereto (except all such equipment, facilities and structures placed on or moved on the described premises by operator for the drilling of the first well as herein described shall be presumed to be the property of the owner until non-owner shall prove differently. Thereafter all property purchased shall be presumed to be joint property until operator shall prove differently.) shall be owned eighty-eight per cent (88%) by operator, twelve per cent (12%) by second parties.

B. The following specific rights, privileges and obligations of non-operators, and each of them, are hereby expressly provided, but not by way of limitation or exclusion of any other rights, privileges or obligations of the said party:

1. Non-operators shall have access to the lands, subject to this agreement, at all reasonable times to inspect and observe operations of every kind and character upon the property.
2. Non-operators shall have access at all reasonable times to any and all information pertaining to wells, drilling, production secured and oil marketed and to the books, records and vouchers relating to the operation of the lands, subject to this agreement.
3. Operator shall, upon request, furnish the non-operators with daily drilling reports, true and complete copies of well logs, as soon as possible after the preparation thereof, tank tables, daily gauge and run tickets and reports of stock on hand the first of each month; and shall also, upon request, make available samples and cuttings from any and all wells drilled in which non-operator has an interest on the said lands.

## VIII. DUTIES OF OPERATOR

- A. Operator shall, at all times, keep the joint interests of the parties hereto in and to the leases and product therefrom and equipment free and clear of all labor and mechanic's liens and encumbrances. \*\*\*\*\*
- B. Non-operators shall have a lien on the interests of the operators in said leases and agreements and the oil and gas produced therefrom, the proceeds thereof and the material and equipment thereof to secure the payment of operator's proportionate share of the costs and expenses of developing and operating the said lands for the purpose of keeping said property free and clear of liens and encumbrances upon the property of non-operators. Any sums recovered from the disposition of operator's property for the payment of the obligations of the operator shall be applied first to costs, second upon the obligations of the operator, and any balance remaining thereafter shall be paid to the operator or to its successors or assigns."

Mr. S. J. Putnam testified that he was employed by the Appellant as sales engineer and sales representative in Utah (R. 103). That in the spring of 1949 he was introduced to a gentleman named Covey in Vernal (R. 106) and that this Mr. Covey said he was interested in strik-



ing gas in the Morrison formation, and that he had an interest in the (Slaugh) well. There was no discussion of whose credit was back of the well operation (R. 107). Later, and in about May or June, he asked Mr. Baird who was interested in the well and Mr. Baird named "The Coveys, Ken Garff, Hafer, and a Doctor or two" none of whom were familiar to the witness (R. 108-109). At that time Mr. Baird advised him that the Coveys were going into the oil business in San Juan Basin (R. 108, 109).

Mr. Putnam further testified that well-drillers need mud or chemicals in a hurry when they need them and that suppliers must be on a 24-hour a day basis (R. 111). This is to avoid interrupting drilling operations (R. 113). Delivery tickets for suppliers were made out "in our warehouse" at Vernal, Utah, by Mr. Liscombe and occasionally by Putnam (R. 120).

Mr. Putnam further testified that the material sold to Baird and Robbins was picked up at the warehouse usually by J. N. Karren or T. J. Colton and delivery tickets were made up at the time (R. 122).

On Cross-examination Mr. Putnam testified that he made no credit investigation before commencing sales to Baird and Robbins (R. 127) and gave his company no advice as to their credit (R. 129). He made the arrangements with Mr. Liscombe for warehouse services and they were to pay him 15 cents per 100 pounds on everything that went out of the warehouse except ten

cents on barite (R. 131). Liscombe consulted with him on the replenishments and they endeavored to keep the supply up to where it should be (R. 132). He never talked to any of the Coveys concerning the supplies being delivered. The corporation operated in the same way before and after qualification in Utah (R. 143). Most of the supplies delivered were via certificated carriers or wild catters, and Baird and Robbins were the only people who picked up most of their supplies at the warehouse (R. 145). He testified in a number of hearings before the Public Service Commission of Utah in support of carriers to haul their products from the warehouse to the wells and understands that these were hearings concerning intrastate commerce (R. 148, 149).

It is the Company's practice to sell to anyone drilling an oil well and normally he is able to pay (R. 153). He and Mr. Liscombe both had keys to the premises where the company's products were stored (R. 154).

Richard D. Ruckenbrod testified that he is an attorney and prepared Articles of Incorporation for the Baird and Robbins Drilling Company, Inc. and that upon the incorporation, partnership activities ceased (R. 193, 194 & 198).

The corporation made social security and unemployment payments of its employees for the drilling of the Slauch well (R. 209). The corporation also made withholding tax payments (R. 210).

## POINTS RELIED ON

Respondents take issue with Appellant on the two questions stated by the Appellant as follows:

### Point One

**Sales of goods in interstate commerce are exempt from the provisions of Section 16-8-1 and 16-8-3 U. C. A. 1953.**

### Point Two

**All of the sales concerned in this action are sales in interstate commerce under the original package doctrine.**

On their cross appeal Respondents also urge points of error which result in a finding that Respondents and Baird and Robbins were engaged in a mining partnership in the drilling of this well as follows:

### Point Three

**No evidence or law supports or justifies Finding of Fact No. 7, that the drilling corporation was a fraud and a fiction and a disregard of the corporate entity is not available to Appellant.**

### Point Four

**No mining partnership existed.**

## ARGUMENT

### Point One

**Sales of goods in interstate commerce are exempt from the provisions of Section 16-8-1 and 16-8-3 U. C. A. 1953.**

Respondents do not quarrel particularly with this statement of the law; but including the statement in this case suggests an application beyond the mere statement.

