

1959

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

Utah Supreme Court

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Harry E. Snow; Attorney for Respondent;

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

Appeal Civil No. 8710

**FILED**

DEC 29 1959

W. E. BUECHE,

Respondent,

vs.

CHARLES E. CONNER COMPANY,  
WILLIAM J. CONNER, and  
CHARLES E. CONNER,

Appellants.

Clerk,

Appeal from

Utah

District Court,

Grand County,

Utah.

Honorable

L. LELAND

LARSON

Presiding

---

**RESPONDENT'S BRIEF ON APPEAL**

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# T A B L E   O F   C O N T E N T S

Respondent's Brief on Appeal -----	1
Preliminary Statement -----	1
Statement of Facts -----	2
Exhibit "1" — Memorandum Agreement -----	3
Points and Authorities -----	12
Argument -----	14
Point 1. — Where there is any evidence to support the verdict, it will not be disturbed on appeal unless it is flagrantly against the weight of evidence -----	14
Point II. — A contract must receive such interpretations as will give effect to the intention of the parties -----	17
Point III. — Findings of Fact made by the Trial Judge will not generally be disturbed by the Appellate Court unless they are clearly contrary to the preponderance of the evidence -----	18
Point IV. — When a party to an Agreement has violated its obligation in a particular that goes to the root of the Agreement, the other party may treat such conduct as an offer to rescind and acquiesce in the desire so manifested to abandon the contract -----	20
Point V. — Contractual provisions requiring accounting by defendants -----	23
Point VI. — Money paid on a rescinded contract may be recovered back where the refunding of the money is all that remains to be done, provided, the plaintiff has not been guilty of fraud or illegal conduct in the transaction -----	25
Conclusion -----	25

# A U T H O R I T I E S   C I T E D

3 American Jurisprudence, Appeal & Error, Sections 896, 900, and 901 -----	13
12 American Jurisprudence, Contracts, Sections 227, 440 -----	13
12 American Jurisprudence, Contracts, Section 456 -----	14
Anderson v. Great Eastern Casualty Company, 31 Utah 78, 168 P. 966 -----	13
Angerman Company, Inc. v. Edgemon, et.ux, 76 Utah 394, 290 P. 169 -----	13
Bowels v. Jung, D. C. Cal. 57 F. Supp. 701. 706 -----	14, 23
Callahan v. Keeseville A. C. & L. C. R. Co., 199 NY 268, 92 N. E. 747 -----	13, 22
Carter v. Standard Acc. Ins. Co., 65 Utah 465, 238 P 259 -----	12
Flinders v. Hunter, 60 Utah 314, 208 P. 526 -----	12
Idaho State Bank of Twin Falls, Idaho v. Hooper Sugar Co., et.al., 74 Utah 24, 276 P. 659 -----	12
In re Lavelle's Estate, Immerthal v. First Security Bank, et.al., 122 Utah 253, 248 P. 2d 372 -----	25
Jorgensen v. Gessell Pressed Brick Co., 45 Utah 31, 141 P. 460 --	13
McBride v. Stewart, 68 Utah 12, 249 P. 114 -----	14
Smoot v. Checketts, 41 Utah 211, 125 P. 412 -----	13
Strickley v. Hill, 22 Utah 257, 62 P. 893 -----	13
Webster's New International Dictionary of the English Language, Second Edition, Unabridged -----	14, 23
Wilson v. Wilson, 5 Utah 2nd 79, 292 P. 2nd 977 -----	12

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RESPONDENT'S BRIEF ON APPEAL

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## **PRELIMINARY STATEMENT**

Throughout this brief, plaintiff and respondent will be referred to as plaintiff, and defendants and appellants will be referred to as defendants, or by their individual names. The Transcript of Proceedings at the Trial will be referred to as (Tr . . . ).

## STATEMENT OF FACTS

The plaintiff is a resident of Chicago, Illinois, where he is engaged in the trucking business. He employed a firm of Attorneys in Chicago by the name of McKeown, Trussell & Boland, being specifically represented by Mr. Edward P. McKeown, the Chicago Attorneys did not appear in the trial or any proceedings in Utah. The defendant, Charles E. Conner, is a resident of Oak Park, Illinois, and the defendant William J. Conner, is a resident of Moab, Utah.

The defendants originally staked six Lode Mining Claims in 1938, known as the Rosetta, Kedzie, Garner, Conley, Jem, and Maypole, in what is locally known as Bachelor Basin in the LaSal Mountains in Grand County, State of Utah. The said claims were again prospected by the defendants in 1954. The said claims had been worked at an earlier date and a tunnel driven into the mountain for a distance of approximately 240 feet (Tr. 139). There had been an old wagon road leading to the said claims, but it had been destroyed by slides and erosion (Tr. 138). Two old cabins had been constructed at an earlier date, and were in disuse and bad repair (Tr. 172). In the spring of 1955, the old mine portal and tunnel were in a dangerous condition (Tr. 138, 139), and as of the latter part of 1956, said tunnel was still in a dangerous condition in that posts and caps had rotted to the point of being nothing but pulp wood (Tr. 139).

