

1967

The Oil Shale Corporation, A Nevada Corporation
v. Fred v. Larson, Also Known As Frederick v.
Larson, Ethel B. Larson, Husband And Wife;
Frederick H. Larson And Dorothy H. Larson,
Husband And Wife : Brief of Respondents

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

THE OIL SHALE CORPORATION,
a Nevada Corporation,
Plaintiff-Appellant,

—vs.—

FRED V. LARSON, also known as
FREDERICK V. LARSON,
ETHEL B. LARSON, Husband
and Wife; FREDERICK H.
LARSON and DOROTHY H.
LARSON, Husband and Wife.
Defendants-Respondents.

Case No.
10887

BRIEF OF RESPONDENTS

Appeal from the Judgment of the Fourth District
Court, in and for Uintah County
Honorable Joseph E. Nelson, Judge

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TABLE OF CONTENTS

	<i>Page</i>
NATURE OF THE CASE	1
DISPOSITION IN THE LOWER COURT	1
STATEMENT OF THE CASE	2
DEFENDANTS' ARGUMENT	8
I. DEFENDANTS' RESPONSE TO TOSCO'S ARGUMENTS A AND B	8
A. THE EVIDENCE SUSTAINS THE TRIAL COURT'S REFUSAL TO GRANT SPECIFIC PERFORMANCE OF THE JULY LETTER	8
B. THE EVIDENCE CLEARLY SUSTAINS THE TRIAL COURT'S FINDING THAT THE OPTION PERIOD COMMENCED JULY 15, 1963 AND ENDED JANUARY 15, 1964	19
C. THE TRIAL COURT CORRECTLY AD- MITTED EVIDENCE OF ORAL AGREEMENTS AS TO THE OPTION PERIOD	25
1. <i>Parol evidence is admissible to show the effective date of a contract</i>	25
2. <i>Parol evidence is admissible because the July Letter is only a letter of in- tent</i>	26
3. <i>Parol evidence is admissible to show additional terms of the transaction</i>	27
4. <i>Parol evidence is admissible to show the meaning of indefinite, vague and ambiguous provisions of a contract</i>	28
D. THE STATUTE OF FRAUDS HAS NO APPLICATION TO EXECUTED AGREEMENTS	31
E. TOSCO DOES NOT ACTUALLY SEEK A DECREE OF SPECIFIC PERFORM- ANCE AS TO THE JULY LETTER, BUT A DECREE REQUIRING DEFEN- DANTS' TO EXECUTE INSTRUMENTS PREPARED BY LARSON'S COUNSEL, AS AMENDED BY COURT DECREE, AND THE COURT CANNOT MAKE A CONTRACT BETWEEN THE PARTIES	32
II. DEFENDANTS' RESPONSE TO TOSCO'S ARGUMENT C	39
THE TRIAL COURT'S CONCLUSIONS 4 AND 5 AND FINDINGS 4, 5 & 7, ARE SUPPORTED BY THE EVIDENCE	39

	<i>Page</i>
III. DEFENDANTS' RESPONSE TO TOSCO'S ARGUMENT D	49
A. TOSCO IS NOT ENTITLED TO A NEW TRIAL	49
B. TOSCO IS NOT ENTITLED TO RESTITUTION	52
CONCLUSION	54

CASES

<i>American Mining Co. v. Himrod-Kimball Mines Co.</i> , 124 Colo. 186, 235 P.2d 804 (1951)	9
<i>Carlson v. Bain</i> , 116 Colo. 526, 182 P.2d 909 (1947)	11
<i>Continental Bank & Trust Co. v. Bybee</i> , 6 Utah 2d 98, 306 P.2d 773 (1957)	29
<i>Cutright v. Union Savings & Investment Co.</i> , 33 Utah 486, 94 Pac. 984 (1908)	32
<i>D.A.C. Uranium Co. v. Benton</i> , 149 F. Supp. 667 (D. Colo. 1956)	11
<i>Davis v. Payne & Day, Inc.</i> , 10 Utah 2d 53, 348 P.2d 337 (1960)	27
<i>Farr v. Wasatch Chemical Co.</i> , 105 Utah 272, 143 P.2d 281 (1943)	27
<i>General Insurance Co. v. Henich</i> , 13 Utah 2d 231, 371 P.2d 642 (1962)	25
<i>Greenwood v. Jackson</i> , 102 Utah 161, 128 P.2d 282 (1942)	32
<i>Hargreaves v. Burton</i> , 59 Utah 575, 206 Pac. 262 (1922)	33
<i>Martin v. Hall</i> , 219 Cal. 234, 26 P.2d 288 (1933)	9
<i>Nichols v. Whitacre</i> , 12 Mo. App. 692, 87 S.W. 594	52
<i>Olsen v. Reese</i> , 114 Utah 411, 200 P.2d 733 (1948)	25
<i>Pitcher v. Lauritzen</i> , 18 Utah 2d 368, 423 P.2d 491 (1967)	8, 25, 33
<i>Price v. Lloyd</i> , 31 Utah 86, 86 Pac. 767 (1906)	33
<i>Venino v. Naegele</i> , 99 N. J. Eq. 183, 131 Atl. 895 (1926)	11
<i>Warren v. Gary-Glendon Coal Co.</i> , 313 Ky. 178, 230 S.W.2d 638 (1950)	9

OTHER AUTHORITIES

Restatement, <i>Contracts</i> , § 26, Comment a (1937)	13
Restatement, <i>Contracts</i> , § 228, Comment a (1937)	26

STATUTES

Utah Code Annotated, § 25-5-3 (1953)	31
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BRIEF OF RESPONDENTS

NATURE OF THE CASE

Plaintiff seeks specific performance of a written instrument. Defendants ask dismissal of the Plaintiff's Complaint and judgment for its costs of suit incurred in this proceeding.

DISPOSITION IN THE LOWER COURT

Defendants adopt and agree with the statement in Plaintiff's Brief as to disposition in the Lower Court, with one exception. In the last paragraph on Page 2 of its Brief, Plaintiff did not inform the Court that a copy of the proposed Revised Findings and Conclusions filed with the Lower Court on Janu-

ary 6, 1967, were made available to counsel for Plaintiff at the same time. Plaintiff's counsel had the opportunity to examine and study the proposed Revised Findings and Conclusions for at least five weeks prior to the hearing in Provo, Utah on February 21, 1967. At the hearing in February, Plaintiff's counsel argued at length, and also submitted a written brief, in opposition to the proposed Findings and Conclusions tendered by Defendants' counsel. The Plaintiff was therefore given ample opportunity to oppose the proposed Findings and Conclusions which were subsequently adopted by the Trial Court.

