

1955

Walter W. Sprague and United States Fidelity & Guaranty Company v. Boyles Bros. Drilling Company : Brief of Appellant

Utah Supreme Court

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In the
Supreme Court of the State of Utah

WALTER W. SPRAGUE and UNITED
STATES FIDELITY & GUARANTY
COMPANY, a corporation,

Respondents,

v.

BOYLES BROS. DRILLING COM-
PANY, a corporation,

Appellant.

FILED

JUL 9 1955

Clerk, Supreme Court, Utah

Case No.
8351

APPELLANT'S BRIEF

GRANT H. BAGLEY,
GRANT MACFARLANE, JR.,
for VAN COTT, BAGLEY,
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In the Supreme Court of the State of Utah

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COMPANY, a corporation,

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v.

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PANY, a corporation,

Appellant.

Case No.
8351

APPELLANT'S BRIEF

STATEMENT OF FACTS

The judgment appealed from was entered at the conclusion of a non-jury trial of an action involving charges and countercharges of breaches of a subcontract providing for the production of rock to be used by respondent Sprague in the performance of his contract with the United States wherein he undertook to construct a levee on the banks of the Snake River in the vicinity of Rigby, Idaho (R. 1-18, R. 26-30).

The subcontract provided for the production of the rock by the joint efforts of appellant and Sprague. Appellant undertook to break into size 50 to 350 pounds a minimum of 12,200 tons of native rock located in the Olsen Quarry. The rock was to be broken in time to enable Sprague to deliver it to the levee within the time limit of his contract with the Government. Sprague agreed to furnish sufficient compressed air to operate appellant's drills efficiently, and to remove the rock from the quarry as it was broken into the sizes specified "so as not to cause delay." Sprague promised to pay appellant for breaking the rock at the rate of forty-eight cents per ton, and to make a progress payment of seventy-five percent of the contract price on or before April 20, 1950. In the event more than 12,200 tons of rock were required for the levee which Sprague had agreed to construct, appellant promised to break the excess provided it was requested to do so before it had broken the required minimum of rock. If the breaking of the 12,200 tons of rock into the sizes specified resulted in the production of other usable or salable rock, Sprague agreed to pay for it at the rate of forty-eight cents per ton at the time of sale or use. The subcontract further provided that if appellant should be unable to furnish adequate labor, equipment or material to complete the subcontract within the time specified, Sprague could in the name of appellant "put on such additional force and outfit as may be required" at the expense of appellant (R. 8-10).

The complaint alleges in the first count that defendant only partially performed its obligations under the sub-

contract; that Sprague paid \$8,087.08 for labor, material, supplies, equipment, rental and services to complete the performance of appellant's obligations under the subcontract; that he paid appellant \$4,392.00 and that there was a balance of \$5,085.16 due him. He claimed that he "was entitled to receive" from the defendant because of its failure to complete its obligations under the subcontract "the sum of \$2,500.00 for additional loading and hauling costs." Sprague alleged also that he was penalized \$1,050.00 for his failure to perform his prime contract within the time therein specified and attributed his default under the prime contract to defendant's alleged failure to perform the subcontract (R. 1-3).

A second cause of action in the complaint asserted that the plaintiff United States Fidelity & Guaranty Company had furnished Sprague the payment and performance bonds required by his prime contract. It reiterated the charges of failure on the part of appellant to complete the subcontract, the expenditures made to complete appellant's obligations, the penalty imposed upon Sprague, and the "additional loading and hauling costs." Contrary to the first count, the second count stated that the progress payment made to appellant, the payment of the additional loading and hauling costs, the expenditures to complete the subcontract and the payment of the penalty against Sprague were all made by the United States Fidelity & Guaranty Company. It claimed the right to be subrogated to all claims which Sprague had against defendant under the subcontract (R. 3-7).

The answer and counterclaim of defendant conceded that defendant had not broken the minimum quantity of rock specified in the subcontract. As justification for its failure in that regard, it asserted that Sprague failed and neglected to furnish compressed air for the operation of its drills, failed and neglected to move the rock from the quarry as it was broken into the sizes specified, and also failed and neglected to make the progress payment within the time required by the subcontract, or at all. It also asserted that it learned that Sprague was insolvent and financially unable to perform his part of the subcontract.

The answer and counterclaim further alleged that following the foregoing defaults on the part of Sprague, defendant removed its equipment and employees from the quarry, that thereupon the plaintiff United States Fidelity & Guaranty Company prevailed upon the defendant to resume the performance of the subcontract, and assured the defendant that if it would do so, United States Fidelity & Guaranty Company would make the progress payment which Sprague had failed to make and would comply with all of the provisions of the subcontract to be performed by Sprague; that in reliance upon such assurance, the defendant returned its equipment and employees to the quarry, and resumed performance of the subcontract. Defendant admitted that the United States Fidelity & Guaranty Company made the progress payment as promised, but alleged that it failed to furnish compressed air for the operation of defendant's drills, except for a short period of time. Defendant also alleged that because of the failure of the United States Fidelity & Guaranty Company to furnish

the compressed air as promised, defendant again stopped performance under the subcontract and again removed its men and equipment from the quarry (R. 11-16).

Although the trial court made and entered what are designated as Findings of Fact and Conclusions of Law, there was no determination made of the controlling issues above set forth (R. 26-29). That court did conclude that Sprague "performed his part of the contract," and that appellant "breached the contract." It also concluded that Sprague suffered damages "for increased cost of loading and hauling rock" and in certain stated sums for rock purchased, and because of expenditures made "in performing those things required by the subcontract to be performed" by the defendant (R. 26-30). Upon these conclusions the court entered judgment in favor of both plaintiffs in the amount of \$12,187.27, plus interest and costs, and dismissed the defendant's counterclaim (R. 30).

Defendant commenced operations in the quarry a few days before Christmas of 1949 (R. 287).

The primary breaking of the rock was done by the use of explosives (R. 85). A tunnel referred to in the record as a coyote hole was driven into the wall of the quarry a distance of seventy-five feet (R. 288). At the end of the tunnel two wings were drilled outward thirty feet on each side of the tunnel, and an enlarged pocket was made at the tip of each wing (R. 288).

The tunnel work was done by the use of a piece of equipment designated as a leyner (R. 288). The drills are mounted on the leyner and operated by compressed air (R.

288). Sprague furnished a Schramm 315 air compressor which was brought to the quarry on the evening of December 20, for defendant's use in running the leyner (R. 288). The compressor was in poor mechanical condition, and several hours were spent by the employees of both Sprague and defendant in getting the compressor started (R. 289). After finally getting it in operation, constant difficulty was encountered getting it started at the beginning of the day (R. 290-4). It failed completely on several occasions and had to be taken from the quarry for repairs (R. 334). One of defendant's employees stated that defendant lost fourteen shifts of work because of the mechanical failures of the compressor (R. 213-14) (Ex. 40) (R. 337). As a result of these delays, the tunnel was not completed until February 3 (R. 86). On that day a large amount of dynamite was placed in the enlarged pockets on the wings of the tunnel and exploded (R. 86). Several thousand tons of rock were broken by the blast and fell to the floor of the quarry (Ex. 25) (R. 293). A large amount of the broken rock was over-size and required secondary breaking to make it conform to the subcontract (R. 316). The secondary breaking was done by either drilling a hole in which dynamite was inserted, or by plastering the dynamite on the outside of the rock (R. 359). Defendant promptly proceeded with the secondary breaking, and by the latter part of February, all visible rock in the quarry was broken into the sizes specified in the subcontract (R. 327).

Sprague made no attempt to remove any of the contract size rock from the quarry, and defendant's employees were withdrawn from the quarry (R. 340, R. 116). In the latter

part of April, defendant was informed that Sprague would immediately commence removal of the rock. An employee was dispatched to the quarry to resume work as soon as the broken rock was removed (R. 342). This employee remained at the quarry for a week or ten days, and since Sprague had made no attempt to remove any rock, the employee left the quarry and removed defendant's equipment (R. 343).

