

1956

Harold E. Best and Earl Craig v. Big Jim Mining Co. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

of the

STATE OF UTAH **FILED**

APR 2 - 1956

Clerk, Supreme Court, U. of U.

HAROLD E. BEST and

EARL CRAIG,

Plaintiffs and Respondents,

vs.

Case No. 8438

BIG JIM MINING COMPANY,

A Nevada Corporation

Defendant and Appellant

APPELLANT'S BRIEF

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IN THE SUPREME COURT
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HAROLD E. BEST and
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vs.

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A Nevada Corporation

Defendant and Appellant

} Case No. 8438

APPELLANT'S BRIEF

STATEMENT OF FACTS

This is an appeal from a judgment of the District Court in and for San Juan County, adjudging that defendant Big Jim Mining Company, a Nevada corporation, had abandoned the assignment of a lease and enterprise with regard to a piece of mining property and had committed a forfeiture of its rights thereunder. The judgment went on to declare the lease assignment abandoned, forfeited, and cancelled, to quiet title therein, and to require reassignment of the lease. Damages were not awarded. (See Judgment)

The complaint of plaintiff alleges in Paragraph 2 that in June, 1953 plaintiff was granted a uranium and vanadium mineral lease by the Utah State Land Board covering all of Section 16, Township 36 South, Range 25 East, Salt Lake Meridian. The lease was admitted in defendant's answer, as was its assignment to Herman Stern as attorney for the defendant. A copy of the assignment, itself constituting the agreement between the parties, is attached to the complaint as Exhibit B, and its execution is admitted.

It is alleged in Paragraph 4, and admitted, that "on or about the 12th day of November, 1953, the Big Jim Mining Company accepted said assignment . . ."

Succeeding paragraphs, placed in issue by defendant in its answer, assert that defendant had failed to fulfill its obligations under its assignment and had abandoned the property, and failed to pay the sum of \$5,500 to plaintiff.

The agreement between the parties, Exhibit B, around the interpretation and performance of which issues arose, provides among other things for a survey of the property by defendant. It also provides for the payment by defendant to plaintiff of the sum of \$5,500 if a mine on adjoining pro-

perty intersects the leased property or if an Atomic Energy Commission drill report is satisfactory.

Further provisions are made for the payment of a minimum of \$250.00 a year, commencing with the calendar year 1959, by the defendant to plaintiff against gross mill receipts derived from the property.

In its answer, defendant denied any breach and affirmatively raised the issue in Paragraph 8 that plaintiff was not the real party^{IN} interest.

A pretrial hearing was held, but no written pretrial order was ever entered. At the trial, defendant was not permitted to examine concerning the issue of real party in interest. However, upon motion of counsel for plaintiff Best, one Earl Craig was joined as plaintiff upon the court's order, (R. 45) without sworn testimony and over the objection of defendant's counsel.

Judgment was for plaintiffs in the respects above described; motion for new trial was made and denied, and this appeal followed.

Many of the points raised in this appeal deal with the failure of the evidence to support the judgment of the trial court, particularly with regard to the issues of abandonment and forfeiture. Because of this, it has been necessary to discuss

this evidence at some length within each of these sections. To avoid duplication and since such discussion is believed to constitute compliance with the Appendix of Forms of the Rules of Civil Procedure, Form 32, permitting subdivision of the fact statement, the facts will not again be set forth here at length.

POINTS

POINT I. THE FINDING AND CONCLUSION OF LAW OF THE TRIAL COURT THAT DEFENDANT ABANDONED THE LEASE IS TOTALLY UNSUPPORTED BY, AND CONTRARY TO THE PREPONDERANCE OF, THE EVIDENCE, AND IS CONTRARY TO THE PRINCIPLES OF JUSTICE AND APPLICABLE PRECEDENTS.

POINT II. THE FINDING AND CONCLUSION OF LAW OF THE TRIAL COURT THAT DEFENDANT COMMITTED A FORFEITURE OF ITS RIGHTS UNDER THE ASSIGNMENT AGREEMENT IS TOTALLY UNSUPPORTED BY, AND CONTRARY TO, THE EVIDENCE, AND IS CONTRARY TO PRINCIPLES OF JUSTICE AND APPLICABLE PRECEDENTS.

POINT III. THE TRIAL COURT DID NOT EXPLICITLY FIND OR CONCLUDE THAT THE CONTRACT OF DEFENDANT AND PLAINTIFF BEST WAS UNENFORCEABLE BY REASON OF LACK OF MUTUALITY; BUT IF SUCH FINDING OR CONCLUSION BE DEEMED IMPLICIT, IT IS TOTALLY CONTRARY TO ALL EVIDENCE AND TO THE AUTHORITIES.

POINT IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND INJUSTICE IN PERMITTING AMENDMENT AS TO PARTIES PLAINTIFF AT

THE TRIAL WITHOUT SWORN TESTIMONY, WHILE AT THE SAME TIME DENYING TO DEFENDANT THE RIGHT TO LITIGATE THE IMPORTANT ISSUE OF REAL PARTIES IN INTEREST, WHICH DEFENDANT HAD SPECIFICALLY RAISED AS AN ISSUE BY AFFIRMATIVE DEFENSE IN ITS ANSWER.

ARGUMENT

POINT I. THE FINDING AND CONCLUSION OF LAW OF THE TRIAL COURT THAT DEFENDANT ABANDONED THE LEASE IS TOTALLY UNSUPPORTED BY, AND CONTRARY TO THE PREPONDERANCE OF, THE EVIDENCE, AND IS CONTRARY TO THE PRINCIPLES OF JUSTICE AND APPLICABLE PRECEDENTS.

Neither the evidence, nor justice, nor applicable precedent, support the view of the trial court that the defendant has abandoned the lease assignment or enterprise.

All the evidence and principles of justice and all the law is to the contrary.

The court, in its erroneous conclusions of law, stated:

“1. That the plaintiffs are entitled to the decree of this court that the defendant has abandoned the assignment of the lease of said School Section 16 and has abandoned the enterprise contemplated therein.”

This conclusion is based upon findings of fact, which will be demonstrated themselves to be either unsupported by the evidence, or irrelevant, to the effect that the defendant could abandon the con-

templated enterprise, and did so. (Findings of Fact 7 and 8.)

The trial court could not and did not arrive at its conclusion of abandonment by the support of substantial evidence in the case. That would not have been possible; for the evidence, properly understood, shows plainly that there was never any intent to abandon or any abandonment by the defendant of its rights. Rather, as will be demonstrated in this section of the brief, the evidence shows that the defendant fulfilled every obligation and pressed on with diligence to the fulfillment of its obligations, expending large sums of money in an earnest effort to make the entire undertaking worthwhile both to itself and plaintiff.