STATEMENT OF THE CASE

To avoid excessive repetition, in this Brief, the Defendants will usually refer to the Plaintiff as "Tosco," to the Defendant, Frederick H. Larson, as "Larson" and Plaintiff's Exhibit No. 2 (the letter of July 25, 1963 and the memorandum of July 11, 1963) as the "July Letter."

Tosco's Statement of Facts, although factually correct in most respects, omits vital parts of the record which are of importance to any decision in this case. Also, in some areas, Tosco's Statement of Facts constitutes argument rather than factual summary. Defendants offer the following supplement and comment regarding Tosco's Statement of Facts:

A. Throughout its Brief, Tosco constantly refers to the July Letter as "the Agreement of July 25, 1963." By doing so Tosco places special and re-

peated emphasis upon an instrument which, by its own terms, is identified as a "letter" (see Page 1 thereof), the purpose of which was to "... state the intention of Tosco and the shareholders of Larson Oil Co., as modified on July 24, to hereafter enter into contracts and agreements giving expression to those understandings as they pertain to the holding of Larson Oil Co."

B. On Page 6 of its Brief, Tosco states as follows: "They [Tosco and Defendants] also agreed that the option would not commence until the payment of the \$20,000.00 and the signing of formal documents." This constitutes Tosco's interpretation of the July Letter. The instrument is silent as to the commencement or ending dates of the option. The record does disclose:

1. In the New York Meeting of July 9 and 10, 1963, Larson and Tosco agreed that the option period would commence July 15, 1963 and end January 15, 1964 (Tosco Brief, Page 5);

2. The understandings of the parties in New York on July 9 and 10, which resulted in a memorandum of July 11, 1963, were incorporated in the July Letter;

3. The drafts prepared by Tosco's attorney, Mr. Tweedy, specified option dates of June 15, 1963 to January 15, 1964, and the leases attached to those drafts as Exhibit "A" provided that the proposed lease was to start January 15, 1964 (Pl's. Exs. 14 and 16);

4. The drafts prepared by Larson's

counsel in November and December of 1963, used the same beginning, ending and lease dates, and

5. The drafts of a transaction prepared by Tweedy in February of 1964, also called for the option to Commence July 15, 1963 and expire January 15, 1964. (Pl's. Exs. 17 and 18.)

C. On the bottom of Page 6 and at the top of Page 7 of its Brief, Tosco states: "Thereupon a new letter agreement of July 25, 1963, *which the Trial Court found binding on both parties*, was drafted in Larson's presence." (Emphasis supplied.) This statement is not correct. A review of the initial Findings of Fact and Conclusions of Law entered by the Trial Court on November 1, 1966 and the Findings of Fact and Conclusions of Law as revised and entered by the Court on January 6, 1967, will conclusively show that the July Letter, in and by itself, was never considered as being binding upon the parties by the Trial Court, or for that matter, by the parties themselves. (TR-1, Pg. 115 L 20-28; TR-1, Pg. 78, L 16-25.)

D. The statement in Subparagraph 3 on Page 8 of Tosco's Brief is incorrect. Here, Tosco states that the issuance of shares of Tosco stock was to be "subject to appropriate investment representations *in compliance with the Federal Securities Law*." (Emphasis supplied.) The July Letter provides that said shares were to be issued to Defendants "subject

to the delivery to it [Tosco] of appropriate investment representation from the recipients *and* subject to such other terms and conditions as may, in the opinion of counsel be required for compliance with the Federal Securities Law.” (Emphasis supplied.)

E. By its statement that Larson and his attorney “made some minor changes to conform the drafts to the July 25 agreement, such as substituting the individual shareholders as parties . . .”, (see Page 9 of Tosco’s Brief) Tosco infers that drafts of documents prepared by Tweedy, Tosco’s attorney, (Plaintiff’s Exs. 4 & 5) contained those understandings which were expressed in the July letter. To the contrary, at the time Tweedy prepared Plaintiff’s Exhibits 4 and 5, he had no knowledge of the discussions which transpired between Larson, Koolsbergen and Winston in Beverly Hills, California, on July 23 and 24, 1963. (TR-1, Pg. 143 L 15-21.)

F. On Page 11 of its Brief, Tosco quotes certain portions of the July Letter with the comment that the quoted portions of the letter constitute the “relevant terms” thereof. Such a statement is purely argumentative and obviously designed only to emphasize Tosco’s position. Factually the quoted portions constitute a small part of the instrument in question and are certainly not all of the relevant terms.

G. On Page 12 of its Brief, Tosco quotes a portion of the testimony given by its attorney,

Tweedy. However, additional testimony by Tweedy concerning his telephone conversation with Larson is of extreme importance in this case. When pressed for a definite answer as to exactly what type of documents Larson agreed to sign, Mr. Tweedy finally stated that Larson had advised him that the Defendants would sign documents if Defendants' attorney and Tweedy could reach an agreement as to the differences then existing between Tosco and Defendants. (TR-1, Pg. 148 L 8-28.) Tosco also fails to inform the Court that Koolsbergen acknowledged that Tosco paid the \$20,000.00 to Defendants on the "expectation" that Defendants would execute formal agreements if Tweedy and Larson's counsel could resolve the matters in dispute. (TR-1, Pg. 100 L 17-18.) Tweedy made no attempt to resolve those differences with Defendants' attorney. (TR-1, Pg. 148 L-23-30; Pg. 149 L 1-13.)

H. On Page 13 of its Brief, Tosco refers to payment of \$20,000.00 by Tosco to the Defendants in the form of four Tosco checks, each in the amount of \$5,000.00. Plaintiff does not advise the Court that each of said checks bore a notation which showed the checks were issued for options granted. (Pl's. Ex. 7.) Of equal importance is the fact that the letter written to Larson by Tosco's comptroller (Defs'. Ex. 10) stated that the four Tosco checks were issued and paid to Defendants "pursuant to the agreement."

I. On Page 13 of its Brief, Tosco states that

Tweedy called Larson's attorney to obtain consent for a direct visitation with Larson in California. Here, the Court should be advised that Tweedy requested permission to talk with Larson only concerning property descriptions. (TR-1 Pg. 135 L 9-15; Pg. 149 L 1-8.) No request was made by Tweedy to discuss with Larson the instruments he had prepared in February of 1964 (Pl's. Ex. 17 & 18).

J. Tosco does not advise the Court of these events:

1. Tosco's engineer, Warriner, made an examination of the Larson lands in August of 1963 and made a report of his examination to Tosco. (TR-1, Pg. 80 L 12-27.)