Where a corporation is engaged only in interstate commerce in a given state and has no other activities therein, the statement is proper. This is all that is involved in the cases cited by Appellant under this point.

But the Court here found that the Appellant was doing business in the State of Utah. The cases do not go so far as to hold that actions arising out of interstate commerce can be maintained in a state where the corporation is doing intrastate business without complying with the laws of that state. But this question is largely academic here because if the Appellant corporation was doing business in Utah it was doing business because of the nature of the sales it was making. The characteristics of those sales constituted both a termination of the interstate movement and the doing of business in Utah. These activities in making sales require compliance with the Statute. Point No. 2 is therefore controlling on Appellant's case.

### Point Two

**All of the sales concerned in this action are sales in interstate commerce under the original package doctrine.**

Here again, there is no great divergence of view between the Appellant and the Respondents. The review of the original package doctrine is factual and is important in dealing with cases where the original packages are or could be broken prior to the making of a sale which could be either interstate or local. It is a convenient

line of demarcation. In *Dahnke-Walker Mining Company vs. C. T. Bondurant*, 247 U. S. 282, 66 L. ed. 239, 42 S. Ct. 106, cited at page 16 of Appellant's brief the treatment of original packages was all dictum. But the limitations of the doctrine are indicated in Appellant's own cases. (*Schollenberger vs. Pennsylvania*, *Austin vs. Tennessee* and *Cook vs. Marshall County* discussed at pages 33 to 33 of Appellant's brief.)

The question in this case is whether anything is accomplished by examining into whether the packages of a product have been changed or broken when the original packing case is of such size and construction as to be useable for shipping as well as for final use by the consumer. Where there is no breaking of bulk and taking packages from a container or shipping case has the manufacturer been able to extend the concept of interstate commerce purely because the package was not changed from the time it left the hands of the manufacturer until it was ultimately consumed? Such a suggestion ignores the position of the original package doctrine as a convenient rule of thumb and makes it a dogma of the law without reason.

The question the court should be interested in is whether Appellant was engaged in business in Utah. If it was then the Court below correctly held that no action can be maintained on any sales made prior to qualification.

The cases hold generally that where interstate goods have come to rest, are displayed for sale, with orders

taken and sales initiated and completed after the goods have come to rest, it is an interstate business and the commerce clause will not affect powers of the states to require qualification.

In *Advance-Rumley Thresher Company vs. Stohl*, 75 Utah 124, 283 Pac. 731 and *Kansas City Wholesale vs. Weber Packing Corporation*, 93 Utah 414, 73 Pac. 2d 1272, the entire business in Utah was involved in the isolated transactions brought before the court and there was no regular course of business within the State of Utah. The Court held that the sales were interstate, that the company was not doing business in Utah, and that the suits could be maintained.

In *Marchant vs. National Reserve Company of America*, 103 Utah 530 at 546, 137 Pac. 2d 331 at 337 and 338 the court held that to constitute doing business in the State there must be a continuing course of business with some permanence about it. That is the significance of the evidence here that Mud Control Laboratories did business in Utah in its usual way (R. 142) and did business with a large number of customers in a very substantial volume (Exhibit 3, Answer 12). Keeping an employee who was an engineer, establishing a laboratory, an office, a warehouse from which sales could be made (R. 241, 242) show that this was a regular part of the Appellant's business, and that it had both substance and permanence.

The permanence was, of course, indicated when the corporation qualified in July, 1949, and has since that date continued to do business in the State of Utah.

The Appellant must succeed, if at all, on the isolated principle of the original package doctrine. The reference to the original package doctrine in *Dahnke-Walker Mining Company vs. C. T. Bondurant*, 257 U. S. 282, 66, L. 3d. 239, 42 S. Ct. 106 at page 17 of Appellant's brief is dictum as the case involved the purchase of wheat in bulk. The same is true of *Wallace vs. Currin*, 95 Fed. 2d 856 cited at page 19 of the brief. This case involves grading of tobacco in bunches in warehouses and was held to be related to interstate commerce within the Federal Grading and Inspection Act and could have had no relationship to the original package doctrine.

*Talbot vs. Smith*, 277 S. W. 257 is an original package case and goes a long way in holding that the transaction in that case did not involve doing business in the State of Kentucky. The case holds that where a North Carolina concern sent 50 sets of aluminum ware to Kentucky and a crew of salesmen to take orders for the ware which orders were submitted to a Kentucky merchant for credit ok that the company was not doing business in the state. The distinguishing factors are obvious; in *Talbot vs. Smith*, the concern had no office, no regular stock of goods available for purchase by an agent or employee in Kentucky, had no employees and no regular course of doing business.

*Pace Manufacturing Company vs. Milliken*, 70 Fed. Supp. 740 cited at page 20 of the brief contains no description of the packages and is based upon the doctrine that delivery is not complete while the goods are in

possession of a carrier which has moved the goods in an interstate shipment, and that they, therefore, are not subject to the police power of the State. The goods in that case were taken from the possession of the railway express agency following an interstate movement. The facts are so different as to make the case of no value.

