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W. E. Bueche v. Charles E. Conner Co. : Brief of Appellants on Appeal

Utah Supreme Court

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In the Supreme Court
of the
State of Utah

FILED

Appeal Civil No. 8710.

Clerk, Supreme Court, Utah

W. E. BUCHE,
Respondent,
vs.

CHARLES E. CONNER COMPANY, WIL-
LIAM J. CONNER, and CHARLES E
CONNER,
Appellants.

Appeal from
District Court,
Grand County, Utah.

—
Honorable
L. Leland Larson,
Presiding.

APPELLANTS' BRIEF ON APPEAL.

ROBERT H. RUGGERI,
First Security Bank Bldg.,
Moab, Utah,

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HORTON, DAVIS & McCALEB,
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In the Supreme Court of the State of Utah

Appeal Civil No. 8710.

<div>W. E. BUECHE, <i>Respondent,</i> <i>vs.</i> CHARLES E. CONNER COMPANY, WIL- LIAM J. CONNER, and CHARLES E CONNER, <i>Appellants.</i></div>	<div>Appeal from District Court, Grand County, Utah.</div> <div>Honorable L. Leland Larson, Presiding.</div>
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APPELLANTS' BRIEF ON APPEAL.

Foreword.

This action was commenced October 24, 1956 by the filing of the complaint and service of summons on that day in Moab, Utah. The case came on for trial April 24, 1957 and proceeded before the Court, without a jury, on April 24, April 25 and April 26, 1957.

The plaintiff rested his prima facie case on April 25* (Tr. 160). A motion for judgment in favor of defendants for plaintiff's failure to prove a cause of action, or to sustain the allegations of his Complaint was made by defendants when the plaintiff rested his case (Tr. 160). The

* The transcript of proceedings at the trial will be referred to as ("Tr.").

Motion was denied and overruled by the Court (Tr. 163) and defendants proceeded to present evidence and testimony in their behalf (Tr. 163), resting their case (Tr. 366) on April 26, 1957. There was no rebuttal offered.

At that time, defendants renewed their Motion to Dismiss made at the close of plaintiff's prima facie case, and after all of the evidence was in (Tr. 366).

Immediately thereafter, the Court stated orally his opinion (Tr. 367-369), finding that the defendants had acted in good faith in spending certain amounts and in incurring certain obligations which they had paid in a bona fide effort to perfect the claims and to put them into production, but concluding that the contract in suit had been repudiated and terminated by the defendants in November, 1955 and that plaintiff was entitled to recover \$5,500.00 of the \$10,000.00 which he had paid into the project, together with costs of the action (Tr. 369). Plaintiff's counsel was directed to draw findings, conclusions and decree accordingly (Tr. 369).

Findings, conclusions and decree were prepared and entered on May 22, 1957, as they appear in the record.

Notice of Appeal was duly filed by defendants, together with a cost bond on appeal and the Designation of Record was served and filed June 20, 1957.

The stenographer's Transcript of Proceedings at the trial was not completed for a little more than two years, but, after its completion, the Record on Appeal was filed August 6, 1959 and is now before the Court.

STATEMENT OF THE FACTS.

Plaintiff, W. E. Bueche, is a resident of Chicago, Illinois where he is engaged in the trucking business (Tr. 163). Defendant, Charles E. Conner, resides in Oak Park, Illinois and is engaged in the food enzyme business (Tr. 21). Defendant, William J. Conner, resides in or near Moab, Utah and is a mining prospector (Tr. 103). The Conners are brothers. There is no company named or known as Charles E. Conner Company as stated in the Complaint, but the Conner brothers are partners, no matter what if any name may be given to it, in ownership of the mineral claims and the prospecting ventures which are involved herein.

The Conners, prior to February 24, 1955, had prospected, located and recorded notices as to six mining claims in the La Sal Mountains in Grand County, Utah. Such claims were recorded or re-recorded on September 20, 1954 in the Recorder's Office in Grand County as Entry Numbers 240-419 to 240-424 inclusive, in Book 40, pages 550 to 553 inclusive, such claims being known as the Rosetta, Kedzie, Garner, Conlen, Jem and Maypole claims, respectively (shown in Plaintiff's Ex. 7, with others). The facts relative to these claims and their recordation are not disputed, but they are also stated in the testimony (Tr. 256).

It was believed by the Conner brothers that there were valuable minerals not only in the recorded claims but also elsewhere in the La Sal Mountains, and near the recorded claims. They knew, however, that proving the presence of minerals in profitable quantities, and whether they could be profitably mined was not only highly speculative but would also require considerable work and considerable expense. They needed financial assistance to carry out such work (Exhibit 1 attached to Complaint).

Mr. Charles E. Conner met the plaintiff, Mr. Bueche, in Chicago, where they both lived, in December, 1954 (Tr. 164), being introduced by a mutual acquaintance. The Conner claims in Utah were discussed. At that time, "uranium" was a magic word. Mr. Bueche went from Chicago to Moab, met a Mr. Gordon Fowler and Mr. William Conner and discussed the Conner mining claims in Bachelor Basin, as well as the various developments in the country around Moab, Utah (Tr. 164). Further discussion ensued in Chicago between Mr. Bueche and Mr. Charles Conner (Tr. 164). Mr. Bueche became interested in the matter and evinced his eagerness to speculate in the matter under certain conditions. Mr. Bueche and his attorney, Mr. Ziv, met with Mr. Conner and eventually with his attorney, Mr. Horton (Complaint Ex. 1). Proposals and counter-proposals were made in February, 1955, which were rejected and finally, on February 24, 1955, Mr. Charles Conner and Mr. Bueche and their attorneys, Mr. Horton and Mr. Ziv, met in Mr. Horton's office and arrived at a memorandum agreement between them (also admittedly binding upon Mr. William Conner), which is "Exhibit 1" attached to the Complaint, admitted by the pleadings. A few days later, on February 28, 1955, Mr. Bueche delivered to Mr. Charles Conner a check for \$10,000, as called for in the agreement, and which is evidenced by the copy of the check "Exhibit 2" which is attached to the Complaint and also admitted by the pleadings.

The check "Exhibit 2" was deposited in a special account called "C. B. Mining Co." in an Oak Park, Illinois bank by Mr. Charles Conner. From time to time, he drew checks thereon, over a period from March, 1955 to May, 1956, which are in evidence as a group of 23 checks (Pl. Ex. 2) which were identified (Tr. 36) and which amounted in total to the \$10,000 deposit. The check stub book (Pl. Ex. 1) also identifying the payees or purposes of the check was also identified (Tr. 37).