Abandonment of a property or enterprise, unlike forfeiture, is not a matter of breach or claimed breach of an obligation. Rather, it depends upon the volition and the action of the holder of the right, which must coincide to show clearly that the right has been relinquished and given up. We will show that neither of these essential prerequisites have, upon any theory, been here fulfilled.

Simply for a definition and discussion of the requisites of abandonment, we turn to the California case of *Los Angeles v. Abbott*, (1933) 129 Cal. App. 144, 18 Pac. 2d 785, where it is stated:

“Abandonment includes the intention to abandon, and the external act by which such intention is carried into effect.” (Page 787, Pacific Reporter citation.)

In the *Abbott* case the opinion of the reviewing court points out that the characteristic element of abandonment is voluntary relinquishment by intentional repudiation.

In *Berry v. Kelly* (1949) 90 Cal. App. (2d) 486, 203 Pac. (2d) 80, the reviewing court reversed a judgment of abandonment, holding that, despite delay in drilling a well, there was “no substantial evidence upon which the trial court could base a finding that defendant had abandoned . . .” (Page 81, Pacific Reporter citation.)

The evidence in the *Berry* case was that defendants had closed operations for several years. But the reviewing court said at page 81, citing several authorities:

“Abandonment cannot be inferred unless it can fairly be shown that nonuse by lessee is coupled with an intent to relinquish all rights in the premises.”

In the light of the above cases and definitions, let us turn to an examination of the present case and of the evidence relating to the question of abandonment. It will be clear this evidence does not support a finding of abandonment.

STATEMENT OF FACTS RE ABANDONMENT

The evidence shows by the testimony of plaintiff Best that the assignment of the lease was signed in June, 1953. (R. 9)

Plaintiff Best further testified that the Big Jim Corporation was to be formed.

The Big Jim Mining Company, a Nevada corporation, was duly formed, around the end of the summer of 1953. (R. 61.) It was formed for the specific purpose of dealing with the mining property whose lease was assigned by plaintiff Best (R. 61); this is the testimony of Mr. Jack Egar, president of the corporation, and whose testimony in th regard was apparently not challenged.

The corporation, formed for the very purpose of dealing with the lease here in question, set out at once, and continuingly, to achieve the purpose of pushing forward its project. Almost all testimony in this regard is virtually uncontradicted and unshaken.

The defendant had a mining survey made (R. 65). It hired a mining engineer in Grand Junction in August, 1953. (R. 65.) It received reports in June and October, 1953. It obtained an Atomic Energy Commission report (also unfavorable) around April, 1954. (R. 71.) It employed and paid

Frank Wicks to interpret and explain these reports (R. 68, 70, 71).

When Wicks interpreted the reports as unfavorable, the defendant's board of directors conferred on further action, and, Mr. Egar testified:

“It was decided that I should try to interest other people in the property.” (R. 70.)

Perservering, Mr. Egar in June, 1954, “took a trip to New York to see Mr. Schultz of Lehman Brothers who are investment brokers.” (R. 72.) In New York Mr. Egar discussed the property with Mr. Schultz but was turned down on the basis of the unfavorable reports. (R. 72.)

Mr. Egar made other efforts and contacted a firm in the mining business, Shattuck Denn Mining Corporation of New York. On June 8, 1954, Mr. Egar spoke to the president of this concern. (R. 74.)

Around July 1, 1954, in a long distance telephone conversation with the president of the Shattuck Denn concern, Mr. Egar was finally notified that Shattuck Denn did not desire to go forward with regard to the property. (R. 75.)

Defendant's efforts continued. Mr. Egar saw more people about the property; all had their geologists look at the property. (R. 75.) Among others approached were Mr. Blair W. Stewart of the Mudd

interests, mining and oil people in Los Angeles (R. 85). The defendant received a letter (Defendant's Exhibit 4) of October 4, 1954, which said in part:

“I am sorry to so have to advise you of our conclusion but wish to express our appreciation of your splendid cooperation and patience with us.”

Continuing still further, the defendant made contact and arranged a deal with Federal Uranium Corporation regarding the lease; stock of Federal Uranium was to be transferred to defendant. (R. 130.)

Other activity of the defendant corporation included payment of the necessary rental to the State of Utah for 1954 and 1955 as required by the lease.

In summary, then, we see that, despite the unfortunately unfavorable reports, the activity of the defendant corporation was single-minded and continuing. In what sense does this constitute abandonment?

The trial court, so far as factual basis for abandonment is concerned, apparently relied heavily, if not exclusively, upon a letter of Mr. Stern, an attorney for defendant. This letter, which is in evidence by stipulation (R. 8), is Exhibit K attached to plaintiff's Request for Admissions, filed March 26, 1955.

This letter of April 30, 1954, in response to insistent demands by plaintiff Best, states that, upon certain conditions, the directors of defendant would execute an assignment. These conditions appear to include the following:

1. That plaintiff Best's then attorney should prepare the assignment. (There is no showing this was ever done.)

2. That plaintiff Best should return to the defendant a sum of money paid by it to him. (There is no showing this was ever done.)

3. That plaintiff Best should repay to defendant two-thirds of the annual rent paid by the defendant. (There is no showing this was ever done.)

Thus, we have here at most a yielding to pressure, conditional upon the fulfillment of several prerequisites, of which none were ever complied with.

This can indicate neither abandonment nor the intent to abandon. The necessary conclusion of non-abandonment is still further reinforced by the circumstances under which the letter of April 30, 1954 was written.

It must be noted that the original assignment by plaintiff Best had been made, according to the allegations of plaintiff himself, only on July 17,

1953 (Complaint, Paragraph 3), less than ten months earlier.

Further, the acceptance of this assignment and agreement had been first made by defendant, according to the allegations of said plaintiff himself, only on November 12, 1953 (Complaint Paragraph 4), only about five months earlier.

Yet, despite the continuing activities of defendant, carried on in the face of the most discouraging reports, plaintiff Best, (Exhibit C to Interrogatories to Party Defendant, filed March 12, 1955) through his attorney, in a letter of April 26, 1954, placed upon defendant the heaviest pressure to reassign the lease. The letter states flatly that "demand is hereby made upon you to reassign said lease to H. E. Best."

The April 26, 1954 communication goes on to threaten, although politely:

"As time apparently is of the essence, this must be done as rapidly as possible. We therefore hope that you will be good enough to give us your prompt consideration and courtesy in this matter, rather than to necessitate a prolonged law suit and the damages which might flow therefrom . . ."