The plaintiff met the defendant, Charles E. Conner, in Chicago, Illinois, in December, 1954, and accompanied Mr. Conner to Moab, Utah, in January, 1955, where he met the defendant, William J. Conner, the brother of Charles E. Conner, and one, Gordon Fowler, the owner of mining pro-

perties adjacent to the Conner Claims in an area known as Miners Basin in the LaSal Mountains in Grand County, State of Utah.

After certain preliminary negotiations, the plaintiff and defendant, Charles E. Conner, entered into a Memorandum Agreement which is Exhibit "1", attached to the Complaint and admitted by the pleadings. The Memorandum Agreement provides as follows:

### EXHIBIT "1"

"WARREN C. HORTON

141 West Jackson Boulevard,

February 24, 1955

"Mr. W. E. Bueche  
8340 S. Manistee Ave.,  
Chicago, Illinois  
Dear Mr. Bueche:

"Relative to the mining and mineral prospecting venture which we have discussed at considerable length, I presented a written proposal dated February 4, 1955 which you rejected with a counter-proposal delivered to Mr. Horton on February 21, 1955. My complete and unqualified rejection of your proposal was communicated to you and Mr. Ziv by my attorney, Mr. Horton, in his letter of February 22, 1955. It has been suggested that we consider the matter anew, there being no existing offers or proposals between us.

"My brother, William C. Conner, and I together own six mining claims in Grand County, Utah, which are evidenced by recorded notices of location filed in the Recorder's Office of the County. These claims were all recorded or re-recorded on September 20, 1954, as Entry Numbers 240, 419 to 240, 424, inclusive. They are respectively known as the Rosetta, Kedzie, Garner, Conlen, Jem and Maypole claims.

"My brother and I expect to complete the location

of two additional claims contiguous to those above listed and we hope to obtain full or part ownership in additional claims adjacent or in close proximity thereto.

“All of the above identified mining claims are included in what we shall hereafter refer to as the “Conner Mining Claims.” It is not intended that any mineral rights which we may hereafter acquire remote from such locations or in other states or territories shall be included in that description. It is intended that there be included therein, and within the venture, any locations within ten miles of the center of said specified locations, or within ten miles of the center of said specified locations, or within the LaSal mountains.

“I have a full power of attorney from my brother, William J. Conner, to deal with such mining claims on his and my behalf, and to bind him by this proposal to the same extent as if he were to execute it on his own behalf.

“The ‘Conner Mining Claims’ are located in a region in Utah in which gold, silver, uranium, and other minerals in rich deposits have been found. The presence of such minerals on the ‘Conner Mining Claims’ and the likelihood that they will be found thereon has been indicated by Geiger counter readings and ore specimens. Whether profitable deposits of such minerals can be found thereon and profitably developed is speculative. It will require the expenditure of time, money and physical efforts to determine that matter. It is my belief that rich mineral deposits, and especially uranium deposits are there in rich quantities.

“I have no desire and my brother has no desire to spend our time prospecting the claims, building roads and tunnels, and developing the property for compen-



sation merely by way of salary or wages. We need financial assistance, however, for the renting or purchase of equipment, the hiring of labor, personal living expenses while working on the project, and generally to 'grubstake' us for the single purpose of finding and proving the presence of the minerals which I believe are there in rich quantities.

"My brother and I are willing to enter into an agreement with you, which must be based on mutual trust and confidence that we shall use our best efforts to find and prove the presence of such minerals at the least outlay of cash with which the work can be accomplished. What we must do, however, to accomplish our purpose must necessarily be left to our judgment and final decision. We are entirely willing to keep anyone associated with us fully informed as to the work being done and the progress being made and we shall be glad to have the advice and counsel of such associates. It will, however, be the complete purpose and intent of my brother and I to devote our efforts to the success of the enterprise for all concerned.

"We offer to sell to you five percent (5%) of all of the net proceeds from this venture if you will pay to me upon the acceptance hereof the sum of Ten Thousand Dollars (\$10,000.00). That sum will be used only for the purpose of the venture and a report of the expenditures from such fund will be made to you from time to time upon your request.

"Since your interest in the venture will be in the proceeds thereof, you will have no personal liability with respect to workmen's compensation or liability insurance and the like. We shall, however, take such steps relative thereto as may be necessary in our judgment for adequate protection.