In the agreement between the parties, it was stated that the territory of the agreement, that is the area in which prospecting would be done and in which anything found would be for the benefit of the parties, would include not only the six recorded claims but also contiguous claims, and additional claims which might be obtained "adjacent or in close proximity" to the location of the prospecting venture. This was specifically defined by the parties in the agreement, Exhibit 1 to the Complaint, as "any locations within ten miles of the center of said specified locations, or within the La Sal mountains." A map outlining this area, made by Mr. Newell, Grand County Surveyor, was stipulated as correct by plaintiff's counsel and it was offered and received in evidence as Defendants' Exhibit 13 (Tr. 241).

At the time of the agreement of February 24, 1955, it was contemplated by the parties and expressly stated in the agreement, page 3, that the project would require "the renting or purchase of equipment, the hiring of labor, personal living expenses while working on the project and generally to 'grubstake' " the defendants.

It was further expressly contemplated by all of the parties, as stated in the agreement of February 24, 1955 (pages 4 and 5) that further funds for the project beyond the initial sum of \$10,000 would probably be required and Mr. Bueche expressly reserved the right to have "the first opportunity" to provide additional funds (February 24, 1955 agreement, page 4), of course, for an additional interest of twice as much additional for the same amount of money.

The location of Bachelor Basin in the La Sal mountains (where the original six claims are located) is high in the mountains and is inaccessible because of snow in many months of the year. These conditions had been discussed

between the parties and are specifically mentioned in the February 24, 1955 agreement (page 5).

In June, 1955, Mr. Bueche again went to Moab and expressly visited the location, traveling there with Mr. Charles Conner (flying from Grand Junction to Moab in a chartered plane) (Tr. 165), and he was there again in August, 1955 with the two Conner brothers and others (Tr. 166).

Shortly after the agreement of February 24, 1955 was executed, certain tools and equipment were purchased for the project, as had been referred to in the agreement.

A Jeep with necessary extra equipment was purchased and a scintillator (both of which, as well as a power saw, lanterns and other tools, had been expressly discussed with Mr. Bueche—Tr. 166) was purchased by Mr. Charles Conner from the project funds. The Jeep which would have cost \$3,000 in Moab (Tr. 208) was purchased in Chicago for \$2,047.62, and delivery expenses from Chicago to Moab cost \$224.49, as shown by the check and check stub exhibits (Pl. Exs. 2 and 3). Mr. William Conner, who with his wife lived in Moab, had a Willys station-wagon and a small house-trailer which were taken up into Bachelor's Basin in June, 1955, where they were used throughout that year until the weather closed further possibility of work at that location in the mountains. Mr. William Conner and his wife lived in the trailer, and the Willys was used to travel back and forth to Moab and elsewhere to obtain necessary supplies, food, gas, oil, tools, repairs on equipment and such purposes throughout that season. Approximately \$780 was paid by the project on the trailer for payments and repairs (Tr. 25, 26). The rental for such equipment in Moab at that time was about \$90 per month (Tr. 212). The lowest rental on a vehicle such as the Willys was \$10 per day plus ten cents per mile (Tr. 207).

During the season in 1955 when work could be done in the Bachelor Basin location, a great deal of difficult work was done on the project. Four additional claims were located and recorded. Surveys were made (Tr. 141) and recorded. A road of more than 3,500 feet was built (Tr. 141). The entire group of claims in Bachelor's Basin was carefully re-prospected. Scintillator readings were taken and recorded. Many assays were made (Tr. 219). Rock was blasted in likely locations. Bulldozer work was done and additional help was hired both for prospecting and to clear passages and paths for geologist's entry into the property. Some trees had to be felled and cleared away as well as boulders and rock. Work was done, both by bulldozer and by hand, to clear the portal of the tunnel on the Rosetta claim and the dump was levelled (Tr. 139). Work in this area at an altitude of around 11,000 feet was very difficult and dangerous (Tr. 218).

The plaintiff's witness, Mr. Gordon Fowler, testified, as did Mr. William J. Conner, that the latter, with his wife, moved up into the locations in Bachelor Basin and Miner's Basin on June 5, 1955 and remained there until October 31, 1955, and he was working in Bachelor Basin during that period (Tr. 137). There was still snow and ice on the claims in June, 1955 and the weather was closing in on October 31, 1955 when William Conner and his wife left the location in Bachelor Basin and went "down below" to a trailer camp in Moab.

The Conner brothers did not cease work on and in connection with the project on October 31, 1955, however. Throughout that winter (Tr. 220 *et seq.*), William Conner, by Jeep and afoot, traveled around from location to location in the foothills of the La Sal mountains and in the mountains, as far as he could get, looking at claims and "sniffing out" possible prospects with the scintillator and breaking rock with hammers for the benefit of the

project, which included the parties to this suit. The agreement between the parties did not limit the project to the winter inaccessible Bachelor Basin. It included a ten mile radius and the La Sal mountains generally. The plaintiff conceded at the trial that this was consonant with his understanding, saying, "I expected them to explore additional territories defined in the agreement." (Tr. 187.) The agreement did not limit the acquisition of claims to those which the Conners might locate and claim, but also included those which they might "obtain" in the defined area. If Conner did learn of a claim recorded by another but which was promising and which might be obtained by the project, he believed he should do so and devoted time and effort in seeking out such claims.

Many conferences occurred in the winter and spring of 1956 relative to other claims and there was a great deal of travel and inspection made by both Conners in this connection.

In the spring of 1956, Mr. Conner went back up into the Bachelor Basin as soon as weather permitted. The road built in 1955 had in many places been washed away during the winter and spring thaws. Trees and boulders in places blocked entrance even with a Jeep. However, he did go in there removing such obstacles as he could, and resumed his prospecting in that area. The tunnel portal was cleared (Tr. 82) and ready for the geologist (Tr. 221) who was expected to be there to make readings and tests after the winter close-up. Conner did not move his wife up into the location and he did not live there through the summer, but he made many trips into Bachelor Basin in 1956 (Tr. 222), and continued to search for elusive evidence of rich mineral, and particularly uranium deposits. Mr. William Conner stated without contradiction that the work had never

ceased, even at the time of trial (Tr. 221). No notice of any kind had been given by Bueche to either of the Conner brothers that he regarded the project as ended and indeed Bueche did not consider the contract terminated or abandoned, even at the time of the trial (Tr. 366).

In early 1956, Mr. Bueche asked Mr. Charles Conner for a statement as to the money which had been expended. Although the agreement did not require any accounting to be made by Mr. Conner, Bueche having at all time the right to examine records, Mr. Conner did make up a short summary of the account (Pl. Ex. 1—Tr. 36). Mr. Bueche was not satisfied with this statement given to him in March, 1956, however, but asked to see the records. Mr. Conner asked Mr. Bueche to come to his office and he could inspect anything desired. Bueche did go to the Conner office and he fully examined the checks and checking account. Most of the \$10,000 had by that time been expended, although not entirely (Pl. Ex. 2), and \$2,500 of the account had been transferred to Moab for convenience in payment of local expenses (Pl. Ex. 2).