2. Larson advised Tosco, both orally and in writing, on numerous occasions, that the option granted Tosco expired on January 15, 1964. (TR-1, Pg. 196 L 15-30; Pg. 197—all and Pg. 198 L 1-10.) (See also Pl's. Ex. 3 and Def's. Ex. 20 & 21.)

K. In its description of events related in the second paragraph on Page 14 of its Brief, Tosco cites only evidence submitted by its witnesses concerning the meeting between Larson and Tweedy in Beverly Hills on February 12, 1964. The testimony in this respect was conflicting and Larson testified that Tweedy attempted to obtain Larson's approval to a transaction completely different and foreign to the understandings expressed in the July Letter (TR-1, Pg. 28 L 10-30).

DEFENDANTS' ARGUMENT

I. DEFENDANTS' RESPONSE TO TOSCO'S ARGUMENTS A AND B

A. THE EVIDENCE SUSTAINS THE TRIAL COURT'S REFUSAL TO GRANT SPECIFIC PERFORMANCE OF THE JULY LETTER.

The contract alleged to exist by Tosco, consisting solely of the July Letter, is indefinite, incomplete and constitutes a mere agreement to agree. In a recent opinion, this Court set forth the requirements of an enforceable contract when it said in *Pitcher v. Lauritzen*, 18 Utah 2d 368, 423 P.2d 491 (1967):

Specific performance cannot be required unless all terms of the agreement are clear. The court cannot compel the performance of a contract which the parties did not mutually agree upon. (Citing authority.)

In speaking of certain terms required for specific performance, the author in 49 Am. Jr., Specific Performance, Section 22, at Page 35 uses this language:

The contract must be free from doubt, vagueness and ambiguity, so as to leave nothing to conjecture or to be supplied by the court. It must be sufficiently certain and definite in its terms to leave no reasonable doubt as to what the parties intended, and no reasonable doubt of the specific thing equity is called upon to have performed, and it must be sufficiently certain as to its terms so that the court may enforce it as actually made by the parties . . . (423 P.2d at 493).

This rule is especially applicable to complicated mining industrial transactions. *American Mining Co. v. Himrod-Kimball Mines Co.*, 124 Colo. 186, 235 P.2d 804 (1951).

There are at least three critical and essential omissions from the July Letter. These are (i) the term of the mining lease contemplated by the parties, (ii) the form of conveyance which would have been required of Defendants if Tosco had elected to purchase the claims and (iii) the clarification of the term "appropriate investment restrictions" which Defendants would have been required to give upon receipt of the Tosco stock.

Of critical importance is the omission in the July Letter of the term of the lease. There is ample and conclusive authority for the proposition that a lease term is essential in a mining lease. For the sake of brevity, reference is made here only to two cases. The first is *Martin v. Hall*, 219 Cal. 234, 26 P.2d 288 (1933).

Appellant alleges execution of a written agreement for a lease [oil and gas] on August 8, 1928. The written agreement is not set forth haec verba in the answer and cross-complaint. As described by appellant it is uncertain, indefinite, and incomplete, particularly *in that it fails to fix a date for commencement of the lease or to fix any term of duration.* (Citing authority.) (Emphasis supplied.) (26 P.2d at 290.)

The second case is *Warren v. Gary-Glendon Coal*

Co., 313 Ky. 178, 230 S.W. 2d 638 (1950). In that case the Big Jim Coal Company made two offers to Warren relative to certain coal lands. The second offer took the following form:

Offer No. 2

September 19, 1946

We offer to lease with the option to purchase the same properties mentioned in Offer No. 1 at 10c per ton royalty on coal mined ($\frac{1}{2}$ of royalty to be put in escrow from the 131 acre tract). Minimum rental \$100.00 per year. Option on the 131 acres \$5,400.00 ($\frac{1}{2}$ to be put in escrow). Option on the balance \$2,600.00 or a total of \$8,000.00. Any royalties paid to apply on the purchase price if and when purchased. The right to use all the surface and timber to be the same as if owned by us. No royalty to be paid on coal mined from the tract of land lying on the watershed of Caney Creek, and if and when this tract is purchased it is to be transferred in fee.

The Howell tract where home is to be reserved.

This contract is to be written out in full later on as the final elaborate agreement between the parties.

In adjudging that the second offer did not constitute a contract which could be specifically enforced the Court stated:

It is fundamental that in order to enable a court of equity to decree specific performance, the terms of the contract must be clear, definite, certain and complete. . . .

When we apply the rules set out in the above paragraph to this loosely drawn and indefinite

instrument, it is manifest that it is not the character of contract that a court of equity will specifically enforce. *The time it was to begin and to end was not stated . . .* (Emphasis supplied.) (230 S.W. 2d at 640)

In opposition to the argument that the lease must have a definite term, Tosco relied upon *D.A.C. Uranium Co. v. Benton*, 149 F. Supp. 667 (Dist. Colo. 1956), during arguments to the Trial Court. The lease before the court in *Benton* had a definite term, i.e., the lease was to continue so long as the property was developed during six months of each year. It is significant that the court in *Benton* quoted as follows from *Carlson v. Bain*, 116 Colo. 526, 182 P.2d 909 (1947):

We have said that under the Authorities, to create a valid contract of lease but few points of mutual agreement are necessary; first, there must be a definite agreement as to the extent and bonds of the property lease; *second, a definite and agreed term; . . .* (Emphasis supplied.)

The July letter is silent as to the form of conveyance with which the Defendants would convey the claims if Tosco had elected to exercise the option to purchase. Was the conveyance to be made by quit claim deed or deed with warranty or without warranty? In any transaction involving real estate, the form of conveyance is critically important. See, for example, *Venino v. Naegle*, 99 N.J. Eq. 183, 131 Atl. 895 (1926), wherein the Court of Chancery in refusing to decree specific performance stated:

In the document under examination it will have been observed that many of the usual provisions of contracts for the purchase and sale of real estate are omitted. As was pointed out in the opinion in the *Tansey* case, it does not disclose what all the terms of the formal agreement were to be; neither does it specify whether or not it was to contain provisions for default of payment of interest and taxes. *No mention is made of the character of deeds by which the title was to be conveyed.* These defects I feel are fatal to the complainant's suit. (Emphasis supplied.) (131 Atl. at 895.)

If Tosco had elected to exercise the option to lease the Larson lands, Tosco would have then been obligated to deliver 5,000 shares of its common stock to the Defendants.