At page 20, Appellant cites the case of *Department of Public Utilities vs. Arkansas-Louisiana Gas Company*, 108 S. W. 2d 586, 194 Ark. 354, aff. 58 S. Ct. 770, 304 U. S. 61, 82 L. 3d. 1149, and a passage which is again dictum. This case involved sale of natural gas moving in an interstate pipe line and drawn from the pipe line for sale to customers in Arkansas. Despite the dictum the court held that the corporation was not sufficiently present in Arkansas as to be subject to the Arkansas Laws requiring the filing of comprehensive reports covering its business.

It is plain from the cases of *Schollenberger v. Pennsylvania*, 171 U. S. 1, *Austin vs. Tennessee*, 179 U. S. 343, *Cook v. Marshall County*, 196 U. S. 261, and *Kirmeyer v. Kansas*, 236 U. S. 568, discussed in Appellant's brief at pages 22-34, that the original package doctrine is useful in marking the point at which interstate shipment ends and intrastate movement begins, but that the doctrine is only of evidentiary value and not an absolute rule. Where a large shipping box contains smaller boxes it is apparent that receipt of the large box, breaking its bulk and apportioning the smaller boxes for local use is a convenient line of demarcation. For cigarettes in small



boxes it is insufficient to extend interstate commerce (*Austin vs. Tennessee*, supra, *Cook vs. Marshall County*, supra.) As applied to lumber, bulk grain, milk or gasoline in tanks the doctrine has little value. For instance in *Baldwin vs. Seelig*, 294 U. S. 511 L. Ed. 1032, 55 S. Ct. 497, a New York regulation of milk designed to make the price of outside milk competitive with local milk was held invalid as a burden and restriction on interstate commerce and in holding that the form of the package was immaterial the Supreme Court said:

“There are purposes for which merchandise, transported from another state, will be treated as a part of the general mass of property at the state of destination though still in the original containers. \* \* \* In brief, the test of the original package is not an ultimate principle. It is an illustration of a principle. \* \* \* It marks a convenient boundary and one sufficiently precise save in exceptional conditions.”

and in *Stanton and Sons vs. Los Angeles County*, 78 Cal. App. 2d 181, 177 Pac. 2d 804, the court refused the original package doctrine as related to shipments of lumber and referred to it in this manner:

“The gossamer of law is the wrapping which makes a load of lumber the original package and when sorted and stacked with other loads for facility in selling the original package is broken.”

The Court cited *F. May & Company vs. New Orleans*, 178 U. S. 496, 20 S. Ct. 977, 44 L. ed. 1165.

*Walling vs. Jacksonville Paper Company*, 317 U. S. 564, 87 L. ed. 460, represents a realistic approach to the problem. That case involved the Federal Fair Labor Standards Act which admittedly goes to the extreme of the power of Congress over interstate commerce in regulating working conditions, hours, and pay of persons whose work is connected with interstate commerce. In that case a manufacturer out of the state shipped merchandise into Florida for handling in three different ways: some shipments went direct from the mill to customers in Florida; some shipments were made on special order and consigned to a branch office designated for delivery to a specific customer; and the balance, which was most of the business, was shipped to a branch warehouse without order and held subject to the taking of orders from a fairly stable group of customers as to kind and amount of merchandise so that their needs could be estimated with a fair degree of accuracy. The Supreme Court held that the third category involved intrastate commerce and that the work of employees was beyond the Federal Fair Standards Act. At page 466 the Supreme Court said:

“The entry of the goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer ‘in commerce’ within the meaning of the act.”

This was true as to all of the goods but as to the third category the interruption was held to terminate the com-

merce. The third category was like the goods of Mud Control Laboratories in this case which came to rest in Vernal, were held for sale to any one of a number of customers representing a fairly stable group whose needs could be predicted with reasonable accuracy.

The movement from the Vernal warehouse to the Baird and Robbins well site was intrastate commerce for rate purposes even though the movement was in the original packages. See *Oregon Railroad and Navigation Company vs. Campbell*, 180 Fed. 253, 60 A. L. R. 1484. The fact that Mr. Putnam testified before the Public Service Commission of Utah in behalf of intrastate carriers is further evidence of the nature of the shipment.

We see no essential difference between the Vernal warehouse and a store which sells cement, sugar, or drilling supplies which come into the state in bags of a convenient size for ultimate sale and use. Mr. Karren drove to Vernal in a Baird and Robbins truck, selected the merchandise he wanted, signed a delivery ticket for the merchandise, took it to the well site, and proceeded to use it. In the same manner would he go to a grocery store for a bag of sugar or salt needed by the drilling company and purchase it on credit.

In *Midland Linseed Products Company vs. Warren Brothers Co.* (C.C.A. 6) 46 Fed. 2d 870, capacity to maintain an action was challenged and the court held that where barrels of linseed oil were shipped in carloads from out of the state and sold from a warehouse in the original barrels that the corporation had to qualify as

doing business within the state, with no mention of the original package doctrine. *Senaca Textile Corporation vs. Missouri Flower & Feather Co.* (Mo. app.) 119 S.W. 2d 991 held that a corporation must qualify to bring suit on facts similar to the operation in the principal case, there being no disclosure in the opinion of the type of merchandise involved or the type of package and no mention of the original package doctrine. *Dalton Adding Machine Sales Company vs. Lindquist*, 137 Wash. 375 242 Pac. 643, 646, 647, involved facts very close to those in our case except that the product involved was adding machines and without discussing the original packages or the doctrine the court held that the corporation must qualify to maintain the action. In *Star Square Auto Supply Company vs. Gerk*, 325 Mo. 968, 30 S. W. 2d 447 at 460 after discussing a case which referred to the original package doctrine the court held that where automobile tires are received in interstate commerce, commingled with other tires and held for sale, the interstate commerce has ended, this being a police power case. *Reliance Fertilizer Company vs. Davis*, 124 Fla. 859, 169 S. 579, involved capacity to sue and again without disclosing the form of packaging or discussing the original package doctrine the court held that shipment of fertilizer into a state subject to taking orders and making delivery involved doing business in the state and required qualification. The same holding was made where the erection of advertising signs was the doing business as found in *National Sign Corporation vs. Mocar Cleveland Sales Corporation*, 33 Ohio App. 89, 168 N. E. 758.