In July, plaintiff, United States Fidelity & Guaranty Company, learned that Sprague had incurred obligations in excess of \$30,000.00 which he was unable to pay (R. 207-14). Among these bills owing was the progress payment due the defendant (R. 242-43). The surety made the progress payment to defendant, and prevailed upon it to resume the work of breaking the rock (R. 97) (Ex. 28). Sprague or his surety moved a few tons of the contract size rock from the quarry in May and on August 1st resumed hauling of the rock to the levee. On August 3rd defendant returned its men and equipment to the quarry and resumed operations (R. 363). Defendant was supplied with a small compressor to operate its drills for secondary breaking (R. 364). Soon after defendant resumed operations in the quarry it became necessary to break additional native rock (R. 365). A large compressor was required to drill the deeper holes needed for the primary breaking (R. 367-7). This was furnished on August 16 (R. 365). On September 21, the bearings in the large compressor burned out, and it was removed from the quarry (R. 366). It evidently was beyond repair, because it was never returned to the quarry (R. 411). The compressor which remained in the

quarry was a small one and would operate only one drill for secondary breaking (R. 366). The plaintiffs endeavored to obtain another compressor, but were unable to do so (R. 412-3). Defendant's equipment and employees remained at the quarry from September 21 until October 5, during which time they were unable to do any work in the quarry because of the lack of a compressor (R. 372). On October 5, defendant withdrew its employees and equipment from the quarry, and did not thereafter resume performance of the subcontract (R. 387-8).

The trial court found that the defendant broke into sizes specified in the subcontract a total of 9,799 tons (R. 27). Sprague admitted that he sold 1,000 tons of the rock broken by defendant, and that this rock was not used on the levee (R. 251). This was over-size rock (R. 251). Sprague's contract with the Government as amended subsequent to the subcontract required 15,400 tons of rock of the sizes specified in the subcontract (R. 27).

After defendant left the quarry on October 5, plaintiffs proceeded to produce the additional rock required to complete the prime contract (R. 119).

STATEMENT OF POINTS

POINT I

THE JUDGMENT APPEALED FROM IS ERRONEOUS BECAUSE IT IS CONTRARY TO THE EVIDENCE WHICH ESTABLISHES THAT THE ONLY BREACH OF THE SUBCONTRACT WAS THAT COMMITTED BY PLAINTIFFS.

POINT II

THERE IS NO EVIDENCE TO SUPPORT A FINDING THAT DEFENDANT DID NOT BREAK THE ROCK INTO CONTRACT SIZE IN A WORKMANLIKE MANNER.

POINT III

THE EVIDENCE IS INSUFFICIENT TO PROVE THAT THE COST TO PLAINTIFF OF PRODUCING THE ADDITIONAL ROCK EXCEEDED WHAT HE AGREED TO PAY DEFENDANT.

POINT IV

THE COURT ERRED IN AWARDING THE PLAINTIFFS ANY AMOUNT ON ACCOUNT OF LOADING OR HAULING COSTS.

POINT V

THE COURT ERRED IN AWARDING PLAINTIFFS \$850.00 ON ACCOUNT OF SPRAGUE'S FAILURE TO COMPLETE HIS PRIME CONTRACT.

POINT VI

UNITED STATES FIDELITY & GUARANTY COMPANY IS LIABLE TO DEFENDANT FOR FAILURE TO FURNISH COMPRESSED AIR BECAUSE IT ASSUMED THE OBLIGATIONS OF SPRAGUE UNDER THE SUBCONTRACT.

POINT VII

THE COURT ERRED IN AWARDING PLAINTIFFS \$292.80 FOR ROCK PURCHASED.

POINT VIII

THE JUDGMENT IS ERRONEOUS BECAUSE IT IS NOT SUPPORTED BY THE FINDINGS OF FACT.

POINT IX

THE JUDGMENT MUST BE VACATED BECAUSE OF THE FAILURE OF THE COURT TO FIND ON THE MATERIAL ISSUES RAISED BY THE PLEADINGS.

POINT X

THE PRESENT ACTION SHOULD HAVE BEEN ABATED BECAUSE OF THE PENDENCY OF ANOTHER SUIT.

ARGUMENT

POINT I

THE JUDGMENT APPEALED FROM IS ERRONEOUS BECAUSE IT IS CONTRARY TO THE EVIDENCE WHICH ESTABLISHES THAT THE ONLY BREACH OF THE SUB-CONTRACT WAS THAT COMMITTED BY PLAINTIFFS.

The failure of plaintiffs to furnish defendant with sufficient compressed air to operate its drills efficiently,

and to remove the rock from the quarry as it was broken into contract size is established by evidence which is without any conflict whatever. Their failure to make the progress payment as provided by the subcontract until more than three months after it was due is admitted by them. It is likewise conceded by plaintiffs that at least as of July, Sprague was financially unable to proceed under either his subcontract or his prime contract, and that the surety upon his payment and performance bonds was compelled to pay out in excess of \$30,000.00 on account of labor and material furnished him. We shall elaborate on these breaches of the subcontract in the order above indicated.

It will be noted that the subcontract is dated more than a month after defendant commenced work in the quarry. Whether it was executed prior to its date does not appear in the evidence, but it is clear that its terms were agreed upon before the defendant started operations. Sprague recognized his obligation to furnish sufficient compressed air to operate defendant's drills efficiently by procuring a Schramm 315 compressor, which he delivered to the quarry on December 20. His breach of this obligation occurred immediately upon delivery of the compressor to the quarry, and continued throughout the time defendant was engaged in drilling the coyote hole. It required the combined efforts of two of Sprague's employees and at least one of defendant's employees for a period of several hours to get the compressor started initially. Practically every morning thereafter defendant's employees encountered more or less difficulty starting it (R. 336). Although adequate

in size, it was in very poor mechanical condition (R. 333). The release valves would not disengage, which caused the motor to stop. Two days after it arrived at the quarry, it was sent to Idaho Falls for repairs (R. 334). About two weeks later, the clutch went out and it was again sent to Idaho Falls after a mechanic sent to the quarry was unable to repair it (R. 330). During the period the compressor was used to operate the leyner, the defendant was required to pay its employees for fourteen shifts of standby time due to the failure of the compressor (See plaintiff's Exhibit 40). A shift consisted of two workmen and a day and a night shift were employed (R. 335).

At no time did Sprague or any of his employees operate or assist in the operation of the compressor except to get it started initially (R. 334). Defendant's employees alone operated the compressor. They were skilled in the operation of various types of air compressors.

Following the completion of the coyote hole, the Schramm compressor was removed from the quarry (R. 338).

For defendants use in the secondary breaking of rock, Sprague furnished a 105 Leroi compressor which would produce only seventy or eighty pounds of compressed air (R. 338). It furnished barely enough compressed air to operate one drill. Nevertheless, before the end of February, defendant broke into the sizes specified in the contract all of the rock broken by the blast in the coyote hole and which was exposed in the quarry.

Sprague failed to remove the contract size rock from the quarry and about May 1 defendant ceased operations

in the quarry. In the latter part of July Sprague's surety made the April payment due under the subcontract and prevailed upon defendant to resume breaking rock.