In the winter and in the spring of 1955-1956, there were some discussions in which Mr. Bueche participated relative to merging the present claims with adjacent claims of Gordon Fowler, and Mr. Fowler was brought to Chicago (Tr. 148) as Mr. Bueche desired a meeting and discussion on it. No merger was accomplished.

When it appeared from reports of Mr. Mateer, geologist selected by plaintiff, that uranium prospects did not appear good on the claims, Mr. Bueche did not agree with him. He wrote of his disagreement and called attention to the presence of other rich minerals (Def. Ex. 12).

The Connors were loath to organize a corporation for the

purpose of selling stock to raise money to pay the expense of building tunnels, shafts and the like, with no greater certainty of the presence of rich minerals than they had by mid-summer 1955. Mr. Bueche, on the contrary, believed that such should be done. He repeatedly urged that a corporation be formed and that some large funds ranging from \$300,000 to \$1,000,000 be thus raised. A trip to Salt Lake City was made by Mr. Charles Conner at Mr. Bueche's request, and conferences were had with lawyers relative to this proposal, and fees were paid for such counsel.

The District Court apparently had been given the idea somewhere that there were no business transactions between the parties or work under the contract after November, 1955. We do not know of any record basis for this, and it was not the fact. Active work continued on the project not only up to October 24, 1956, when this action was filed, but even after the trial.

The Court asked the plaintiff whether it was not true that there was no business carried on after November, 1955, except to obtain an account. However, Mr. Bueche himself denied this, and related meetings and conversations as late as May, 1956 relative to the project and the financing thereof (Tr. 366).

Since the plaintiff in his prima facie case had made no effort to show how the \$10,000.00 had been expended, and defendants' Motion for judgment having been denied, the defendants, who were asking that an accounting be ordered, but were not prepared to do so in detail at the trial, produced evidence of expenditures of money, time and effort by the defendants on the project. Actual checks, vouchers and receipts were produced to substantially the full amount of \$10,000.00, the absence of receipts for many

minor expenses being fully explained and in no wise disputed or countered by plaintiff. Major capital expenditures which were made by defendants were:

Purchase Price of Jeep.....	\$2,047.62
Insurance on Jeep.....	70.18
Expenses for delivery of Jeep to Moab.....	225.00
Scintillator and Equipment.....	650.00
Power Saw.....	249.00
High-powered Electric Lantern.....	10.00
Cost of Survey.....	490.00
Hire of Bulldozer and Driver.....	608.00
Fees paid to Gordon Fowler.....	150.00
Payment on Trailer.....	1,250.00
Expenses of Gordon Fowler.....	151.69
Coleman Gas Lantern.....	17.41
License Fees and Tax for Jeep and Trailer..	125.00
	<hr/>
	\$6,003.90

These expenditures from the sum of \$10,000.00 left a balance of \$3,996.10 to cover "grubstake" expenses, travel expenses of Mr. Charles Connor to Moab from Chicago on six occasions, travel expenses to Salt Lake City, fees paid to Senior & Senior of some \$125.00, recording fees, assay fees and numerous other additional expenses.

The testimony is undisputed that the cost of groceries alone while the working party was at Bachelor Basin in 1955 was \$80.00 to \$90.00 per month. This, together with gasoline, oil and other such necessities, amounted to more than \$1200.00 for the months of June through October, 1955. Actually, Mr. William Conner worked on the project agreed to by the parties substantially full time from March, 1955, at least through the summer of 1956. His bare living expenses and gas for the Jeep more than accounted for the balance of the \$10,000.00 sum as the testimony of the witnesses states without dispute.

It was also brought out at the trial that title to the

vehicles and the tools was in one or the other of the Connor brothers. That title was so kept was true of the entire project, including bank accounts and mining claims. Such was precisely in accord with the agreement, Mr. Bueche at all times knew it and no objection was ever made thereto.

Because the Court proceeded as if a full accounting by defendants was required, defendants called two additional witnesses to assist the Court in determining that defendants' expenses had been reasonable as to the only items which seemed to be in dispute.

Mr. Dennis Earl Byrd, who had operated Byrd Aviation Company, in Moab, Utah, for a number of years and who had also operated the Hertz Automobile Rental franchise in Moab, Utah, was called as a witness. He testified that he had been in the business of renting Jeeps and was familiar with the rental charges for such vehicles. He stated that, in the early part of 1955, the rental cost was \$10.00 a day plus ten cents a mile (Tr. 205), but that during the summer of 1955 the price had been raised to \$12.00 per day and, in the fall, was raised to \$20.00 plus ten cents per mile, and that that price had prevailed as the standard rental rate throughout the remainder of 1955 and through 1956. The witness testified to the fact that the use of a Jeep in prospecting in the mountainous areas around Moab was so hard on such vehicles that even at \$20.00 a day, the business was not profitable (Tr. 208). He stated that, on a monthly rental for such vehicles, four days a month were dropped from the charge as compared with the daily rental (Tr. 206). He further testified that the standard write-offs on Jeeps is 40% for the first year, 40% for the second year and 10% for each two years thereafter, at which time the vehicle was worthless. Such depreciation is that used for federal income-tax basis

and the actual fact was that the vehicle was worth very little at the end of the third year (Tr. 210).

The defendants also called as a witness George J. Blake, who owns and operates a trailer business in Moab, Utah, and was engaged in that business in Moab in 1955 and thereafter. Mr. Blake testified that the twenty-one foot trailer which Mr. William Conner used was of a type which, up until December, 1955, would rent from \$80.00 to \$90.00 per month, with a less expensive rate during the winter months (Tr. 212). The witness testified that the more expensive rate was resumed and prevailed in 1956, starting in March of that year (Tr. 213).

The Pleadings.

We know of no rule in Utah which permits the pleadings to be ignored. We must, therefore, summarize the controversy as it appears in the pleadings, and as defendants understood the issues to be at the trial, since no amendments were sought or made.

The Complaint. The Complaint alleges that the parties entered into the agreement "Exhibit 1" attached thereto, and that plaintiff paid the sum of \$10,000.00 as shown in Exhibit 2.