Dealing in barrels and kegs which were never opened but which were received in interstate commerce and sold from a warehouse was involved in *Hollingshead Company vs. Baker* (1926) 4 Tenn. App. 362. There the Corporation was doing intrastate business and could not maintain the suit although the original package doctrine was not discussed. Shipment of goods to an agent who thereafter took orders and delivered the goods was held to be intrastate commerce in *Jewel Tea Company vs. Patillo*, 50 Ga. App. 620, 178 S. E. 926, and *Jewel Tea Company vs. Williams* (C. C. A. 10) 118 Fed. 2d 202. It was held the corporation could not maintain the action because it was doing local business in *Seidenback vs. A. E. Little Company*, 146 Okla. 274, 294 Pac. 126, where shoes were shipped into Oklahoma in interstate commerce and sold through a department store on a commission basis, title remaining in the out of state manufacturer until sold.

It seems that the significant fact in these cases is the unimportance of the original package doctrine since it would make such an easy point of decision for the courts to rely on if the doctrine had substantial significance.

If original packages served a purpose as shipping containers and if the point at which interstate commerce ended and intrastate commerce began were a difficult one, the original package doctrine would still have validity. But the courts have refused to be bound by this rule where the reason for the rule did not exist.

Here the court found the Appellant was doing business in Utah. This finding was possible only because interstate shipment had ended, the goods were held in Utah awaiting customers, and the movement out of the warehouse was an entirely separate, intrastate movement.

### Point Three

**No evidence or law supports or justifies Finding of Fact No. 7, that the drilling corporation was a fraud and a fiction and a disregard of the corporate entity is not available to Appellant.**

This is of great importance because the corporation had no interest in the lease. It is a prerequisite to a mining partnership that there be a joint ownership in the lease or the land. *Bentley vs. Brossard*, 33 Utah 396, 94 Pac. 736; *Meister vs. Farrow*, 190 Mont. 1, 93 P. 2d 753; *U. S. vs. Wholesale Oil Co.* (C. C. A. 10) 154 P. 2d 745.

If the corporation did the drilling and purchased supplies from Appellant there was no partnership with cross-appellants and no mining partnership. The Court avoided this question by finding the corporation to be a fraud and a fiction (Finding 7, R. 240). The court also found (Finding 5, R. 239) that the well was drilled by M. E. Baird and H. L. Robbins doing business as Baird and Robbins Drilling Company. This Finding might appear to follow necessarily from Finding No. 7, disregarding the corporate entity. If Finding No. 7 was beyond the issues available to the Appellant, then the

new trial should have been granted to determine who actually did the drilling—the corporation or the partnership—without any impelled conclusion because the corporation was a fiction.

There is much evidence that the corporation drilled the well. The Joint Operating Agreement (Exhibit C) authorized Baird and Robbins to drill the well through a closed corporation. The Corporation had just been formed on December 31, 1948, when the Agreement was finally signed on January 5, 1949 (R. 194, 197, 198, 199). And Mr. Ruckenbrod testified that upon formation of the corporation the partnership didn't function any more (R. 197). Appellant made no determination of whom or what Baird and Robbins were, but sent invoices to "Baird and Robbins Drilling Co." and four to "Baird and Robbins" (Exhibit B). All delivery tickets likewise were in the name of "Baird and Robbins Drilling Co." except one to "Baird and Robbins" (Exhibit A).

Appellant filed an action in the Fourth District Court against "Baird and Robbins Drilling Company, a corporation" on or about September 23, 1949, for this same cause of action, and obtained a judgment by default on December 9, 1949 after presentation of evidence (Exhibits 1 and 2). Exhibits 4 and 5 are checkbooks of the corporation showing that drilling expenses were paid with corporation checks. The corporation paid income withholding, social security and unemployment taxes on the drilling operations (R. 209-210). The bank account at Vernal was in the name of "Baird and Robbins Drill-

ing Co., Inc." (Exhibit 8 and Exhibits marked "Bank of Vernal" including checks and statements). The Continental Bank and Trust Company account was in the name of "Baird and Robbins Drilling Co." (Exhibits F, G, and envelope marked July, 1948) but the checks used in that account were plainly marked "Baird and Robbins Drilling Co., Inc." (Exhibits 6, 7, 5 and envelope marked July, 1949).

There is no evidence that Appellant made any inquiries about who was drilling the well and who would pay for it. Appellant simply sold mud and assumed that whoever was drilling the well would pay for it (R. 153). There was no fraud, misleading, misrepresentations, reliance or change of position. Appellant believed it was selling to a corporation, brought suit and took a judgment against the corporation. Now it seeks to create a windfall for itself by proving a partnership it never relied on in extending credit.

Filing suit and obtaining judgment should estop the Appellant from changing its mind (13 Am. Jur. Corporations, sections 63 and 69), and is almost conclusive evidence of the party it believed it dealt with (See Exhibit 1).