On August 3, defendant sent its men and equipment back to the quarry to resume breaking rock. On August 1, plaintiffs started to haul away the rock that had been broken to contract size. Some of the oversize rock broken by the primary explosion was in the quarry, and defendant proceeded with the work of breaking it into contract size. It sent three jack hammers to the quarry to do the secondary breaking. However, only the Leroi 115 compressor was furnished to operate these jack hammers. It soon became necessary to do further primary breaking of rock, and much more compressed air was required than could be supplied by the Leroi compressor. In response to defendant's demand, the plaintiffs rented from Bergraph Brothers a 315 compressor which was delivered to the quarry about August 19. A compressor of this size was required to operate the drills to make the holes needed for the primary breaking of the rock. After the arrival of the Bergraph compressor, the breaking of the rock by the defendant proceeded at a very rapid pace. Defendant employed five men on two shifts. Three drills were kept in operation and during the next four or five weeks several thousand tons of rock were broken by the defendant into the sizes specified in the subcontract. This was hauled away by the plaintiffs without unreasonable delay. This stepped-up activity in the quarry was abruptly halted on the evening of September 21, when the bearings in the Bergraph compressor burned out (R. 365-6). Plaintiffs' superintendent was immediately

notified of the failure of the Bergraph compressor and he tried to locate another one because "I was aware of the fact that we must have another compressor. Now whether I started to locate one before he told me or after, but as soon as it broke down, as soon as I got to town, I started to locate another compressor" (R. 414). He returned the compressor to Bergraphs and requested that "they repair it immediately (R. 411). He kept pressing Bergraph Brothers "trying to expedite the repairing of it" (R. 412). He also contacted "every equipment house and contractor, or anybody who I thought might have a compressor or know of a compressor throughout the state and two surrounding states, trying to locate a compressor, and I sat on the phone for hours and hours and hours calling" (R. 412). During this period from September 21, until October 5, defendant's equipment and employees remained idle in the quarry. Defendant was required to pay one of its employees for full time during this period, while he sat in the quarry waiting for compressed air to operate the defendant's equipment. Several other employees were paid show-up time during this period and held themselves in readiness to return to the quarry. Defendant removed its equipment and employees from the quarry on October 5 (R. 372).

The failure of Sprague to remove the rock from the quarry concurrently with its being broken into contract size occurred prior to the time his surety induced the defendant to resume performance of the subcontract.

All of the rock broken by the initial blast and which was exposed in the quarry was rebroken to contract size by the defendant before the end of February. The precise

amount of rock thus broken may not be definitely established but the records maintained by the plaintiffs disclose that more than 1,000 tons of rock were broken into contract size in the quarry prior to February 23 (R. 360-1). None of this rock was removed from the quarry for a period of more than two months. About the last week in April, Sprague informed defendant that he would start removing this contract size rock from the quarry (R. 342). Defendant promptly sent one of its employees to the quarry to resume secondary breaking of rock. He remained at the quarry with his equipment waiting for Sprague to remove the rock. Sprague failed to remove any of the rock, and about May 1, defendant withdrew its employee and equipment from the quarry (R. 343).

Sprague kept a record of the date each ton of contract size rock was removed from the quarry. This record consisted of weigh tickets issued by an employee of the United States, who weighed the rock on scales just outside the quarry (Ex. 32). One copy of the weigh ticket was given to Sprague and one copy to the trucker who hauled the rock. The weigh tickets issued to Sprague and the copies issued to the truckers were introduced in evidence by the plaintiffs. Mrs. Sprague who kept the books for her husband summarized these weigh tickets in Exhibit 49. According to these records no contract size rock whatever was moved from the quarry until May 7, when a little more than 24 tons were hauled away. On May 15, 114 tons, on May 16, 194 tons, and on May 17, 248 tons of contract size rock were hauled away from the quarry. No contract size rock was removed from the quarry after May 17, until

August 1. On August 1, 198 tons and on August 2, 222 tons were removed (Ex. 32).

The foregoing breaches of Sprague's covenants in the subcontract have several legal consequences, all of which are exactly opposite to the judgment appealed from. The first is that the failure of Sprague or his surety to furnish the defendant with sufficient compressed air to operate its drills efficiently after it had been induced by the surety to resume production of rock justified the defendant in stopping performance of its part of the subcontract. The legal effect of Sprague's failure to furnish compressed air while defendant was drilling the coyote holes will be considered later.

As has been pointed out, the 315 compressor broke down completely on the evening of September 21. This left in the quarry only the 105 Leroi compressor, which was barely sufficient to operate one drill for secondary breaking. Defendant then had three drills in the quarry with five employees to operate them. The 315 compressor was required to do the primary breaking of the rock, and inasmuch as all of the rock broken by the explosion in the coyote holes had been rebroken into contract size and removed from the quarry, the failure of the 315 compressor completely halted the further production of rock. Apparently, the failure of the 315 compressor was beyond repair, as it was taken from the quarry to Idaho Falls and never returned. Defendant's equipment remained idle in the quarry until October 5, as did two of its employees. Its other employees remained in readiness to resume work in the quarry. No compressed air of any kind was furnished

by either Sprague or his surety during this period of more than two weeks, except what could be produced by the small Leroi compressor which was useless to the defendant because it could not be used for primary breaking. Plaintiffs fully realized that their failure to furnish compressed air at this time prevented the defendant from producing the rock, as they made frantic efforts to procure another compressor. They were not, however, able to do so and defendant was fully justified in stopping performance before the additional rock had been produced. Such justification is set forth in Restatement of the Law of Contracts (Sec. 274).

“(1) In promises for an agreed exchange any material failure of performance by one party not justified by the conduct of the other discharges the latter's duty to give the agreed exchange even though his promise is not in terms conditional. An immaterial failure does not operate as such a discharge.”

The trial court in its Memorandum Decision recognized the failure of Sprague and his surety to comply with the covenant to furnish defendant sufficient compressed air to operate its drills efficiently, but stated that it was not sufficient in time or effect to constitute a rescission or cancellation of the contract. The trial judge was not only confused with respect to the testimony of the witnesses on the subject of compressed air furnished to the defendant, but he misconceived the law applicable to a breach of contract. The defendant made no claim either in its pleadings or at anytime in the course of trial that it had the right to rescind the contract or have it cancelled. On the contrary, the defendant asserts, and has at all times

asserted, that the breach of the covenant by Sprague to furnish compressed air legally justified it in failing to produce the amount of rock required by the contract, and gave it the right to recover the damage sustained by it as a result of the breach. The right to rescind a contract rests upon entirely different considerations from those which give a right of action for damages or which justify a party in refusing to perform its part of a contract. The distinctions are pointed out by the Supreme Court of the United States in *Anvil Mining Company v. Humble*, 153 U. S. 540. In that case the plaintiffs and defendant entered into a contract by the terms of which the plaintiffs undertook to mine a certain quantity of ore during a specified period from the defendant's mine. The defendant undertook to lift the ore after it had been placed on the skips by the plaintiff at the first level of the mine. There was testimony that the defendant interfered with the plaintiffs' performance of the contract. The court instructed the jury as follows:

“If the jury find from the evidence that the plaintiffs were in good faith endeavoring to carry out and perform said contract according to its terms, and the defendant wantonly or carelessly and negligently interfered with and hindered and prevented the plaintiffs in such performance to such an extent as to render the performance of it difficult, and greatly decrease the profits which the plaintiffs would otherwise have made, then and in such case such interference was unauthorized and illegal and would have justified the plaintiffs in abandoning the contract, and would have entitled them to recover such damages as they actually suffered by being hindered and prevented from performing such contract.”

The jury returned a verdict in favor of the plaintiffs and the defendant contended that the instruction permitted the plaintiffs to recover damages and at the same time rescind the contract. The Supreme Court of the United States disposed of this point as follows:

“It is insisted, and authorities are cited in support thereof, that a party cannot rescind a contract and at the same time recover damages for his non-performance. But no such proposition as that is contained in that instruction. It only lays down the rule, and it lays that down correctly, which obtains when there is a breach of contract. Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrong-doing of the other party has brought about. Generally speaking, it is true that when a contract is not performed the party who is guilty of the first breach is the one upon whom rests all the liability for the nonperformance. A party who engages to do work has a right to proceed free from any let or hindrance of the other party, and if such other party interferes, hinders, and prevents the doing of the work to such an extent as to render its performance difficult and largely diminish the profits, the first may treat the contract as broken, and is not bound to proceed under the added burdens and increased expense. It may stop and sue for the damages which it has sustained by reason of the non-performance which the other has caused.”