The Complaint then alleges the gist of plaintiff's charge against defendants, saying, in Paragraph 5, that the defendants used the \$10,000.00 "in working and prospecting on other claims than those set forth in the agreement"; that "none of the efforts of the defendants were used in and about the six mining claims" referred to in the agreement, but that the \$10,000.00 was expended by defendants for their own personal use and for working on other claims. In paragraph 6, the defendants were charged with converting the \$10,000.00 to their personal

use. Judgment was demanded for \$10,000.00 in favor of plaintiff.

The Answer. The Answer asserts that the Complaint presents no cause of action since it makes no offer to rescind or terminate the agreement or to restore the defendants to the *status quo* prior to the contract.

The Answer admits the contract, admits receipt of the \$10,000.00 but denies that said sum was used on any other project or converted from the purposes of the contract by defendants. It asserts, on the contrary, that said sum of \$10,000.00, and more, has been spent by defendants on the contract project, that work on the subject matter is still continuing.

The Counterclaim. The Answer contains a counterclaim asserting that the filing of the action is just cause for termination and asks the Court so to decree. It further prays "that the Court order and direct that an accounting be made by the parties," to be followed by a decree as to the amounts, if any, due between the parties.

Reply to Counterclaim. Plaintiff in reply to the counterclaim asserted "that none of said sum" (\$10,000.00) "was expended in pursuance to said agreement" and "that the whole sum of \$10,000.00 was converted to the personal use of said defendants." It denies that defendants are entitled to any relief.

The issue as made by the Complaint and Answer was whether defendants had used the entire \$10,000.00 sum working on other claims than those specified in the agreement, and had converted such sum to their personal use.

We respectfully submit that it became and at all times remained the burden of plaintiff to prove his charge. 20 Amer. Jurisprudence, Sec. 147, p. 150. There was a complete failure of such proof. Defendants moved for judg-

ment of dismissal of the Complaint at the close of plaintiff's prima facie case, and again at the close of all evidence. Both Motions were denied.

While preserving their rights on such motion at the end of plaintiff's prima facie case, the defendants proceeded to show and did show that in reliance on said contract they spent the \$10,000.00 and more, and spent great work and effort in carrying out the agreement for which no compensation was paid. Defendants were not prepared to make a detailed account at that time as they fully and reasonably expected that if any accounting were to be made, it would follow the interlocutory decree prayed by defendants. It was defendants' belief, as it still is, that plaintiff having fully failed to sustain his charge, the Complaint should be dismissed, and that defendants could then either dismiss their counterclaim or, by showing some proofs of substantial expenditures pursuant to the contract, establish their right to a decree terminating the agreement and ordering a detailed accounting. It is submitted that such practice should have been followed.

THE POINTS UPON WHICH APPELLANTS RELY TO REVERSE THE JUDGMENT.

1. There was no evidence either at the close of plaintiff's case or at the close of all evidence to sustain the charges of the complaint and defendants' motions to dismiss should have been granted.

3 American Jurisprudence, Sec. 852.

Ketchum Coal Co. v. District Court, 48 Utah 342.

2. The Court cannot disregard the Contract and make a new one between the parties.

Daly v. Old, 35 Utah 74.

Salt Lake v. Colladge, 13 Utah 522.

3. The Findings of Fact, insofar as they tended to sustain the judgment, were unsupported by evidence, and must be set aside.

Maynard v. Locomotive Engineers etc., 14 Utah 458.

Sandberg v. Victor Mining Co., 24 Utah 1.

4. The Findings of Fact to the effect that defendants had worked on the contract and made substantial expenditures thereon supported the decree prayed by defendants and not plaintiff's case and the decree should have been entered as prayed by defendants.

Sandberg v. Victor Mining Co., 24 Utah 1.

5. There was never any breach of any provision of the contract by defendants. Expenditure of the \$10,000.00 did not bring about a termination of the agreement. Further expenses were expected and it was never intended that

the work could be completed in a period of only a few months. The Court cannot by interpretation so change the contract.

Daly v. Old, 35 Utah 74.

Johnson v. Kayle, 5 Utah 2d 9, 13.

6. No contractual provision required an accounting by defendants since the records were at all times available for inspection as the parties had agreed, and were made available upon request.

Daly v. Old, 35 Utah 74.

Deseret Nat'l Bank v. Dinwoodey, 17 Utah 43.

7. Plaintiff is estopped to seek a rescission of the contract unless he first offers to place defendants in a position in which they are not harmed as the result of entering into the contract.

Pomeroy, Equity Jurisprudence, Sec. 805.

Black, Rescission and Cancellation, Sec. 617.

ARGUMENT.

This is a case of a party who having entered into a highly speculative venture, with full warning and caution, decides to pull out after the venture appears unlikely to succeed and to demand return of his money and before its completion. Mr. Bueche became doubtful of success and sought to rescind on spurious grounds, that he had not received an accounting although all of the records were available to him. The defendants in the meanwhile, relying upon Mr. Bueche's promises, had spent the money exactly as the parties had contemplated. Plaintiff has no right to return of his investment simply because the venture did not prove successful.

1. Plaintiff Failed to Sustain His Burden of Proof and at No Time Presented Evidence in Support of His Allegations.

The plaintiff, Bueche, was fully aware that defendants, pursuant to the agreement, had spent a large part of the \$10,000.00 sum by the Spring of 1956 mostly in initial expenditures for equipment. However, he was also fully aware from the time that the contract was made on February 24, 1955 that the venture would require cash investments, in all probability, greatly in excess of \$10,000.00 before it could be successfully completed. Indeed, he personally accepted and expressed such conditions, and knew of the equipment which had been purchased, the expenditures which had been made, and the progress of the venture when in the fall and winter of 1955-1956 he had mimeographed for distribution one hundred copies of a prospectus, Def. Ex. 11, for the purpose of raising additional funds for the project from others. Mr. Bueche testified that, on January 2 or 3, 1956, he and Mr. Charles

Conner met at Mr. Horton's office to discuss the possibility of raising more money for the venture. Some notes were drawn up telling the story of what had been done at the Bachelor Basin location at that time. It was in the form of a memorandum which might be used in discussing the project with a few friends. In the memorandum, the belief was expressed that an additional \$25,000.00 would be required, or even more. Mr. Bueche could not therefore consider the contract terminated because the \$10,000.00 had been spent. Mr. Bueche had 100 copies of the notes mimeographed. As appears in the transcript, he was handed the document Defendants' Exhibit 11 and the following question by counsel and answer by Mr. Bueche were made:

"Q. I show you this document and ask if that is a copy of the prospectus which you had mimeographed.

A. Yes, sir." (Tr. 179.)

Defendants' Exhibit 11 is a summary of what had occurred up and around Bachelor's Basin up to that time. There is no possibility that Mr. Bueche did not know the contents.

