

1956

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Holbrook, Baucom & Wilkins; Attorneys for Respondents;

Recommended Citation

Brief of Respondent, *Best v. Big Jim Mining Co.*, No. 8438 (Utah Supreme Court, 1956).
https://digitalcommons.law.byu.edu/uofu_sc1/2480

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

RECEIVED

DEC 12 1956

LAW LIBRARY
U. of U.

In the Supreme Court of the State of Utah

HAROLD E. BEST and EARL CRAIG,
Plaintiffs and Respondents,

vs.

BIG JIM MINING COMPANY,
A Nevada Corporation,
Defendant and Appellant

Case No. 8438

FILED
AUG 15 1956

Clerk, Supreme Court, Utah

BRIEF OF RESPONDENTS

HOLBROOK, BAUCOM & WILKINS
Attorneys for Respondents

INDEX

	Page
STATEMENT OF FACTS	1
POINT I THE TRIAL COURT PROPERLY FOUND THAT THE DEFENDANT BELOW, THE BIG JIM MINING COMPANY, ABANDONED THE MINING LEASE AND AGREEMENT ENTERED INTO BE- TWEEN IT AND HAROLD E. BEST AND EARL CRAIG, PLAINTIFFS BELOW	6
POINT II THE TRIAL COURT PROPERLY FOUND THAT DEFENDANT FORFEITED ITS RIGHTS UN- DER THE ASSIGNMENT OF THE UTAH STATE LEASE FOR URANIUM AND VANADAIUM.....	17
POINT III THE EVIDENCE AND AUTHORITIES SUPPORT A FINDING OF LACK OF MUTUALITY IN THE AGREEMENT BETWEEN PLAINTIFFS AND DEFENDANT.	42
POINT IV THE TRIAL COURT ACTED IN COM- PLETE HARMONY WITH THE CUSTOM OF COURTS AND THE LAW AND PROPERLY EX- ERCISED ITS DISCRETION CONCERNING THE QUESTION OF REAL PARTY IN INTEREST.....	43

TABLE OF CASES

Alford v. Dennis, (Kan.), 170 Pac. 1006	39
Arthur S. Hoyt Co., Inc. v. Galagher's Warehouse, Inc., 19 F.R. Serv. 17a. 42, Case I (D.C.E.D. Pa, 1953).....	45

Automatic Dialing Corp. v. Maritime Quality Hardware Co., 16 F. R. Serv. 17a. 13, Case 2, 98 F. Supp. 650.....	55
Baldwin v. Jacobs, 182 Ia. 719, 166 N.W. 271	14
Becker v. Rute, 228 Ia. 533, 293 N.W. 18	15
Benedum-Trees Oil Co, v. Davis, 107 F.2d 981, (C.C.A. 6th, 1939)	10
Berry v. Kelly Co., 90 Cal. App. 2d 486, 203 P.2d 80	14
Bradley v. Fackler (Wash.) 126 P.2d 190	11, 19
Brown v. Wilmore Coal Co., 82 CCA 295, 153 Fed. 143..	12, 27
Caine v. Hagenbarth, 37 Utah 69, 106 Pac. 945.....	39
Carlisle v. Lady, 109 Cal. App. 567, 293 Pac. 686.....	11
Caswell v. Gardner, 12 Cal. App.2d 597, 601, 55 P.2d 1222..	11
Chandler v. Hart, 161 Cal. 445, 19 Pac. 516	39
Child v. Gillis Construction Co., 42 Utah 120, 129 Pac. 356..	47
Colorado Fuel and Iron Co. v. Pryor, 25 Colo. 540, 57 Pac. 51, 60 A.L.R. 935	22
Conrad v. Morehead (1883) 89 N.C. 31	41
Cotner v. Mundy, 92 Okl. 268, 219 Pac. 321	38
Crane v. French, 39 Cal. App.2d 642, 104 P.2d 53.....	15
Elk Fork v. Jennings, 84 Fed. 839	12
Fischer v. Petroleum Co. 156 Kan. 367, 133 P.2d 95.....	16, 38
Frank v. Giesy, 4 F.R. Serv. 16. 32 Case 1, 117 F.2d. 122 (C.C.A. 9th, 1941).....	50
Freeport Sulphur Co. v. American Sulphur Royalty Co., of Texas, 6 S.W. 2d. 1039, 60 A.L.R. 890	20
Garrison v. Hogan, 112 Cal. App. 525, 297 Pac. 87	11
Harris v. Morris Plow Co., 144 Kan. 501, 61 P.2d 901	10
Harris v. Riggs, 63 Ind. App. 201, 112 N.E. 36, 39	12
Hiramatsu v. Maryland Ins. Co., 73 Utah 303, 309, 273 Pac. 963	44

Hodges v. Mud Branch Oil & Gas Co., 270 Ky. 206, 109 S.W. 2d 576	10
Hoff v. Girdler Corp., 104 Colo. 56, 88 P.2d 100.....	6
Howorth v. Mills, 62 Utah 574, 221 Pac. 165	28
Johnson v. Geddes, 49 Utah 137, 161 Pac. 910	29
King v. Edward Hines Lumber Co., (D. Ore. 1945) 68 F. Supp. 1019, 1021, 8 F.R. Serv. 16. 32 Case 3	49
Leterman v. Becher & Co., 260 Fed. 543, 171 C.C.A. 327....	47
McLouth Steel Corp. v. Mesta Machine Co., 19 F.R. Serv. 17 a. 44 Case I (D.C.E.D. Pa. 1953).....	50
Meagher v. Uintah Gas Co., 112 Utah 149, 185 P. 2d 747..12, 32	
M. H. Walker Realty Co. v. American Surety Co., 60 Utah 435, 211 Pac. 998	47
Monfort v. Lanyon Zinc Co., 67 Kans. 310, 72 Pac. 784..	31
Montague Manufacturing Co. v. Aycok-Holly Lumber Co., 139 Va. 742, 124 S.E. 208.....	47
Munson v. A. & H. Inv. Co., 62 Utah 13, 218 Pac. 109.....	40
Myers v. Shell Petroleum Co., 153 Kan. at P. 296, 110 P.2d at P 826	17
Paine v. Griffith, 86 Fed. 455, 30 C.C.A. 182.....	12
Paper Container Mfg. Co. v. Dixie Cup Co. (D.C. Del. 1947), 74 F. Supp. 389	54
Petroleum Co. v. Coal, Coke & Mfg. Co., 89 Tenn. 381, 18 S.W. 65	43
Rice v. Lee, 44 Cal. App.2d 909, 113 P.2d 235	11
Rocky Mountain Fuel Co. v. Clayton Coal Co., 110 Colo. 334, 134 P.2d 1062	37
Romero v. Humble Oil & Refining Co., 93 F. Supp. 117 (E.D. Pa. 1950)	10
Rosenblum v. Dingfelder, 111 F.2d 406, 407	45
Rose v. Lanyon Zinc Co., 68 Kan. 176, 74 Pac. 625	28

Sander v. Mid-Continent Petroleum Corp., 292 U.S. 272, 54 Sup. Ct. 671, 78 L. Ed. 1255.....	10
Severson v. Barstow, 103 Mont. 526, 63 P.2d 1022.....	10
Shaw v. Jeppson, (Utah), 239 P.2d 745	46
Smith v. Moody, 192 Ark. 704, 94 S.W.2d 357.....	10
Spies v. DeMayo, 396 Ill. 255, 72 N.E. 2d 316	7
Taylor v. Kingman Feldspar Co., 41 Ariz. 376, 18 P.2d. 649	34, 43
Tinker v. Northwest Air Lines, Inc., 16 F.R. Serv. 17 a. 13 Case 1, 11 F.R.D. 540 (U.S.D.C., N.D. 1951).....	45
Weaver v. Marcus, (C.C.A. 4th, 1948) 165 F.2d 862.....	54
Whelan v. Shell Oil Co., Inc., 212 S.W.2d 991 (Tex. Civ. App. 1948)	6

STATUTES

Federal Rules of Procedure, 16	50
Utah Rules of Civil Procedure, Rules 1, 21, 27, 27b, 16 59	50, 52, 53, 56

TEXTS

II American Law of Property 680	41
60 A.L.R. 890, 961, 922, 955	19, 20, 22, 33, 41
3 C.J.S. Agency, Sections 216 and 244.....	47
6 C.J.S. Assignments, Section 74	47
Lindley on Mines, Sec. 644	26
Pre Trial Techniques of Federal Judges, 1944, 4 F.R.D. 183, 192	51

In the Supreme Court of the State of Utah

HAROLD E. BEST and EARL CRAIG,
Plaintiffs and Respondents,

vs.

BIG JIM MINING COMPANY,
A Nevada Corporation,
Defendant and Appellant.

Case No. 8438

BRIEF OF RESPONDENTS

STATEMENT OF FACTS

On the 5th day of June, 1953, Harold E. Best, a resident of Grand Junction, Colorado, obtained a mineral lease from the State of Utah. This lease was Mineral Lease No. 5418, and involved the standard form development and royalty covenants.

Because Mr. Best is a man of limited capital he necessarily had to borrow money to aid the financing of procuring the lease.

He borrowed this money from Earl Craig, who, during the trial, was joined as a party plaintiff at the insistence of the defendant.

Plaintiffs then began to investigate the possibility of developing the school section and determined that necessary financial support could not be obtained in Grand Junction. (R. 118) Because of this fact plaintiffs let it be known that they were open to offers from outside interests. Best was contacted by a group of California residents who subsequently formed the Big Jim Mining Company, a Nevada corporation (R. 61, R. 63). Negotiations for the development of the school section were entered into, which negotiations ultimately resulted in the assignment of the school section to the Big Jim Mining Corporation (R. 63); Exhibit "B", which, hereinafter will be referred to as the agreement.

The agreement provides:

"Assignee promises to commence operations, weather conditions permitting, as soon as reasonable."

The original lease provides as follows in the Sixth provision of Article III:

"To commence actual operations upon the land included herein on or before December 31, 1953 and thereafter to diligently operate the property in accordance with the provisions contained in this lease . . ."