In order to claim that the corporation was a fiction the person making the claim must have been misled or must have relied to his prejudice on representations.

The law as to disregarding the corporate entity is discussed in Sections 7 and 8 of 13 Am. Jur. on Corporations as follows:



"The doctrine that a corporation is a legal entity existing separate and apart from the persons composing it is a legal theory introduced for purposes of convenience and to subserve the ends of justice. The concept cannot, therefore, be extended to a point beyond its reason and policy, and when invoked in support of an end subversive of this policy, will be disregarded by the courts. Thus, in an appropriate case and in furtherance of the ends of justice, a corporation and the individual or individuals owning all its stock and assets will be treated as identical, the corporate entity being disregarded where used as a cloak or cover for fraud or illegality."

Annotations on the question are at 1 A. L. R. 610 and 34 A. L. R. 597. The general rule is that the corporate entity will not be disregarded with exceptions to this rule where creditors would be defrauded, where corporations are formed to avoid liability under contracts, or where individuals have attempted to shield themselves through a corporation. The later annotation at page 602 quotes a rule for relief from *Minifie vs. Rowley*, 187 Cal. 481, 202 Pac. 673:

"Before the acts and obligations of a corporation can be legally recognized as those of a particular person, and vice versa, the following combination of circumstances must be made to appear: First, that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of the said person and corporation has ceased; second, that the facts are such that an adherence to the fiction of the separate existence of the corporation would,

under the particular circumstances, sanction a fraud or promote injustice."

In *Surgical Supply Center vs. Industrial Commission* (Utah 1950) 223 Pac. 2nd 593 at page 596, the Court discussed the rules as to disregarding a corporate entity in a case entirely different on its facts and observed:

"We recognize that the courts have often looked through the veil of corporate structure in order to prevent fraud or injustice. *Old Ben Coal Co. v. Universal Coal Co.*, 248 Mich. 486, 227 N. W. 794; *People ex rel. Attorney General vs. Michigan Bell Telephone Co.*, 246 Mich. 198, 224 N. W. 438. However, no question of fraud is involved in the present case, and we find no occasion to disregard the corporate entities of the two plaintiffs."

Also in *Geary vs. Cain*, 79 Utah 268, 9 Pac. 2nd 396, the Court was dealing with fraudulent conveyances to a corporation and the possibility of ignoring the legal fiction in order to prevent fraud, holding, however, that because the stockholders were not the persons accused of committing fraud, and that they did not hold the stock of the corporation in trust for the fraudulent person the corporate fiction could not be disregarded but did say:

"Courts of equity and courts of law as well, and courts which administer both law and equity in the same action, as do the courts of this state, will, to prevent fraud and accomplish justice, in

proper cases ignore the legal fiction that a corporation is a person separate and distinct from the person or group of persons who own its stock. *Western Securities Co. v. Spiro*, 62 Utah, 623, 221 P. 856; *D. I. Felsenthal Co. v. Northern Assurance Co.*, 284 Ill. 343, 120 N. E. 268, 1 A. L. R. 602, and annotation on page 610. \*\*\* The doctrine simply means that the courts, ignoring forms and looking to the substance of things, will regard the stockholders of a corporation as the owners of its property, or as the real parties in interest, whenever it is necessary to do so to prevent a fraud which might otherwise be perpetrated, to redress a wrong which might otherwise go without redress, or to do justice which might otherwise fail. It cannot be applied in this case, which is an action against the corporation and a person who holds but one share of its stock, so long as it appears that there are other stockholders, who are not parties to the action, owning all but one of the outstanding shares and it is not made to appear that they hold the same in trust for Addison Cain."

There is no evidence that after March 7, 1949, the date of the first sale by Appellant, there was any act connected with drilling except by and in behalf of the corporation. There is no evidence to support Finding No. 5 and it must be assumed that it followed, in the Court's reasoning, from Finding No. 7. This is a fallacy, because even if the corporate entity is to be disregarded the result would be to treat the stockholders as the responsible parties individually. Assume a joint ven-

ture between the corporation and cross-appellants and then such facts as require the corporate entity to be disregarded. Would not the result be to place the corporate obligation on the stockholders, without any expansion of the obligations of the Respondents? The case of *Geary v. Cain* (supra) seems apt. If there is fraud or other equitable basis for disregarding the corporate entity the stockholders will be held accountable but the rule will not apply where the stockholders are strangers to the fraud. So here, if the corporate entity is disregarded the brunt of the burden would fall, not on the stockholders of the corporation or on the persons responsible for creation of the corporation but on crss-appellants whose only offense was to deal with the corporation. The judgment of the Court allowing recovery against cross-appellants was based in part upon the finding that the corporation was a fraud and a fiction, which is wholly unsupported in the evidence and which is a position not available to Appellants against these Cross-Appellants. Furthermore, there is no evidence to support the finding that the well was drilled by the partnership, and even if there were that evidence is so weak as to indicate that the court's finding was largely based upon its view that the corporate entity could be disregarded. A new trial should have been granted to determine, entirely apart from any tendency to disregard the corporate entity, whether the well was actually drilled by the corporation or the partnership. The burden of proof as to this was on Appellant.

### Point Four

#### No mining partnership existed.

For two reasons there was no mining partnership, apart from the questions raised under Point Three:

First, there was no sharing of losses;

Second, there was no joint control or operation.