"It is possible that Ten Thousand Dollars (\$10,000.00) will be sufficient financing for the ultimate success of the venture. However, we may need additional funds. If so we will give you the first opportunity to provide them. It is our understanding that upon notice to you, you will make available to us the additional sum of Ten Thousand Dollars (\$10,000.00) for the purposes of the venture at any time within two years after the date hereof, such sum to be paid to us within twenty (20) days after receipt by you of a written demand therefore on our behalf. If said second sum of Ten Thousand Dollars (\$10,000.00) is paid by you pursuant to such notice, your interest in the net proceeds of the venture will be increased by ten percent (10%) to a total of fifteen percent (15%). If it is not so paid by you within said period we shall have the right to look elsewhere therefore, and you shall have no liability to pay said additional sum.

"It is understood, however, that as to said additional ten percent (10%) interest it shall be available to you as expressed herein only if we call upon you for such additional funds. If you now desire to obtain said additional ten percent (10%), we hereby grant to you an option to take such additional interest at the present time provided said additional Ten Thousand Dollars (\$10,000.00) is paid to Charles E. Conner by you within ten days after the date hereof.

"We agree that if the 'Conner Mining Claims' shall be transferred to any corporation, formal business organization or trust that your rights and interest evi- of such transfer. We further agree that before any such transfer is made by us, we shall give you at least denced hereby shall be fully protected as a condition ten (10) days written notice of our intentions in order

to give you the opportunity to join with us in such transfer if you desire or to take such other course as may suit your judgment.

“You shall be free at all times to inspect the property, the records of the venture, and to participate in discussions and the formulation of plans and procedure. It is to be understood, however, that your participation in such matters shall be advisory and that the final decision shall be in accordance with our judgment.

“It is our intention to proceed actively with prospecting and development of the property on behalf of the venture as soon as snow conditions and weather shall make that physically possible.

“This proposal shall be withdrawn automatically and become null and void unless accepted within five (5) days after the date hereof.

“Your acceptance of this proposal will be evidenced by your signed acceptance of three copies of this document, one of which will be retained by each of us, and by your payment to Charles E. Conner of said sum of Ten Thousand Dollars (\$10,000.00). Upon your acceptance in such manner, it shall become an agreement between us, binding upon our heirs, administrators, executors and assigns, and shall remain in force and effect for twenty years from the date hereof, and as long thereafter as said venture can be operated profitably, unless it shall be sooner terminated, amended or supplanted by mutual agreement.

WILLIAM J. CONNER  
By Chas. E. Conner  
His Attorney-in-fact

Chas. E. Conner  
CHARLES E. CONNER

In the Presence of  
Warren C. Horton  
R. Rzio

Accepted this 28th day of February, 1955.

W. E. Bueche  
W. E. BUECHE

In the Presence of  
Warren C. Horton  
R. Rzio

Receipt of the sum of Ten Thousand Dollars (\$10,000.00) from W. E. Bueche acknowledged, this 28th day of February, 1955.

Chas. E. Conner"

The defendant, William J. Conner, made a trip or two into the LaSal Mountains early in the spring of 1955, for the purpose of inspecting the claims, and with his wife moved his trailer into Miners Basin, June 5, 1955 (Tr. 137). During the year 1955, the defendant hired and paid for the following work and labor:

Employee	Type of Work	Amount Paid
Gordon Fowler	Supervising	\$150.00 (Tr. 144)
Metropolitan Engineers, Inc.	Surveying	\$490.00 (Tr. 245)
Richard Stocks	Bulldozing work	\$608.00 (Tr... 98)
TOTAL		\$1,248.00

The defendant, William J. Conner, helped lay out the road-work (Tr. 217), helped survey the claims (Tr. 217, 257); helped Mr. Fowler stake four (4) additional claims (Tr.

217, 257), also walked around, looked around, snooped around trying to find other locations (Tr. 217). He dug in the ground and even blasted (T. 219), and he moved off the mountain October 31, 1955 (Tr. 137) into Moab, Utah, and lived there until the filing of this action (Tr. 295).

During the spring and summer of 1956, the defendant, William J. Conner, visited the claims in the LaSal Mountains nine or ten times, and was there only a few hours each time (Tr. 296). On one occasion, he and a Roy Fuller shoveled in front of the mine portal (Tr. 206).

The defendant, Charles E. Conner, made six trips to Utah during the years 1955 and 1956, (Defendant Brief, page 11), and upon one occasion helped move a few trees out of the roadway (Tr. 88).

After the defendant, William J. Conner, moved from the LaSal Mountains in 1955, and during the spring and summer of 1956, he prospected the Yellow Cat Area (Tr. 259), Yellow Circle Area (Tr. 259), the Henry Mountains in Garfield County (Tr. 282), White Canyon in San Juan County, (Tr. 282), LaSal Road near Steen's Mine (Tr. 281), and ran down leads wherever there was a possibility to make a little money for the Company (Tr. 282).