The same proposition is stated in 17 *C. J. S.* at pages 979-980, as follows:

“In some cases a breach of the contract of one party may be of such character as to permit the other party to abandon it and sue at once for entire damages. Such an abandonment is to be distinguished from a technical rescission discussed in paragraph 421, *supra*, in that the contract may still be resorted to by the party for the purpose of fixing the damages which he has sustained by reason of the breach occasioning the abandonment of performance. Notice to the party in default of the intention to claim damages is unnecessary.”

It necessarily follows that since the defendant was legally justified in stopping operations on October 5, it did not breach the contract and plaintiffs can recover nothing, on account of defendant's failure to break the required additional rock. We quote from Restatement of the Law of Contracts under Sec. 312, as follows:

“a. The expression ‘breach of contract’ is confined to wrongful conduct. The promisor does not necessarily commit a breach of contract if he fails to perform his promise. Thus, under the definition in the Section, non-performance of a contract, if justified, is not a breach. Justification may be due to the fact that the duty arising when the contract was formed has been discharged, or if that is not the case, to the fact that a duty of immediate performance has not arisen because some condition precedent has not occurred.”

In *William B. Hughes Produce Co. v. Pulley*, 47 Utah 544, 155 Pac. 337, the plaintiff Hughes Co., contracted to purchase 600 pounds of potatoes from defendant and agreed

to furnish the sacks for sacking them. It was undisputed that plaintiff failed to furnish the sacks and that defendant abandoned the contract by selling the potatoes to a third person. The trial court entered judgment for plaintiff, apparently on the theory that failure to supply the sacks for the potatoes was not a sufficiently substantial breach to justify defendant's abandonment of the contract. On appeal, the judgment of the trial court was reversed and the action dismissed. Our Supreme Court said:

"Now, it seems to us that while the defendant had obligated himself to deliver the potatoes as stipulated in the agreement, the plaintiff had bound himself to furnish the necessary sacks in which the potatoes were to be sacked before delivery. If it be held that plaintiff was not required to furnish the sacks, then something he agreed to do must be eliminated from the agreement. * * * It might be that a certain stipulation by the party agreeing to perform it offers no excuse for the other party to refuse to comply with all of the terms of his agreement. Courts should, however, be very careful not to excuse parties from their obligations by substituting their own judgment for that of the parties with respect to what constitutes a material stipulation in a contract. * * * This court is firmly committed to the doctrine that courts may 'enforce, but not create, liabilities' * * * What right have we to excuse the plaintiff from furnishing the sacks while we enforce the obligation of the defendant to deliver the potatoes. * * * Under the terms of the contract, the defendant was * * * required to sack the potatoes and to deliver them sacked within 30 days from the making of the contract. He, we think, was not required to comply with these conditions unless he was furnished the sacks in

which to place the potatoes. Had the plaintiff complied with the terms of his agreement in that regard, no dilemma nor controversy would perhaps have arisen. The plaintiff, and not the defendant, therefore, is responsible for defendant's failure to deliver the potatoes at the time and place specified in the agreement. That being so, we cannot see how the plaintiff can prevail in an action for a breach of a contract, for which breach he alone is responsible."

Other cases which support defendant's contention that it did not breach the contract by stopping work before all of the rock was broken, and that the plaintiffs cannot recover anything on account of defendant's failure to complete the work are: *Bennett v. Shaunghnessy, et al.*, 6 Utah 273, 22 Pac. 156; *Pool v. Motter*, 55 Utah 288, 185 Pac. 714; *Pack v. Wines*, 44 Utah 427, 141 Pac. 105; *Lawley v. Wade*, 39 Utah 537, 118 Pac. 484; *Orphere, etc. v. Clayton*, 44 Utah 453, 140 Pac. 653; *McConnell v. Corona etc.*, 149 Cal. 60, 85 Pac. 929; *Boomer v. Muir*, (Cal. App.), 24 P. 2d 570; *Bradley v. Nevada, etc.*, 42 Nev. 411, 178 Pac. 906; *Davis v. Brown etc.*, 21 S. D. 173, 110 N. W. 113.

The foregoing authority establishes not only that the defendant was justified in terminating the subcontract because of the plaintiffs' breach of the covenant to furnish defendant sufficient compressed air to operate its drills efficiently, but also that the defendant is entitled to recover under its counterclaim the damage sustained by it as a result of such breach. We have already pointed out the number of shifts which defendant was required to pay for when its men were idle because there was no compressed air to operate defendant's equipment. A total of 14 shifts was lost while the coyote hole was being drilled. Following

the breakdown of the compressor on September 21, one of defendant's employees remained at the quarry throughout a period of two weeks. Several employees were paid show-up time during this two-week period. All of these employees except Lowery were paid at an hourly rate. The evidence of the amount paid by defendant for time lost due to air compressor failure is definite and certain. As we compute it, defendant paid in excess of \$475.00 for show-up time and for lost time including time spent by defendant's employees in getting the compressor started.

In addition to the lost time paid for by defendant, its equipment remained idle in the quarry for substantial periods because there was no compressed air available to operate it. We concede that the amount of defendant's damage in this connection is not definitely established, but it was more than nominal.

Finally, the compressor which was furnished to operate defendant's leyner and the small Leroi compressor furnished to operate defendant's drills for secondary rock breaking were in poor mechanical condition and did not furnish sufficient compressed air to operate defendant's equipment efficiently. The evidence of the amount of damage on account of the poor mechanical condition of the compressors is uncertain, but there can be no doubt but that it was substantial. Again, the uncertainty lies solely in the amount of damage and not in the fact of damage.

The covenant of Sprague with respect to the removal by him from the quarry of the rock broken by defendant into contract size may be inartfully worded but it is not difficult to determine its meaning. Paragraph 10 provides

in the first sentence that defendant is to commence the performance of the subcontract as fixed in the prime contract, and to complete the same in sufficient time to give Sprague the necessary time to deliver and place the materials on the levee within the time limit of the prime contract. Then follows the further provision "all secondary breaking of rock shall coincide with hauling operations so as not to cause delay." While this language may suggest the age-old question, which comes first the chicken or the egg?, there can be little doubt but that the operations of Sprague and the operations of the defendant were to be as nearly concurrent as practicable. Sprague could not haul the rock away until it had been broken into contract size. But neither could the defendant break the rock into contract size unless it was removed from the quarry almost as fast as it was broken. This is so because of the limited size of the quarry floor.

If there were any ambiguity with respect to when Sprague was to remove the contract size rock from the quarry, the law would imply a covenant on his part to move the rock as fast as necessary to eliminate any obstruction to or interference with defendant's operations.

The foregoing proposition is of universal application and is thus announced by the Supreme Court of Washington in *Haley v. Brady*, 17 Wash. 2d 775, 137 P. 2d 505, 146 A. L. R. 859, as follows:

"The following quotation from the case of *M. L. Ryder Building Co. v. City of Albany*, 187 App. Div. 868, 176 N. Y. S. 456, 457, 458, is applicable to the instant case:

"In every express contract for the erection of a building or for the performance of other construc-

tive work, there is an implied term that the owner, or other person for whom the work is contracted to be done, will not obstruct, hinder, or delay the contractor, but, on the contrary, will in all ways facilitate the performance of the work to be done by him. This is the principle which underlies the cases of *Messenger v. City of Buffalo*, 21 N. Y. 196; *Mansfield v. New York Cent. [& H.] R. R. Co.*, 102 N. Y. 205, 6 N. E. 386; *Mulholland v. Mayor*, 113 N. Y. 631, 20 N. E. 856; *Horgan v. Mayor*, 160 N. Y. 516, 55 N. E. 204; *Gearty v. Mayor*, 171 N. Y. 61, 63 N. E. 804; *Del Genovese v. Third Ave. R. Co.*, 13 App. Div. 412, 43 N. Y. S. 8.