Yet, with that knowledge and that activity in January, 1956, there was presented to the Court and the Court entered a Finding 6: "That after November, 1955, the plaintiff and defendants had no business relations of any kind pertaining to the claims * * *". Mr. Bueche himself denied this fact at the trial (Tr. 366).

Actually, Mr. Bueche had numerous suggestions for raising large sums of money such as by incorporating and selling shares. His letter, Defendants' Exhibit 9, clearly establishes that fact.

The evidence shows that more than \$10,000.00 was spent for vehicles, tools and "grubstake" expenses between February 24, 1955, the date of the agreement, and October 24,

1956, when this action was filed. The proofs are replete with evidence that Bueche knew it. Yet, when the Complaint was filed, he evidently told his attorney that *not any* of the \$10,000.00 had been spent in performance of the contract, but had been diverted completely to other matters.

Not any proof was presented to sustain this charge.

In plaintiff's prima facie case, the agreement, Ex. 1 to the Complaint, and the check, Exhibit 2, were stipulated to be true.

Plaintiff then called Charles E. Conner, William J. Conner and Gordon Fowler as witnesses and rested his case (Tr. 160).

Mr. Charles E. Conner testified that he and his brother had six claims at the time of the Bueche contract and that they added four more in 1955 in the area defined in the Bueche contract (Tr. 26). The witness was asked and testified positively that the only mining claims he and his brother had were those located in Bachelor's Basin (Tr. 27), and that, in 1955, all work done on any claims were those claims.

Mr. Conner testified that those who worked on the claims in 1955 besides himself were his brother, William, Mr. Fowler, the surveyors Metropolitan Engineers and the bulldozer owner and operator, Mr. Stokes (Tr. 32). He testified positively that neither he nor his brother were paid any salary, although there was "grubstaking" expense paid (Tr. 34). He identified Plaintiff's Exhibit 1 as a list of general expenses disbursed on the project which he gave to Mr. Bueche on March 24, 1956 (Tr. 38).

In April or May, 1956, some work was done by William Conner on some claims known as Butler Wash. The work was for only a short time and Mr. Conner did not even move out there (Tr. 58). Also, some work was done by his brother for a short time on a Lile and a New Castle

claim in 1956 or 1957 (Tr. 59). No testimony or evidence whatsoever was presented that any money was spent on this matter. The contract clearly did not contemplate that either of the Conners were to devote 100% of their time to the contract project.

William J. Conner was next called by plaintiff. He testified as to the work which he did on the Bachelor Basin claims in 1955 and pursuant to the contract at other points in the ten-mile radius and in the La Sal mountains. He also testified as to expenses which he had paid in connection with that project. The witness positively stated that he used none of "Mr. Bueche's money" except when he "was working for Mr. Bueche's interest" (Tr. 124). Detailed cross-examination failed to disturb the truth of such statement, and no proof to the contrary was offered.

The next witness called was Mr. Gordon Fowler, who has some claims in Miner's Basin, "a mile and a half" from Bachelor's Basin (Tr. 137). This witness testified that William Conner came into Miner's Basin with his wife on June 5, 1955, worked on the Bachelor Basin claims until winter set in on October 31, 1955 and then had to move out (Tr. 137). Mr. Fowler testified generally as to the work done by Mr. Conner in 1955, prospecting, building a 3500 foot road, cleaning out the portal of a mine shaft, working on surveys and laying out claims (Tr. 137-141). He testified that he saw Mr. Conner working there from time to time in 1956, including some blasting work (Tr. 143), but that Mr. Conner did not live there in 1956. Mr. Fowler testified that he was paid \$150.00 for supervising and advising certain work (Tr. 144), and that he was also given a round-trip ticket to Chicago where he went to discuss a merger with Mr. Bueche and Mr. Conner (Tr. 144). The witness testified that a Ray Fuller also did some work on the Bachelor Basin claims with Mr. Conner (Tr. 147).

Mr. Fowler testified that his trip to Chicago in 1956 was to discuss a merger and that was the subject of his "conversations with Mr. Bueche, Mr. Conner" (Tr. 148). Subsequently in 1956 Mr. Bueche and Mr. Conner together made a trip to Miner's Basin further to discuss a merger (Tr. 149). Mr. Fowler had also had correspondence with Mr. Bueche on the subject (Tr. 151) (Pl. Ex. 9, and 10).

After calling those witnesses and identifying and having received in evidence only Exhibits 1, 2, 3, 4, 6, 7 and 8 (all of which have been described), the plaintiff rested.

There was no evidence of any nature whatsoever offered in plaintiff's prima facie case that any of Mr. Bueche's money had been spent on any claims other than those included in the contract or that any money whatsoever had been spent except on the contract subject matter. The evidence adduced by plaintiff not only failed to support plaintiff's claim, but it directly refuted it.

Defendants' Motion to Dismiss for complete failure of proof by plaintiff was overruled and denied.

It is respectfully submitted that failure to grant defendants' Motion at that stage was a serious error which requires a reversal of the judgment herein.

This rule is stated in 3 American Jurisprudence, Sec. 852, in which there is cited *Ketchum Coal Co. v. District Court*, 48 Utah 342. Under the rules expressed by the court in that case, the defendants were entitled to judgment at the close of plaintiff's case. That motion having been overruled, they were again entitled to judgment at the close of all evidence when the motions were renewed.

2. The Court Cannot Disregard the Contract and Make a New One for the Parties.

It was evident from remarks made by the Trial Court that while he believed that the parties acted in good faith, Mr. Bueche had made a poor contract when his compensation was to be but 5% of the profits for his investment of \$10,000.00. However, in 1955, "uranium" was a magic word. It was almost universally believed that a good claim would produce a great fortune. Bueche, when the contract was drawn, and as appears therein, contemplated paying in an additional \$10,000.00 and obtaining therefor an additional 10%. It was contemplated that additional funds might be required and the compensation therefor could only come out of the Conner interests. That was the reason for the contract provisions and the parties knew it. Exhaustion of the \$10,000.00 fund was never intended to bring about a termination of the project.

Whether the contract promised Bueche all of the rights which he might obtain by further bargaining or not is, of course, immaterial. No complaint is made by plaintiff as to the contract provisions and the Court has no right to rewrite the contract as he has virtually done. Never at any time did the parties contemplate that the Connors would pay for the equipment and expenses except by sale of portions of their interest in the project for funds for its furtherance.

The duty of the Court to interpret and construe a contract in accordance with its provisions, without power to rewrite the contract, is indeed fundamental contract law. Long established leading cases in Utah are:

Daly v. Old, 35 Utah 74, where the Court said:

"The court in construing a contract may enlarge or restrict words or clauses, which, if construed literally would defeat the intention of the parties, but the lan-

guage of a contract must be given its usual and ordinary meaning unless clearly employed in a technical sense.”