Subject to delivery to it [Tosco] of *appropriate investment representations* from the recipients *and* subject to such other terms and conditions as may, in the opinion of its counsel, be required for compliance with the Federal Securities Laws. (July 25 portion of July Letter, Pl's. Ex. 2, p. 2.) (Emphasis supplied.)

There is no evidence in the record to clarify or indicate the meaning of "appropriate investment representations."

No authorities have been discovered which define the term "appropriate investment representations.' The noted authority, *Words and Phrases*, omits the phrase entirely.

It is clear that investment representations by the Defendants to Tosco would be a very material consideration from the viewpoint of both parties. However, the absence of language in the July Letter which would define or indicate what the representations would be, how they would operate, and the length of time during which such representations would be effective, constitutes a further significant omission.

The essential omissions notwithstanding, it is clear that the July Letter, in and of itself alone, constituted a mere agreement to agree and could not, therefore, serve as the basis for a decree of specific performance. In the Restatement, *Contracts*, § 26, Comment A (1957), the authors state:

Parties who plan to make a final written instrument as the expression of their contract, necessarily discuss the proposed terms of the contract before they enter into it and often, before the final writing is made, agree upon all the terms which they plan to incorporate therein. This they may do orally or by exchange of several writings. It is possible thus to make a contract to execute subsequently a final writing which shall contain certain provisions. If parties have definitely agreed that they will do so, and that the final writing shall contain these provisions and no others, they have then fulfilled all the requisites for the formation of a contract. *On the other hand, if the preliminary agreement is incomplete, it being apparent that the determination of certain details is deferred until the writing is*

made out; or if an intention is manifested in any way that legal obligations between the parties shall be deferred until the writing is made, the preliminary negotiations and agreements do not constitute a contract. (Emphasis supplied.)

The fact that the July Letter, in and of itself alone, constituted only an agreement to agree clearly appears from the document itself. The July 25 portion of the July Letter provides:

In conversations held between Mr. Frederick H. Larson, who was in telephone contact with Mr. Fred V. Larson, and who was representing the shareholders of Larson Oil Co., and Mr. Koolsbergen and various members of the Tosco staff in New York on July 9 and 10, as recorded in Mr. Albert F. Lenhardt's memorandum of July 11, and a subsequent meeting on July 24 in Los Angeles, the understandings described below applicable to the holdings of Larson Oil Co. were reached. *The purpose of this letter is to state the intention of Tosco and the shareholders of Larson Oil Co., as modified on July 24, to hereafter enter into contracts and agreements giving expression to those understandings as they pertain to the holdings of Larson Oil Co. . . . (Emphasis supplied)*

I have asked our attorneys to commence the drafting of the necessary documents to carry out these understandings and reduce them to formal agreements and would appreciate your prompt reply.

What clearer indication could there be that the parties had not completed negotiations and agree-

ments as to all aspects of the subject transaction? The evidence adduced during trial conclusively demonstrates that the parties had not reached final agreement as of July 25, 1963.

Koolsbergen described the practice of Tosco in purchasing mining properties, which was utilized in this case, as follows:

When we contemplate going in to acquire reserves, real property, before we decide to spend a lot of time and put money in on *drafting documents*, and putting people to work and *preparing agreements*, we want to take a quick look sometimes for the very simple reason to see if the properties are there. (Emphasis supplied.)

The second thing is, is it worthwhile to continue the next step, which is the *negotiation of the contract*. (Emphasis supplied.) (TR-1 p. 78, L 17-25.)

Pursuant to this practice, Tosco had a cursory examination of the properties made by Mr. Warriner, of DeWitt, Smith & Company in *August of 1963* (TR-1 p. 80 at L 12-17), i.e., one month *after* execution of the July 25, 1963 memorandum.

With reference to the July Letter (Pl's. Ex. 2), Koolsbergen further testified:

Q. Yes, but so far as you and Mr. Larson were concerned, and the other Larsons, there was no agreement as to the term of the lease?

A. There was no agreement as to term, be-

cause that was supposed to be negotiated in the option agreement and subsequently. (TR-1, p. 83, L. 26-30.)

With reference to a title examination of the Larson properties, Tweedy testified:

The memorandum of July 25 provided an agreement between the parties as to what the option might contain, but further provided that drafts would be prepared setting forth the terms and transactions. I would not have undertaken the very extensive process of examining titles to 30,000 acres of unpatented oil shale claims without having assured myself that there was an agreement between my client and the optionor. (TR-1, p. 114, L. 4-13).

With reference to the formula set forth in the July Letter, Tweedy was of the opinion that a stated purchase price would be to the benefit of both parties, and that such could be determined in the course of negotiations:

Yes, it [July 25, 1963 memorandum] contained a formula, and I think that I suggested to Mr. Dufford, that it might be better if we could get the parties, *in the course of negotiation*, to come up with a specified dollar amount. (TR-1 p. 133 at L. 15-18.) (Emphasis supplied.)

As further indication that the July Letter was not complete as far as Tosco was concerned, the testimony of Tweedy with regard to warranties and form of conveyance is important:

[With reference to the drafts which were pre-

pared], we have some provisions here for the form of deed and again representations and warranties. I wanted to get from Mr. Larson more representations and warranties than Mr. Dufford wanted Mr. Larson to give. (TR-1 p. 133 at L 21-36.)

With reference to Larson's refusal to execute the drafts prepared by Tweedy in February, Tweedy testified:

- Q. Actually there was no specific instrument in existence that he [Larson] assured you that he would sign,
- A. That is correct; you and I had not *finished negotiations*. (Emphasis supplied.) (TR-1 p. 148 at L. 8-12.)

Most important is the testimony of Koolsbergen during Tosco's case in chief relative to the July Letter:

- Q. But is it your position that with respect to the Larson-Oil Shale Lease, July 25, 1963, that that memorandum created no binding agreement?
- A. I am not a lawyer. To me it was a document which was offered, it contained the terms of an offer, and so far as I was concerned, we were not bound and he was not bound until the document was signed. We never in our life go into an extensive transaction with just a one or two page memorandum especially when you deal with people who are either not interested enough to enter a transaction, to really understand it, and that

is why I always insist that complete documents are being prepared, which are understood by counsel and understood by the parties and then they are signed, not before.