“ ‘In the *Mansfield* case the court said that the contract implied—“an understanding by all parties that they were to be unrestricted in the employment of means to perform it, and that nothing which it was the duty of the owner to do to enable the contractor to perform, should be left undone.” ’ ”

That Sprague violated both his express and implied covenant to remove the rock from the quarry as fast as it was broken into contract size, so as not to obstruct or interfere with defendant's work is uncontradicted. Between the 3rd day of February when the large explosion occurred, and about the 23rd of February the defendant broke into contract size all of the rock in the quarry that was visible or exposed. Not a single piece of this contract size rock was removed from the quarry until May. A few tons were moved on May 7 and a few more between the 15th and 17th of May. A large amount of the contract size rock remained in the quarry until August. There is no indefiniteness or uncertainty as to when the contract size rock was removed from the quarry because a record in triplicate was

made at the time each truck load was hauled away. That the failure to remove the rock totally prevented the defendant from proceeding to break additional rock is clearly established. In the latter part of April, Sprague notified the defendant that he intended to remove the contract size rock from the quarry. Immediately the defendant sent its employee Lowery to the quarry with equipment to proceed to break more rock. Sprague, however, failed to move any of the rock and plaintiff's employee and its equipment remained idle in the quarry for a week. He was unable to break any rock because Sprague did not move any.

The authorities cited above fully sustain the proposition that defendant was legally justified in ceasing operations in the quarry on May 1, because of the breach of the contract by Sprague. They also demonstrate that defendant is entitled to recover damages sustained by it. This damage may not be great but it is substantial, and the trial court erred in not allowing the defendant to recover.

POINT II

THERE IS NO EVIDENCE TO SUPPORT A FINDING THAT DEFENDANT DID NOT BREAK THE ROCK INTO CONTRACT SIZE IN A WORKMANLIKE MANNER.

The contract provides that defendant "shall proceed with such work in a workmanlike manner and complete the same without unreasonable delay." The court found that "defendant did not break the rock to the size required in a workmanlike manner." While this is a pure conclusion of law and leaves the judgment without any support so far

(To be inserted next preceding Point II, page 26)

Regardless of the correctness of the foregoing conclusions, defendant is entitled to recover upon its counterclaim the balance due and owing to it on account of the rock broken into contract size and on account of the 1,000 tons of rock broken by defendant and sold by Sprague.

The trial court found that defendant broke into contract size 9,799 tons of rock (for convenience 9,800 tons) (R. 27). Sprague admitted that he sold to Doyle Mathews 1,000 tons of the rock broken by defendant. The contract price of the broken rock was forty-eight cents per ton (Ex. A). The total of these items is \$5,184.00. United States Fidelity & Guaranty Company paid defendant \$4,392.00. Sprague paid nothing. The balance due defendant is \$792.00.

Plaintiffs in their complaint concede that defendant is entitled to be paid this balance. They claim that defendant was given credit for it. We have already demonstrated that neither of the plaintiffs had any valid claim against defendant. There was, therefore, nothing against which plaintiffs could credit the balance due the defendant. It remains owing to the defendant.

At a later place in this brief, we will point out that United States Fidelity & Guaranty Company became primarily liable to the defendant for the performance of Sprague's covenants in the subcontract.

We submit that the court erred in not awarding the defendant a judgment against plaintiffs for the balance admittedly due for the rock broken by it.

as it awards plaintiff's "loading and hauling costs" we will treat it as a finding of fact.

At the outset we emphasize that the plaintiffs did not in either of the complaints filed by them make any suggestion of complaint with respect to the manner in which defendant broke the rock. Neither did they assert that any of the equipment used by the defendant was insufficient or unsuitable for the work. There was no allegation that the defendant's employees were unskilled or that they were negligent in performing the work.

The rock to be broken was then in its native state in the quarry, which was a narrow canyon with a wall of solid lava rock. The parties contemplated that two breaking operations would be necessary to reduce the rock to contract size, because the contract provides that all secondary breaking of rock shall coincide with hauling operations so as not to cause delay, and that if the breaking of the rock into contract size resulted in the production of rock of any size which is usable or salable, the same was to be paid for by Sprague at the rate of forty-eight cents per ton.

Defendant proceeded to break the rock by the use of explosives. The primary breaking was done by drilling powder holes into the quarry wall. The first hole was drilled into the side of the wall a distance of seventy feet with two wings each thirty feet long. At the end of each wing, a pocket was created and the powder deposited in the pocket (R. 288). Sprague's superintendent visited the quarry while these powder holes were being drilled, as did also some Government engineers in charge of the prime project

(R. 113-114). No one offered any criticism of defendant's work. The first blast broke several thousand tons of the rock. This left only a comparatively small part of the total to be broken. The primary breaking of this part was done by drilling the powder holes on the top of the quarry wall (R. 367-8). After defendant quit the quarry in October, plaintiffs adopted the same method of doing the primary breaking that had been employed by the defendant (R. 119).

The secondary breaking of the rock was done by drilling powder holes into the larger pieces and by plastering the explosive to the side of the smaller pieces. Plaintiffs also adopted this method of secondary breaking after defendant left the quarry in October (R. 115).

The provision of the contract requiring the defendant to proceed with the work in a workmanlike manner and complete the same without unreasonable delay adds nothing to defendant's duties or obligations. If the contract were silent on the subject, the law would imply a covenant on the part of defendant to proceed in a workmanlike manner and complete the work without unreasonable delay. See *Westbrook v. Watts*, 268 S. W. 2d 694, (Tex. Civ. App. 1954).

When the defendant undertook to do the work in a workmanlike manner, it undertook to do it as a reasonably skillful person would. It did not undertake to employ the highest skill known in the mining industry, nor would it discharge its duty by employing the least skill known to that industry. A workmanlike manner of breaking rock is the method that would be employed by a reasonably skillful miner. See *Holland v. Rhoades*, 56 Ore. 206, 106 Pac. 779; *Westbrook v. Watts*, *supra*; *Economy, etc. v. Raymond, etc.*,

111 F. 2d 875, (C. C. A. 7th) ; *Cameron v. Sisson*, 24 Ariz. 226, 246 P. 2d 189.

It seems to us that the obvious method of breaking a mountain of solid lava rock into sizes of 50 to 350 pounds is by the use of explosives. No witness in this case suggested any other method, and the plaintiffs themselves adopted it after the defendant quit because of lack of compressed air.

There is no evidence that the holes made in the mountain to receive the explosives were unsuitable for that purpose or were improperly located. Making the powder holes on the top of the wall may not have been as efficient as putting them in the side, but at that time most of the rock had been broken by the initial explosion, and the condition of the quarry had been radically changed. In any event, plaintiffs themselves used this method of primary breaking when they took over the operation after October 5.

No complaint is made that the equipment employed by defendant to break the rock was either unsuitable or inefficient. The operators of the equipment were experienced and competent workmen. The explosives were used with skill. One explosion broke several thousand tons of the rock.

We submit that the finding under consideration is without support either in the pleadings or the evidence and cannot form the basis of any judgment against the defendant.

POINT III

THE EVIDENCE IS INSUFFICIENT TO
PROVE THAT THE COST TO PLAINTIFF OF

PRODUCING THE ADDITIONAL ROCK EX-
CEEDED WHAT HE AGREED TO PAY DE-
FENDANT.

Assuming, contrary to the undisputed facts, that defendant was not justified in failing to produce the full amount of contract size rock required, there is no factual basis for awarding plaintiffs any damages on account of such failure.

The trial court found that the defendant broke into contract size 9,799 tons of rock, and that the amount required under the contract of January 25, was 15,400 tons. For present purposes we accept these findings. In this connection, however, we point out that Sprague admits that he sold 1,000 tons of rock that had been broken by defendant (R. 251). This sale was made without the knowledge or consent of the defendant (R. 251), and since the rock was not used upon the levee, defendant must under any circumstances have this amount of rock deducted from the amount which it was required under the contract to break.

This 4,600 tons of rock was broken by Sprague, that is he hired the necessary employees and equipment to do the work. He did not purchase the additional rock and did not subcontract the breaking, or call for bids. In this circumstance and upon the assumption above stated, the measure of Sprague's damage for the failure of the defendant to break into contract size the additional 4,600 tons of rock would be the difference between what Sprague agreed to pay the defendant and the reasonable cost to him of breaking the rock. In determining this difference, Sprague is

not entitled to any costs of the compressed air used to break the rock, because under the contract he agreed to furnish the compressed air.