The defendants purchased the following described property with money secured from the plaintiff:

Item	Cost
1955 Willys Jeep	\$2,047.62 (Tr. 324)

House Trailer *	\$1,250.00 (Tr. 65, 66, 72)
Spot Light	\$ 10.00 (Tr. 344)
Coleman Lantern	\$ 17.41 (Tr. 75)
Power Saw	\$ 249.33 (Tr. 223)
Scintillator & Accessories	\$ 650.00 (Tr. 223)
1950 Jeep Station Wagon **	\$ 150.00 (Tr. 253)
<b>TOTAL</b>	<b>\$4,374.36</b>

The total sum of \$1,717.98 was paid for travel expenses of Charles E. Conner and others as follows:

Plane ticket for Gordon	
Fowler	\$ 150.00 (Tr. 73, 74)
Charles E. Conner's trip	
to Moab and back to	
Chicago, Illinois	\$ 275.00 (Tr. 75)
Trip from Chicago to	
Moab by Jeep	\$ 225.00 (Def. Brief, p. 11)
Various trips from Chicago	
to Moab and back to	
Charles E. Conner	\$1,000.00 (Tr. 69, 70)
Trip for Charles E. Conner	
and Gordon Fowler to	
Salt Lake City	\$ 67.95 (Tr. 33)
<b>TOTAL</b>	<b>\$1,717.95</b>

Mr. Charles E. Conner classified the following expenditures to be for 'grubstaking' and general expenses:

---

\* The House Trailer above mentioned was traded in on another House Trailer by William J. Conner which he was living in at Moab, Utah, at the time of trial (Tr. 265).

\*\* The 1950 Jeep Station Wagon belonged to William J. Conner and his wife, (Tr. 253).



July 6, 1955	\$ 250.00 (Tr. 74)
July 16, 1955 *	\$1,092.67 (Tr. 74)
October 12, 1955	\$ 300.00 (Tr. 77)
January 10, 1956	\$ 200.00 (Tr. 77)
February 25, 1956	\$ 500.00 (Tr. 77)

---

TOTAL    \$2,342.67

Other expenditures were made for the following miscellaneous items:

License and car tag for Jeep & Trailer	\$125.00 (Tr. 76)
Insurance on Jeep	\$ 70.00 (Tr. 70, 72)
Work on core drill **	\$200.00 (Tr. 81)

---

TOTAL    \$395.18

The total expenditures claimed by defendants are as follows:

Grubstaking & General Expenses	\$1,248.00
Work and Labor	\$4,374.36
Personal Property	\$1,717.95
Travel Expense	\$2,342.67
Miscellaneous Expenditures	\$ 395.18

---

TOTAL    \$10,078.16

---

\* The expenditure dated July 16, 1955, was in the nature of a check payable to William J. Conner in the sum of \$2,500.00. The sum of \$1,092.67 was arrived at by this writer after deducting the sums of \$608.00 paid Mr. Stocks, \$490.00 paid Metropolitan Engineers, Inc., \$249.33 for power saw, and \$150.00 payment on defendant's personal Willys Jeep Station Wagon.

\*\* No drilling was ever done on the claims in the LaSal Mountains (Tr. 81).

The plaintiff, after having made visits to the said claims in June and August 1955, became alarmed that very little, if any, work had been performed on the said claims, and began inquiring and investigating into the operation of the venture. By the end of November, 1955, the plaintiff was thoroughly convinced that the money had been spent in a manner not contemplated or provided for by the Memorandum Agreement, and after repeated attempts to get an accounting from the defendants, he demanded a return of the said \$10,000.00 from the defendants on the 22nd day of May, 1956. The demand was refused, and this action was commenced October 24, 1956.

The case came on for trial, April 24, 1957, before the Court sitting without a jury in Moab, Grand County, State of Utah. The Court rendered judgment for the plaintiff and against the defendants in the sum of \$5,500.00 costs and interest at the rate of 8% per annum.

## POINTS AND AUTHORITIES

P O I N T I. — WHERE THERE IS ANY EVIDENCE TO SUPPORT THE VERDICT, IT WILL NOT BE DISTURBED ON APPEAL UNLESS IT IS FLAGRANTLY AGAINST THE WEIGHT OF EVIDENCE:

Idaho State Bank of Twin Falls, Idaho v. Hooper Sugar Co., et.al., 74 Utah 24, 276 P. 659.

Carter v. Standard Acc. Ins. Co., 65 Utah 465, 238 P. 259.

Flinders v. Hunter, 60 Utah 314, 208 P. 526.

Wilson v. Wilson, 5 Utah 2nd 79, 292 P. 2nd 977.