The consideration for the assignment from Best to the Big Jim Mining Company is set forth in paragraphs 4 and 5 of the agreement, as follows:

"The assignee will pay to the assignor 16½% of the gross mill receipts after first deducting from the gross

mill receipts $12\frac{1}{2}\%$ of said mill receipts, which said $12\frac{1}{2}\%$ is paid to the State of Utah as part of the rent for said leasehold. The assignee will further pay to the assignor $16\frac{1}{2}\%$ of all bonuses after the first deducting $12\frac{1}{2}\%$ of said bonus which said $12\frac{1}{2}\%$ must be paid to the State of Utah as further rental for said leasehold.

“Assignee promises to have a licensed surveyor survey the aforementioned leasehold immediately. If the eastern boundary of said leasehold either intersects or is on the line where present mine wall of deepest penetration westerly ends, the assignee will pay to the assignor the sum of \$5500.00 if the survey shows that the eastern line is westerly of the present mine wall of deepest westerly penetration then the assignee has the right to wait until it has received the Atomic Energy Commission drill report of uranium and vanadium of said leasehold and only if the report is satisfactory must the assignee pay the assignor \$5500.00.”

The defendant drew the agreement, (R. 10, R. 121) and the agreement further provided for the defendant, as follows:

“The assignee at all times has the right to abandon said mine and retain all the equipment thereon except as forbidden by the said laws of Utah. In the event of the abandonment of said mine, assignee must reassign said lease to assignor.”

The lease contained a forfeiture clause for non-production and failure to comply with the terms thereof.

The defendant had a survey made of the property to determine the eastern boundary (R. 94). It was determined that the boundary did not fall so as to entitle Best to the contracted \$5,500.00.

In the fall of the year of the contract, the Atomic Energy

Commission's drill reports were received by defendant (R. 95). Plaintiffs attempted to find the contents of these reports but were refused access to them by defendant (R. 18). Plaintiffs then demanded the \$5,500.00 (R. 21, R. 78) and were informed by Big Jim that the Atomic Energy Commission reports were unsatisfactory, (R. 95) and that the mining and production of the property was impossible (R. 71, R. 74, R. 75). Herman Stern, of the Big Jim Mining Company, testified at the trial that the defendant was under no obligation to mine the property (R. 127). After the obvious refusal of the defendant to mine or develop the property and pay the \$5,500.00, demand was made for the return of the property (R. 22), Exhibits "C" and "J". Big Jim Mining Company, by letter of April 30, 1954, stated that a reconveyance of the property would be forthcoming, Exhibit "K". The Big Jim Mining Company did not reconvey, however, notwithstanding the demands and their own promises. Best then commenced the instant action for the return of his property.

The plaintiff Best in the prosecution of this law suit utilized every possible means of discovery. This can be seen from the file and record herein. The defendant Big Jim Mining Company at no time utilized any discovery technique whatsoever.

At the pre-trial the issues for trial were stated by the Court as follows:

"All right. So for the pre-trial we will put this question of law. Was this contract an enforceable contract? That is, the first one. Then a mixed question of law and fact. Has there been an abandonment of this contract, Exhibit B. Another question of law and fact. Has there

been a forfeiture of the defendant's right to claim under the assignment made pursuant to this agreement? Then another question. If there has been either an abandonment or forfeiture, what damage has the plaintiff sustained and how much? Those are the issues in this case. Now ordinarily I would go into more detail about the thing but as I view it, there isn't going to be any serious controversy over what the facts are. That's correct, isn't it?" (P-T R. 40).

Subsequent to this defendant's counsel questioned the issue of forfeiture and discussion followed. The Court then restated the issues as follows (P-T R. 44):

A. "... I will restate the issues. Is there such a lack of mutuality in the contract, Plaintiff's Exhibit "B," that the plaintiff is entitled to a reassignment of the lease to the school section described in the complaint?

"Has there been an abandonment of the contract, Plaintiff's Exhibit "B," on the part of the defendant?

"Has the defendant breached the contract, Plaintiff's Exhibit "B," and if there has been such a breach is the plaintiff entitled to have the school section reassigned?"

"Is the plaintiff entitled to damages, and if so, in what amount?"

After the issues were again considered counsel for defendant requested an additional issue be added which was stated by the Court as follows (P-T R. 45):

"... Has there been a waiver of the abandonment if any has occurred and a waiver of the breach if any has occurred . . . "

At the trial the evidence was presented in regard to the issues. Defendant Big Jim Mining Company at that time attempted to raise an issue as to real party in interest. At the

instance of defendant, plaintiff moved to join Earl Craig as a party plaintiff (R. 42). The Court did not allow defendant to pursue questions pertaining to conceivable interests and dealings of the plaintiffs, but the Court did give the defendants the right to pursue such questions of any person by deposition or any discovery technique subsequent to the trial (R. 45). Defendant, apparently realizing that any such interests were non-existent, did not avail itself of the right given by the Court and did not in any manner attempt to utilize discovery technique in order to change the ruling of the Court, or get a new trial as the Court had given it the opportunity so to do.

The Court completed the trial of the issues and found them in favor of Plaintiffs.

POINT I

THE TRIAL COURT PROPERLY FOUND THAT THE DEFENDANT BELOW, THE BIG JIM MINING COMPANY, ABANDONED THE MINING LEASE AND AGREEMENT ENTERED INTO BETWEEN IT AND HAROLD E. BEST AND EARL CRAIG, PLAINTIFFS BELOW.

Abandonment is a legal doctrine encompassing two elements: An intent to abandon and a physical relinquishment. *Whelan v. Shell Oil Co., Inc.*, 212 S.W. 2d 991 (Tex., Civ. App. 1948). The intention may be shown by an express intention on the part of the lessee or assignee or by circumstantial evidence such as non-production of the property. *Hoff v. Girdler Corp.*,

104 Colo. 56, 88 P. 2d 100; *Spies v. DeMayo*, 396 Ill. 255, 72 N.E. 2d 316.

In the instant case the defendant Big Jim Mining Company not only failed and refused to develop the school section in question thereby circumstantially fulfilling the requisite element of intention but the company also expressly asserted that a mining venture was out of the question and that the property would be reconveyed pursuant to the demands of plaintiffs. Demand for return of the property was made on numerous occasions because defendant consistently asserted that it had no intention to proceed and develop the property. Exhibit "C", a demand letter from plaintiffs' California counsel, states in part as follows:

A. " . . . In view of nonperformance with reference to commencement of operations relative to the properties under said lease, demand is herewith made upon you to reassign said lease to H. E. Best."

In answer to this letter the defendant Big Jim Mining Company replied as follows in Exhibit "K":

"This will confirm our telephone conversation of April 28th wherein I told you that the directors of Big Jim Mining Company will execute the assignment forthwith as demanded in your letter of April 26th. Kindly prepare the assignment you want executed."

This exhibit was admitted through plaintiffs' Request For Admission to be a copy of a letter "between plaintiff and his agents on the one hand and defendant and its agents on the other" and was duly admitted into evidence at the trial. At the trial when questioned as to the intention of the defendant to

return the property, Jack Egar, the President of the defendant Big Jim Mining Co., answered and concluded as follows:

“My answer is in the letter” (R. 84).

The foregoing exchange of letters resulted after many prior demands and conversations in regard to the defendant's abandonment of the property. Plaintiff Best discussed the possibility of re-adjusting royalty interests with Jack Egar, president of the defendant Big Jim Mining Co., in an effort to get something accomplished in reference to the development of the property (R. 20). Subsequent to this a demand letter was written to the defendant, Exhibit “J”, which letter was more than a month in time prior to Exhibit “K” as discussed above. Defendant considered the AEC Drill Reports as shown by Exhibit “B”.

It is obvious from all of the foregoing and other evidence in the record that the defendant Big Jim Mining Co., concluded to abandon the contemplated mining enterprise and reassign the lease in question. The defendant, of course, at no time undertook the development of the property, thereby fulfilling the element of “physical relinquishment” (R. 126).

The foregoing together with other evidence is more than sufficient to sustain the decision of the trial court.

In addition to the express intention, however, the record throughout discloses the circumstantial evidence as to intention which again irrefutably establishes abandonment on the part of defendant.

Defendant through Mr. Herman Stern testified that the AEC drill reports of the property were unsatisfactory.

Question: "And did you so advise Mr. Best in the opinion of the company the report of the AEC was unsatisfactory?"

Answer: "I did." (R. 95).

Defendant's answer to plaintiff's Interrogatory No. 1:

"The AEC report was unsatisfactory because the map and drill logs showed that of the 43 holes drilled, only 5 contained ore that was commercially marketable, and that these holes were far apart and in no definite trend of mineralization. In addition it has been determined that the ore has a high limestone content."

Defendant through Mr. Egar testified to the response received in regard to the property after various companies and engineers had examined the reports of the property.

Answer: "He said that he had many such reports come to him and never had it been his experience to have so many poor drill report holes on one property. He cannot understand why they drilled so many." (R. 74)

Answer: "Yes, he notified me that after getting the report from his geologist they had no interest in this piece of property." (R. 75)

Question: "Did you see anybody who was favorably inclined toward this property?"

Answer: "No. - - - " (R. 75).

Defendant through Mr. Stern was questioned by the court as follows:

The Court: "Well, but you don't have any, under your theory you don't have an obligation other than to investigate, you don't have any obligation to mine, is that right?"

Answer: "We only have the obligation to mine if it proves profitable. In other words, if there is no ore there or would be so expensive to take out then we don't have this obligation . . . " (R. 127)

The record is replete with evidence such as this which without any question circumstantially establishes intention to abandon as found by the Trial Court.

In *Smith v. Moody*, 192 Ark. 704, 94 S.W. 2d 357, plaintiff sought to cancel a portion of a lease alleging that defendant had abandoned and failed to attempt development work contending that the property could not be drilled except at great loss. The court ruled in favor of the lessor and observed on page 358 of the Southwest Reporter, stating that if the lessee's contention were true, "the lessees have not been damaged by the cancellation of so much of the contract of lease as cannot be profitably performed." See also *Sander v. Mid-Continent Petroleum Corp.*, 292 U.S. 272, 54 Sup. Ct. 671, 78 L. Ed, 1255; *Romero v. Humble Oil & Refining Co.*, 93 F. Supp. 117 (E.D. Pa. 1950); *Harris v. Morris Plow Co.*, 144 Kan. 501, 61 P. 2d 901.