*First, there was no sharing of losses.*

Had there been no mention of losses the law might imply a sharing of losses from a general operation together and from the sharing of profits. Cross-Appellants admit that the joint operating agreement provided for division of profits, 12% to cross-Appellants and 88% to Baird and Robbins. But this agreement was drawn to negative a sharing of losses and specifically accomplishes that. "The Coveys were willing to purchase interests only on certain conditions" (R. 199) and the joint operating agreement contains those provisions, as above quoted at pages 3 to 11.

Paragraph I A of the Joint Operating Agreement limits the investment to \$16,000 plus the purchase of pipe ( Par. ID) the \$16,000 to be used for "Development of Well One" (Par. IV) "and no part of any costs or expenses for the drilling of said well . . . shall be charged or be a claim upon the second parties." A corporation owned by Baird and Robbins could drill the well "in which even it is understood said corporation shall have no claim against the second parties, nor any lien against

said leasehold . . ." (Par. IV B). And further: "Operator shall, at all times, keep the joint interests of the parties hereto in and to the leases and product therefrom and equipment free and clear of all labor and mechanic's liens and encumbrances." (Par. VIII A).

The cases have not, and this Court surely will not, impose a liability for losses on parties who have specifically contracted that the losses shall be borne by Baird and Robbins. No policy of the law suggests this and no conduct of cross-appellants or act of reliance by Appellant suggests any equity in such a position.

Mining partnerships are governed generally by partnership law with three essential differences: the interests are assignable, death of a partner does not cause dissolution, and authority of a partner to bind the partnership is limited to usual mining expense. *Bentley v. Brossard*, 33 Utah 396, 94 Pac. 736, 743. Therefore as to any question involved in this case, the law is the same.

It is a requirement of both a general merchantice partnership and a mining partnership that there be a sharing of losses. Or. stated conversely, where the agreement precludes a sharing of losses no partnership arises. Of course, the parties could form a partnership as to third parties and limit losses as between themselves, but here there is no such intent and the only question is whether the agreement established a partnership by implication of law and contrary to the intentions of the parties.

The agreement that no losses should be bourne by

cross-appellants prevented the implication of a partnership. *Farmers' and Merchants' National Bank v. Anderson*, 250 N. W. 214, 216 Iowa 988; *Farmers' Coop v. Farmers' Union*, 260 Pac. 755, 127 Okl. 275; *McAnally v. Cochran*, 170 Okl. 368, 46 Pac 2d 955; *Ash et al vs. Mickelson*, 118 Okl. 163, 247 Pac. 680; 68 C. J. S. 429-430; 58 C. J. S. 688, 691; 40 Am. Jur. 153; 131 A. L. R. 508, 539; *White v. Houston Lumber Co.*, 179 Okl. 89, 64 Pac. 2d 908.

*Farmers' and Merchants' National Bank v. Anderson* (supra) was an action to enforce liability for debts of an oil development venture on the theory of partnership. At pages 217-218 of 250 N. W. the court held:

\*\*\*\* that, while it is not necessary that such agreement should be express as to all its terms, it is necessary that it be shown that it was the understanding and intention of the parties that there be a community of interest in capital, a sharing of the profits, and a mutual liability for the losses; and that, in the absence of any one of these elements, there can be no real partnership. \*\*\*

"It is quite true that this court has repeatedly stated that it is not necessary that there be an express agreement establishing mutual liability for losses, and that, where the community of interest in capital and division of profits is clearly shown, the mutual liability for losses will be implied unless shown to be inconsistent with the intention of the parties. It is equally clear that under our decisions an express agreement on the subject of losses will control, and that, if such agreement provide for nonliability for losses, this fact alone will negative the existence of a partner-

ship. As said in *Veenstra v. Mathews*, 194 Iowa 792, 190 N. W. 382, 383: "It is strenuously argued by the defendant that there was no partnership because there was no agreement for a division of losses. It is true that there was no express agreement for such division. It is not essential that there should be, though it is essential to the existence of a partnership that there be a mutual liability for losses. In the absence of express agreement on the subject of losses, the mutual liability for losses will be implied where the fact of partnership is established by other evidence. Of course, if there be an express agreement on the subject of losses, such agreement will control. If such express agreement negative the sharing of losses, it negatives the partnership." \*\*\*

"Where a man has contributed his money to and taken the risk of losing it in an enterprise, with the distinct understanding and agreement that he shall not be liable for any greater amount than the money thus contributed, we are unable to see the justice or reasonableness of a doctrine which says that he must nevertheless be held liable to one who has dealt with such enterprise, with full knowledge of the terms of the agreement that the man who contributed his money to such enterprise shall not be liable for any of the debts thereof."

And in our case, where there was no knowledge in Appellant about a possible partnership, Appellant is in better position than if it had known all about the agreement. 68 C. J. S. Partnerships, pp. 429-430 thus states the rule:

"Accordingly, as a general rule, the absence of a liability to bear the losses or expenses of a



business ordinarily indicates that no partnership was intended or exists, and it has been held that, where the effect of an agreement between two or more persons in relation to the prosecution of an enterprise provides that, although all are to share in the profits one of their number shall incur no risk and be chargeable with no loss, the agreement is not one of partnership."

*Second, there was no joint control or operation.*

The Joint Operating Agreement (Exhibit C) provided that "Operator" (Baird and Robbins or their corporation) should carry on the drilling operation. This Agreement gave "Operator" the "sole right of prospecting and exploring the lands" subject to the agreement (Par. III A); gave "Operator" the sole right and discretion to hire and control employees "and such employees shall be the employees of the operator and under its sole direction and orders" (Par. III B); and all Cross-Appellants had were the rights of inspection and information (Par. VII B). This lack of joint operation prevented implication of a partnership or the arising of a partnership including Cross-Appellants as members.