This rule of damages is elementary. See *Dover Lumber Company v. Case*, 31 Idaho 296, 170 Pac. 108; *Northern Construction Company v. Johnson*, 132 Ark. 528, 201 S. W. 510; *Richmond, etc. v. Black*, 39 Cal. App. 1, 177 Pac. 508; *Trinity, etc. v. Mills*, 293 Ky. 463, 169 S. W. 2d 311; *Schaffner v. President, etc.*, 94 Ind. App. 554, 154 N. E. 780.

There is no finding of fact by which it is determined what this difference amounts to. The finding "that by reason of said breaches of said contract on the part of defendant, the plaintiff Sprague suffered damages in the sum of \$6,368.85, which sum was necessarily expended by plaintiff Sprague in performing those things required by the contract between plaintiff and defendant to be performed by defendant over and above all credits given by plaintiff to defendant" falls short of such a determination. It is a pure conclusion of law. It is similar to the finding made in *Duggins v. Colby*, 45 Utah 335, 145 Pac. 1042. In that case defendant sold to the plaintiff some sheep in exchange for a tract of land, and agreed to have the sheep registered before a certain date. Before that date, plaintiff sold the sheep to third parties with an agreement to have them registered. Some of the sheep were not registered by defendant, and plaintiff compromised the claims of the parties to whom he sold the sheep. The court found only that registering sheep adds to their market value and that by the failure of defendant to have the sheep registered, plaintiff's damage was a sum equal to the amount for which he compromised with his buyers. There was no finding as

to the number of sheep not registered or of the market value of unregistered sheep of the kind sold. This court held that the finding made was a mere conclusion and since the true measure of plaintiff's damage was the difference between the agreed value of the land given in exchange for the sheep and the reasonable market value of the sheep unregistered, there was no determination of this issue and nothing to support a judgment for plaintiff.

Not only is there not a finding that it cost Sprague more to break the additional rock than he agreed to pay defendant, but the memorandum opinion of the court declares that such cost was less than what he agreed to pay the defendant. We quote from the memorandum opinion the following:

"The evidence reveals the breaking of rock by Sprague after Boyles quit cost 45.5 cents per ton for the 5,485 tons broken by him, or \$4,495.55, which shows a cost incurred by Sprague which had it been done under the contract with Boyles would be \$4,632.80, a saving to Sprague of \$137.00."

While the court was in error in stating that the contract required defendant to break 5,485 tons in addition to that broken by it, there is, nevertheless, a clear-cut decision that the cost to Sprague of breaking the additional rock was 45.5 cents per ton, which is 2.50 cents less than Sprague agreed to pay. In this state of the record the award made against the defendant for the sum of \$6,668.85 is not only unsupported by any finding of fact, but is contrary to the decision made by the trial court.

Quite apart from the foregoing considerations, the evidence in the record is insufficient to prove that the cost to

Sprague of breaking the additional rock was more than he agreed to pay the defendant. The evidence produced by the plaintiff with respect to the cost of breaking the additional rock consists of several packages or bundles of miscellaneous invoices, bills and statements purporting to have been made by various parties covering material of various kinds, rental of equipment and machinery, claims for work and labor and for transportation, taxes and other charges. Mrs. Sprague described the contents of these various packages and bundles as bills rendered "for the production of rock" (R. 136-157). The defendant objected to the introduction in evidence of these packages and bundles (R. 141-148).

In addition to these packages and bundles of miscellaneous documents, plaintiff introduced in evidence a number of checks issued to various parties and purporting to bear the endorsement of the payees. No proof of such endorsements was offered. The checks were identified simply as having been issued to pay bills for labor and material used "in the production of rock."

The objection of the defendant to the packages and to the checks was clearly well taken. See *Zemp etc. v. Harmon etc.*, (S. C. 1954), 82 S. E. 2d 531.

Even if they were admissible in evidence it is impossible to find in this heterogenous mass of documents any segregation of the items relating to the cost of breaking the rock. Assuming that the documents in the packages are invoices for labor and material furnished to Sprague, that the invoices were paid, and that the labor and material went into the project, there is still no way of determining

what items are to be allocated to the work which defendant agreed to do. There is no segregation of the cost of the compressed air required to break the additional rock, or of the cost of the drills required in breaking the rock, or of the cost of the labor required to operate the drills, or of the cost of hauling the rock from the quarry to the levee. There is no breakdown whatever that would enable the court to say that it cost Sprague anything more to perform the labor which defendant undertook to perform than he agreed to pay defendant.

This is not a case in which damages could be presumed to arise out of the failure of defendant to produce the specified quantity of rock. The burden rested upon the plaintiffs to prove that it cost them more to break the additional rock than Sprague was required to pay under his contract with defendant. They did not meet that burden. See *Stevens v. Mitchell*, 51 N. M. 411, 186 P. 2d 386.

POINT IV

THE COURT ERRED IN AWARDING THE PLAINTIFFS ANY AMOUNT ON ACCOUNT OF LOADING OR HAULING COSTS.

The court in its Finding of Fact No. 5 concluded "that by reason of said breach of said contract on the part of the defendant, the plaintiff Sprague also suffered damages in the sum of \$823.15 for increased costs of loading and hauling rock." There are no facts found which afford any basis for this conclusion. Neither is there any evidence in the record to support it.

All defendant agreed to do was to break a specified amount of rock into certain sizes within a limited time, and in a workmanlike manner. We have demonstrated that defendant was excused from breaking the full amount of rock because of the failure of plaintiffs to furnish compressed air, and that Sprague's failure to complete his prime contract in time was due to a combination of circumstances for which the defendant was not responsible. We have also shown that the work done by the defendant in breaking more than 9,000 tons of rock was done in a workmanlike manner.

Even if it be assumed that the foregoing conclusions are incorrect, there is no basis for awarding the plaintiffs anything for so-called increased costs of loading and hauling rock. All that appears in the record as to the matter of loading and hauling costs is that to begin with Sprague paid his truckers 70 cents per ton for hauling the rock, and later increased the rate to 80 cents (R. 267). This appears to have been solely a matter of agreement between the parties, and nothing that the defendant did or failed to do had any connection with the increase of the hauling rates.

The trial court in its Memorandum Decision said that the increased hauling charges were the result of a "strike" on the part of the truckers because the rock was not produced as fast as they could haul it. This assertion in the Memorandum Decision is unfounded. There is not a word of evidence of any "strike" or protest of any kind on the part of any of the truckers who hauled the rock from the quarry. All that appears in the record is some hearsay testimony objected to by the defendant and erroneously

received by the trial court to the effect that some truckers wanted more money for hauling rock and complained that they couldn't get loaded fast enough and couldn't make any money (R. 267). There is likewise not any evidence that the methods of operations of the defendant in the quarry varied in the slightest degree at anytime. The rock was produced in exactly the same manner both before and after the increase in the hauling rates.

We respectfully submit that the award to the plaintiffs for increased costs of loading and hauling rock is wholly unwarranted by either the pleadings or the evidence.

POINT V

THE COURT ERRED IN AWARDING PLAINTIFFS \$850.00 ON ACCOUNT OF SPRAGUE'S FAILURE TO COMPLETE HIS PRIME CONTRACT.

It is conceded that Sprague did not complete his prime contract within the time therein provided and was penalized for his delay. The defendant is in no manner responsible for any delay on the part of Sprague in the performance of the prime contract. The delay was due to his own failure to furnish the defendant with compressed air and to remove the contract-size rock from the quarry within a reasonable time after it was broken. His financial collapse, weather conditions, restrictions upon the use of highways for hauling rock, modification of the prime contract and changes in the plans of the levee undoubtedly caused considerable delay for which defendant is in no manner responsible.