It has also been held in gas cases that an inability to market should not permit a lessee to hold and freeze the lessor's land indefinitely. *Benedum-Trees Oil Co. v. Davis*, 107 F. 2d 981 (C.C.A. 6, 1939); *Hodges v. Mud Branch Oil & Gas Co.*, 270 Ky. 206, 109 S.W. 2d 576; *Severson v. Barstow*, 103 Mont. 526, 63 P. 2d 1022.

The only defense presented by defendant in regard to abandonment of the lease and property was to the effect that defendant was attempting to sell the property to others—in

other words, defendant had no intention of developing the property but rather directed its efforts toward speculation.

Rice v. Lee, 44 Cal. App. 2d 909, 113 P. 2d 235, involved an action to quiet title by the lessor of an oil and gas lease. The lessee did not commence to drill or develop the property and the Court found that the lessee did not intend to drill and develop the property and also that the lessee intended to hold the property for speculative purposes. On pages 236 and 237 of the Pacific Reporter the Court asserted the following:

“ . . . that rights granted under such leases are for exploration and development and the courts will not permit the lessee to fail in development and hold the lease for speculative or other purposes . . . ”

“ . . . evidence and reasonable inferences to be drawn therefrom are ample to support the conclusion of the trial court that the lessees did not intend to explore, drill and develop the demised premises, and that such failure constituted an abandonment.”

See also: *Carlisle v. Lady*, 109 Cal. App. 567, 293 Pac. 686; *Caswell v. Gardner*, 12 Cal. App. 2d 597, 601, 55 P. 2d 1222; *Garrison v. Hogan*, 112 Cal. App. 525, 297 Pac. 87.

Bradley v. Fackler, (Wash.) 126 P. 2d 190, sets forth the following policy after holding abandonment existed:

“It would be unjust and unreasonable, and contravene the nature and spirit of the lease to allow the lessee to continue to hold his term a considerable length of time, without making any effort at all to mine for gold or other metals. Such a construction of the rights of the parties, would enable him to prevent the lessor from getting his tolls under the express covenants to pay the same, and deprive him of all opportunity to work

the mine himself, or permit others to do so. The law does not tolerate such practical absurdity, nor will it permit the possibility of such injustice.”

Justice Wade dissenting in *Meagher v. Uintah Gas Co.*, (Utah), 185 P. 2d 747, a case which will be discussed and distinguished hereinafter, quotes from *Harris v. Riggs*, 63 Ind. App. 201, 112 N.E. 36, 39:

“The rights granted under such leases are for exploration and development. The title of interest granted is inchoate until oil or gas is found in quantity, warranting operation, and courts will not permit the lessee to fail in development and hold the lease for speculative or other purposes, except in strict compliance with his contract for a valuable and sufficient consideration other than such development.”

In *Brown v. Wilmore Coal Co.*, 82 C.C.A. 295, 153 Fed. 143, the court concluded as the trial court found in the instant action, that a mining enterprise was contemplated. On Page 145 the court observes the following:

“Mr. Brown didn’t expect to do any mining personally and he has not, either by himself or others; his purpose being to sell leases to others or transfer them to some company which would operate them.”

The court analyzed the intention in abandonment carefully and concluded that its essence was not a broad intention to abandon or retain mineral rights alone, divorced from the obligations which adhere to it under the contract, but the *intention to abandon the contemplated enterprise*.

See also *Paine v. Griffith*, 86 Fed. 455, 30 CCA 182; *Elk Fork v. Jennings*, 84 Fed. 839.

A mining enterprise was without question contemplated by the plaintiff and defendant. The assignment called for royalty interest and development. The defendant allegedly was capitalized to mine the property (R. 13). At the trial defendant through Herman Stern stated that only a qualified obligation to mine existed (R. 127). But even more telling than this, defendant through Jack Egar testified that the company considered the engineering report of the property and concluded that *rather than develop the property to interest other people in it* (R. 70).

The foregoing not only adds to the circumstantial evidence for abandonment but in and of itself is an *express* manifestation that the contemplated enterprise was abandoned. The Court properly found that the enterprise contemplated by the parties was the development and mining of the school section and that "the defendant in this action did abandon the said contemplated enterprise" (Findings 6 and 8).

The position taken by defendant and appellant not only is against the weight of authority but is unreasonable and unjust. To sustain defendant's theory would amount to legalized larceny. An assignment of the lease was obtained for no consideration whatsoever save an amount to be paid upon favorable drill reports plus the prime consideration of royalty interest. Defendant then blandly asserts that it could not possibly mine the property and in fact that the property cannot be profitably mined; that it will not in fact mine or develop the property. Of course, contends the defendant, the foregoing does not amount to abandonment because we may be able to sell the property. If this is true the next successor in interest

could also take the same position and so on *ad infinitum*. The result is obvious. The original lessor ends up giving away his property, and received absolutely nothing. The entire chain is contrary to the provisions of the lease, the evidence and sound reason. Such a position cannot be sustained.

Appellant allegedly cites authority for its position, but an examination of these cases indicates their distinguishing features.

Berry v. Kelly Co., 90 Cal. App. 2d 486, 203 P. 2d 80, involved an oil lease. The defendant took possession of certain property. A derrick was in place when possession was taken and a 3,000 foot depth had been drilled. Portions of the acreage were covered by sumps, a ramp, and oil saturated dirt. Mechanical failures caused defendant to have the machinery and derricks moved. Also the defendant had been involved in litigation which had been concluded only a few days prior to commencement of the action by the lessor and before this action was concluded the lessee had not been able to give the go ahead to an oil company with which he had contracted to re-drill the well and place it on production within 45 to 70 days. The court also made special note of the fact that the lessor had never given the lessee notice that he may have defaulted or that any action may be taken. The court found that there was no evidence of an intent to abandon.

The facts of the instant case certainly in no way resemble those last cited.

Baldwin v. Jacobs, 182 Ia. 719, 166 N.W. 271, is a farm lease case in which the court pointed out that the defendant's

moving to other premises would not in and of itself amount to abandonment. The defendant affirmatively claimed the use of the premises and the sale of growing crops by defendant was considered to be usual farming practice. Had the defendant notified the plaintiff that the farm was worthless, that the soil was not conducive to growth, that farming on the land could not be profitable, and that he was going to reassign the lease to plaintiff, the decision of the court may well have differed.

Becker v. Rute, 228 Ia. 533, 293 N.W. 18, is a landlord-tenant case wherein the tenant surrendered the premises to the landlord after receiving notice of forfeiture. The tenant then brought action for the rent which the landlord subsequently received, claiming abandonment thereby entitling the tenant to a mitigation of damages. The court held that the duty of the landlord to minimize damage pertained only to abandonment and not to a surrender under a forfeiture notice.

It would appear that this case is interesting but meaningless insofar as the instant action is concerned. The case obviously involves a legal incident of abandonment, that being the duty to mitigate damage. This duty under Iowa law is not present in forfeiture through contract provision. Nothing can be gained here by an academic discussion with the appellant as to the legal incidents of abandonment and forfeiture. The case is obviously not in point.

Crane v. French, 39 Cal. App. 2d 642, 104 P. 2d 53, involved a situation where the only evidence presented by the plaintiff to establish abandonment was the fact that defendant was not on the premises. This is not comparable to the instant case and distinguishable on that basis.

Fischer v. Petroleum Co., 156 Kan. 367, 133 P. 2d 95, was a policy decision rendered by the California Court. The lessee had failed to continue to develop certain oil properties. Lessee after demand refused to further develop because of flooded market conditions but stated that drilling would proceed as market conditions improved. On Page 97 of the Pacific Reporter the court comments as follows:

“During the past few years, there has existed in the oil industry a condition wherein the potential production is greatly in excess of market demand; ***states and the United States government have adopted measures to control and restrict production of petroleum to meet the market demand.”

A Kansas statute permitted only fractional production of operating wells. In commenting on the apparent lack of harmony of Kansas decisions on development, the court said:

“Some of the differences perhaps may be accounted for by the fact that through comparatively recent years there has been generally a shifting of emphasis from production to conservation of our natural resources. This trend, evidenced by conservation and pro-ration statutes and in other ways is so well recognized as to require no comment. Courts naturally reflect this trend by stressing the mutual interests of both the lessor and lessee rather than the special interest of the lessor only in securing production.”

The Court held that abandonment had not occurred. It is well to note, however, the language of the court on page 101:

“Of course if the lessee has clearly indicated by word or conduct that he regards the tract not worth developing at any time, it may well be held that he has abandoned the lease and such abandonment calls for forfeiture and removal of the encumbrances.”

Also note *Myers v. Shell Petroleum Co.*, 153 Kan. at P. 296, 110 P. 2d at p. 826:

“Manifestly if the lessee thinks an undeveloped portion of his lease cannot be developed with profit to him he may be required to surrender such portion of the lease.”

The appellant certainly cannot contend that the market conditions for uranium are presently comparable to those of oil in the *Fischer* case. The Federal Government itself is presently guaranteeing a market and price. The cry for uranium for the defense of this country needs no elaboration.

In conclusion it must be readily seen that ample evidence is present to sustain the trial court decision of abandonment. The appellant has presented neither evidence nor law to support its position and the trial court decision should be sustained.

POINT II

THE TRIAL COURT PROPERLY FOUND THAT DEFENDANT FORFEITED ITS RIGHTS UNDER THE ASSIGNMENT OF THE UTAH STATE LEASE FOR URANIUM AND VANADIUM.

In addition to the Trial Court's finding that defendant abandoned the lease and the contemplated enterprise, findings were likewise entered by the Trial Court concerning a forfeiture, as follows:

“6. The enterprise contemplated by the parties was the development and mining of said Section 16 for commercial ore bodies with reasonable diligence and

continuity, and when the parties in paragraphs 6, 7 and 8 of their agreement, said Exhibit "B", referred to "mine", the reference was to the said contemplated enterprise and not only to the tunnel hereinbefore referred to in paragraph 3 of these Findings.

* * *

"10. The main and basic considerations for plaintiffs entering into the said assignment, Exhibit "B", was to have reasonably prompt development and diligent operation of the property to effect recovery of royalties due plaintiffs under the assignment, and to receive the payment of \$5500.00 under the terms of Exhibit "B."