Q. This never happened then in connection with the Larson transaction?

A. That never happened.

Q. You never got what you called a complete agreement, understood by counsel and the parties, that was signed?

A. No, I was told by Mr. Tweedy, that we could expect such an agreement. (TR-1 p. 170 at L. 26-30; p. 170 at L. 1-18).

As conclusively demonstrating that the parties never did reach an agreement based upon the July Letter, and that many areas which the parties considered essential were to be negotiated, one need only refer and compare the drafts of Tweedy (Pl's. Ex. 14, 16, 17 & 18) and Larson's counsel (Pl's Ex. 17 & 18) with the July Letter. At this point, reference is made only to the disagreements of the parties as evidenced by the various drafts, i.e.,:

1. There was no agreement as to a lease term;
2. There was no agreement as to whether stock would be exchanged or cash in lieu thereof;
3. There was no agreement as to the procedure to be utilized in connection with acquisition of patents;
4. There was no agreement as to whether title

documentation would be certified or uncertified;

5. There was no agreement as to the purchase price to be paid in the event an option to purchase was exercised;

6. There was no agreement as to the terms of payment for the purchase price in the event the option to purchase was exercised; and

7. There was no agreement as to the warranties to be made by Larson in connection with the conveyance of the Larson properties, nor the form such conveyance was to take.

The contract as alleged by Tosco being incomplete and a mere agreement to agree, there is no basis whatsoever for a decree of specific performance.

B. THE EVIDENCE CLEARLY SUSTAINS THE TRIAL COURT'S FINDING THAT THE OPTION PERIOD COMMENCED JULY 15, 1963 AND ENDED JANUARY 15, 1964.

Tosco concedes in its Brief that the parties on July 11, 1963 agreed that the option period would commence July 15, 1963 and terminate January 15, 1964 (Tosco Brief, p. 5). This same oral understanding was confirmed by the parties subsequent to the letter of July 25, 1963 as conclusively evidenced by the following:

1. Larson testified that this was a clear understanding of the parties both on July 11 and 25, 1963; (TR-1 p. 24 at L 17; p. 33 at L 1; p. 186 at L 8);

2. The July Letter involves two transactions, closely related, i.e., terms proposed for acquisition of the Larson holdings, and, Larson's efforts to secure contiguous properties for Tosco. It is evident that the parties intended to initiate their efforts on both phases of the transaction as soon as possible. For the sake of brevity, only one quotation is taken from the July 11 portion of the July Letter:

In addition [to the Larson holdings] there are about 15 small parcels of patented shale lands contiguous to the Larson and Skyline properties and totaling about 14,000 acres . . . Mr. Larson feels he could put the parcels together in a single package again for Tosco. *Time is of the essence, however, since three or four approaches have been made to some of these people in the past few weeks.* (Emphasis supplied.)

Although no commencement date for Larson's employment is stated in the July Letter, Larson commenced employment on July 15, 1963 and concluded his employment on July 15, 1964, and was paid on that basis by Tosco; (TR-1 p. 47 at L 9-11).

3. The drafts prepared by Tweedy on July 18, 1963 after consultation with Koolsbergen (TR-1 p. 85 at L. 5-12) specifically provided that the terms of the option to lease would be from July 15, 1963 to January 15, 1964. (Pl's. Ex. 15 & 16).

4. Options and Leases prepared by Larson's counsel and mailed to Tweedy and Tosco on or about December 13, 1963 specified the same beginning and

ending dates for the period of the option to lease, i.e., from January 15, 1963 to January 15, 1964. (Pl's Ex. 4 & 5).

5. The drafts prepared by Tweedy as late as February 11, 1964 (Pl's. Exs. 17 & 18), and presented by Tweedy to Larson during the latter part of February, 1964, specifically provided that the option period would commence as of July 15, 1963 and end January 15, 1964.

6. Larson advised Tosco on numerous occasions of his understanding that the option period commenced July 15, 1963 and ended on January 15, 1964. At no time did Tosco object to Larson's interpretation or attempt to contradict same, until the telephone conversation between Tweedy and Larson in February of 1964 and after the expiration of the option period. In fact, Koolsbergen wrote to Frederick V. Larson by letter dated *August 3, 1963* expressing his pleasure at the agreement of the parties:

I am delighted to arrive with you and your associates at *an agreement* concerning the lands owned by you and the Larson Oil Company. These lands will be a significant contribution to the oil shale industry in the West. I am hopeful that you, yourself, will be able to assist us in arriving at a plan for the best utilization of the Larson oil shale lands. I hope that you will be able to provide the necessary guidance to our attorneys and engineers in bringing the property into production.

I am also hopeful that you will be able to go to Denver and assist in presenting testimony

regarding your early experience in the oil shale lands. Such testimony will help us to bring the lands to patent. (Emphasis supplied). (Defs'. Ex. 24.)

7. Notices of Larson's position as to the termination of the option period were transmitted to Tosco by Larson's memorandums of November 21, 1963 (Def's. Ex. 20 & 21) and his memorandum of December 13, 1963 (Def's. Ex. 3). The November 21 memorandum stated:

If the option to lease is exercise on *January* 15, 1964, Tosco will be obligated to convey 2,500 shares of Tosco stock 1,250 shares to Frederick H. Larson and 1,250 shares to Dorothy H. Larson). (Emphasis supplied.)

The December 13 memorandum stated:

Enclosed are copies of Option and Lease on the Fred V. Larson patented lands and copies of Option and Lease on the Frederick H. Larson unpatented lands. . . .

Under the terms of our agreement, my father and mother will be entitled to \$10,000.00 at the time of signing the leases. . . .

The enclosed option and lease referred to contained a commencement and termination date for the option of July 15, 1963 and January 15, 1964. (Pl's. Ex. 4 & 5).

8. On January 14, 1964 Lenhardt, while in New York City at the Tosco offices, called Larson and acknowledged that the Tosco option expired January 15, 1964 and also requested of Larson an

extension of the option period (TR-1 p. 198 L. 14-30). Larson refused to grant the extension and Lenhardt then told Larson that Tosco would try to pay the \$20,000.00 as soon as it had the funds. (TR-1 p. 199 L. 1-4). The testimony in this regard was uncontradicted.

9. Larson received a letter from Tosco dated January 16, 1964 requesting him to advise S. D. Leidesdorf & Co., auditors for Tosco, of any amount due Larson as of December 31, 1963 (Def's. Ex. 23). Larson answered this inquiry advising that Tosco was indebted to the Defendants in the amount of \$20,000.00 as consideration for the options which expired on January 15, 1964 (Def's. Ex. 25).

10. On or about January 31, 1964, Tosco paid the Defendants the \$20,000.00 by four separate checks (Pl's. Ex. 7) each in the amount of \$5,000.00. Checks to Frederick V. and Ethyl B. Larson had a notation showing that it was issued for "options granted," and each check was signed by Koolsbergen and Joseph A. Marks, treasurer of Tosco. Koolsbergen acknowledged that the checks were prepared before he signed them (TR-1 p. 97 L. 1-8). On February 3, 1964 the treasurer of Tosco wrote to Larson (Def's. Ex. 10) requesting that Larsen acknowledge receipt of the four Tosco checks which were paid by Tosco "pursuant to the agreement."