Sprague's defaults have been dealt with above and will not be reiterated, other than to emphasize that the coyote holes would have been completed in a fraction of the time actually employed if the defendant had been supplied with compressed air sufficient to operate its drills efficiently, and that several thousand tons of rock broken into contract size remained in the quarry from the latter part of February until after the middle of May and a lesser amount until August, where it completely prevented the defendant from proceeding to break the additional rock required to fulfill its contract.

In addition, Sprague's failure to make the payment due in April justified defendant in abandoning the contract on May 1. The payment was due April 20, and it amounted to \$4,392.00.

This court has held in line with authorities elsewhere that failure to pay for labor and material at the time agreed upon relieves the contractor of his obligation to proceed with the work.

In *Bennett v. Shaughnessy, et al.*, 6 Utah 273, 22 Pac. 156, plaintiff and defendant entered into a contract whereby the plaintiff undertook to drive a tunnel along a vein of ore in the defendant's mine for a distance of 1,200 feet, and to complete the work on a specified date. The defendant agreed to pay for the work as it progressed to each 100 feet. Plaintiff constructed the tunnel a distance of 100 feet, and was paid according to the contract. He continued the work until the tunnel had been completed to a length of more than 200 feet. Defendant failed to pay for the second 100

feet when it became due, and the plaintiff abandoned the work. He brought suit to recover for the work done and to have the judgment made a lien upon the property. The Supreme Court of the Territory of Utah held that plaintiff was justified in abandoning the tunnel work and was entitled to recover for the full footage performed also a lien upon the defendant's property. The court said:

“* * * The character of the work to be performed under the contract in this case, the length of time given, and the amount of money required for its completion, as well as the language of the contract itself, show that the object of the provision for payments at stated periods during the prosecution of the work was to enable plaintiff with the money thus obtained to continue the work until completed. The payment of the \$1,000.00 upon the completion and acceptance of each 100 feet was a condition precedent to the further prosecution of the work by the plaintiff, and the failure of the defendants to pay the \$1,000.00 due on the completion of the second 100 feet justified plaintiff in abandoning the contract, and, the defendants being in fault, the plaintiff was entitled to recover for the work done. The judgment of the district court is affirmed.”

Another reason why Sprague cannot recover any damage for the alleged delay of the defendant is that the contract sued upon authorized Sprague to “put on such additional force and outfit as may be required” if the defendant should be unable to furnish adequate labor, equipment or material to complete the contract within the time specified. The parties to a contract are, of course, at liberty to provide for an exclusive remedy for delay in performance of

the work agreed upon. We submit that the parties to the contract under consideration did just that.

In *Russell v. Bothwell, et al.*, 57 Utah 362, 194 Pac. 1109, the contract covering the construction of a dwelling provided that if the contractor should be delayed in the completion or prosecution of the work by the negligence or default of the owner, then the time for completion of the work might be extended for a period equivalent to the time lost by reason of such negligence or default. The contractor was delayed by the failure of the owner to furnish material promptly, and this court held that no damages could be recovered.

POINT VI

UNITED STATES FIDELITY & GUARANTY COMPANY IS LIABLE TO DEFENDANT FOR FAILURE TO FURNISH COMPRESSED AIR BECAUSE IT ASSUMED THE OBLIGATIONS OF SPRAGUE UNDER THE SUBCONTRACT.

Defendant does not assert any claim against the United States Fidelity & Guaranty Company for failure of Sprague to furnish compressed air prior to the time it induced the defendant to resume operations in the quarry. Defendant does, however, maintain United States Fidelity & Guaranty Company is liable for failure to furnish compressed air after September 21. This liability is founded upon its agreement to do so in consideration of the defendant resuming performance of the subcontract.

As already stated, the defendant was prevented from performing its undertaking to break the specified amount of rock by the failure of Sprague to remove the contract size rock from the quarry. Defendant was unable to do anything in the quarry from the latter part of February until early in August, because the contract-size rock remained in the quarry during that period. It is true that defendant sent its employee back to the quarry the latter part of April when Sprague informed it that he intended to move the rock to the levee, and that this employee drilled a few holes into some oversize rock preparatory to blasting. However, Sprague did not move any rock, and defendant's employee was withdrawn from the quarry on May 1. Even if defendant had not been prevented from performing its obligation by the failure of Sprague to move the rock, it was fully justified in terminating the subcontract on May 1, by his failure to make the progress payment which was due on April 20.

In this status of the subcontract, the United States Fidelity & Guaranty Company appears on the scene. Sprague was financially unable to pay the progress payment or the bills he had incurred for labor and materials furnished to him and used in the performance of his prime contract. The Guaranty Company was his surety not only on his performance bond but also on his payment bond. The progress payment plus the bills owing by Sprague exceeded \$30,000.00. These bills and the progress payment were paid by the surety.

In the latter part of July, it sent its representative Mr. Douglas to the project with instructions to do everything

possible to assist Sprague in the performance of his obligations. Mr. Douglas testified:

“Q. Did you make any arrangements with Mr. Sprague or anyone connected with Boyles Bros. with respect to this work?

“A. Yes.

“Q. This quarry work?

“A. I talked to Mr. Stevens relative to his contract with Sprague and he outlined to me what his responsibilities were and what he intended to do, and I as representative of United States Fidelity and Guaranty Company come down to assist Sprague in connection conjunction with working with him to try and do that.

“Q. Didn't you tell or assure Mr. Stevens that Boyles Bros. Drilling Company would be paid for work?

“A. Well, as a surety to the contractor I did assure him but it wouldn't be necessary by the fact we were bonding the contract, and assured him he would be paid for work he did.”

On August 11, Mr. Douglas on behalf of United States Fidelity & Guaranty Company wrote defendant among other things “we stand ready to fulfill our part in this matter and we must insist and we feel our demand is only reasonable that you fulfill your part of the agreement” (Ex. 27-P).

A short time later Mr. Douglas again writes to the defendant to express “our appreciation of the manner in which you have tackled the quarry job and the results that are being obtained” (Ex. 28-D). Shortly thereafter, a 315 compressor was sent to the quarry and within a few weeks

several thousand tons of rock were broken into contract size by defendant.

We think there is implicit in this evidence on agreement on the part of United States Fidelity & Guaranty Company to perform all of the obligations of Sprague under the subcontract in consideration of the defendant resuming operations thereunder, and that this agreement made the surety company primarily liable to furnish the defendant sufficient compressed air to operate its drills. In support of this point see *Everts v. Matteson*, 21 Cal. 2d 437, 132 P. 2d 476; 4 Williston on Contracts, (Rev. Ed. 1936), Sec. 1211.

If there were any doubt about the primary liability of the Guaranty Company, it is dispelled by the positive allegation in the original complaint to the effect that it became obligated to perform the contract and did perform it (R. 43-4).

POINT VII

THE COURT ERRED IN AWARDING PLAINTIFFS \$292.80 FOR ROCK PURCHASED.

The court concluded in its findings of fact "that by reason of the breach of contract on the part of defendant the plaintiff suffered damages in the sum of \$292.80 for rock he purchased to complete his contract with the United States."

real There are several reasons why this award is erroneous, even if it be ~~stated~~ that defendant is not excused from its failure to produce the full amount of rock provided for in the contract.

In the first place, the so-called finding is a conclusion of law, and was without any basis in fact. Secondly, there

is no evidence that Sprague purchased any rock to take the place of rock which defendant did not produce. When plaintiff offered evidence of the purchase of rock, the court sustained the defendant's objection to the offer (R. 81).

Finally, it is undenied that Sprague, pursuant to the provisions of the contract, proceeded to break the additional rock after defendant left the quarry on October 5. The full measure of plaintiff's damage for defendant's failure to produce all rock required by the contract, assuming the failure is not excused by the plaintiff's breach of the contract, is the cost of breaking the rock exclusive of the cost of compressed air. If Sprague purchased additional rock and if that rock was of the kind which defendant was required to produce, he made that purchase on his own account and upon no assumption is defendant liable therefor.