* * * *

Thus the evidence shows that even the highly conditional (and never carried out) offer to re-

assign of April 30, 1954, was a reluctant response to the direct and insistent pressure of the legal representative of Best himself. Surely then it cannot be deemed to constitute or afford any substantial evidence of abandonment.

Nor, of course, can the continuing and finally successful efforts of defendant to interest someone else in the property, above detailed, constitute evidence that defendant intended to or did abandon the deal. Rather, such efforts necessarily constitute clear and convincing evidence of the efforts of defendant to carry out its contract.

As is stated in the case of *Baldwin v. Jacobs*, (1918 182 Iowa 789, 166 N.W. 271, 272, an assignment or subletting is not an abandonment, but rather, an assertion of right to the lease. So defendant here sought to assert its right.

Where then is the evidence of abandonment? It is lacking. As common sense and the cases tells us, a tentative, partial and conditional offer to yield to pressure of lessor to surrender does not constitute an abandonment; it ill behooves plaintiff to take this inequitable position. See *Becker v. Rute* (1940) 228 Ia. 533, 293 N.W. 18, 21.

Even a letter saying that the lessee did not consider further development at the time justified, was not held abandonment. *Fischer v. Petroleum Co.*

(1943) 156 Kan. 367, 133 Pac. (2d) 95, 101, opinion adhered to on rehearing in 156 Kan. 722, 137 Pac. (2d) 139.

Nor does the fact that defendant, working to advance prospects, was not physically on the premises, operate as an abandonment, *Crane v. French*, (1940) 39 Cal. App. (2d) 642, 104 Pac. (2d) 53, 60. There must be clear proof of intent to abandon.

In summary, it is clear on the facts and the law that there is no substantial evidence supporting a finding of abandonment. Rather the evidence clearly shows that defendant, in the face of severe difficulties and discouragements, pushed onward continually in its effort to further and advance the property. This Honorable Court should, it is respectfully submitted, so hold.

POINT II. THE FINDING AND CONCLUSION OF LAW OF THE TRIAL COURT THAT DEFENDANT COMMITTED A FORFEITURE OF ITS RIGHTS UNDER THE ASSIGNMENT AGREEMENT IS TOTALLY UNSUPPORTED BY, AND CONTRARY TO, THE EVIDENCE, AND IS CONTRARY TO PRINCIPLES OF JUSTICE AND APPLICABLE PRECEDENTS.

The trial court found, and found upon no substantial evidence, and contrary to the strong preponderance of the evidence, that the defendant failed to operate and develop the property with reasonable diligence. (Finding of Fact 12) sufficient to

meet its obligation under the contemplated enterprise. It then concluded that the lease had been abandoned.

The trial court erred grossly in several vital ways, which we shall show in this section of Appellant's Brief, and summarize briefly in this introductory portion of the section.

A. In the first place, the contract does not in any way contain provisions requiring instant mining of the property, whether or not such mining is economically feasible, and to imply such a provision is both totally illogical and contrary to precedent.

B. In the second place, the defendant in this case fulfilled and over-fulfilled its obligations under the contract. It established a \$20,000 corporation for the sole purpose of dealing with the property. It undertook many obligations, and earnestly carried them out, spending substantial sums and seeking development of the property in face of severe discouragements.

C. In the third place, even if somehow the contract could be misconstrued and tortured into terms that would somehow support a conclusion of breach of same terms by the defendant, such supposed breach could never, under law or principles of justice, be held sufficient to warrant anything more than granting of damages.

In further portions of this section, we will discuss greater detail the principles and propositions above set forth.

A. The Contract Does Not Provide For Immediate Mining Regardless of Feasibility, But Rather Provides Impliedly For Reasonable Efforts By Defendant.

The trial court found a breach of contract, despite the continuing efforts of the defendant in attempting, and finally succeeding, in finding persons to invest in and further the interests of the property.

But where are the provisions that were supposedly breached with regard to operation of the property? Let us examine some of the obligations undertaken — and performed.

A. The defendant promised to have a licensed surveyor survey the leasehold immediately.

Defendant, without contradiction or question fulfilled this obligation. (R. 65.)

B. The defendant promised to pay \$5,500 if either of two contingencies occurred. Neither of them happened. Admittedly, the mine on the next property did not adjoin the leasehold (R. 94.) and the Atomic Energy Commission drill report was unsatisfactory without *any* contrary evidence whatever.

C. Big Jim promised to reimburse Best for certain travel expenses, at the time the \$5,500 might be paid.

D. Defendant promised to “commence operations, weather permitting, as soon as possible.” What does this mean, and what can it mean, in the terms of the contract? It must mean, and it does mean, that the surveying operations and the securing of the Atomic Energy Commission report, must be undertaken promptly. There is nothing to the contrary in the record.

The trial court mistakenly took the view that the contract should and must, and therefore did, contain a provision requiring the mining of the property, and unconditionally, even without regard to whether the land could properly and profitably be mined.

The precedents, in Utah and elsewhere, contradict the trial court’s position. Thus, in *Monfort v. Lanyon Zinc Co.*, (1903) 67 Kan. 310, 72 Pac. 784, it was held that where the contract so provided, a contract was sufficiently complied with where rent was paid but mineral exploration was not carried on.

The correct view of law in such a situation is that any implied covenant creates no further obligation than the employment of reasonable and prudent diligence.

Thus, in *Brewster v. Lanyon Zinc Co.* (C.C.A. 8, 1905) 140 Fed. 801, 811-12, the court held that the large expense of exploration and development, and the fact that the lessee bears the loss of failure, require and entitle the lessee to protect his own interests and not to proceed beyond the point of profit.

Speaking of an asserted breach of an implied covenant to develop, the court's opinion in the *Brewster* case stated:

“ . . . no breach can occur save where the absence of such diligence is both certain and substantial in view of the actual circumstances at the time, as distinguished from mere expectations on the part of the lessor and conjecture on the part of mining enthusiasts. The large expense incident to the work of exploration and development, and the fact that the lessee must bear the loss if the operations are not successful, require that he proceed with due regard to his own interests, as well as those of the lessor. No obligation rests on him to carry the operations beyond the point where they will be profitable to him, even if some benefit to the lessor will result from them.”

This same principle, with an approving quotation from the *Brewster* case, was clearly enunciated in the later case of *Fischer v. Magnolia Petroleum Co.* (1943) 156 Kan. 367, 133 Pac. (2d) 95, 101, opinion adhered to on rehearing in 156 Kan. 722, 137 Pac. (2d) 139. See also *Sauder v. Mid-Conti-*

nent Petroleum Corp. 292 U. S. 272, 54 S. Ct. 671 78 L.Ed. 1255, 93 A.L.R. 454, and cases collected at 2 Summers on Oil & Gas, Perm. Ed. § 414, p. 368, footnote 29.