11. As late as March 23, 1964, in a memorandum prepared by by Winston, Tosco's counsel,

reference was made to disputes arising out of the option agreement dated July 15, 1963. (Def's. Ex. 19).

In light of the foregoing, it is critical to analyze Tosco's contention that there is insufficient evidence to support the Trial Court's findings.

Tosco contends that Larson's testimony is incredible (Tosco's Brief p. 21-22). The Trial Court had the opportunity to assess the conduct and appearances of the witness on the stand, the reasonableness of the testimony, the accuracy of the recollection of each witness, and to analyze the inclination of each witness to speak the truth; the Trial Court obviously believed the testimony of Larsen and did not believe the testimony of Koolsbergen and Tweedy.

Tosco then has the audacity to state, with reference to the option period,

There is not a single, solitary contemporaneous document proving, or even tending to support, the existence of the oral agreement claimed by Defendants. No letter, no memorandum, no note, no diary entry; nothing in evidence prior to Defendants' February 1964 repudiation of their contractual obligation states that the option commenced to run in July, or at any other time prior to the time clearly and expressly provided in the July 25 written agreement. (Tosco Brief, p. 21).

Tosco thus ignores and attempts to obscure contents of the documents referred to in paragraphs numbered 3, 4, 5, 6, 8 and 9, *supra*.

This Court has stated on numerous occasions that when there is competent evidence in the record to support the Trial Court's findings, such findings will not be set aside on appeal. See e.g., *Pitcher v. Lauritzen*, 18 Utah 2d 368, 423 P. 2d, 491 (1967).

C. THE TRIAL COURT CORRECTLY ADMITTED EVIDENCE OF ORAL AGREEMENTS AS TO THE OPTION PERIOD.

1. *Parol evidence is admissible to show the effective date of a contract.*

Even though parol evidence as to the effective date of a contract conflicts with the date shown on the contract, such evidence is admissible as affirmed by this Court on at least two occasions: *General Insurance Co. v. Henich*, 13 Utah 2d 231, 371 P.2d 642 (1962); *Olsen v. Reese*, 114 Utah 411, 200 P.2d 733 (1948). In the latter case, this Court stated:

Plaintiff, in making a tender of proof, testified that the contract was not signed on the date shown in the instrument.

An exception is recognized to the parol evidence rule in the case of dates upon instruments. It is said that the rule that parol evidence cannot be received to contradict a written contract does not apply to the date, which may be contradicted whenever it is material to the issues to do so, or, if lacking, may be supplied by parol or other competent testimony. (200 P.2d at 737)

Testimony showing the agreed commencement date of the option (July 15, 1963) is in effect evidence

to show the date that the contract became effective.

2. *Parol evidence is admissible because the July Letter is only a letter of intent.*

The authorities uniformly agree that when a memorandum represents only statements related to a proposed transaction and does not constitute the entire agreement, parol evidence is admissible to show the complete agreement. As stated in Restatement, *Contracts*, § 228, Comment a (1937) :

It is an essential of an integration that the parties shall have manifested assent not merely to the provisions of their agreement, but to the writing or writings in question as a final statement of their intentions as to the matter contained therein. If such assent is manifested the writing may be a letter, telegram or other informal document. That a document was or was not adopted as an integration may be proved by any relevant evidence.

The July Letter itself reflects that it is a mere letter of intent:

The purpose of this letter is to state the intention of TOSCO and the shareholders of Larson Oil Co., as modified on July 24, to hereafter enter into contracts and agreements giving expression to those understandings as they pertain to the holdings of Larson Oil Co.

Larson testified that he and Tweedy agreed there were many terms in the transaction which were to be negotiated subsequent to the preparation of the July Letter. (TR-1 p. 187 L. 23-30; p. 188 L. 1-2.) Kools-

bergen testified that the terms of the lease were to be negotiated subsequently. (TR-1 p. 83 L. 26-30.) A comparison of the drafts prepared by the parties readily shows that negotiations took place as to the various material terms. (See Pl's. Ex. 14 & 16; compare, Pl's. Ex. 4 & 5 and Pl's. Ex. 17 & 18.)

The July Letter, being a mere letter of intent, parol evidence was admissible to show the option period, July 15, 1963 through January 15, 1964.

3. *Parol evidence is admissible to show additional terms of the transaction.*

The Court has recognized on at least two occasions that extrinsic evidence is admissible to show additional terms of a contract not included in the written agreement. See *Davis v. Payne and Day, Inc.*, 10 Utah 2d 53, 348 P.2d 337 (1960); *Farr v. Wasatch Chemical Co.*, 105 Utah 272, 143 P.2d 281 (1943). In the latter case, this Court stated:

To sustain this ruling of the Court that the evidence of this prior collateral agreement was incompetent, counsel invokes the rule that parol evidence is not admissible to contradict, add to, or vary the terms of a written instrument. The rule is, of course well established but it has no application here. The problem of ascertaining when the rule applies to a given fact situation is discussed by Wigmore, Sec. 2430 of his work on evidence. It is there stated: "The inquiry is whether the writing was intended to cover a certain subject of negotiation; for if it was not, then the writing

does not embody the transaction on that subject * * *. (143 P.2d at 282.)

The July Letter provides :

1. Tosco will pay \$20,000.00 at the time of signing of the agreement (\$10,000.00 to Fred V. and Ethel B. Larson, his wife; and \$10,000.00 to Frederick H. Larson and Dorothy H. Larson, his wife) and will receive in turn a six-month option during which it will examine the title, history and status of the mining claims, the feasibility of patent proceedings and the extent and minability of the reserves.

Tosco interprets this provision as meaning that the period of the option did not commence until execution of the formal agreements and payment of the \$20,000.00 by Tosco. However, the only interpretation which is justified by careful reading of that provision, is that Tosco was to pay \$20,000.00 for which it would receive an option on the Larson lands for a period of six months. The beginning and ending dates of the option period are not specified in that provision, and the agreement of the parties as to the option term constitutes an additional provision of the transaction.