*McAnally vs. Cochran* (supra);

*U. S. vs. Wholesale Oil Co.* (C. C. A. 10), 154 Fed. 2d 745;

*Johanson Brothers Builders vs. Board of Review, Industrial Commission* (Utah 1950) 222 Pac. 563, 567;

*Bentley vs. Brossard* (supra);

131 A. L. R. 508, 540, 541;

68 C.J.S., 425-426; 58 C.J.S. 688;

4 Summers Oil and Gas. Secs. 723, 724.

The requisites of a mining partnership are thus stated in 58 C. J. S. 688:

“With respect to the elements of the relation of a mining partnership each case must necessarily be determined by its own facts. However, there are three basic requirements which must always be present for the creation and existence of the relationship, and they are co-ownership, joint operation, and an agreement to share in profits and losses. It has been also held that, in addition to the above, community of interest and mutual agency are also necessary. \*\*\*”

This treatise goes on to consider these three elements in greater detail, stating that joint ownership is not sufficient to make a mining partnership, nor is mutual agency, and as to the requisite of joint operation, makes this statement at page 690:

“Joint operation. An agreement for cooperation and the joint working of a mine is essential to the creation of a mining partnership; and in some jurisdictions an actual joint operation or development is essential. As a general rule a mining partnership arises when two or more co-owners or lessees of a mining claim actually engage in working it and share according to the interest of each, although there is no express agreement between them to become partners; but mere joint operation of a mine or well will not necessarily create a partnership.”

The same question was discussed in *McAnally vs.*

*Cochran* (supra) where an agreement was made to use well-drilling tools and in consideration thereof to assign an interest in the lease, the borrower of the tools undertaking the actual drilling and doing the hiring and paying of employees. The court held that operation of a mining lease by co-tenants did not establish a mining partnership and quoted the following language from *Gillespie vs. Shufflin*, 91 Okl. 72, 216 Pac. 132 at page 956 of 46 Pac. 2d:

“In order to constitute a mining partnership, the parties must cooperate in developing a lease for oil and gas, each agreeing to pay his part of the expenses and to share in the profits or losses. \*\*\*

“Inter sese, there must be an intention of the partners to do so, in order to create a partnership and such intention cannot be inferred, alone, from a joint venture in drilling a well.”

The Court then quoted from the earlier case of *Ash et al vs. Mickelson*, 118 Okla. 163, 247 Pac. 680:

“A mining partnership or joint adventure cannot exist, unless there is a cooperation among the parties in the development of a lease for oil and gas, each agreeing to pay his part of the expenses and to share in the profits and losses. \*\*\*

“The mere holding of an interest in an oil and gas lease and leasehold estate with other co-tenants and having knowledge that a well was being drilled thereon by one or more of the co-tenants does not constitute “cooperation” as contemplated by the authorities herein cited.” \*\*\*

"There is no evidence in the record that shows or tends to show that the owners of the leasehold estate ever contemplated a partnership among the various owners of the lease at the time they purchased an interest in same, some of which were before the well was ever begun. Neither does the evidence show or tend to show that there was any such agreement between the parties during the progress of the drilling of the well, nor as to the operation and management of the well after production was found. The parties never came together for the purpose of perfecting such an arrangement. J. F. Root and F. S. Hoxie had exclusive control during the drilling of the well and with no authority to act for any other cotenant, and the same is true after they had reached the Skinner sand and had decided to make a well therein. It is not shown that any of the other parties of interest was ever consulted about employing labor for cleaning the well or doing any of the other many things necessary to be done at a new well, or in purchasing tankage or other equipment necessary therefor. Neither does the testimony show that the parties in charge had any authority to act for others."

In *United States vs. Wholesale Oil Company* (supra) the question was to determine whether a partnership existed in the operation of retail gasoline filling stations or whether the relation was that of employer and employee. The station managers had a monthly drawing account which was charged against one half of the profits, the business could not be sold without the approval of the company and when an operator quit the business

there was an accounting of profits between them and no distribution of assets. In holding that there was no partnership the Court stated at page 748:

“Neither did the operator have the right to exercise his independent judgment in the management and operation of his business. \*\*\* The business was conducted in the name of the company; the bank account was kept in the name of the company in a bank designated by it; the checks were written against the account only by the company and none were written against this account by the operator save that in an emergency he might draw a check against the account. \*\*\* Neither did he assume any liability for the debts of the so-called partnership or joint adventure. He did not become liable for merchandise accounts or for other obligations incurred by the company.”

As a test of joint operations this language is close to the activities of the parties here. The Baird and Robbins Company made all decisions concerning the drilling of the well, controlled all of the funds in bank accounts to which Cross-Appellants were strangers, purchased all supplies, employed all laborers and supervisory employees, and never at any time consulted with Cross-Appellants or anyone else concerning decisions to be made in the drilling of the well. It seems obvious that if Cross-Appellants had attempted to interfere in any way with drilling of this well as a partner would have a right to do, Baird and Robbins would have pointed to the joint operating agreement and advised Cross-Appellants to

stay out of the drilling operation. To suppose that Cross-Appellants could have made purchases for the drilling of this well and bound Baird and Robbins thereby would be to stretch this operating agreement beyond any reasonable interpretation—and yet, if a mining partnership were intended between parties such activities would have been reasonable. The intention of the parties as expressed in the operating agreement negatives any possible intended joint operation.