In the present case the trial court has erroneously placed upon defendant's shoulders the burden of providing that it had in nowise breached any implied covenant. This, it is submitted, defendant did clearly show, while plaintiff brought forward no evidence tending to prove any breach of an implied covenant to develop under the circumstances.

Actually, the burden to disprove a breach of such a covenant should not even have been placed on defendant. As is clearly set forth in *Fischer v. Magnolia Petroleum Co.*, supra:

“A lessor who alleges breach of the implied covenant to develop has the burden of showing, by substantial evidence, that the covenant has been breached. He must prove that the lessee has not acted with reasonable diligence under the facts and circumstances of the particular situation. 24 Am. Jur. 661, § 184; 2 Thornton, Oil and Gas, 858, and cases cited footnote 177; 2 Summers, Oil and Gas, Perm. Ed., § 414, pp. 367, 368.”

The interpretation of the trial court would impose upon the defendant not the express, but the implied obligation, to mine the property at once, and regardless of whether an intersecting mine was

available, or whether surveys revealed the existence of any minable ore on the property.

Such an obligation was *not* assumed. To undertake such an obligation would be not impossible—but foolish, reckless and unreasonable.

Could the trial court properly assume that the defendant here in entering into the contract behaved foolishly, recklessly unreasonably? And this in the teeth of the contract provision providing for minimum rental payments commencing not instantly—but in 1959, thus affording a measure of the time perspectives in which the parties were proceeding?

The questions provide their own plain answers. Of course the defendant assumed no such hidden mysterious obligations. Of course the trial court erred proposing to impose such obligations when the contract did not.

A good Utah analagy to the present case is that of *Caine v. Hagenbarth* (1910) 37 Utah 69, 106 Pac. 945, where this court also overturned a trial court decision purporting to place a heavy implied obligation on the purchaser of a mining interest.

The opinion of the court there said — and the words are here almost precisely applicable:

“ . . the parties to the contract in question were therefore dealing with things whose

value, in the very nature of things, was uncertain and speculative . . . “We are further convinced that if such a promise had been squarely demanded by the respondents from appellant, he would promptly have refused to make it. Moreover, the demand of respondents in view of what they had to sell and did sell is unfair, unjust and wholly inequitable.”

In the instant case also the respondents sold a mining interest whose value “in the very nature of things, was uncertain and speculative.”

Here as in the *Caine* case, if an explicit promise to mine at once in any eventuality had been demanded, it would undoubtedly have been refused.

Here as in the *Caine* case the demand of the plaintiff to imply such provision “is unfair, unjust and wholly inequitable.”

* * * *

The trial court here favored a forfeiture, and failed to require clear or any proof by the plaintiff of the issue of forfeiture. By its course, the court came squarely into conflict with the virtually uniform course of decisions in Utah and elsewhere disfavoring forfeiture.

Thus, in the case of *Munson v. A. & H. Inv. Co.* (1923) 62 Utah 13, 218 Pac. 109, this court reversed on appeal a judgment of forfeiture. In so doing, the court’s opinion stated at page 21:

“Forfeitures are not and never have been regarded by the courts with any special favor; and where a party insists upon a forfeiture he must make clear proof and show that he is entitled to it. It has ever been regarded as a harsh way of terminating contracts, and for this reason he who seeks to avail himself of the privileges must be held strictly within the limits of the authority which gives the right. 2 Warvelle on Vendors, § 807.

“If the contract specifies what defaults or breaches of conditions shall be ground for forfeiture, it governs the rights of the parties in this respect, and a forfeiture on other grounds not included in the contract will not be sustained.’ 2 Black on Rescission of Contracts, §418; *Cughan v. Larson*, 13 N.D. 373, 100 N.W. 1088.

“ ‘Such forfeitures are sustained only when the parties have contracted therefor, and the terms of the contract will not be extended to sustain forfeitures.’ 39 Cyc. 1373.

“Tested by these principles, the forfeiture claimed . . . cannot be sustained.

“The forfeiture, to be upheld, must be authorized by the express provisions of the contract . . .”

There can be no doubt that in this case, as in was not authorized by the express provisions of the the *Munson* case, the forfeiture that was declared contract and cannot be upheld.

In another Utah case, that of *Howorth v. Mills* (1923) 62 Utah 574, 221 Pac. 165, this court again

took the view that “the courts are not going to compel a forfeiture, which is abhorrent to all courts, unless the contract requires it.”

In refusing to enforce a forfeiture in the *Howorth* case, the unanimous opinion of the court stated at page 579:

“In so holding we are not only enforcing the terms of the contract in question as written and as intended by the parties, but we are also enforcing the universally recognized principle that forfeitures are not favored by the courts, and will be enforced only when it is clear that such was the manifest intention of the parties . . .”

See also *Alford v. Dennis* (Kan. 1918) 170 Pac. 1006, again expressing the well-known principle that equity is reluctant to enforce a forfeiture, and even more reluctant to do so where such forfeiture is sought on the basis of no express covenant.

And see *Chandler v. Hart* (1911) 161 Cal. 445, 119 Pac. 516, 519.

B. On Any Sustainable Interpretation of the Agreement, Defendant Has Complied With Its Obligations.

If the contract be interpreted as requiring that the defendant despite unfavorable reports push forward energetically to seek development of the property as might be feasible, the defendant once again

has complied. It has striven diligently to secure this development, by interesting others in the property. (The details and record citations dealing with this effort are contained in the section showing lack of abandonment, and this Court is respectfully referred to that section. Repetition would be needless.)

The defendant did what was reasonable under the circumstances. What shall be done, to further the contract, when a mine tunnel does not run to the edge of the property, though plaintiff Best had indicated plainly he believed it did?

Plaintiff Best himself testified (R. 25):

“I stepped off and showed the distance to the furthest drift back in the mine and stated I thought the end of that drift might be on the property.”

He persisted in this position even after the signing of the contract, and as late as August 20, 1953, when he wrote in a letter to Mr. Stern, attorney for defendant (Defendant's Exhibit 1):

“I have just returned from a conference with Mr. Yetter and Mr. Clark of Engineers Associates. They have finished the map of their survey of the school section and the mine. The back one fourth of the mine is on our property.”

When these expectations were disappointed and reports proved unfavorable, what provision of the contract requires immediate mining? The plain

and simple answer is that *no* provision requires it, nor does justice or logic require it, nor do any of the applicable cases require it.