4. *Parol evidence is admissible to show the meaning of indefinite, vague and ambiguous provisions of a contract.*

This Court has recognized that when the terms of a contract are indefinite and vague, parol evidence and subsequent writings of the parties are admissible

to show the meaning of indefinite terms. In *Continental Bank & Trust Co. v. Bybee*, 6 Utah 2d 98, 306 P2d 773 (1957), this Court stated:

The sole question before this court, then, is whether the parties intended by this agreement that respondent should assume the obligation on the note held by Continental Bank. This intent should be ascertained first from the four corners of the instrument itself, second from other contemporaneous writings concerning the same subject matter, and third from the extrinsic parol evidence of the intentions. (Citing authority.) If the ambiguity can be reconciled from a reasonable interpretation of the instrument, extrinsic evidence should not be allowed. (Citing authority.) If the instrument on its face remains ambiguous in spite of the reasonable construction, the intent may be ascertained in the light of all written instruments which were a part of the same transaction. (Citing authority.) If the intent is ambiguous still, then parol evidence may be admitted, (Citing authority) and rules of construction may be invoked to declare the intention of the parties. (Citing authority.)

Tosco has, in effect, selected one sentence from the July Letter which serves as the sole basis for their contention in this case that the option never started to wit:

1. Tosco will pay \$20,000 at the time of signing the agreements . . . and will receive in turn a six-month option . . .

If this interpretation of the July Letter were correct, until formal documents were signed and the

\$20,000.00 paid, there was no obligation on the part of either party to do anything, and, *there was no contractual relationship whatsoever*. To the contrary, this is obviously not what the parties intended, and this conclusion is apparent without *any* reference to the acts of the parties subsequent to July 25, 1963.

The July 11 portion of the Letter states:

Meetings were held with Mr. Frederick H. Larson representing the Larson Oil Co., and the TOSCO staff on July 9th and 10th to discuss the acquisition of oil shale properties owned by Larson Oil Co. *and the acquisition of a number of small parcels of Utah shale lands located in the vicinity of the Larson properties.* . . . Their holdings [Larson] consist of approximately 30,000 acres of unpatented shale lands and 1,000 acres of patented lands lying to the north and partially to the east of the Skyline property in Utah.

In addition, there are about 15 small parcels of patented shale lands contiguous to the Larson and Skyline properties and totaling about 14,000 acres . . . Mr. Larson feels he could put the parcels together in a single package again for TOSCO. *Time is of the essence, however, since three or four approaches have been made to some of these people in the past few weeks.* . . . (Pl's. Ex. 2, July 11 P. 1)

. . . Mr. Larson will be employed as a consultant by TOSCO for up to one year at \$1,200.00 per month plus expenses. *During this time he will work toward assembling the small parcels into a single package and assist in the work involved in patenting the Larson Oil Co*

lands . . . (Emphasis supplied.) (Pl's. Ex. 7
July 11, P. 4.)

At the conclusion of the July 25 portion of the Letter, the following appears:

I have asked our attorneys to commence the drafting of the necessary documents to carry out these understandings and reduce them to formal agreements *and would appreciate your prompt reply.*

It is therefore clear that acquisition of the Larson holdings and the acquisition of surrounding acreage was of utmost importance to Tosco, and it was imperative to initiate efforts to accomplish both ends immediately. When this obvious interpretation of the July Letter is compared to the one sentence of that letter upon which Tosco bases its whole case, at best, the one sentence becomes vague, indefinite and ambiguous, and extrinsic evidence was clearly admissible to show the intent of the parties as to the commencement and ending dates of the option.

D. THE STATUTE OF FRAUDS HAS NO APPLICATION TO EXECUTED AGREEMENTS.

Tosco complains that the Trial Court's Findings as to the option period violate the Utah Statute of Frauds. Section 25-5-3, U.C.A. 1953. Tosco fails to consider that the July Letter, as supplemented by the oral agreements of the parties and their subsequent conduct, constituted an agreement which was fully performed by both Tosco and the Defendants. The Statute of Frauds had no application to a fully

executed contract. *Greenwood v. Jackson*, 102 Utah 161, 128 P.2d 282 (1942); *Cutright v. Union Savings & Investment Co.*, 33 Utah 486, 94 Pac. 984 (1908). Here, briefly stated, the Trial Court correctly determined that Defendants granted Tosco a six-month option to lease their lands. The agreed term of the option was from July 15, 1963 to January 15, 1964. Tosco agreed to pay \$20,000.00 as consideration for the option. Tosco did not elect to exercise the option and paid the \$20,000.00 consideration.

- E. TOSCO DOES NOT ACTUALLY SEEK A DECREE OF SPECIFIC PERFORMANCE AS TO THE JULY LETTER, BUT A DECREE REQUIRING DEFENDANTS TO EXECUTE INSTRUMENTS PREPARED BY LARSON'S COUNSEL, AS AMENDED BY COURT DECREE, AND THE COURT CANNOT MAKE A CONTRACT BETWEEN THE PARTIES.

Plaintiff repeatedly asserts that the July 25, 1963 letter is a complete and enforceable contract, but then asks the Court not to enforce the July 25 Letter, as such, but to order Defendants to execute instruments in the form of Appendix B to its Brief, which would require execution by Defendants of documents composed by the Court, not the parties to the transaction. It is difficult to understand Plaintiff's position in this regard. In the final analysis, the Plaintiffs now literally ask the Court to enforce a document, the material provisions of which they rejected in January and February of 1964 and which is, in fact, an instrument as to which the Court would supply the majority of the terms. To illustrate, the

Option and Mining Lease relating to unpatented claims (See Appendix B — Pgs. 2b to 29b of Plaintiff's Brief) contains a multitude of provisions which were not even discussed in the July Letter. The Option portions of these instruments contain not less than nine separate subjects. Of the total subjects discussed in the Options, only three were even remotely covered by the July Letter. The proposed Leases in Appendix B to Tosco's Brief cover no less than 20 different provisions, of which only six were specified in the July Letter. Further, of the six provisions specified in the July Letter, all of them have been amplified considerably to remove the ambiguities, defects and omissions inherent therein. This Court has consistently refused to supply missing elements of a contract in order to make a complete transaction for the parties involved. *Hargreaves v. Burton*, 59 Utah 575, 206 Pac. 262 (1922); see also *Pitcher v. Lauritzen*, 18 Utah 2d 368, 423 P.2d 491 (1967); *Price v. Lloyd*, 31 Utah 86, 86 Pac. 767 (1906).

The absurdity of Tosco's present offer (Tosco Brief, p. 19) to execute an option and lease in the form of Appendix B to its Brief, becomes obvious by an analysis of the documents prepared by Tweedy in February of 1964 (Pl's Ex. 17 & 18) which graphically demonstrates Tosco's complete rejection of the July Letter and the attempts of Larson to finalize the parties transaction.