POINT II. — A CONTRACT MUST RECEIVE SUCH INTERPRETATION AS WILL GIVE EFFECT TO THE INTENTION OF THE PARTIES AT THE TIME OF CONTRACTING.

12 American Jurisprudence — Contracts, Sec. 227  
Anderson v. Great Eastern Casualty Company, 51 Utah  
78, 168 P. 966.

POINT III. — FINDINGS OF FACT MADE BY THE TRIAL JUDGE WILL NOT GENERALLY BE DISTURBED BY APPELLATE COURT UNLESS THEY ARE CLEARLY CONTRARY TO THE PREPONDERANCE OF THE EVIDENCE.

3 American Jurisprudence, Appeal & Error, Secs. 896,  
900, and 901.

Angerman Co., Inc. v. Edgemon, et.ux. 76 Utah 394  
290 P. 169.

Jorgensen v. Gessell Pressed Brick Co., 45 Utah 31,  
141 P. 460.

Smoot v. Checketts, 41 Utah 211, 125 P. 412.

Strickly v. Hill, 22 Utah 257, 62 P. 893.

POINT IV. — WHERE A PARTY TO AN AGREEMENT HAS VIOLATED ITS OBLIGATIONS IN ANY PARTICULAR THAT GOES TO THE ROOT OF THE AGREEMENT, THE OTHER PARTY MAY TREAT HIS CONDUCT AS AN OFFER TO RESCIND AND ACQUIESCE IN THE DESIRE SO MANIFESTED TO ABANDON THE CONTRACT.

12 American Jurisprudence — Contracts, Sec. 440.  
Callahan v. Keeseville A. C. & L. C. R. Co., 199 NY  
268, 92 N. E. 747.

## POINT V. — CONTRACTUAL PROVISIONS REQUIRING ACCOUNTING BY DEFENDANTS.

Webster's New International Dictionary of the English Language, Second Edition, Unabridged.

Bowels v. Jung, D. C. Cal. 57 F. Supp. 701. 706.

## POINT VI. — MONEY PAID ON A RESCINDED CONTRACT MAY BE RECOVERED BACK WHERE THE REFUNDING OF THE MONEY IS ALL THAT REMAINS TO BE DONE, PROVIDED THE PLAINTIFF HAS NOT BEEN GUILTY OF FRAUD OR ILLEGAL CONDUCT IN THE TRANSACTION.

McBride v. Stewart, 68 Utah 12, 249 P. 114.

12 American Jurisprudence — Contracts, Sec. 456.

## ARGUMENT

### P O I N T I. — WHERE THERE IS ANY EVIDENCE TO SUPPORT THE VERDICT, IT WILL NOT BE DISTURBED ON APPEAL UNLESS IT IS FLAGRANTLY AGAINST THE WEIGHT OF EVIDENCE.

The defendants supposedly entered into this transaction with the plaintiff, based on the mutual trust and confidence that the defendants would use their best efforts to find and prove the presence of minerals at the least outlay of cost, and that the money would be used only for the purpose of the venture.

Even though this was a highly speculative venture, the plaintiff was at least entitled to a 'fair shake' for his money. He was entitled to have the bulk of the \$10,000.00

ventured, spent toward the development of the mining claims. Be it remembered that he was not purchasing any legal right to any one mining claim, but five per cent of all of the net proceeds from the venture, which included the six lode mining claims already staked and adjoining claims within ten miles of the center of said specified locations, or within the LaSal Mountains.

What was done by the defendants during the year 1955 toward the finding and proving the presence of minerals on said claims?

The claims were surveyed, which took approximately 8 days (Tr. 293), and approximately 3500 feet of roadway was bulldozed upon the mountainside which took 76 hours (Tr. 100). Four new claims were located which took 16 days (Tr. 294), and Mr. William J. Conner had walked around, snooped around, blasted a couple of times, carried a Scintillator (Tr. 217), and he spent the summer up there running around that "snow capped peak," (Tr. 292), but didn't even go back into the old mining tunnel already excavated on the Rosetta claim (Tr. 296).

In the late fall and winter of 1955, and the early part of 1956, defendant, William J. Conner, spent his time prospecting the Henry Mountains (Tr. 282), White Canyon (Tr. 282), an area around the Steen Mine (Tr. 281), the Yellow Cat Area (Tr. 259), Yellow Circle (Tr. 248) and any other place he heard of a lead (Tr. 282). In addition, he worked on claims in Butler Wash (Tr. 280), the Lile, and New Castle Claims (Tr. 59). As a matter of fact he

put 12,000 miles on the 1955 Jeep, and 4,000 miles on the Jeep Station Wagon (Tr. 246), but didn't even locate one single mining claim.