Thus, in the case of *Rose v. Lanyon Zinc Co.* (1903) 68 Kan. 176, 74 Pac. 625, the reviewing court held that where the lease did not itself provide for the sinking of a well, they would not write in such a term. The court's opinion comments in acidly turning down the argument that the contract should somehow be considered as implying the need for drilling a well:

“If that were the purpose of the parties, the English language furnished abundant means to express it.” (Page 628, Pacific Reporter Citation.)

The court further stated:

“If plaintiffs should desire to contract for an immediate exploration, they must have that right; and if they should desire to give an oil or gas company five years in which to sink a well, upon a consideration satisfactory to themselves, and as the result of negotiations free from imposition and fraud, they must have that right. But having deliberately made a contract of the latter description, they have no right to call upon a court to declare that it is of the other kind . . .”

The trial court must not, in interpreting the contracts of parties, disregard or torture the provisions stated. This was done here, in imposing upon

the defendant obligations never expressed; and yet this is contrary both to common sense and the consensus of legal authority and precedent both in Utah and elsewhere.

Thus, in the instructive and important case of *Johnson v. Geddes* (1916) 49 Utah 137, 161 Pac. 910, this court sternly reversed a lower court holding that purchasers of a mineral land interest were required to pay moneys under a contract whether or not they obtained these moneys by sale of minerals extracted.

Said Justice Frick:

“At the threshold of this controversy we are again reminded that courts are created to enforce, and not to make contracts. In other words, unless it is shown that the contract in question was obtained by fraud, oppression or duress, or that it is against law or public policy, or is unconscionable, it is the duty of the courts to enforce it according to its terms and not by forced construction to modify or disregard it.” (Page 145).

Particularly apposite also is the response of the court to the contention that since certain of the moneys were to be payable only upon the actual obtaining of it from mining, there was a necessarily implied obligation to mine, regardless of the profitability of such operation. To this the court's opinion sharply replied:

“The defendants did not, certainly not in express terms, agree to work and develop the mining claims. No doubt it was their intention to do that, and no doubt it was assumed by the plaintiffs that they would do so. There is, however, nothing in the contract, that obligates the defendants to do so at any time nor within what any one else might consider to be a reasonable time. If the plaintiffs had desired such a contract they should have demanded it...” (Page 148).

Even if it should eventually come about that the sellers of the mineral interest should not receive moneys out of proceeds from mining, the court pointed out, this was the contract of the parties. Too, the moneys were not specified to be paid within any particular time.

Finally, the court points out that any remedy the plaintiffs might have for breach should be for damages only, in a court of law. This is the expression of the court:

“Courts of law are always open for such actions, and courts of equity may act only when the remedy at law is inadequate . . . Neither can a court of equity give relief merely because under a long-time contract the parties did not foresee and provide for all possible emergencies that might arise.”

The forceful applicability of the principles of the *Geddes* case is plain. Especially is this so when one considers that the delay in mining in the *Geddes*

case was the far longer one of eight years, with no particular effort being made by defendants to work or in any way develop their mining interest.

By way of contrast, and to show how the non-forfeiture principles of the *Geddes* case apply here with especial strength, let it be pointed out that here the total elapsed time before filing of suit was only about one and a half years instead of eight. Too, here the defendant continued throughout to seek to promote the development of the tract, which was not the case in the *Geddes* matter.

In summation the majority opinion says—and we submit that the conclusion is here manifestly appropriate:

“The real question in this case may thus be viewed from any angle, and still we arrive at the same conclusion, namely, that under the contract the defendants did not obligate themselves to do things the district court has required of them, and hence the judgment of that court cannot be sustained.”

The error of the district court in imposing obligations never assumed by the parties is pointed up by the forceful ruling of this court in another and fairly recent case, *Meagher v. Uintah Gas Co.* (1947) 112 Utah 149, 185 Pac. (2d) 747.

In that case this court, reviewing and reversing a lower court holding that lessee had lost mineral

rights by not exploring beyond the specific requirements of the contract, held the parties wrote the contract and that it had no such implied provision for forfeiture..

The court pointed out that there were specific obligations laid upon defendant, that these provided ample consideration, and that no others should be implied.

In the present case also, there are specific obligations also. Not to repeat unduly, these include, among others, a conditional obligation to pay \$5,500, an absolute obligation to secure a prompt survey, an obligation to pay to plaintiff Best a minimum rental of \$250.00 per year starting in 1959, and so on. (Exhibit B to complaint) These and others were performed plainly afford adequate consideration; and the court erred grievously in assuming that mysteriously the defendant assumed other onerous and unstated obligations which were somehow breached.

C. Even If, Contrary To The Obvious Facts And The Overwhelming Preponderance Of The Evidence, Defendant Should Be Deemed To Have Committed A Breach, Such Breach Could In No Manner Warrant The Harsh Relief Of Forfeiture.

As elsewhere discussed, we believe it is clear no breach of this contract on defendant's part has

occurred. To the contrary, we submit the overwhelming preponderance of the evidence, that defendant has most conscientiously carried out obligations laid upon it by a contract entered into by the parties.

Even if, however, a contrary view could be taken, it is crystal clear under the evidence that such breach would be no proper occasion for the extraordinarily harsh and drastic remedy of forfeiture.

The evidence shows clearly that the assignment of the lease was signed in June, 1953 (R. 9). Surveyors were engaged for a mining survey in August, 1953 (R. 65). That summer, in pursuance of the agreement, the defendant corporation was duly formed (R. 61). A mining engineer was employed in August, 1953 (R. 65). Reports were received in June and October, 1953.

In April, 1954, an extremely unfavorable Atomic Energy Commission report was received, and an engineer employed to interpret and explain it (R. 71).

In June, July and August, 1954, defendant's president traveled to New York and contacted various firms to enlist their aid with regard to the property (R. 72, 75, 85).

In October, a communication was received from a Los Angeles mining firm dealing with de-

fendant's efforts to interest the firm, and the firm's appreciation of defendant's efforts (Defendant's Exhibit 4).

Efforts continued, and a deal regarding the lease was arranged (R. 130).

The instant suit was filed on November 10, 1954.

From the above it is obvious that defendant's efforts to fulfill its obligations were continuing, and extended right down to the time of the filing of the complaint. It is also obvious that the reports were uniformly unfavorable.

Further, no more than about sixteen months in all elapsed between the execution of the assignment and the filing of suit.

Therefore, it is submitted that even if a breach could be deemed to have been committed, it was neither long continued, nor substantial, nor was it an intentional repudiation of any of defendant's obligations.