Salt Lake City v. Colladge, 13 Utah 522, where the Court said:

“Where there is nothing to warrant the construction of a contract adopted by the trial court, the appellate court has power to modify such construction, and to require a decree to be entered in conformity with such modification.”

3. The Findings of Fact, Insofar as They Tended to Sustain the Judgment, Were Unsupported by Evidence and Must, Therefore, Be Disregarded.

Of the Findings of Fact which were entered by the District Court, there are many which fully support the defendants' position in this case and others which recite the background of the contract between the parties and matters of that nature which are not at all in issue. There are, however, some Findings of Fact which presumably support the Judgment as to which there is no supporting evidence.

For example, Finding of Fact No. 5 to the effect that in November of 1955 the defendants represented to the plaintiff that they had spent the full \$10,000.00 sum is not true and is not supported by any evidence whatsoever. On the contrary, the evidence is substantial and undisputed that, after the purchase of necessary tools and equipment (which occurred by June, 1955), there then remained only approximately half of the original \$10,000 sum from which the expenses of active prospecting had to be paid.

The only significance of the date of November, 1955 was that that was the date when the working parties had to come down from the high mountain level at which they

had been working in the summer and were restricted to prospecting in the lower levels of the La Sal Mountains and in the lower areas in and within the ten-mile radius of Bachelor Basin and the La Sal Mountains. There is no dispute of the fact, as testified to both by Charles Conner and William Conner and agreed to by the plaintiff Mr. Bueche, that, in the spring of 1956, there still remained funds in the project accounts which had not been expended and that the fund was not exhausted until sometime in May, 1956. The Oak Park Bank account still had a substantial balance in the early part of 1956 (Tr. 91) and a substantial amount, \$2500, had been transferred to Moab banks for payment of local expenses and had not been spent until at least as late as the early summer of 1956 (Tr. 91). In 1956 and substantially throughout that year right up to the time of trial, Mr. William Conner was active not only in working from time to time on the project in Bachelor Basin but also in prospecting at other points within the project area. Mr. Charles Conner was actively engaged in conferences and meetings with Mr. Bueche and with others in efforts to merge claims, raise additional funds, and possibly to carry out incorporation of the company as Mr. Bueche wished. Conferences in connection with the project occurred early in 1956 when Mr. Fowler was brought to Chicago to discuss possible merger with Mr. Bueche and Mr. Conner (Tr. 144-151).

The testimony of Mr. William Conner is undisputed and is, indeed, confirmed by the plaintiff's witness Mr. Fowler that, upon a number of occasions in 1956 and during the summer thereof, Mr. William Conner was working in Bachelor Basin even though he was not actually living there at that time (Tr. 82, 221, 222). During the course of the trial, the Court expressly asked the plaintiff Mr. Bueche whether their business was carried on after No-

vember, 1955, except to obtain an accounting of the project, and Mr. Bueche expressly denied the inference of the Court that there was no work carried on after November, 1955 and himself related business transactions in connection with the project occurring at least as late as May, 1956 (Tr. 366).

There was, therefore, no evidentiary foundation for Finding of Fact No. 5 or No. 6 to the effect that the contract was in any way terminated or that work was terminated in November, 1955, which was the basis for the Court's computation that there were funds which Mr. Bueche was entitled to recover.

There is no evidence whatsoever in the record that one cent of Mr. Bueche's investment was spent upon any project other than that which was the subject matter of the contract in suit.

Finding of Fact No. 7 is likewise unsupported by any evidence. The contract between the parties expressly provides that Mr. Bueche would have the right at all times to inspect the property and the records of the venture, including the records of disbursements, and it was never agreed between the parties nor intended that there would be any burden upon the Conner parties periodically to prepare and report to Mr. Bueche an item-by-item account of the expenditures in the venture. Mr. Bueche could have, if he had wished, presented his own accountant to make up a full and complete account at any time. When he asked about the account, a statement was made for him which generalized the expenditures and which is identified in the record as Plaintiff's Exhibit 1. The check book and the return checks were likewise shown to Mr. Bueche (Tr. 358-359) and Plaintiff's Exhibits 2 and 3 were available for his inspection at any time upon request. Indeed, a complete written description of the check book and the checks even after Mr. Bueche had personally examined

them was transmitted to Mr. Bueche in correspondence which the plaintiff did not choose to put into evidence (Tr. 360).

In the early summer of 1956, Mr. Bueche was given the opportunity to examine and did examine substantially all of the receipts and vouchers which were in Chicago and which showed the expenditures for minor items paid by cash in small amounts for gas, food and the like, as well as for larger expenditures for machinery and tools (Tr. 359). There is no evidence in the record that the defendants refused to make an accounting but, on the other hand, there was no obligation on the part of the defendants to make a detailed accounting to Mr. Bueche since he not only had the opportunity to see the records whenever he wished, but did actually see them so that he could make whatever computations he desired.

The fact was that Mr. Bueche knew at all times the financial condition of the project and, without any objection or repudiation of the agreement in any way, discussed and proposed various plans for obtaining additional capital for the project (Tr. 191).

Findings of Fact Nos. 8 and 9 are, of course, not findings of fact at all but mere conclusions and they again are based upon no evidence as above set forth.

It is, of course, sound law that Findings of Fact must be based upon substantial evidence, must be consistent, and must not be against the pleadings. If the record discloses a contrary basis then such Findings are in no way binding upon this Court, and must be set aside.

This fundamental rule is universally accepted and applied. A leading early case in Utah is:

Maynard v. Locomotive Engineers, etc., 14 Utah 458.

There, the Court said:

“When the facts are found, it must affirmatively appear therefrom that they support the judgment, or else the judgment will be subject to attack on appeal.”

In *Sandberg v. Victor Mining Co.*, 24 Utah 1, the Court said:

“Where findings of fact are inconsistent with each other and against the pleadings and the preponderance of the evidence, they will be set aside on appeal and new findings rendered.”

4. The Findings of Fact Actually Support Defendants' Counterclaim and Are Contrary to the Allegations of the Complaint.

It should be remembered that the Complaint in this case asserted that the defendants had completely diverted the sum of \$10,000 to their personal use and that *no portion thereof* had been used in connection with work upon the project described in the contract. No amendment to this contention was ever made and it was, indeed, repeatedly asserted by the plaintiff that that was his contention. There was never any contention by the plaintiff in its Complaint that there had ever been a termination of the contract between the parties and, indeed, the plaintiff at the trial testified that it was his belief that the contract was still in force and effect and that he expected any benefits that might be derived thereunder.