In *Johanson Brothers Builders vs. Board of Review* (supra) the Industrial Commission determined that no partnership existed under a plan whereby a brick mason agreed with other brick masons that they would work together on various jobs all of which would be obtained by Carl Johanson each of them to share in the profits according to a formula. This Court pointed out that under the Utah Statute a partnership is “an association of two or more persons to carry on as co-partners of a business for profit” and also that “all partners have equal rights in the management and conduct of the partnership business.” The Court held that no partnership was established because, as further pointed out at page 567, the bank account was carried in the name of Carl F. Johanson and wife and no one else had a right to draw on it; Johanson mingled contracting business funds with other income; all the equipment belonged to Johanson and there was no acquisition of an interest in such assets by the other interested parties; and only Carl Johanson could have contracted for any job. The practical tests applied to that case could be equally applied to

this case. Baird and Robbins owned trucks, and presumably some other equipment (see Exhibit C, Par. IV B), leased equipment, made all decisions concerning operations, banked the money in their account mingling it with other funds in both the Continental and Bank of Vernal accounts and consulted with Cross-Appellants in no particular.

The question of mining partnership was carefully considered by this court in *Bentley vs. Brossard* (supra) in 1908. In that case one Fannof owned a mine and entered into a lease with one Brossard for development of the mine in equal interests, with the proviso that Fannof should not be held for any of the expenses or losses. The lease required Brossard to work and develop the claims in a proper manner, to employ a specified number of men, to sell the ore and divide the proceeds in an agreed manner. Fannof could be employed if the operation was with steam. Brossard also had the right to purchase an interest in the property at a given price. Brossard then entered into agreement with other people who were made defendants with him in the case, these people agreeing to advance certain sums of money "for development of said mining claims and the carrying out of" the Fannof contract. Proceeds accruing to Brossard were to be shared with the people he interested. Brossard had charge of the work and supervised it although there was evidence that the other contributors joined in the operation and participated in the decisions. Action was brought by a laborer against Brossard and

those interested with him, and although Fannof testified at the trial he was not made a party defendant.

The trial court submitted the case to the jury on the question of the mining partnership and the Supreme Court held that the contracts and the evidence constituted a mining partnership as a matter of law. Although Fannof appears to be in the position that the Cross-Appellants are in here, he was not made a party in that action. The Court held that the contract itself created the relationship of partnership quoting a decision that the requisites of joining together for the common benefit, each contributing property or services, and having a community of interests in the profits was sufficient (page 407 of 33 Utah). The court discussed the requirement of sharing losses and further that the agreement to share profits with nothing said about losses was prima facie an agreement to share losses which is also necessary to a partnership (page 408). At the bottom of the same page the court relies heavily upon the contract between Brossard and Fannof which was the inducement of the subleases, and it was this contract which committed the sublessees to the program of working and developing the mines in accordance with the lease. It was impossible for them to undertake to perform the Fannof contract without associating themselves together within the contemplation of that contract (page 409). The court also discussed the distinctions between a mining partnership and an ordinary commercial partnership. None of these distinctions is significant in the



*Bentley* case or in the case at bar and there is no rule that a mining partnership is more easily formed or is formed against the plainly expressed intention of the parties any more than is a commercial or trading partnership. We still have to read the contract and determine its intent. The court explained the fact of Brosard's doing the work on the theory that he was made the general manager by the partners, and it was proper for a general manager to take control of the operations.

Specifically the differences between that case and the case at bar are that the contributors in the *Bentley* case were necessarily committed to the contract requiring development of the mine and nothing in the sublease negated the implications of full responsibility for carrying out that contract. In our case there is no obligation of development outside the Joint Operating Agreement. This agreement specifically negatives the joint responsibility for mutual operation as to this well.

Cross-Appellants were investors in oil and gas leases. They wanted to be sure a well was drilled on the property in which they were acquiring an interest. This is a common practice and a normal approach which a prospective investor would take in connection with purchase of an undivided interest in an oil well. The growth of oil exploration in Utah gives this case more significance than it would have had ten years ago. It is not ordinarily the intention of investors to become partners with well drillers, nor is it the expectation of suppliers to hold interest holders responsible for materials furnished to well-drillers.

In accordance with the intention of the parties and the agreement which was carefully prepared to guard against this very liability, this court should hold that no mining partnership arose under the joint operating agreement.

## SUMMARY AND CONCLUSION

Appellants were doing business in Utah by causing interstate commerce in their products to end at the Vernal warehouse, by incorporating their products in their Utah business and making local sales in substantial quantity to all who came for the products. The original package doctrine should not be given any such absolute effect as to create a barrier to control where none in fact exists.

The Joint Operating Agreement between the parties guards against sharing of losses by Cross-Appellants which is significant in determining whether a partnership was intended to arise. The lack of practicable control over the drilling operation is further evidence that the incidents of a partnership did not exist and that no partnership was intended. To argue otherwise is to contend that the essentials incidental to a partnership which were carefully excluded by the agreement will now be made a part of the agreement by force of law. This would not only ignore the intention of the parties but destroy their power to contract. There has been no holding out of partnership, no representation of any kind and no reliance by Appellants on the existence of a partnership

or on the credit of Cross-Appellants. There is no reason to disregard the corporate entity and the Court should hold the finding as to that erroneous and prejudicial and, either grant a new trial, or direct that the judgment be vacated and judgment of no cause of action entered.

Respectfully submitted,

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