Under these circumstances, declaration of a forfeiture would be a shock to conscience and a violation of legal principles and precedent. If plaintiff were entitled to a remedy, which is strongly denied, that remedy should not be the drastic one of forfeiture.

In the case of *Alford v. Dennis* (Kan. 1918) 170 Pac. 1006 even where it appeared that defendant might have committed some breach, the harsh remedy of forfeiture was denied. The trial court was instead directed either to fix damages or to require defendants “to proceed in good faith to prospect and develop plaintiffs lands within a reasonable time, to be fixed by the trial court.” (Page 1007.)

In language generally appropriate to the present case, the reviewing court stated:

“The plaintiff asks the court to cancel this contract, to decree a forfeiture of it, and not for default of any expressed provision of the contract, but merely for default of one of its implied covenants. The instances are rare where equity will enforce a forfeiture. It will never do so where less drastic redress will satisfy the demands of justice. *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801, 72 C. C. A. 213. Forfeitures of oil and gas leases for breaches of mere implied covenants are seldom decreed. *Davis v. Gas Co.*, 78 Kan. 97, 96 Pac. 47; *Brewster v. Lanyon Zinc Co.*, supra; *Thornton’s Law Relating to Oil and Gas* (2d Ed.) §§ 91, 157.”

Similarly, forfeiture for breach was denied in the case of *Howerton v. Gas Co.*, 81 Kan. 553, 106 Pac. 47, 34 L.R.A. (N.S.) 34; *Id.*, 82 Kan. 367, 108 Pac. 813, 34 L.R.A. (N.S.) 46.

As in the *Alford case*, the cause was remanded either to determine damages or to require drilling within a reasonable time.

Plainly, the relief of forfeiture is likewise totally inappropriate in the instant case.

We submit plaintiff is entitled to no relief; but were a different conclusion reasonable, still forfeiture would be far too harsh a remedy.

* * * *

Another cogent reason that forfeiture is an inappropriate remedy is that the development of the property was, under the evidence, only an incidental objective of plaintiff Best in entering into the contract. His primary objective, as shown both by the agreement itself and by his own written and oral admissions was to obtain his opportunity for the \$5,500; and it was because he did not receive the \$5,500 that this action was commenced. This will be shown by specific record citations.

Under this state of the facts, the cases are plain that plaintiff cannot obtain forfeiture where the breach is only a covenant which is only incidental to the primary purpose.

We turn now to an examination of the facts in this case. It may first be observed that the agreement itself (attached as an exhibit to the complaint

of plaintiff) provides for the payment of \$5,500 upon certain contingencies (which, as more fully stated elsewhere, did not come to pass). The agreement notably provides for additional minimum rental payments to plaintiff commencing in 1959, against royalty payments. Thus the parties plainly made their own interpretation of 1959 as the time before which defendant should not be required to mine if the tunnel in the adjacent property did not intersect with the leased property.

But we do not need to rely upon such reasonable but indirect interpretation as to whether it was the \$5,500 contingently payable or mining development that was the principle⁴ inducement and consideration to plaintiff Best. Let us examine his own letter of September 9, 1953, to Mr. Stern. This letter is attached as Exhibit A to plaintiff's Request for Admission of March 12, 1955. It is in evidence by stipulation and was in part also orally read into the record (R. 33.)

In this letter Plaintiff Best himself specifically states:

“Therefore because I do need some cash which is the original reason that consideration was ever given to transferring the school section . . .”

Reinforcing still further his written admission, plaintiff Best himself acknowledged orally in court that it was because he wanted \$5,500, and not be-

cause he wanted mining development, that he instituted the present action. At page 52 of the Reporter's Transcript, in response to a question as to whether he had ever been offered \$5,500 by defendant prior to commencement of suit, plaintiff revealingly testified:

“A. No. That's why I started suit to get the property back.”

The reason that plaintiff did not get his \$5,500 is plain. None of the contingencies upon which the parties contracted that he should receive it actually occurred, and defendant was left with the dismal and difficult task of attempting to further the interests of the property even though ingress meant digging no mine, and the reports, elsewhere cited, were miserably unfavorable.

However, what is of interest is the open acknowledgment by the plaintiff that he started the present action not because of any supposed delinquency with regard to breach of a proposed covenant regarding mining, but rather because he did not receive the \$5,500 which obviously he was not entitled to receive. Nonetheless, plaintiff did have the full opportunity to receive that \$5,500 if events turned out as he himself stated and contracted that they should. That this was the real and sufficient consideration can hardly be disputed on the basis of the above.

The cases are clear that where a contract is substantially fulfilled it cannot be forfeited even for breach, if the breach is of a promise which is not the principal consideration.

This was the holding in the case of *Watchorn v. Roxana Petroleum Corp.* (1925) 5 Fed. (2d) 636. In stating and holding to this effect, the court's opinion in the *Watchorn* case laid down the principle in extremely appropriate language, herewith quoted:

“ . . . it is well established that where a contract is substantially executed it cannot be rescinded for breach of covenant incidental to its main purpose. The remedy is recovery of damages for the breach. *Howe v. Howe & Owen Ball Bearing Co.*, et al., 154 F. 820, 83 C.C.A. 536; *Kauffman v. Raeder*, et al., 108 F. 171, 47 C.C.A. 278, 54 L.R.A. 247; *Neenan v. Otis Elevator Co.* (C.C.) 180 F. 997; *Oscar Barnett Foundry Co. v. Crowe*, 219 F. 450, 135 C.C.A. 162.”

Therefore, even if a breach by defendant be assumed, it was neither substantial, long continued, nor with regard to the primary purpose of the contract. Under familiar principles of equity, the judgment of the trial court granting forfeiture would still be far too harsh, and a different decree more soundly based upon equitable principles would require to be framed.

POINT III. THE TRIAL COURT DID NOT EXPLICITLY FIND OR CONCLUDE THAT THE CONTRACT OF DEFENDANT AND PLAINTIFF BEST WAS UNENFORCEABLE BY REASON OF LACK OF MUTUALITY; BUT IF SUCH FINDING OR CONCLUSION BE DEEMED IMPLICIT, IT IS TOTALLY CONTRARY TO ALL EVIDENCE AND TO THE AUTHORITIES.

The trial court made no conclusion of law indicating its decision was in any manner based upon lack of mutuality of obligation. If, however, any such implied conclusion could somehow be drawn from the somewhat ambiguous Finding of Fact 7:

“The Agreement provided that the defendant in this action could abandon the contemplated enterprise with impunity,”

then such finding and conclusion are in no wise supported by the evidence or precedent. Hence they could not possibly support the judgment of the trial court.