Regarding the prospecting of claims away from the prescribed area, the defendant, Charles Connor, testified as follows, beginning on Page 349 Transcript of Proceedings of the Trial:

"Q. Course you knew all along that your brother was prospecting over in the Henrys?

A. That is right.

Q. And all over the Western Section of Utah?

A. That is right. And Mr. Bueche knew that too.

Q. Yet you made specific instructions in the contract that it would be within a ten mile radius, did you not?

A. That is right."

Mr. William J. Connor testified that he visited Bachelors Basin 9 or 10 times in 1956 for a few hours each time; that at one time he and a Mr. Fuller did shovel dirt for a few hours to clear out a portal in case Mr. Mateer came back and wanted to enter the old tunnel (Tr. 123, 124).

What did Mr. Charles E. Connor do toward prospecting the claims and developing the property?

One time in 1956, he walked from Miners Basin to Bachelors Basin, and while doing so helped move a tree from the roadway (Tr. 88).

What substantially was the \$10,000.00 spent for?  
\$4,345.02 was spent for personal property.

\$1,717.95 was spent on travel expenses for Mr. Charles E. Connor and friends.

\$2,432.00 was spent on general expenses and grubstaking, and

\$345.18 was spent for miscellaneous expenses.

There was only the sum of \$1,248.00 actually spent developing the property, and according to Mr. William J. Connor \$608.00 of that was wasted, inasmuch as the road was put in the wrong place (Tr. 221, 264).

It is respectfully submitted that the evidence supports the verdict, and that the Trial Court could readily grant judgment to the plaintiff.

## POINT II. — A CONTRACT MUST RECEIVE SUCH INTERPRETATION AS WILL GIVE EFFECT TO THE INTENTION OF THE PARTIES.

The plaintiff invested the sum of \$10,000.00 in the venture for the promise that he would receive 5% of the net profits if there be any. There was no guarantee that there would be a profit, but the Agreement provided that the defendants would put forth their best efforts to find and prove the presence of precious minerals with the least amount of outlay of cash. Certainly it was contemplated by the parties that the substantial part of the said \$10,000.00 would go for the building of roads leading onto the claims, hiring of labor, and renting or purchasing mining equipment for the purpose of mining the claims. It was never contemplated by the parties or provided for by the Agreement to prospect for or develop mining claims in an

area farther away than ten miles from the original 6 claims. The prospecting had already been done between the years 1938 and 1954. Mr. Charles E. Conner in the Agreement states:

“I have no desire, and my brother has no desire to spend our time **prospecting the claims**, building roads and tunnels, and developing property for compensation merely by way of salary or wages. We need financial assistance, however, for the renting or purchasing of equipment, the hiring of labor, personal living expenses while working on the project, and generally to ‘grubstake’ as for the single purpose of finding and proving the presence of minerals which I believe are there in rich quantities.” (emphasis mine)

Certainly it was never contemplated that the plaintiff should purchase a home for the defendant, William J. Conner, or purchase a Jeep for the private use of the defendants to prospect the whole Southeastern Section of the State of Utah. It is respectfully submitted that a Jeep was unnecessary and of no value in the particular area where the claims were located. How the defendants can interpret the said Agreement to provide for the payment of \$1,717.95 for transporting Charles E. Conner and his friends over the country, is difficult for the writer to comprehend.

**POINT III. — FINDINGS OF FACT MADE BY THE TRIAL JUDGE WILL NOT GENERALLY BE DISTURBED BY THE APPELLATE COURT UNLESS THEY ARE CLEARLY CONTRARY TO THE PREPONDERANCE OF THE EVIDENCE.**



On the 10th day of January, 1956, all of the \$10,000.00 deposited to the Oak Park Bank in Chicago to the account of C. B. Mining Company had been exhausted, except the sum of \$753.10 (Tr. 91). That out of the \$2500 transferred to the William J. Conner account in Moab, Utah, the most that could have possibly been in that account was \$1,053.67. Considering the fact that Charles E. Conner sent William J. Conner a check for the sum of \$300.00 in October 1955 (Tr. 76), a check for the sum of \$125.00 in December 1955 (Tr. 76), and a check for \$200.00 in January, 1956, all of the original \$10,000.00 had been exhausted except the sum of \$753.10 held in the Oak Park Bank.

By November, 1955, the relationship of the plaintiff and defendant had deteriorated to one of distrust and suspicion (Tr. 200). The defendants were representing that the funds invested by the plaintiff were spent (Tr. 185, 316), and the plaintiff was asking for an accounting of the funds (Tr. 185, 356-360).

The testimony of the plaintiff beginning at page 185 of the Transcript of Proceedings at the Trial is as follows:

Q. Now, relative to the records then, looking at them, you at the very first time that you asked to see the records, and you went over to Mr. Conner's Office for the records where you saw them, didn't you?