It was the defendants, in their Counterclaim, who contended that the plaintiff by filing suit had terminated the agreement and who asked that a decree be entered declaring that fact and that an accounting be ordered to determine what, if any, money remained unexpended or due to the plaintiff, it being the defendants' contention that all of the initial funds paid by Mr. Bueche, as well as additional

funds provided by the Conner brothers had been properly and fully expended.

The Findings of Fact entered by the Court and stated in his oral opinion (See Finding of Fact No. 4) are that the defendants did act in good faith in a bona fide effort to bring about the results sought by the parties and that they did in fact spend or incur obligations to spend for the year 1955 alone the sum of \$4500.00. Actually, as the evidence showed, the sums spent in 1955 were greatly in excess of \$4500.00 since the Court in arriving at that figure did not take the actual cost of the machinery, but computed such items only upon a depreciation basis for a period of eight months' use, that is until winter prevented any further work in Bachelor Basin.

Nevertheless, this Finding by the Court is directly contrary to the plaintiff's contention that the defendants did not spend any of the \$10,000.00 in work upon the contract project and the finding of the Court was most clearly to the effect that the defendants had proceeded in good faith in connection with the contract.

The Findings of Fact, therefore, entered by the Court directly refuted the contentions made by the plaintiff and should have required an order of dismissal thereof. The findings did also support the contentions of the defendants that they had spent substantial funds in performance of the contract and should, therefore, have resulted in a decree in favor of defendants on their Counterclaim and ordering a full accounting with opportunity to present all pertinent evidence thereon as prayed in the defendants' Counterclaim. Actually, what the District Court seemed to attempt to accomplish by his judgment in the case was to decree an actual termination of the contract and an exclusion of Mr. Bueche's rights in the project thereafter and to make a rough estimate of an account, both of which were matters which defendants sought in their Counter-

claim (except that the account should have been actual) and which plaintiff did not seek in his Complaint. Even on such findings, therefore, the Judgment should have been to dismiss the Complaint and to award an interlocutory Judgment to the defendants in accordance with their prayers for relief, directing an accounting. Such is the rule established in *Sandberg v. Victor Mining Co.*, 24 Utah 1, as heretofore cited and quoted.

5. There Was Never Any Breach of the Contract by Defendants. It Was Never Expected That Expenditure of the \$10,000 Fund Would Bring About a Termination of the Agreement.

The District Court was apparently of the opinion that the \$10,000.00 sum paid by Mr. Bueche had been fully expended in November, 1955, apparently overlooking the testimony agreed to by Mr. Bueche that there were substantial sums remaining in the account at that time, which were not spent until as late as summer 1956. The Court also apparently overlooked the testimony of Mr. Bueche that there was active work on and in connection with the contract between the parties at least as late as May, 1956. Certainly, therefore, there could not have been a termination of the contract in November, 1955, as the District Court found.

The agreement between the parties, Exhibit 1 to the Complaint, clearly shows the understanding between the parties that there was considerable likelihood that the sum of \$10,000.00 would be insufficient to carry the project to a satisfactory completion. Indeed, the parties specifically set a term of twenty years in the agreement and clearly did not expect that claims would have been prospected, mining operations would have been commenced and profitable ore have been produced within any period of five

months. The contract, at Mr. Bueche's insistence, contained provisions relative to the raising of additional funds if necessary, and Mr. Bueche insisted that he be given the first right to invest additional funds in the enterprise before third parties might be called upon to do so. Clearly, therefore, the expenditure of the \$10,000.00 sum was not intended by the parties and did not bring about a termination of the agreement. Certainly the Court cannot, by interpretation, ignore the intent of the parties and revise the contract to make it a better contract for the plaintiff in the Court's opinion than the one which he actually entered into, and which defendants entered into in good faith as the District Court substantially found.

Daly v. Olds, 35 Utah 74.

The term of the contract was twenty years as expressed by the parties, not the complete consumption of dollars in the bank, nor even cessation of work in Bachelor Basin at 12,000 feet elevation in the dead of winter. Neither party asserted or agreed with the Court that the contract was terminated in November, 1955. The Court could not so adjudge upon the contents of the record.

In *Johnson v. Kayle*, 5 Utah 2d 9, 13, the Court said:

“It has been held that if no date is fixed by the contract for the termination of the adventure, the agreement is in force until the purpose is accomplished, and neither party can, without just cause, terminate the adventure until that time.”

6. There Was No Contractual Provision Requiring an Accounting by the Defendants.

The District Court put considerable stress upon a belief on its part that the contract had been terminated and abandoned by the defendants because they had failed to provide to the plaintiff what the Court considered a satis-

factory accounting of the expenditures of funds in connection with the contract project. Yet, even in this belief, the Court was ignoring the express provisions of the contract of February 24, 1955. Actually, it was fully understood between the parties at the time that agreement was drawn that there would not be accountings of a formal character which the defendants would have to prepare or have prepared and submitted periodically to the plaintiff. On the contrary, the parties expressly provided in their agreement that the plaintiff would, at all times, be free to examine the records of the venture and he could, therefore, of course, have had an account made up by an auditor of his choice if he did not wish personally to do so himself. The fact was, as we have previously shown, that all of the records of the project were made available to Mr. Bueche for his inspection when he expressed the desire to examine them. Plaintiff cannot now say that there was any breach of contract or dereliction of duty for failure to provide an accounting in a formal form when the contract obviously contemplated a different procedure. In this respect, the Court again attempts to rewrite the contract and to vary the contents, contrary to established law. *Daly v. Old*, 35 Utah 74. *Deseret Nat'l Bk. v. Dinwoodey*, 17 Utah 43.

7. Plaintiff Is Estopped to Seek a Rescission of the Contract Unless He First Offers to Place Defendants in a Position in Which They Are Not Harmed as the Result of Entering Into the Contract.

Had the contract of February 24, 1955 never been entered into, the defendants would have had no funds with which to purchase Jeeps, scintillators, tools and other necessary equipment and they would have had no funds with which to hire labor and the necessary work in connection with the prospecting project contemplated by the agreement. Although the plaintiff insisted at the trial that the contract

had not been rescinded or terminated in any way, the fact was, of course, that he sought the return of the full \$10,000.00 sum which he had invested. Such act, whether he wished it so or not, amounted to a request for a rescission and cancellation of the agreement, with a petition that he be restored to his full status quo prior to the execution of the agreement. He did not, however, tender or offer in any way to the defendants anything which could restore them to their status prior to the date of the agreement. The Judgment of the Court, in effect, leaves the defendants with equipment which is now entirely worthless and worn out and yet with an obligation to pay to Mr. Bueche the sum of \$5500.00 even though they had proceeded to purchase such equipment with the full knowledge of Mr. Bueche and in reliance upon his promises and undertakings, and in good faith as the Court expressly found.