In this connection it should be pointed out that Sprague's prime contract was modified, subsequent to making the subcontract with defendant, and that it required 1100 tons of rock to meet the requirements of the modification (R. 79). If Sprague did purchase rock (and there is no evidence that he did), he undoubtedly used it to meet the modification of the prime contract.

POINT VIII

THE JUDGMENT IS ERRONEOUS BECAUSE
IT IS NOT SUPPORTED BY THE FINDINGS
OF FACT.

The complaint alleges that the defendant only partially performed its agreement to break the specified amount of

rock and that as a result of such failure Sprague paid certain sums for labor and material required to break the additional rock. The defendant in its answer and counterclaim admitted that it produced only part of the rock required by the contract, but was prevented from fully performing its obligation by the failure of Sprague to furnish sufficient compressed air to operate its drills efficiently, and to remove the rock from the quarry as it was broken in contract size.

The controlling issue so far as the plaintiff's case is concerned is: Did Sprague supply the defendant with sufficient compressed air to operate its drills efficiently?

The findings of fact made by the trial court are completely silent upon this issue. Not a word is said anywhere upon the subject of compressed air. The trial court adopted the findings proposed by the plaintiff who studiously avoided entirely the matter of compressed air.

The so-called finding that Sprague performed his part of the subcontract is a pure conclusion of law. Whether he did perform his contract was the turning point of the lawsuit. Without an affirmative finding that Sprague furnished the defendant throughout its operations in the quarry sufficient compressed air to operate efficiently the drills required to break the rock, there is no foundation whatever for any judgment in plaintiff's favor. With respect to Sprague's surety, its right to recover could rise no higher than those of its insured. That the judgment is not supported by findings of fact and must be vacated is not a debatable proposition. The only question is whether

this court should direct the trial court to dismiss the complaint or to grant a new trial. Inasmuch as there is no conflict in the evidence with respect to Sprague's failure to furnish compressed air as he agreed to do, there is no alternative open to this court except to direct that the complaint be dismissed.

POINT IX

THE JUDGMENT MUST BE VACATED BECAUSE OF THE FAILURE OF THE COURT TO FIND ON THE MATERIAL ISSUES RAISED BY THE PLEADINGS.

If we indulge the violent assumption that there was some conflict in the evidence with respect to the nonperformance by the parties of their respective covenants in the contract, the judgment would have to be vacated, because of the failure of the trial court to make findings upon any of such issues. The first count in the complaint alleged in substance that the defendant only partially performed its duties under the contract, that Sprague paid out certain sums for labor and material to complete the duties of defendant, and that Sprague "suffered damages by reason of defendant's failure to fully perform" the contract a certain sum "for additional loading and hauling costs." It was further alleged that by reason of defendant's failure to perform, Sprague was unable to perform his prime contract, and suffered liquidated damages in a certain amount.

The second count is practically identical to the first count, except that United States Fidelity & Guaranty Com-

pany is alleged to have paid out the sums and suffered the damages that Sprague claims in the first count to have paid out and suffered.

The defendant in its answer and counterclaim admits that it did not produce the full amount of rock specified in the contract, and alleges as legal justification for such failure the breach by Sprague of his covenant to furnish compressed air, his failure to remove the rock from the quarry as it was broken by defendant, and his failure to pay the seventy-five percent of the contract price on April 20. Defendant also asserted that Sprague sold a large amount of the rock broken by defendant, for which he did not account to the defendant.

The counterclaim also alleged that because of the breaches of the subcontract by Sprague, defendant after producing a large quantity of rock to the contract size, ceased work and removed its men and equipment from the quarry, that about that time the United States Fidelity & Guaranty Company informed the defendant that Sprague was insolvent and financially unable to proceed with his contract, that if defendant would resume breaking rock it would furnish the necessary compressed air, and would pay for all of the rock; that in reliance upon these promises, defendant resumed the work of producing the rock as required by the subcontract with Sprague, that United States Fidelity & Guaranty Company failed to perform its promises except to make the progress payment, and as a result of such failure, defendant again ceased work and removed its men and equipment from the quarry before the contract amount of rock was produced.

The reply put in issue the affirmative allegations of defendant's counterclaim, except plaintiffs admitted that they sold some rock that was broken by the defendant. They asserted "that defendant was given credit for the amount of said rock."

An examination of the findings made and entered by the trial court reveals no determination whatever of any of the issues raised by the above mentioned pleadings of the parties, nor was there a finding of fact which necessarily or even by implication resolves any such issue.

Upon the assumption above made, the judgment must be vacated for it is settled by a long line of decisions of this court that it is reversible error for the trial court to fail to find upon any material issue. See *Gaddis Investment Company v. Morrison*, 3 Utah 2d 43, 278 P. 2d 284, and cases there cited.

POINT X

THE PRESENT ACTION SHOULD HAVE BEEN
ABATED BECAUSE OF THE PENDENCY OF
ANOTHER SUIT.

The record disclosed that on September 22, 1952, the plaintiffs commenced an action in the District Court of Salt Lake County to recover damages from the defendant on account of an alleged breach of the contract now under consideration (R. 43-4). The complaint is in substance the same as the complaint in Case No. 99370, the only difference being that it was alleged that the plaintiff, United States Fidelity & Guaranty Company, issued its bond for the per-

formance of the contract of defendant with plaintiff, W. W. Sprague, and that by reason of the alleged breach of contract on the part of defendant, United States Fidelity & Guaranty Company became obligated to perform said contract, and did perform said contract to its damage in the sum of \$5,585.22.

Shortly thereafter, the plaintiff asked leave to file an amended complaint (R. 49). The proposed amended complaint begins with the recitation that no attempt is made to plead a cause of action on behalf of United States Fidelity & Guaranty Company. It omits the allegations with respect to the guaranty of the contract between Sprague and defendant. Otherwise, the cause of action in the proposed amended complaint is the same as the original complaint. The trial court refused to permit the filing of the amended complaint (R. 57).

In its answer and counterclaim the defendant set up pendency of this prior action.

We submit that the present action should have been dismissed because the order refusing to allow the plaintiff to file an amended complaint is ⁸bar to the maintenance of the present action. To this effect are: *State v. California Packing, etc.*, 105 Utah 191, 145 P. 2d 784.

SUMMARY

The uncontradicted evidence in this case discloses that Sprague breached his contract in three distinct particulars. *One*, he failed to furnish the defendant with sufficient compressed air to efficiently operate its drills required to break

the rock into contract size. *Two*, he failed and neglected to remove from the quarry the rock broken into contract size, thereby preventing the defendant from performing its undertaking to break a specified amount of rock. *Three*, he failed to pay the defendant seventy-five percent of the contract price on April 20, or at all.

The foregoing breaches of the contract by Sprague justified the defendant in abandoning the contract on May 1, and again on October 5. Sprague having breached his contract cannot recover any damages from the defendant, but on the contrary is liable to the defendant for the damage sustained by it as a result of those breaches. Sprague's surety has no greater rights under the contract sued upon than Sprague has, and it became primarily liable to the defendant for the damage sustained by it as the result of its failure to furnish defendant with sufficient compressed air to operate its drills following the breakdown of the 315 compressor on September 21.

Even if it be assumed that the defendant was not legally warranted in terminating the contract on October 5, the plaintiffs can recover nothing because they undertook to produce the additional rock as they had the right to do under the subcontract, and there is no evidence in the record which proves or tends to prove that it cost them more to break the rock than Sprague agreed to pay the defendant.

There is no claim made in the pleadings and there is no evidence that the rock broken by defendant under the contract was broken in an unworkmanlike manner. There is no evidence that anything done by the defendant or

omitted by it caused the increased "loading and hauling costs" incurred by Sprague.

There is no evidence that Sprague's default under his prime contract was due to anything other than his own failure to perform his subcontract with defendant and his own modification of the prime contract and his own financial failure and weather conditions.

The findings of fact made by the trial court are insufficient to support the judgment appealed from, and the material issues raised by the pleadings were not determined.

Finally, the action should have been abated because another action between the same parties involving precisely the same issues was pending and undetermined in the same court.

Respectfully submitted,

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