A. No sir. I asked to see the records in November, December, I asked how much money was left and I was told that the funds were dissipated. They were gone.

Q. Did he use the word dissipated?

A. I was using the word dissipated around that time, but the fund were gone. And I said I would like to have

a record as soon as possible. And then in January and in February I asked again. And then I got the yellow sheet, dated March 23rd, I believe.”

Again on page 185 of the Transcript of Proceedings at the Trial, the plaintiff testifies:

Q. So that actually though the only time you ever went there to inspect the records, which was as was defined in your agreement, you were shown all records that were there?

A. After I insisted on seeing the checks. But I had made numerous visits between the various dates and those could have been shown me without no trouble. In other words, I wasn't trying to antagonize anybody. I was trying to get along. But it seemed the more I tried to talk the more Mr. Conners got antagonized. That is why Mr. Kirby had to get into the situation to get us together, because he didn't even want to talk to me.”

All of the meetings and conferences between Charles E. Conner, Mr. Gordon Fowler, and Mr. W. E. Bueche, concerning the efforts of Mr. Conner to merge claims and raise additional funds and incorporate, as so frequently discussed in defendants Brief on Appeal, actually transpired in the summer of 1955, not early in 1956, as the defendants would like one to believe. (Tr. 73, 144, 148, 149, 151, 152, 176, 350) (See also Defendants Exhibit 9)

**POINT IV. — WHEN A PARTY TO AN AGREEMENT HAS VIOLATED ITS OBLIGATION IN A PARTICULAR THAT GOES TO THE ROOT OF THE AGREEMENT, THE OTHER PARTY MAY TREAT SUCH CONDUCT AS**



AN OFFER TO RESCIND AND ACQUIESCE IN THE  
DESIRE SO MANIFESTED TO ABANDON THE CON-  
TRACT.

In addition to the points heretofore set forth and without being repetitious, I quote from the testimony of Mr. Bueche beginning on page 194 of the Transcript of Proceedings at the Trial:

“Q. On that trip did Mr. Charles Conner work on those Claims?

A. I didn't see him.

Q. What was he doing when you were up there?

A. Hunting.

Q. Did Mr. William Conner work on these claims while you were up there?

A. I didn't see him.

Q. What was he doing?

A. Oh, Mr. William Conner?

Q. Mr. William Conner.

A. He took me up there and showed me what the bulldozer had done. And I told Mr. Conner, Mr. Bill Conner, I says, 'We have to get this tunnel cleaned. We have got to get in there and see what is going on.' And he agreed that that had to be done. He further stated he never liked to go up there alone. It was dangerous and he didn't relish being up there at all. And he always liked to have someone with him, he said, 'dangerous country.'

Q. When did he tell you you that?

A. Upstairs when he and I were talking in front of the Rosetta tunnel; this collapsed tunnel.

Q. Have you been back to those claims since August, now, of 1955?

A. Yes, sir.

Q. When were you back there?

A. September 22, 1956.

Q. Did you observe whether or not any more work had been done on the claims?

A. Yes, sir.

Q. Had it been?

A. Outside of a little shoveling there had been no work done.

Q. From the time you were there in 1955?

A. And the road was completely covered by roots of trees, boulders some trees were fallen in a diagonal position. The cutouts were all washed out. We could hardly traverse them by foot."

Again starting on page 201 of Transcript of Proceedings at the Trial, the plaintiff testifies further:

"Q. And didn't you tell me that the first that you expressed any objections was after the people had got down from Bachelors Basin on the low lands?

A. That is when I strenuously objected.

Q. That is when you first objected?

A. I objected before then. I asked what was being done to promote this project further when Mr. Conner said the money was just being reduced. In fact in August he said their funds was practically nothing."

The Transcript of Proceedings from beginning to end clearly demonstrates that the defendants, either through outright ignorance, or intentionally, whichever the case may be, used the plaintiff's money for a grand vacation.

The Callahan v. Keeseville A. C. & L. C. R. Co., 199 NY 268, 92 N. E. 747, case gives a good statement of the rules as to when a contract can be rescinded when it states:

“There is no hard and fast rule on the subject of rescission, for the right usually depends on the circumstances of the particular case. It is permitted for failure of consideration, fraud in making the contract, for inability to perform it after it is made, for repudiation of the contract, or an essential part thereof, and for such a breach as substantially defeats its purpose . . .” (emphasis mine)

#### POINT V. — CONTRACTUAL PROVISION REQUIRING ACCOUNTING BY DEFENDANTS.

The defendants have gone to great length in their Brief on Appeal to show that no accounting was necessary or contemplated. The Agreement states as follows:

“The sum will be used only for the purpose of the venture and a report of the expenditure from such funds will be made to you from time to time upon your request . . .” and “you shall be free to inspect the property, the records of the venture . . .”