"11. Subsequent to the receipt by the defendant of the AEC report contemplated by said Exhibit "B", plaintiffs made demands for the payment of \$5,500.00 and on April 26, 1954, plaintiffs demanded a reassignment of the lease on said School Section 16 because of the non-performance of the obligations to be performed by the defendant as provided in said Exhibit "B".

"12. The defendant failed to pay \$5,500.00 under the Agreement and takes the position that said Section 16 contains no commercial ore deposits and further contends there is no obligation under the Agreement to mine or develop and the only obligation is to pay rentals to the State of Utah in order to keep the Lease in good standing; and defendant has failed and refused to prosecute any mining operation or development on the property sufficient to meet its duties under the contemplated enterprise, Exhibit "B", and the Lease from the State of Utah.

"That under the terms of the Lease from the State of Utah and the said Exhibit "B", defendant is bound to undertake development work with reasonable diligence."

From the foregoing facts the Court concluded that the defendant had committed a forfeiture of its rights under the said assignment of School Section 16.

That either the theory of abandonment, discussed in Point I of this Brief, or the theory of forfeiture, to be discussed herein, supports the Trial Court's judgment is illustrated by the case of *Bradley v. Fackler, supra*, in which the court distinguished between abandonment (intention of the lessee and if the enterprise is abandoned the courts will afford relief by cancellation of the lease or other appropriate remedy) and forfeiture (which results from action of the lessor in declaring the lease forfeited by reason of the failure of the lessee to perform express or implied covenants contained in the lease) and the court said:

"Thus, a lessee's failure to continue mining operations on the leased premises may constitute both an abandonment of the lease and a violation of a covenant obligating him to prosecute the mining enterprise with reasonable diligence."

See also 60 A.L.R. 926, wherein the editor states as follows:

"A mining lease may be avoided not only on the ground of forfeiture by the lessee, but also on the ground of abandonment. In this regard there is a distinction between failure and neglect of the lessee to develop the leased premises, or to operate the mines or wells discovered, and the abandonment by him of the enterprise, although in many instances the distinction is perhaps obscure. An important distinction is that abandonment is a question of intention; hence the act of the lessee may indicate his intention to abandon the enterprise he has undertaken under the lease, when it would not be sufficient to show neglect or failure

to develop or produce sufficient mineral as to entitle the lessor to a forfeiture of the lease. The cases hold that abandonment is a question of fact, and where established affords ground for relief to the lessor by a cancellation of the lease or other relief.”

The annotation from which the foregoing quotation was taken begins with the case of *Freeport Sulphur Company v. American Sulphur Royalty Company of Texas*, 6 S.W. 2d 1039. At 60A.L.R. 890 and continuing through and including page 936, is an excellent annotation concerning the “Duty of lessee or purchaser or mineral rights other than oil or gas as to development and operation.” The entire annotation is directly in point with respect to the subject matter of this inquiry and we strongly invite the Court’s attention to the rules and cases therein set forth. Further reference to the annotated portion beginning at 60 A.L.R. 901 will be found in subsequent portions of this argument.

Based on the foregoing law, if the evidence in this case supports an abandonment or forfeiture, or both, the judgment of the lower court must be affirmed.

Defendant and appellant contends under Point II of its Brief that the contractual arrangements between the parties cannot be interpreted as establishing defendant’s duty to operate the property with reasonable diligence. Defendant ignores or overlooks express and implied conditions establishing such a duty.

The allegations in paragraphs 2 through 5 of Plaintiffs’ Complaint as as follows:

“2. On or about the 5th day of June, 1953, the 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; said land being a school section situate in San Juan County, State of Utah; said Utah State Land Board lease being identified as mineral lease No. 5418 on the records of the Utah State Land Board. A copy of said lease is attached hereto as Exhibit "A".

"3. On or about the 17th day of July, 1953, the plaintiff assigned said lease No. 5418 to one Herman Stern as attorney for the Big Jim Mining Company, the defendant herein. A copy of said assignment is attached as Exhibit "B", that on or about the 18th day of August, 1953, the plaintiff at the request of the said Herman Stern acting for the Big Jim Mining Company, and to further effectuate said agreement and assignment of July 17, 1953, as aforesaid, executed a Utah State Land Office form assignment, assigning said Utah State Land lease to the Big Jim Mining Company.

"4. That on or about the 12th day of November, 1953, the Big Jim Mining Company accepted said assignment and agreed to perform all covenants and obligations.

"5. That by the terms of said Utah State Land Board lease No. 5418 actual operations on the leased land were to commence on or before December 31, 1953, and said lessee covenanted to diligently operate said property in accordance with said lease."

Defendant's Answer admits all of these allegations in Plaintiffs' Complaint.

Hence, in construing the agreement between the parties, it is necessary to consider not only the terms of the assignment itself, which is attached to the complaint as Exhibit "B", but also the terms of the Utah State Lease for Uranium and Vanadium, which is attached to the complaint as Exhibit "A", must

also be considered as an integral part of the agreement. In the case of *Colorado Fuel and Iron Company v. Pryor*, 25 Colo. 540, 57 Pac. 51, 60 A.L.R. 935, the court said:

“In construing a contract, the first point to ascertain is what the parties meant, understood, and intended as determined by the words employed; . . . and, as an aid in this respect, the situation of the parties, and the facts and circumstances surrounding the transaction at the time of the execution of the contract, as also its subject matter, and the object of the parties in making it, may be taken into consideration . . . ”

The necessity of construing these documents together is substantiated by Article VII of the Utah State Lease which provides, as follows:

“It is mutually understood and agreed by the parties hereto that all of the terms, covenants, conditions, and obligations in this lease contained, shall be binding upon the heirs, executors, administrators, and assigns of the lessee.”

The Utah State Lease is granted in consideration of the rents and royalties to be paid to the State Land Board and provides as an obligation of the lessee in Article III, Section 6, the following:

“To commence actual operations upon the land included herein on or before Dec. 31, 1953, and thereafter to diligently operate the property in accordance with the provisions contained in this lease. Failure to so continue the operation of the land included herein for a period of more than six (6) months without prior written approval of the State Land Board shall be cause for forfeiture, and that upon the violation of this provision or any of the other terms of this lease the Lessor may at its option after thirty (30) days notice by reg-

istered mail cancel this lease. After the expiration of the said thirty (30) days and the cancellation of the lease no notice of such cancellation need be given the Lessee.”

According to the express provisions of the Utah State Lease the defendant is obligated to commence actual operations on the land and to develop the property diligently, and it is stated that failure in this duty will result in a forfeiture. And yet, defendant poses the brash question: “But where are the provisions that were supposedly breached with regard to operation of the property?”

Turning now to a brief analysis of the assignment of the Utah State Lease from plaintiff Harold Best to the defendant, which is set forth in paragraph 2 of the Lower Court’s Finding of Fact with the paragraphs of the said Assignment being numbered by the Court for convenience. The agreement refers to the Utah State Lease and property involved, and in paragraph 4 defendant agrees to pay to plaintiff a substantial overriding royalty. As a further covenant, in paragraph 5 of the Assignment it is agreed that defendant will pay plaintiff an additiional \$5,500.00 only if a contemplated report from the AEC is satisfactory. There is no conflict in the facts which revealed that the AEC report was unsatisfactory and that the \$5,500.00 was never paid.

In paragraph 6 of the Assignment, as numbered by the Lower Court, the parties recognized the possibility of abandonment, or paranthetically, a forfeiture, and it is stipulated that upon the happening of the event, the defendant must reassign the lease to plaintiff.

It is then provided in paragraph 9 of the Assignment as follows:

“Assignee (defendant) promises *to commence operations*, weather conditions permitting, as soon as reasonable.” (Italics added)

Defendant contends that its duties were fulfilled by the efforts of defendant in finding persons *to invest* in the property after it had determined by survey and geological reports that the property was completely unsatisfactory for a mining operation. It is difficult to understand how the “operations” contended by defendant as the sole extent of its duty, i.e., to find another buyer for the property, could be delayed by weather conditions. It is clear that the parties were contemplating the same actual operations on the property required by the Utah State Lease to begin on or before December 31, 1953, and in view of the fact that the Assignment was executed in mid-summer, i.e., July 17, 1953, it would reasonably be expected that adverse weather conditions would not offer any substantial delay.

In utter desperation to show some effort or expenditure, defendant even contends that its capitalization and formation into a corporation was a discharge of its duty to operate the property diligently.

In truth and fact the record reveals no attempt whatsoever by defendant to operate the School Section in any manner. On pages 126 and 127 of the Transcript, Mr. Herman Stern, Vice-President and Treasurer of the Defendant (R. 88), responded to the court’s inquiry as follows:

THE COURT: "May I ask a question there? This is true, isn't it, that you had a survey made?"

A. "Correct."

THE COURT: "Paid for the survey?"

A. "Yes."

THE COURT: "You have had the property examined—"

A. "Yes."

THE COURT: (continuing) by geologists and engineers?"

A. "Yes."

THE COURT: "You have paid the rent for 1954 and 1955?"

A. "Yes."

THE COURT: "What else have you done?"

A. "That's all the work we have done for 1954. Fifty-five we have other plans going. In other words, I have heard since November that there is another working to be put in very close to the property so we are going to send out engineers to get a new report what's going on to see what we can do on this thing so we can go from there."

THE COURT: "You don't admit that you have any obligation to do any of those things, do you?"

A. "We have an obligation to keep the property up, yes, to do all the work that is required."

THE COURT: "Well, but you don't have any, under theory, you don't have any obligation other than to investigate, you don't have any obligation to mine, is that right?"

A. "We only have the obligation to mine if it proves

profitable. In other words, if there is no ore there or would be so expensive to take then we don't have this obligation. We have to first determine to get at the ore to remove it and how rich it is. In other words, supposing there is no more ore on this property. Then we may not have any obligation to mine."

THE COURT: "But you've got to make entries and tunnels, don't you?"

A. "Well, you have to drill the property. You drill."

THE COURT: "You drill it?"

A. "First, yes. To determine where your tunnels are if you're going to build tunnels or sink shafts. You have to drill it first?"