The law is thoroughly well settled that one cannot seek a rescission of a contract without first restoring or assuring the restoration of the status of the other party prior to the agreement. Unless such provisions are made, the plaintiff is estopped to seek such a rescission.

The applicable rule of estoppel is fundamental in our law and is succinctly expressed in Pomeroy's Equity Jurisprudence, Section 805, as it applies to this case, wherein the author (citing numerous authorities) states the rule that where the parties, such as the defendants in this case, have acted upon the plaintiff's promises as stated in the contract and, having spent the money upon the subject matter of the contract as they were authorized to do, would now suffer great harm if the plaintiff were permitted to rescind the contract. Of course, to create an estoppel of this nature, there are conditions as recognized by Pomeroy which must exist. As he states, the party claiming the estoppel,—

“must in fact act upon it in such a manner as to change his position for the worse; in other words he must so

act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it."

Mr. Bueche repudiated the contract in fact when he filed this action and demanded a refund of the \$10,000.00 which he contributed to the project. In reliance upon the contract provisions, the defendants in good faith bought equipment and tools and devoted many months of hard and dangerous labor to effect the purpose of the agreement and with never any notice from Mr. Bueche prior to filing of this action that they should cease their operations and work insofar as performance of the contract was concerned. As shown by the evidence, the vehicles, machinery and equipment purchased as contemplated by the contract are now substantially worthless because of obsolescence, depreciation and wear. If the Judgment stands as entered by the District Court, all of the work and effort on the part of the defendants would have been for no compensation whatsoever and they would be left saddled with a debt of \$5500.00 with nothing to show for it except worn-out materials and their mining claims which their work has shown to be substantially worthless. Mr. Bueche was quite willing to go along with the project and, indeed, insisted upon its being continued even after reports from a geologist of his own selection showed the absence of worthwhile minerals in Bachelor Basin. It was not until after that race had been run and Mr. Bueche's horse had lost that he wanted to get his money back. Indeed, even at the trial, Mr. Bueche insisted that he was entitled to whatever benefits might be derived even as of that date.

Black on Rescission and Cancellation of Contracts, (Second Edition), Sec. 617, states the rule apparently recognized throughout the United States without dissent, that—

“It is well settled that any person demanding the rescission of a contract to which he is a party must restore or offer to restore to the other party whatever he may have received under the contract in the way of money, property or other consideration or benefit. It is only by doing this that he can entitle himself to the return of what he, on his part, may have given or paid, and to be released from the obligation of the contract.”

The Black work states that the rule has been codified in many states and requires, in the case of rescission, on the party seeking it, the following rules:

“1. He must rescind promptly, upon discovering the facts which entitled him to rescind, if he is free from duress, menace, undue influence or disability, and is aware of his right to rescind, and (2) He must restore to the other party everything of value which he has received from him under the contract, or must offer to restore the same upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so. In other words, a party will not be permitted to rescind a contract so as to reclaim what he has parted with and at the same time retain what he has received in the transaction.”

In this case, Mr. Bueche, on February 24, 1955, entered into a contract which he expressly conceded was highly speculative with a substantial likelihood that considerably more money would be required from some source before success of the project could be achieved, even if the prospecting contemplated resulted in discovery of substantial bodies of rich ore. This could not be accomplished in a few months as the parties thoroughly recognized when, in their agreement, they made the term thereof a period of twenty years. Nevertheless, in 1955, there was extensive work done on and in connection with the claims in Bachelor Basin,—prospecting was carried out thoroughly in that area and also within other areas in the La Sal Mountains

and within the ten-mile radius of Bachelor Basin. Mr. Bueche had the consideration which he bargained for and that was the likelihood or possibility that rich ores would be found. He was impatient and apparently thought that rich ore deposits should be found and could be exploited within a matter of only months after he entered into the agreement. The geologist reports and the assay reports were all furnished to Mr. Bueche immediately upon receipt and even though the geologist report was one which Mr. Bueche himself had ordered, the disappointing nature of it did not deter Mr. Bueche's enthusiasm. He stated in his letters in evidence that, in spite of the geologist's report, he was still convinced that there were rich ores present not only of uranium but also of other valuable minerals and, in particular, copper and gold.

Mr. Bueche knew the facts as to the machinery which had been purchased by the project. He knew the work that had been done in building roads, surveying, staking out and recording new claims, prospecting in areas and expenditure of project funds to the extent that they had been expended in November, 1955. He did not, however, give any notice that he wanted to rescind the contract or to terminate it in any way or to obtain a refund of his investment prior to the filing of the action and, indeed, he testified even during the action that he still considered himself entitled to any benefits or discoveries which might be made within the contract area. Certainly this is not a compliance with the rules as stated by the hundreds of authorities cited by Black. Bueche made no prompt rescission upon discovery of the facts (which actually he knew at all times). He was wholly free from duress, menace, undue influence or disability and neither at the time this action was filed nor at any time did he offer to restore the defendants to the condition in which they were at the time of the contract. Mr. Bueche had all of the benefits of the speculative venture

and if the project had been successful during that period, he would have had the profits thereof as, indeed, he expects to have even up to the present time.

Under the facts in this case and the established law, we submit that the most which Bueche could demand, even if all of the evidence were to sustain his position, would be a return to him of the existing physical objects of the venture, such as the depreciated vehicles, scintillator and machinery which were purchased out of the project funds and which were still in existence at the time this action was filed. Certainly he was not entitled to a return of his investment when he had already had the benefit of the speculation.

Conclusion.

It is respectfully submitted that there is not a shadow of evidence which was presented, either at the close of plaintiff's prima facie case or at the close of all of the evidence, which would support the plaintiff's contentions made in his Complaint. The Complaint should, therefore, have been dismissed upon defendants' motions and the failure to do so was clear error which requires reversal of the Judgment herein.

The evidence is also thoroughly clear that the parties at no time prior to the filing of this action terminated the contract between them or ceased in their efforts to obtain the results which they all sought at the very start of the relations between them. That they ran out of funds in carrying on the project by no means constituted a termination of the contract since the parties in their agreement had expressly contemplated that very fact and recognized the probable necessity for obtaining additional funds from other sources. The defendants at all times have been ready, willing and able to continue the work in accord-

ance with the agreement between them and the plaintiff and, indeed, there had been no termination of their efforts even at the time of trial. It is respectfully submitted that the Judgment herein should be reversed, that the District Court be directed to enter judgment in favor of the defendants on their Counterclaim, and directing the Court to order and proceed with a full detailed accounting as prayed by defendants.

Respectfully submitted,

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