As is stated in 1 Williston on Contracts, 504:

“It is often stated as if it were a requisite in the formation of contracts that there must be mutuality. This statement is likely to cause confusion and, however limited, is at best an unnecessary way of saying that there must be valid consideration.”

While of course, ^{MUTUALITY IS LACKING} if there is initially a right of immediate cancellation without notice and without fulfillment of any obligation whatever, there is in the instant case no such factual situation.

The original agreement here, incorporated into the complaint, shows clearly that, before defendant could have the right to exercise the abandonment clause, it was obligated:

1. To hire a surveyor to survey the leasehold;
2. To pay \$5,500 if the surveyor's report showed that an adjoining tunnel run to the edge of the property, or if Atomic Energy Commission reports were favorable;
3. To pay certain traveling expenses of the assignor at the time the \$5,500 might become payable;
4. To keep the lease in good standing by paying necessary rental while these other obligations were being carried forward.

The above does not exhaust the necessary obligations of defendant; but it suffices to show that there were many obligations of defendant under the contract.

The matters show ample consideration for the assignment—and consideration which has been executed.

Thus plaintiff cannot avoid the contract by asserting that at some later point, after the defendant's undertaking many obligations and giving much consideration, the defendant might be able

under the contract to exercise a right to cancel, upon certain further considerations. There is no way of segregating out consideration and saying that certain of the agreements have consideration and other do not; this is contrary to precedent and principle.

As is said in the California case of *Tennant v. Wilde* (1929) 98 Cal. App. 437, 277 Pac. 137, 139:

“... it may be said that, where there is consideration for any of the agreements specified in a contract the contract as a whole cannot be said to lack mutuality or consideration, nor can any particular promise or agreement contained therein be singled out and deemed inoperative because no special or particular consideration appears to have been given or promised for it.”

See also authorities there cited; and *Hill v. General Petroleum Corp.* (1932) 128 Cal. App. 284, 16 Pac. (2d) 1035; and authorities cited at 12 Am. Jur. 511.

Here we have the situation of plaintiff Best having assigned his interest under the State of Utah lease to defendant.

Yet even in the weaker situation of the granting of a license, Utah courts have held that this too might and did become irrevocable where money was spent in good faith in reliance upon a continuance of the license. *Kennedy Combined Metals Re-*

duction Co. (1935) 87 Utah 532 51 Pac (2d) 1064. See also *Migliacco v. Davis* (1951) 120 Utah 1, 232 Pac (2d) 195.

Defendant's Duty of Assignment on Abandonment Would Itself Furnish Consideration.

It should also be pointed out that any right to abandon the contract at any time, even after the giving of ample separate consideration, is expressly accompanied by the duty of reassignment imposed by the contract itself, which states, (See Exhibit B to Complaint) :

“In the event of the abandonment of said mine, assignee must reassign said lease to assignor.”

It is the correct rule, and is generally held, that where, as here, the right of abandonment is coupled with a detriment, such as the one here involved of reassignment, this is sufficient to meet the requirement of valid consideration. See authorities cited at 1 Williston on Contracts 365 and *Brewster v. Lanyon Zinc Co.* (C.C.A. 8, 1905) 140. 801, 811-12.

There were many obligations imposed on defendant, and it fulfilled them; and it expended time, money and effort with regard to the property. Further, even the requirement of reassignment upon a closing out of the contract would furnish consideration.

Thus, in the light of the foregoing, it is submitted that from any viewpoint, any effort must fail which would seek to support the erroneous judgment of the trial court on the basis of supposed lack of mutuality.

POINT IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND INJUSTICE IN PERMITTING AMENDMENT AS TO PARTIES PLAINTIFF AT THE TRIAL WITHOUT SWORN TESTIMONY, WHILE AT THE SAME TIME DENYING TO DEFENDANT THE RIGHT TO LITIGATE THE IMPORTANT ISSUE OF REAL PARTIES IN INTEREST, WHICH DEFENDANT HAD SPECIFICALLY RAISED AS AN ISSUE BY AFFIRMATIVE DEFENSE IN ITS ANSWER.

In the instant case the trial court permitted and indeed insisted without sworn testimony upon the entry of an amendment to the pleading including a new party as the owner of one-half of the original party's claim.

This was done, apparently, because the trial court felt that its pretrial order limited the issues and excluded the issue of whether plaintiff Best in fact held the claim at the time of commencement of suit. Yet in point of fact, and contrary to the plain mandate of the Rules of Civil Procedure, the trial court in fact made no formal order following the pretrial (R. 42), and the defendant had sharply and specifically raised the issue of ownership in its answer, which issue the trial court nevertheless excluded from those triable at the trial.

Nonetheless, the trial court, in accordance with the request of plaintiff Best's counsel, heard such evidence as such plaintiff wished to present on the subject of ownership. This consisted solely and exclusively of the testimony, totally unsworn, of one of the plaintiff's counsel. Permitting no rebuttal of such testimony, the trial court acted upon it and upon it exclusively, and entered its order amending the pleadings to add plaintiff Craig as a party plaintiff.

* * * *

While the above statements may seem startling and exaggerated, each of them is exactly correct, and will be demonstrated to be so in the body of this section of appellant's brief.

The defendant in its answer sharply raised the question of whether title was in plaintiff Best when the suit was brought.

Its answer stated at Paragraph 8 thereof:

“That the plaintiff is not the real party in interest in this action and that the plaintiff has assigned to another person or persons his right to receive $16\frac{1}{2}\%$ of the gross mill receipts after first deducting from the gross mill receipts $12\frac{1}{2}\%$ of the said mill receipts which said $12\frac{1}{2}\%$ is paid to the State of Utah as part of the rent for the said leasehold.”

A pretrial hearing was held on March 28, 1955.

Rule 16 of the Rules of Civil Procedure provides in relevant part:

“The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action; unless modified at the trial to prevent manifest injustice.”

It nowhere appears in the record, despite the rule’s plain provision that the “court *shall* make an order which recites the action taken at the conference . . . and which limits the issues for trial,” that any such written order or any order at all was made by the trial court.

Indeed, the evidence is to the contrary; and shows plainly that the trial court did not prepare a pretrial order, though it admitted that it should have done so. We quote from the record (R. 42), with Mr. Arnovitz, trial counsel for defendant, speaking:

“Now in justification of my position in this, I asked, and I don’t criticize the reporter, and I take it for granted the reporter has plenty of business to do. But at that time in order to be sure, the courts generally make

up an arder, at least in our district, and say these are the issues.

“THE COURT: Now listen, on that I dictated that off. Just almost like you read it. And I asked you fellows if you thought that I need prepare a formal order and both of you said no.