Defendant's own testimony recognizes the necessity of drilling the property as an initial step in determining whether ore bodies exist but no such drilling operation was undertaken. The survey referred to was completed only to determine the boundaries of the property (R. 94), and the alleged geological reports, obtained by defendant in 1954 were without cost, from other concerns which were investigating this property (R. 127, 128).

The ill-conceived attempts to discover some third person to whom the defendant could assign its interest is an affirmative factor showing the complete lack of any efforts "to commence actual operations on the land" and "to diligently operate the property." In this regards, *Lindley on Mines*, Section 644, states that while the general rule places the burden of proof upon him alleging an abandonment or forfeiture, an exception is noted as follows:

" . . . where a party shows that no work was performed by his adversary within the limits of a claim

he makes out a *prima facie* case and thereafter, should such adversary depend upon labor done outside the claim, the burden is cast upon him of proving the performance of such a labor and proving that its reasonable tendency is to benefit the claim."

Certainly plaintiffs have established by competent evidence the complete failure of defendant to fulfill its duties with respect to this mining venture. As stated in the case of *Brown v. Wilmore Coal Co.*, *supra*, as follows:

"Mr. Brown didn't expect to do any mining personally and he has not, either by himself or others; his purpose being to sell the leases to others or transfer them to some company which would operate them."

Such an intention as indicated by the *Brown* case will not fulfill obligations under a mining lease.

Unquestionably the Utah State Lease was in the immediate contemplation of the parties when the Assignment was executed, and the parties must have contracted with respect to the urgent need demanded by the Utah State Lease to commence operations by December 31, 1953, in order to avoid a possible forfeiture of rights to the State Land Board. The date of December 31, 1953, demanded by the State Land Board, by which time actual operations must commence, and the immediate danger of escheat of the mineral lease, prompted plaintiff through his attorney to write the letter dated April 26, 1954 (attached to plaintiffs' request for admission as Exhibit "C" and admitted in evidence by stipulation), demanding a return of the property for "non-performance with reference to commencement of operations relative to properties under said lease . . . " The parties in their agreement contemplated im-

mediate operation of the properties, a duty which defendant completely ignored in its abortive attempts to interest other individuals in the mining venture.

That a court should not torture language to establish a new contractual relationship not contemplated by the parties is a proposition which we readily accept and accordingly endorse the principle as set forth in many of the cases cited by appellant. Several of these cases, standing for such a proposition, will be distinguished in succeeding paragraphs of this brief.

In the case of *Howorth v. Mills*, 62 Utah 574, 221 Pac. 165, an action was commenced to recover an installment of purchase price past due on a contract for the sale of real property on which the defendant had paid \$8,833.00 on a \$16,500.00 purchase price. After judgment for plaintiff for past due installments and on appeal the defendant contended that the seller's remedy was limited to a forfeiture. This court simply held that under the particular contract, the seller could either declare a forfeiture or follow the chosen remedy of suing for specific performance, and the judgment was affirmed. The language quoted from the case in appellant's brief on page 27 is taken out of context and under the facts of the *Howorth* case has absolutely no bearing on the present controversy.

In the case of *Rose v. Lanyon Zinc Company*, 68 Kan. 176, 74 Pac. 625, the lessee agreed "to drill a well upon said premises within one year from this date *or* thereafter pay (to lessor) Forty Dollars annually until said well is drilled . . ."

The plaintiffs contended in attempting to invoke a forfeiture that it had been represented to them that the defendant

would furnish gas for the domestic use of the family, and as a result the defendant was obligated to drill a well. The court applied the parole evidence rule and held that the expressed stipulations in the agreement control oral stipulations directly contrary to the expressed terms in writing. Oil and gas leases of this type allowing the lessee the option to drill or to pay a stipulated rental are widely used in this particular field and are to be carefully distinguished from a situation where no alternative course of action is open. In the *Rose* case, a duty to develop the leased premises does an injustice to the expressed terms of the lease. Such a conclusion is completely unwarranted in the present case.

In the case of *Johnson v. Geddes*, 49 Utah 137, 161 Pac. 910, cited by appellant on page 26 of its brief as "instructive and important," the plaintiff commenced an action to recover the sum of \$9,000.00 from defendant as a balance due on the purchase price for mining claims. Judgment for plaintiff was reversed on appeal. The majority opinion devoted itself almost entirely to an analysis of the agreement between the parties by the terms of which defendants were given an option to pay as the full purchase price of the claims either (1) \$16,000.00 unconditionally or (2) \$21,000.00, \$12,000.00 unconditionally and the balance of \$9,000.00 to be paid out of the proceeds of the mine. The defendant elected to purchase the mining claims for the \$21,000.00 amount, paid the \$12,000.00, received a warranty deed on the claims, and thereafter completed no work and refused to pay the \$9,000.00 for which plaintiff brought the action. The court held that the contract was clear and explicit, applied the parole evidence rule, and analyzed the contract as follows:

“In the first option agreement it is made as plain as the English language can make it that the \$9,000.00 ‘shall be paid only’ out of the ‘net one-half of the proceeds of all ores mined from said property.’ Then follows the provision that the defendants’ shall determine ‘extent and manner of the development work.’ In another part of the option agreement it was again provided that the \$9,000.00 shall be paid ‘in the manner and only in the manner provided for . . . ’ ”.

The court reasoned that under the clear and expressed terms of the contract defendants had no duty to operate the properties in order to obtain proceeds from which plaintiff would receive the remaining \$9,000.00, and the court indicated it was powerless to impose such a duty in face of the expressed language in the agreement.

In a dissenting opinion, Chief Justice Straup admits that the court cannot make a new contract for the parties, but he allows that the language should be interpreted with reference to the surrounding circumstances and the subject matter involved, and he concludes, as follows:

“To say one had agreed to pay \$9,000.00 out of proceeds of ore mined by him from the property, and then say he was at no time required to work or mine it or do anything to obtain ore, seems to me but contrary propositions. I thus think the defendants had a duty to perform and were required to make reasonable efforts to meet the payment out of net proceeds of ore, and that they were entitled to a reasonable time to do that.”

“To uphold the defendants in their contention would mean that they have the sole right to say when such unpaid balance should be paid, or that it shall ever be paid.”

Involved in the *Johnson* case are many glaring factors which distinguish the decision from the present action. The case did not involve an action for abandonment or forfeiture; a warranty deed had transferred full title to the defendants. A substantial part of the consideration had been paid by the defendants, i.e., three-fourths of the amount necessary to effect an unconditional purchase under one option phase of the agreement. The additional sales price under the option accepted by defendant indicated plaintiff assumed the risk of defendant's failure to develop the properties. According to the expressed language in the contract, little if any room was left for interpretation by the court or application of an implied covenant to develop the properties. None of the foregoing factors are present in the case now before the Court. Moreover, in the present action, not only is the Court confronted with an agreement and circumstances from which the duty of development and operation fairly leaps as a necessary conclusion, but in addition, as subsequent portions of this argument will reveal, under these facts the universal rule is that an implied covenant to develop and operate the properties with reasonable diligence is a necessary, equitable, and just interpretation.

Surely, Chief Justice Straup's conclusion is singularly applicable to the present case. Here the plaintiffs have received nothing, the defendants have not been damaged by a forfeiture of the lease, but if defendant's interpretation is allowed, it is likely that the plaintiffs will never receive anything from operation of the properties.

The case of *Monfort v. Lanyon Zinc Co.*, 67 Kans. 310, 72 Pac. 784, another of appellant's authorities, treated a

situation where the lease expressly provided that the lessee could retain its rights by paying specified rentals. Again, this is no authority for the position taken by the defendant.

In the case of *Meagher v. Uintah Gas Co.*, 112 Utah 149, 185 P. 2d 747, judgment was rendered for plaintiff in an action to quiet title in an oil and gas lease. On appeal this Court reversed the judgment, and in interpreting the agreement concluded that many specific provisions were set forth requiring substantial expenditures and development, and that these provisions were completely fulfilled by the defendant. These conditions included such obligations as drilling until the "Sundance formation" was pierced. The contract involved gave the lessee a continuing interest if the lessee completed substantial development and expended large sums, all directly related to development and operation necessary to comply with the specific provisions of the contract. None of these factors is present in this case now before the Court, and accordingly, the language in the dissenting opinion of Justice Wade is particularly appropriate.

Other authorities cited by appellant will be distinguished in subsequent portions of this Brief. We now turn to an analysis of the law with respect to implied covenants for development and operation of properties under mining leases.

Accompanying the express provisions in the contracts which allow for no other interpretation than the duty of defendant to operate the property with reasonable diligence and continuity, as found by the Lower Court, a recognized principle establishes an implied condition for operation and development when one of the main considerations for the mining

lease is the payment of royalties out of operations. As indicated in the foregoing, both the Utah State Lease (Exhibit "A") and the agreement (Exhibit "B"), provide for the payment of substantial royalties to the State Land Board and to plaintiffs, respectively.

The implied obligation is two-fold: first, to develop; and second, to operate. With respect to the implied obligation to develop, in 60 A.L.R. 901, the editor states the policy considerations and the rule, as follows:

"A lease of land for the exploration and development of minerals is executed by the lessor in the hope and upon the condition, either express or implied, that the land will be developed for minerals. Hence, it would be unjust and unreasonable, and contravene the nature and spirit of the lease, to allow the lessee to continue to hold the land for any considerable length of time without making a reasonable effort to develop its according to the express or implied purpose of the lease, even though there is a provision in the contract for the payment of a minimum royalty.

"Hence, where the consideration for the lease of land for the mining of minerals therefrom is the agreement by the lessee to pay a royalty on the product mined, this stipulation is construed to indicate it to be the intention of the parties that the lessee shall develop the leased premises for minerals to the mutual profit of himself and the lessor, and from this presumed intent there springs the implied obligation on the part of the lessee to develop the premises and mine the product within a reasonable time."

Concerning the obligation to operate after appropriate development of the properties, in 60 A.L.R. 904, the rule is stated as follows:

“In the absence of any express covenant upon the subject, there is an implied covenant that the lessee in a mining lease, if ore is disclosed which may be profitably mined, will use ordinary diligence in working the mine and securing the product, if the terms of the lease disclose that the lessor’s share of the product mined, or a royalty, is the real consideration for his entering into the lease.”