Webster’s New International Dictionary of the English Language, Second Edition, Unabridged, at page 2113, defines the word “report” as follows:

“3. To give a formal or official account or statement of; to state formerly, as a treasurer reports the receipt and expenditures.”

The case of *Bowels v. Jung*, D. C. Cal. 57 F Supp. 701. 706, states:

“To “report” means to give account of, to relate, to tell.”

Webster defines “record” at page 208, as follows:

"1. Act or fact of recording or being recorded, reduction to writing as evidence . . .; 2. That which is written or transcribed to perpetuate acknowledge of acts or events . . .; Syn. — Records, archives, chronicles, annals. Records as here compared, are in general written accounts of facts or events . . ."

Webster defines "expenditures" at page 896:

"1. Act of expanding, a laying out, as of money, disbursements; 2. That which is expended or paid out, expense, as receipts and expenditures of a business; 3. Accounting, an outlay, or creation of a liability, for an asset or an expense item."

The Memorandum Agreement may not spell out just how detailed an accounting should be, however, it is clearly defined that the defendants were under the obligation to keep and maintain a true record of the expenditures, and make such record available to the plaintiff upon his request.

The evidence is undisputed that the plaintiff requested to see the records in November, 1955. That after repeated demands the defendant sent him a purported accounting on the 24th day of March, 1956 (Tr. 185, 358-360). See also plaintiff's Exhibit 1. The information furnished the plaintiff in March was not true, and very misleading. For instance, the statement indicated that road building and surveying had cost the sum of \$2650.00, which was \$1552.00 more than that actually spent. Even at the time of the trial, defendants were claiming as valid, expenditures that were made as late as December, 1956, (Tr. 237), some two months after this case was filed.

POINT VI. — MONEY PAID ON A RESCINDED CONTRACT MAY BE RECOVERED BACK WHERE THE REFUNDED MONEY IS ALL THAT REMAINS TO BE DONE, PROVIDED, THE PLAINTIFF HAS NOT BEEN GUILTY OF FRAUD OR ILLEGAL CONDUCT IN THE TRANSACTION.

Twelve American Jurisprudence — Contracts, Sec. 456, states:

“... money paid upon a contract which is subsequently rescinded is never forfeited unless there is an express or implied contract to that effect, and upon such rescission, the money paid must be returned to him who advanced it . . . A party rescinding because of breach of the other party has a right to recover back money paid as had and received to his use.”

## CONCLUSION

The Appellants have the responsibility of showing in detail where the evidence touching the findings are inconsistent therewith or is not enough to sustain it. The case of *In re Lavelle's Estate, Immerthal v. First Security Bank, et.al.* 122 Utah 253, 248 P. 2d 372, states as follows:

“An Appellant cannot be asked to go through the transcript, showing how the testimony shown on each page does not support the finding. Yet insofar as it is practicable, he must detail, with citation to the record where appropriate, the particulars wherein the evidence touching the finding is inconsistent therewith or is not of enough moment to sustain it.”

It is respectfully submitted that defendants have not complied with this requirement.

The evidence is clear that the defendants represented to the plaintiff that they needed financial assistance for renting or purchasing equipment, the hiring of labor, personal living expenses while working on the project, and to generally "grubstake" the defendants while finding and proving the presence of minerals located in six mining claims in the LaSal Mountains in Grand County, State of Utah, or within a ten mile area from the center of the claims.

Regardless of the speculative nature of the venture, the plaintiff was entitled to have had the money spent for the express purpose of finding and proving the presence of minerals which the defendant, Charles E. Conner, represented to the plaintiff that he believed to be there in rich quantities. The defendants completely failed to live up to the Agreement. The only thing that was accomplished by the defendants with plaintiff's money was the staking of four additional claims contiguous to the original six claims, which according to the testimony of William J. Conner, took him 16 days, and making a survey which took a total of 8 days at the cost of \$490.

The contention of the defendants that spending \$4374.36 for personal property which was used exclusively for the personal needs of the defendants, \$1717.95 for travel expenses, and \$2737.85 for "grubstaking", general expenses, and other incidentals, out of a \$10,000.00 investment, put

up for the purpose of finding and proving the presence of minerals in a prescribed area, as being fair and honest to the plaintiff, under an Agreement which calls for mutual trust and confidence between the parties, and with the provisions that the defendants would give their best efforts to find and prove the presence of valuable minerals, is absolutely shocking to this writer.

It is respectfully submitted that the Trial Court was extremely liberal with the defendants in allowing them a credit of \$4,500.00, and that the judgment should be sustained.

Respectfully submitted,

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