“MR. ARNOVITZ: Well I don’t know if that is in here. Is it, I don’t know. I don’t recall that is in here. I don’t recall the court asking whether to prepare a formal order or not.

“THE COURT: Well I should have written a pretrial order. I thought that this here was a simple lawsuit that we have, with all those four or five problems I set them out.

“MR. ARNOVITZ: And, Your Honor, when I asked for the order I did it with the idea that I would then have before me the order so if there was anything that needed to be called to the court’s attention I would have it. Now it didn’t come.”

That such pretrial order, gravely affecting as it does the entire course of the proceedings, is to be written one, would be obvious even without precedent. But of course the cases exist, though we need not here multiply citations. Let us simply take for example a case under the similar Federal Rules of Civil Procedure 16. It is that of *Clark v. United States*, (D. C., Oregon, 1952) 18 Fed. Rules Service 16.21, Case 1; 13 F.R.D. 342. Here it is made perfectly clear that the pretrial order is to be in

writing. Indeed, it should be drafted by counsel for the parties, since it is in effect a pleading. This is the view strongly taken in the above case, written by District Judge (now Ninth Circuit Judge) Fee.

It is plain that the total absence of such a written pretrial order contributed largely to the confusion, and to the error of the trial court in denying to plaintiff the right to litigate the weighty and pleaded issue of real party in interest. The trial court treated pretrial as limiting issues irrevocably, as far as defendant was concerned; yet no actual order ever issued from the pretrial hearing.

Plaintiff Best's original complaint did not allege that anyone but himself was a proper plaintiff party in interest. Nor was any effort made by plaintiff prior to trial to amend the complaint to include anyone else as a plaintiff.

On the other hand, as above stated, in Paragraph 8 of its answer defendant denied sharply that Best was the only or the proper party in interest.

With the foregoing history, it seems clear that the defendant had raised the issue of real party in interest, and had not been foreclosed by the pretrial order (for there was no such order) from pursuing such issue.

As the court itself said with regard to this

issue, this is an important issue and one which was pleaded. To quote:

“... of course this matter is quite substantial, this question of party in interest. But on the other hand you had pleaded that. Of course, I think counsel should call it to the court's attention, but nevertheless, the problem is still there.” (R. 38.)

The trial court regarded it as important, but plaintiff's counsel, who admitted he had known for months of another interest being involved (R. 39) nonetheless had made no move to amend the pleadings prior to trial. Speaking of Earl Craig, the person later in trial added as plaintiff, Mr. Baucom, trial counsel for plaintiff Best, declared:

“I didn't think it was substantial, I really didn't think anything about it.” (R. 40.)

The trial court (R. 45) granted the motion to make Earl Craig a party plaintiff. This was done entirely without any sworn evidence being placed before the trial court, on the basis of the unsworn comments, not subject to cross-examination or rebuttal, of Mr. Baucom, trial counsel for plaintiff Best. These unsworn comments appear principally at page 38 and 39 of the reporter's trial transcript.

The granting of the motion to add Craig as a party plaintiff was, then, plainly based upon no substantial evidence.

No personal criticism of plaintiff's counsel is intended or should be implied; but it is an old and sound tradition of our Anglo-American common law, supported by many precedents, that a trial attorney should not testify as to substantial and important issues involved in the case he is trying. And the fallacy of basing a decision on an important issue on such testimony, and such testimony alone, is glaringly magnified when the testimony of the attorney is merely unsworn comment.

To carry its error still further, the trial court sternly refused to permit counsel for defendant even to inquire into the subject. (R. 35.)

Late in the trial, defendant's counsel sought to go into the question as to whether Best "has any interest left in this property at all, as to whether he is a proper party plaintiff at all." (R. 134)

After further colloquy, the trial court specifically forbade further questioning and stated with regard to the question of real party in interest:

"Well, I will preclude you from that investigation." (R. 135)

Thus, by the foregoing chain of events and rulings, defendant was totally barred from litigating an important issue it had pleaded, while on the other hand the plaintiff was permitted and ordered to amend its pleadings on the basis of the unsworn

testimony of plaintiff's counsel, of which no rebuttal was permitted.

That this was serious and reversible error admits of no question. It leaves totally unsupported the status of the plaintiff as real parties in interest, and foreclosed the right of defendant to litigate this question.

Under previous rules of procedure, such rulings have in the past required reversal by this Court of trial court judgments. Thus, in *Skews v. Dunn* (1882), 3 Utah 186, 2 Pac. 64, this Court held that the trial court erred reversibly in substituting one plaintiff for another, in violation of principles governing determination of the real party in interest.

Turning for interpretation of our modern rules on pretrial to decisions under the similar Federal Rules of Civil Procedure, we find that the federal cases condemn the failure to have a written pretrial order "well before the trial." Reversal was held required in *Burton v. Weyerhaeused Timber Co.* (U.S.D.C. Ore., 1941) 4 Fed Rules Service, 16.32, Case 2, because of confusion arising over certain issues at the trial.

The failure in regard to the pretrial order was emphasized as a ^{US}causal factor in the confusion which required reversal.

In this general regard another federal case and its principles should be noted. It is true that the instant case does not even involve an actual pretrial order duly prepared. But even if it did involve such an order, the rigidity and inflexibility of the trial court would be error.

This is well illustrated by the case of *Geopulos v. Mandes* (U.S.D.C., Dist. of Columbia 1940) 4 Federal Rules eSrvce, 16.33, case 1. Here the issue of laches was apparently waived by defendant. However, where this was shown to be inadvertent, and where defendant had earlier tried to assert this issue amendment was permitted to include this issue in the pretrial order. The guiding principle is that where rigid adherence to the issue set down in the pretrial order will cause injustice, these issues may be enlarged.

CONCLUSION

We believe we have shown clearly that there was in this case no forfeiture, no abandonment, no lack of mutuality. We believe the trial court also erred reversibly in prohibiting to defendant exploration of the pleaded issue of real party in interest, while at the same time permitting and ordering amendment as to parties plaintiff on the unsworn testimony of plaintiff's counsel. It is submitted that justice requires the reversal of the trial

court, to avoid effects of an unjust forfeiture declared against defendant.

Worthy counsel for respondents will try to escape the inescapable facts of trial court errors, by citing some matters or cases not specifically referred to in this brief. Yet the fatal errors are in the record, and we believe will remain there despite all efforts of respondents to deal with them.

It is respectfully submitted and prayed that this Honorable Court, by reason of each of the errors discussed in earlier sections of this brief, should reverse the judgment of the trial court and grant defendant a judgment to avoid a most inequitable and legally unwarranted forfeiture.

Respectfully submitted,

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