In the case of *Taylor v. Kingman Feldspar Company*, 41 Ariz. 376, 18 P.2d 649, the plaintiffs contended in an action to quiet title and cancel a lease of feldspar properties that the lease was void for want of mutuality since the sole consideration accruing to the lessor is a promise to pay a royalty and the lessee is given the sole and absolute right to terminate and cancel the lease without liability. The court looked with favor upon this proposition which bears consideration in other points of the present appeal. The important phase of the case is plaintiffs’ contention that an implied covenant existed obligating the lessee to “prosecute the work of mining and shipping with reasonable diligence and continuity of effort, and the failure or refusal of the lessee to so prosecute such work constitutes a breach of contract and a failure of consideration which entitled the lessor to have such lease cancelled and to be restored to possession.” The court endorsed the contention and said:

“Again we think plaintiffs have correctly stated the general rule of law. While it is true that a large number, if not the majority of cases upholding this principle have arisen where the lease was for oil or gas lands, we are nevertheless impressed that the same rule in reason should apply to mineral lands of any character. When mining operations are leased on a royalty basis, the only way in which the lessor can get

anything for his property is through the lessee's working it. *It is obvious that no sane man would execute such a lease unless he believed the lessee would at least make a reasonable effort to develop the premises, and we think that a lease which provides the sole or the main consideration moving to the lessor is to be a royalty from the proceeds of the mine implies a covenant for diligent operation and imposes on the lessee the duty of proceeding in that manner, and his failure or refusal so to do warrants the lessor in cancelling the lease.*" (Italics added.)

In paragraph 10 of the Findings of Fact entered by the Lower Court it is stated, as follows:

"The main and basic considerations for plaintiffs entering into the said assignment, Exhibit "B", was to have reasonably prompt development and diligent operation of the property to effect a recovery of royalties due plaintiffs under the assignment, and to receive the payment of \$5500.00 under the terms of Exhibit "B".

Appellant in its argument raises the rather unusual contention that all plaintiff Harold Best expected to receive from the operation was the payment of \$5,500.00 under the terms of the assignment. Certainly the receipts of the money was of great importance to Mr. Best. However, it is inconceivable that the fund could be the sole or even a substantial consideration for the agreement. In the first place, according to the assignment, Best was not to receive the \$5,500.00 unless an operating mine was located on the property or unless the AEC report was satisfactory. Upon the satisfaction of either of these conditions the \$5,500.00 would be paid but not until then. Hence, when the fund is paid, the defendant is virtually assured of commercial property with the result that the \$5500.00

would be of minor importance and the over-riding royalty due Mr. Best would be of major importance. As stated by the Lower Court on pages 146 and 147 of the transcript:

" . . . The other significant feature of the contract is one to the effect that the assignee promises to commence operations, weather conditions permitting, as soon as reasonable. I have listened to the testimony in this case and the arguments of counsel and their various contentions. It is contended by the defendant that the basic reason for the, Mr. Best, one of the plaintiffs, entering this contract was to obtain the fifty-five hundred dollars. Well, I will agree that that was one of his basic objects was to receive the fifty-five hundred dollars. But I think also the other inducement and basic object of entering the contract was to have reasonably prompt development of the property in order that he might, if it were possible, recover the royalties that this contract reserved to him, because in a situation now according to the plaintiffs' contention, he has no obligation to do anything more than keep the lease to the State in good standing. Well, that couldn't possibly be of any benefit to the plaintiffs unless the property is mined. Now I can't write any provisions into this contract. The contract is silent upon what will be the situation if the survey reveals that the tunnel didn't penetrate the easterly boundary of Section 16. And if the A.E.C. prospecting didn't reveal the presence of ores. But as I listened to this testimony I put this, arrive at this conclusion from the conduct of the parties as revealed by this evidence that if there was no ore revealed in the prospecting of the A.E.C. that the defendants would be under no further obligation in this contract."

On September 9, 1953 plaintiff Harold E. Best wrote a letter to defendants' Agent (Exhibit "A" attached to plaintiff's Request for Admission admitted in evidence by stipulation) in

which the over-riding royalty is considered of such substantial importance that Mr. Best discusses the "haulage allowance" and other questions with respect to the royalty due. Mr. Best indicates that he would waive the "haulage allowance" which would be a minute part of the money to be received under the royalty arrangement, if defendant would pay over in cash the sum of \$2,500.00.

The over-riding royalty was one of the main and basic considerations for the agreement.

If the court should abide by defendant's position in this matter not only would plaintiffs be deprived of the \$5,500.00, since the conditions for payment of that amount were not fulfilled, but in addition plaintiffs would be deprived of their royalties under the agreement since defendant contends that it has no obligation to develop or operate the properties. Such an interpretation would lead to the conclusion that the parties contracted with the intention of having the property escheat to the State Land Board, a result which plaintiffs would be powerless to avoid unless the lease is cancelled.

Another case illustrating the application of the doctrine of implied covenant is *Rocky Mountain Fuel Co. v. Clayton Coal Company*, 110 Colo. 334, 134 P.2d 1062, in which the plaintiffs brought an action to quiet title against the defendant-lessee under a lease for mining and marketing coal. The lower court found that the consideration for the lease was the agreement to pay royalties; that it was therefore the duty of defendant to prosecute the work with reasonable diligence which defendant failed to do; and that thereby defendant forfeited and abandoned the lease. On appeal judgment for plaintiff-lessor

was affirmed. The court held that the lease was abandoned and forfeited by defendant and stated:

“(where a consideration was received) for the right to explore, develop and remove the mineral is a royalty, the courts have read into the lease the implied covenant to develop and operate with reasonable diligence. (Citing authorities). This rule applies to minerals in place such as coal, as well as to oil and gas.” (Citing authorities)

See also the case of *Cotner v. Mundy*, 92 Okla. 268, 219 Pac. 321, involving a sand and gravel lease.

Other cases cited by appellant lose all of their authority when viewed in the light of facts and circumstances then existing. The case of *Fischer v. Magnolia Petroleum Company*, *supra*, cited on page 18 of Appellant's Brief, actually stands as authority for imposition of the implied covenant to develop and operate mining properties with reasonable diligence. The case expressly holds that unless otherwise provided in the instrument, there is an implied covenant by the lessee who is to receive a royalty that the tract will be prudently developed. The court cites many authorities on page 99 of the Pacific Reporter to substantiate this rule. In the *Fischer* case, however, the lessee had drilled the property and had discovered a producing well. Also, other extensive drilling had resulted in dry holes. Another distinguishing factor is that the United States and the State of Kansas had adopted policies and measures to control and restrict the production of oil due to the fact that potential production was greatly in excess of market demands. No such factor may be found in the present case where national defense and government

policies reflect the need for immediate production of uranium indicated by a production bonus system.

Again, the case of *Caine v. Hagenbarth*, 37 Utah 69, 106 Pac. 945, cited by appellant on page 20 of its brief, is no authority for the propositions which defendant attempts to support. The *Caine* case concerns the sale or transfer of an option to purchase, and the case simply holds that the assignee should not be bound to pay the purchase price without exercising the option. The case is the furthest thing from an analogy to the present action and is not in point.

Similarly, in the case of *Alford v. Dennis*. (Kan.) 170 Pac. 1006, a portion of the land, originally covered by one contract of lease, had been assigned and the assignee contended that it was implied that a covenant to develop covered his portion of the property separate and apart from the property as a whole. The court held that the lessee had fulfilled its duties under the lease of the original properties and that there was no implied covenant to develop that small portion of the properties ultimately assigned to plaintiff. The obligations to develop had been fulfilled by the drilling of a total of 25 wells on the leased tract. In the light of these factors, the case is completely distinguished from the present action.

The case of *Chandler v. Hart*, 161 Cal. 445, 119 Pac. 516, concerned the lease of land for a term of years with a full consideration in the form of stock paid at the time of execution of the lease. The court said:

“We know of no rule declaring that a demise of land for such purposes, *upon a full consideration received in advance*, is forfeited by a failure of the lessee to

develop and extract the oil, unless such a right of forfeiture is reserved in the demise, either expressly or by necessary implications from the expressed terms.”
(Italics added)

The court in the *Chandler* case reasoned that no implied covenant applied since the entire consideration was received in advance, no royalties having been reserved. Situations where leases are executed for the purpose of making a discovery of oil are carefully distinguished, in which latter event the court announced:

“ . . . the estate and right of possession of the lessee in the premises ceases if he does not diligently prosecute to success the work of discovery and the work of extraction after discovery.”

And so many of the cases cited by appellant when properly viewed in the light of the circumstances then existing stand as authority for the action of the Trial Court in the present case.

The case of *Munson v. A. & H. Inv. Company*, 62 Utah 13, 218 Pac. 109, involved an action for rescission of a contract for the sale of an interest in an apartment house. The great body of judicial authority in Utah and elsewhere concerning the failure to perform conditions of payment under contracts for the purchase of real property under no conceivable circumstances may be used as authority for duties imposed under a mineral lease when the lessor reserves a royalty interest in the leased property.

In answer to defendant's contention that the Court should not have imposed the relief of forfeiture, we invite attention to plaintiffs' authorities briefed in the foregoing where a forfeiture was the natural and immediate result of a breach of

conditions to develop and operate the properties with reasonable diligence. While in some other fields of the law forfeitures are considered as rather a harsh remedy, in the area of mining leases all of the equities favor a forfeiture. The rule is stated in 60 A.L.R. 922, as follows:

“While equity generally abhors a forfeiture, and will refuse to enforce a provision therefor, yet when such a forfeiture works equity and is essential to public and private interests in the development of minerals in land, the landowner as well as the public will be protected from the laches of the lessee, and a forfeiture of the lease will be decreed, where such forfeiture does not contravene unambiguous stipulations in the lease, and is based upon the neglect and failure of the lessee to explore the leased land for minerals and take the steps necessary to the production of minerals, if there are any.”

The many authorities cited in A.L.R., after the foregoing rule is announced by the editor, impel the conclusion that declaration of a forfeiture is the favored remedy.

As stated in *Conrad v. Morehead*, (1883) 89 N.C. 31, as follows:

“It would be unjust and unreasonable, and contravene the nature and spirit of the lease, to allow the lessee to continue to hold his term a considerable length of time, without making any effort at all to mine for gold or other metals.”

In addition to the necessary conclusion that reason and justice support the remedy of forfeiture, II American Law of Property 680 recognizes that when there has been no production upon the claims then there is no measure of damages

and the remedy at law is inadequate, and the only conceivable remedy is termination of the interest.

Again, appellant makes a glaring attempt to torture general rules taken from unrelated fields of the law to substantiate its contentions.

The defendant did nothing which could be conceived as reasonably calculated to operate and develop the properties. The duties imposed by the contract and implied by the law have resulted in the necessary and equitable forfeiture of the lease and the action of the Trial Court in this regard should not be disturbed.

POINT III

THE EVIDENCE AND AUTHORITIES SUPPORT A FINDING OF LACK OF MUTUALITY IN THE AGREEMENT BETWEEN PLAINTIFFS AND DEFENDANT.

It is admitted that the trial court did not explicitly find or conclude that the agreement was unenforceable for reason of lack of mutuality. For that reason defendant's argument on this point is surplusage. It is obvious that either abandonment or forfeiture sustains the decision of the trial court. If a finding of mutuality be deemed implicit and necessary to support the Trial Court's judgment, such a finding is supported by the evidence. The agreement provides as follows:

"The assignee at all times has the right to abandon said mine and retain all the equipment thereon except as forbidden by the said laws of Utah. In the event

of the abandonment of said mine, assignee must re-assign said lease to assignor.”

It is also well to note in relation to this clause that the defendant drew the agreement (R. 10, R. 121).

Petroleum Co. v. Coal, Coke and Manufacturing Co., 89 Tenn. 381, 18 S.W. 65, indicates certain factors which would support lack of mutuality in an option case. The lessee had option to develop, and mine, and any penalty provision was lacking. From these factors the court concluded a lack of mutuality existed. See also *Taylor v. Kingman Feldspar Company*, supra.

Defendant through Herman Stern testified as follows in answer to the obligation of mining:

“We have the obligation to mine if it proves profitable . . . ”

In other words, defendant, under its own theory of the case, has the exclusive option of decision under the agreement. It is bound to do nothing insofar as mining the property is concerned. Such an agreement as conceived and drafted by the defendant is lacking in equitable treatment of the plaintiff and in its own necessary legal sufficiency. The plaintiffs were rightfully restored to their mining lease by the Trial Court.

POINT IV

THE TRIAL COURT ACTED IN COMPLETE HARMONY WITH THE CUSTOM OF COURTS AND THE LAW AND PROPERLY EXERCISED ITS DISCRETION

CONCERNING THE QUESTION OF REAL PARTY IN INTEREST.

A. Defendant did not raise the issue of real party in interest by affirmative defense and defendant was in no way prejudiced by the action of the lower court.

The introductory paragraph to Point IV of appellant's brief is indeed "startling" as appellant contends, but startling only because of a completely erroneous statement of the law and what transpired at the trial.

Defendant initially contends that its answer raised the issue of plaintiff Harold Best's standing as a real party in interest. Such is not the case. Defendant in paragraph 8 of its answer alleged no more substance than the plaintiff Harold Best had assigned his interest to another person or persons. This in no way tenders an issue for trial.

In the Utah case of *Hiramatsu v. Maryland Insurance Co.*, 73 Utah 303, 309, 273 Pac. 963, plaintiff commenced an action under a policy against his insurance company for damages to his car. The car was purchased by plaintiff from the Service Motor Company under a title retaining contract which was assigned to the Thatcher Brothers Banking Company, and defendant alleged in its answer that plaintiff was not the only real party in interest, but that these two concerns were also real parties.

After judgment in favor of plaintiff and on appeal defendant contended that Thatcher Brothers Bankers and the Service Motor Company were "real parties in interest and not bound by the judgment." This Court affirmed the judgment

for plaintiff and stated at page 965 that it did not appear on the face of the complaint that any one other than plaintiff was a real or necessary party and that defendant attempted to raise the issue by its answer. The Court said:

“It is merely alleged that they ‘are real parties in interest,’ but nothing is, nor are there any facts, alleged to show wherein or in what particular either of them was a real party in interest when the action was commenced. *That was essential if the defendant desired to enter an issue in such respect.*” (Italics added)

The Court concluded that the question of real party in interest “presents no ruling for review, and thus shows no error or prejudice in the premises.”

A similar case is found in *Arthur S. Hoyt Co., Inc., v. Gallagher’s Warehouse, Inc.*, 19 F.R. Serv. 17a. 42, Case I (D.C.E.D. Pa., 1953) wherein the court stated that the second separate defense attempts to raise the question that the plaintiff is not the real party in interest, but the statement of it “amounts to nothing more than a conclusion of law without supporting facts.”

In the case of *Tinker v. Northwest Air Lines, Inc.*, 16 F.R. Serv. 17a. 13 ,Case 1, 11 F.R.D. 540 (U.S.D.C., N.D. 1951), the court considered defendant’s argument concerning an assignment, the “sole effect” being “to constitute a different person the owner of the claim against the defendant.” Defendant’s motion for a rehearing was denied and the court quoted from *Ronsenblum v. Dingfelder*, 111 F. 2d 406, 407, as follows:

“Since the claim is owned and may be sued on by someone, all a defendant may properly ask is such a

party plaintiff as will render the judgment final and res judicata of the right sued upon.”

Similarly, in the Utah case of *Shaw v. Jeppson*, 239 P. 2d 745, plaintiff obtained an injunction against the defendant from teaching dancing in competition with the plaintiff. On appeal defendant raised the question that plaintiff was not the real party in interest; that rather an undomesticated foreign corporation was the real party. This Court held that the plaintiff exacted the restrictive covenant “for the purpose of protecting her own interests. She is entitled to enforce it on her own behalf.” This Court held further that even if some other person “may incidentally derive an indirect benefit from plaintiff’s enforcement of her own rights,” this would not preclude plaintiff from enforcement. Justice Crockett, speaking for the court, announced:

“The reason the defendant has the right to have a cause of action prosecuted in the name of the real party in interest is so that the judgment will preclude any action on the same demand by another and permit the defendant to assert all defenses or counterclaims available against the real owners of the cause.”

Justice Crockett concludes with a statement which applies with equal force to the present action, as follows:

“Defendant will suffer no difficulty in this case on that score.”

And so we pose the question: Wherein lies the prejudice against this defendant? The claim was prosecuted by the contracting parties of record and the judgment is final and res judicata as to all rights involved. Even if we assume, which we expressly deny, that plaintiff Harold Best throughout all

the contractual negotiations was acting as an agent for an undisclosed principal, Best would be liable under the contract, hold the power to sue in his own name, the principal would be fully bound by the action of his agent, and the ultimate disclosure of a heretofore unknown principal could not affect the status of the defendant. 3 C.J.S. Agency, Sections 216 and 244; *Montague Manufacturing Co. v. Aycock-Holly Lumber Co.*, 139 Va. 742, 124 S.E. 208.

Let us assume further, which again is denied, that plaintiff Harold Best assigned his interest under the contract with defendant to some unknown third person. Could this affect the rights of the defendant? Certainly an assignment will not be effective and could not prejudice the rights of a contracting party until such assignment is made known. *In re Leterman, Becher & Co.*, 260 Fed. 543, 171 C.C.A. 327. It is stated in 6 C.J.S., Assignments, Sec. 74, as follows:

“The notice, however, must be sufficiently direct and definite to enable the debtor to know of the assignment; it should name or identify the assignee; it must be sufficiently definite to enable the debtor to identify the subject matter thereof; and it will not be effective until actually communicated to the debtor.”

Actually, if plaintiffs could not sue in this case as contracting parties and record title holders, it is difficult to imagine anyone who could bring the action against defendant. *M. H. Walker Realty Co. v. American Surety Co.*, 60 Utah 435, 211 Pac. 998.

This Court in *Child v. Gillis Construction Co.*, 42 Utah 120, 129 Pac. 356, involving the question raised by defendant on appeal of plaintiffs' capacity as a real party in interest,

appropriately summarized the doctrine involved by a statement now of substantial importance to plaintiff in this case, as follows:

“ . . . there is absolutely nothing shown how the fact whether Mr. Child (Plaintiff in the action) was principal or agent could in any way affect appellant's legal rights, and hence the error, if in fact the court committed such by not submitting the question of agency to the jury as requested by appellant, is wholly harmless. *To reverse a case for such a reason under such circumstances would amount almost to a travesty.*”
(Italics added)

B. Defendant is bound by the pre-trial order which did not raise the defense of real party in interest. On file with this Honorable Court is a complete transcript of the Pre-Trial Hearing held on the 28th day of March, 1955, wherein various aspects of the discovery pleadings are settled (Pre-Trial Tr. 2-31), counsel for both sides make a statement to the court as to their respective contentions, (Pre-Trial Tr. 32-40) the facts established by discovery techniques are reviewed, and the Court ultimately entered a Pre-Trial Order based on the rather lengthy arguments and discussion. The Pre-Trial Order and the stipulation of counsel with respect thereto (Pre-Trial Tr. 40-45) is as follows:

MR. HOLBROOK: “We will be willing to submit it on that basis, Your Honor. We have nothing further to present to the court at this time.”

THE COURT: “Is that all right with you then the way I have set it out?”

MR. ARNOVITZ: “I think the issues substantially. I've had some doubt as to whether the issue of forfeiture is in the complaint but I assume that Your Honor now states that it becomes a part of the issues?”

THE COURT: "Well, of course when I say has there been a forfeiture, has there been a breach of such a nature that the defendant has lost any right to further assert anything, it's assignment. That is the issue. And, of course, that involves the question of law whether under this contract he is entitled to a reassignment in the event of a breach. I can make it a little bit more specific. I will restate the issues. Is there such a lack of mutuality in the contract, Plaintiff's Exhibit B, that the plaintiff is entitled to a reassignment of the lease to the school section described in the complaint?

"Has there been an abandonment of the contract, Plaintiff's Exhibit B, on the part of the defendant?

"Has the defendant breached the contract, Plaintiff's Exhibit B, and if there has been such a breach is the plaintiff entitled to have the school section reassigned?

"Is the plaintiff entitled to damages, and if so, in what amount?"

MR. ARNOVITZ: "I would also like to have stated, if Your Honor please, an issue as counsel has referred to it in his affidavit, an issue as to whether there has been a waiver of either the breach or the abandonment."

THE COURT: "All right. Has there been a waiver of the abandonment if any has occurred and a waiver of the breach if any has occurred? We will put it that way then. And I will try and set the case of trial in May. I won't set it for trial before the 15th of May, is that agreeable." (Pre-trial Tr. 44-45).

A binding thread necessary to sustain the dignity of the courts and the rights of litigants is the well-recognized rule stated in *King v. Edward Hines Lumber Co.*, (D. Ore. 1945) 68 F. Supp. 1019, 1021, 8 F.R. Serv. 16.32, Case 3, as follows:

"An admission by counsel in open court made part

of the judicial record and used as a foundation for judgment, is the most solemn and binding act. * * * If courts cannot rely on admissions of counsel made in pre-trial conferences, then that procedure has no validity.”

The Federal Courts in interpreting Rule 16 of the Federal Rules of Procedure, which is identical to the Utah Rule, have frequently held that limitation of issues at a pre-trial conference bars consideration of other questions on appeal. *Frank v. Giesy*, 4 F.R. Serv. 16.32, Case 1, 117 F.2d, 122 (C.C.A. 9th, 1941).

Nowhere in the pre-trial conference held in the present case is there any mention of the defense concerning real party in interest and as indicated in foregoing arguments this question was not raised by an appropriate pleading. In the case of *McLouth Steel Corp. v. Mesta Machine Co.*, 19 F. R. Serv. 17a.44 Case I (D.C.E.D. Pa. 1953), the defendant raised the issue that the insurance company and not the defendant was the real party in interest. The court held that the right to have the real party in interest on record as a plaintiff was a right which was waived by the defendant. The court said:

“In the present case, after two years of procedural maneuvering, the defendants presented their motion four days before the day on which the case was set for trial, where all parties had prepared and witnesses had been brought from considerable distances. It is hard to see how a motion could be less timely.”

Certainly all the factors of preparation, travel, and loss of time apply equally to this case. Moreover, the question of real party in interest was not raised until the trial was in progress, and then after an expressed waiver by failure to plead

and include the issue in the pre-trial conference. Either a waiver occurred or it was a tactical maneuver designed to prevent preparation and defense to a question which would have no bearing on the case in any event. To reverse such a case on these technical grounds would surely be a travesty on justice.

Appellant in its attempt to establish some technical reason for reversal alleges the failure of the Trial Court to enter a formal pre-trial order. If it should be concluded that a formal order executed by the court is a mandatory requirement, as we have pointed out previously, such a failure in no way prejudiced the defendant. However, the practice of the Federal and Utah courts under Rule 16 is not invariably to complete a formal document designated as an order. This practice is illustrated in *Shafroth, Pre-Trial Techniques of Federal Judges*, 1944, 4 F.R.D. 183, 192, where it is stated, as follows:

“A very usual practice is for the pre-trial judge to dictate an order at the close of the conference in the presence of counsel with the privilege on their part to object to any part of it which does not accord with their understanding. * * * In still other jurisdictions the transcript of agreements reached and of the issues in their streamlined form as developed at the conference is itself considered as a pre-trial order which guides the course of the trial.”

The Lower Court in this case followed this recognized practice in every respect. After the issues were settled by stipulation of counsel in the pre-trial conference, the Lower Court in the presence of counsel, affording them every opportunity to amend and object, dictated the pre-trial order to the reporter. Surely such a procedure is in complete harmony with the Utah Rules of Civil Procedure and with the fundamental

basis of interpretation therein set out in Rule 1, that the Rules "shall be liberally construed to secure the just, speedy, and inexpensive determination of every action."

C. The trial court allowed defendant every opportunity to present evidence concerning the real party in interest.

There is no question in this case but what defendant intended to search for something in the trial which was completely immaterial and irrelevant to the issues, which was unsupported by a sufficient pleading, which was waived by defendant in the pre-trial conference, and which could not be prejudicial to defendant's case in any event. Notwithstanding, defendant was given every opportunity by the Lower Court to pursue its inquiry in proper form which would not delay, handicap and confuse the trial of the case. The Lower Court did not, as stated by appellant in its brief, "sternly refuse to permit counsel for defendant even to inquire into the subject." On the contrary, the Court indicated to counsel for defendant that he may use every discovery technique following the close of the trial and that he would be heard on a motion for a new trial in the event any factor appeared which would be prejudicial to the defendant's case. The Court said:

"... and if at the close of this case I decide it and you are dissatisfied with my decision I will let you use discovery and I will hear you on any motion for a new trial if you make the discovery that there is something growing out of this thing that you mentioned of this man paying the rentals to the State Land Board."
(R. 45-46)

Even in the light of this authorization defendant did not see fit to embark upon the inquiry but in the motion for a new

trial supported his allegation that plaintiffs were not the real parties in interest by a vague affidavit based on hearsay.

This procedure was certainly a proper exercise of judicial discretion and an effective use of the Utah Rules of Civil Procedure. Rule 27 (b) provides in part that "before the taking of an appeal if the time therefore has not expired, the district court in which the judgment was rendered may allow the taking of depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in such court," and Rule 59 provides that "the court may open the judgment if one has been entered, make additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment."

The evidence presented by defendant in the motion for a new trial was, as indicated above, a vague, hearsay affidavit merely perpetuating an unwarranted suspicion, which could have no substance even if the Lower Court had allowed the delay and confusion of a so-called fishing expedition at the time of trial. A valid exercise of judicial discretion should not be disturbed on appeal.

D. The Trial Court properly allowed amendment as to parties plaintiff.

Appellant takes exception to the procedure followed by the Lower Court in allowing joinder of Earl Craig as a party plaintiff. Appellant alleges that the addition of Earl Craig as a party plaintiff in the action was without competent evidence and based upon the oral representations of counsel. We must assume that appellant does not advance the proposition that

an attorney is not fully competent to represent to a court his authority to sue for a party; the contrary to this proposition is too firmly established in our judicial system by everyday practice to warrant further argument. Appellant must be contending, therefore, that there was no evidence before the court as to Earl Craig's interest in the subject matter of the litigation. Again appellant conveniently overlooks its own evidence in this regard. Actually counsel for defendant offered as evidence records from the County Recorder's office showing a partial assignment of the Utah State Land Board Lease to Earl Craig by plaintiff Harold Best (R. 37). After representations by counsel for plaintiff that he was authorized to represent Earl Craig for any interest he may have in the subject matter of the litigation (R. 39) and upon plaintiff's motion, Earl Craig was joined as a party plaintiff in the lawsuit. This procedure is in complete harmony with the Utah Rules of Civil Procedure, Rule 21, which provides as follows:

"Mis-joinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately."

Action of the court under this rule is a matter of judicial discretion and will not be disturbed on appeal unless a clear abuse is shown. *Weaver v. Marcus*, (C.C.A. 4th, 1948) 165 F.2d 862. The breadth of the lower court's discretion is shown by the power to add or drop parties on the court's own initiative. *Paper Container Mfg. Co. v. Dixie Cup Co.*, (D.C. Del. 1947), 74 F. Supp. 389.

In the case of *Automatic Dialing Corp. v. Maritime Quality Hardware Co.*, 16 F.R. Serv. 17a.13. Case 2, 98 F. Supp. 650, arising as a result of a breakdown of contractual relationships, judgment was awarded to defendant on its counter-claim. In the trial on the merits before the court, "exhaustive testimony was taken, numerous exhibits were filed with the court, and extensive briefs have been submitted to the court by all parties."

After judgment plaintiff raised the issue as to the capacity of defendant to prosecute its counter-claim in view of the real party in interest rule. Plaintiff introduced an assignment from defendant to the Reconstruction Finance Corporation of all monies due or to become due from plaintiff. The court received from counsel for the RFC a statement that the agency consents to the jurisdiction of the court to be joined as a party to the counter-claim in the action. The court held as follows:

"It is in the interest of justice to all parties that the RFC be made a party to the present action, thus meeting the requirements of the Real Party In Interest Rule, and concluding the case for all the parties concerned. Therefore, by virtue of authority vested in it by Rules 13 (h) and 21 of The Federal Rules of Procedure, this court will order that the RFC be joined as a defendant herein * * * This court considers that the consent of the RFC in this regard is a highly commendable step, in eliminating the possibility of a rehearing of the evidence in this somewhat complex case."

The hearty endorsement of the court of the procedure followed in joining RFC as an additional party after judgment was entered, would, we believe, receive like approval in this case if we were able to fulfill defendant's suspicion that

someone other than Harold Best and Earl Craig are real parties to this litigation. Defendant has nothing to gain by such a discovery and plaintiffs have nothing to lose by such a revelation. Defendant has fulfilled its desire that any party whose interest has been shown be joined in the action, and to claim prejudice as a result is again indicative of defendant's attempt to avoid the Lower Court's judgment with misleading and contradictory arguments.

CONCLUSION

Defendant's brief intermittently reflects alleged facts adeptly twisted to coincide with random selections of abstract general law.

Plaintiffs have stated facts established by the record and have harmoniously joined these facts with authorities, directly and conclusively establishing the reason and justice supporting the judgment of the Trial Court. As the Trial Court observed the evasive witnesses and drew conclusions as to veracity and import of the testimony, so also will the Appellate Court analyze the issues and law and distinguish the sound and just from the evasive and indecisive.

Defendant manifested every intention and performed every act of abandonment. Conversely, defendant did nothing to fulfill its duties of development and operation of the properties, again indicating an abandonment, and in the alternative, resulting in a forfeiture, and yet defendant asks this Court to look with pleasure upon a continuance of the assignment in

face of the paradox that it has taken no positive action, and indeed contends that nothing need be accomplished.

Defendant is caught in the inconsistent mire of its arguments and is forced into an abortive reliance on real parties in interest and alleged error in the proceedings, which are in fact non-existent and in no event prejudicial.

It has been made abundantly clear through the means of a careful briefing of defendant's authorities that its position is without any support whatsoever.

Under the state of the record, the findings of the Trial Court and the only conceivable remedy should not be disturbed on appeal.

Respectfully submitted,

HOLBROOK, BAUCOM & WILKINS
Attorneys for Respondents