ANALYSIS OF PLAINTIFF'S EXHIBITS 17 and 18

Tweedy prepared two separate sets of instru-

ments about February 11, 1964. The instruments were introduced in evidence by Tosco and identified as Plaintiff's Exhibits 17 and 18. One set of instruments (Pl's. Ex. 17) related to the Larson patented lands and consisted of an "Option" to which was attached and incorporated, as Exhibit "A," an instrument to be executed upon exercise of the option to lease. Exhibit "A" was entitled, "Mining Lease and Option to Purchase." The other set of instruments (Pl's. Ex. 18) also consisted of an Option with the Mining Lease and Option to Purchase attached and incorporated as Exhibit "A." Since this section relates primarily to a discussion of Plaintiff's Exhibits 17 and 18, the options to lease will be referred to in this paragraph as "Option" or "Options" and the leases attached as Exhibits "A" will be referred to as "Lease" or "Leases." These Options and Leases were the drafts which Tweedy discussed with Larson in California about February 15, 1964. (TR-1 p. 138 L-25-30; p. 139 L 1.)

Tosco would have the Court believe that the Options and Leases which were presented to Larson for consideration on or about February 15, 1964, embodied those few definite understandings which were related in the July Letter. (Tosco Brief, Page 14, first paragraph.) However, analysis of those instruments discloses a complete departure from the July Letter in certain respects. To illustrate:

A. The July Letter (Pg. 2—July 25 portion) provides:

If it elects to lease, it will, at the time of the election, deliver to Fred V. Larson and Ethel B. Larson, his wife, 2500 shares of its authorized, but unissued, common stock and simultaneously deliver to Frederick H. Larson and Dorothy H. Larson, his wife, 2500 shares of its authorized but unissued, common stock . . .

The Options and Leases deprived Defendants of said shares.

B. The July Letter (Pg. 2, July 25 portion thereof) provides for payment of delay rental of \$10,000.000 per year for the unpatented claims. The Option and Lease (Pl's. Ex. 18) relating to unpatented claims also deprives Defendants of this payment.

C. The July Letter, (Pg. 2—July 25 portion) provides that "Tosco will have the right to drop any of the unpatented claims which it deems to be unpatentable or uneconomical, but the shareholders shall have the right to attempt to carry to patent any claims so dropped by Tosco," but the July Letter makes no provision for any reduction of the \$10,000.00 rental payment if claims are relinquished. However, the Option and Lease (Pl's. Ex. 17) which relate to the unpatented claims, contain a provision for ratable reduction of the annual delay rental payment of \$10,000.00, if any of the unpatented claims are relinquished by Tosco. (See Paragraph 3.2.4 — Lease.)

D. The July Letter is silent as to warranties

or representations concerning Defendants' title to the Larson lands. Yet, the Options and Leases would have required the Defendants to give complete and unrestricted representations and warranties as to the validity of their title. (See Paragraph 9 of Options and Paragraphs 18 and 19 of the Leases.) Further, in Paragraph 19.2 of the Option and Lease relating to the unpatented areas, Tweedy would have required the Defendants to execute a completely erroneous and untrue statement, i.e.:

19.2 Patent applications have been prepared in proper form, executed by the proper parties and filed with the appropriate agency of the Department of Interior of the United States of America in connection with the claims listed in Schedule 1 of Exhibit "A."

E. The July Letter is completely devoid of any provision as to the form of conveyance to be utilized by Defendants in the event Tosco elected to exercise the purchase option contemplated by Paragraph 7 of the July Letter. However, the Options and Leases would have the Defendants convey the patented properties by a general warranty deed (Paragraph 17—Lease—Pl's. Ex. 17) and the unpatented claims by special warranty deed. (Paragraph 18.3—Lease—Pl's. Ex. 18.)

F. The July Letter does not exempt Tosco from obligation to produce minerals from the Larson lands in the event it exercised its option to lease. The Leases, however, contain the following provision:

15. *Obligation to Produce* — No statement contained in this Lease shall be construed by implication or otherwise to obligate Lessee to mine or produce any shale oil or other metal or metalliferous substances from the Leased Lands during the term hereof or any extensions or renewals.

This is particularly onerous, when coupled with the 40 year lease terms which Tosco would have required as a condition to execution of the formal agreements. (Leases — Paragraphs 2.) (TR-1 Pg. 130 L 8-10.)

G. The Leases would require the Defendants to submit their lands to Tosco for a period of 40 years “and as long thereafter as Lease Minerals can be produced from the Leased Lands, or any part thereof, in commercial quantities.” (Leases — Paragraphs 2.) The July Letter contains no provision for the term of the mineral lease which would be effective upon the exercise of its option by Tosco. If this case did not involve such serious subjects, the prospects of Tosco’s insistence upon a 40 year lease term, its withdrawal of the \$10,000.00 annual delay rental provision and its exemption of any obligation to develop or produce, might provide some amusing speculation as to the plight of the Defendants.

H. The July 25 Letter has no provision concerning abstracts or other title data. However, Paragraph 3 of the Options would require the Defendants to obtain and deliver to Tosco, without compensation, currently certified abstracts of title, covering all the Larson lands which were the subject matter of the

Options. (See Paragraph 3 — Options.) In addition, Paragraph 3 of the Options would compel the Defendants to deliver to Tosco, without compensation, all title data, engineering reports and data, patent applications and other documents.

I. The July Letter has no provision remotely suggesting a so-called "Lesser Interest" clause. However, the Leases provide (Paragraph 10) that if the Lessor [Defendants] owns less than the entire and undivided *fee estate* in the Leased Claims, a proportionate reduction would be made in *all* payments otherwise due the Defendants under such Leases. Insertion of the Lesser Interest clause in the Lease relating to the unpatented claims (since it relates to the "entire and undivided fee estate") would have the effect of nullifying any payments otherwise due the Defendants under the Lease, at least until the claims were patented.

J. In addition to the omissions and conflicts discussed above, the Leases contained numerous other provisions which were not specified in the July Letter.

Larson's rejection of the Tweedy drafts of February 11, 1964 (Plaintiff's Exhibits 17 and 18) is the act which Tosco relied upon to accuse him of repudiating the transaction. (TR-1 Pg. 144 L 13-28.) It becomes readily apparent that he was given no choice, but to reject the documents offered.

Tosco will undoubtedly argue that several provi-

sions in the Options and Leases were taken directly from instruments prepared by Larson's counsel in December of 1963 (Plaintiff's Exhibits 4 & 5). In part, this is a correct statement. However, it must be kept in mind that Plaintiff's Exhibits 4 and 5 were prepared by Larson and his counsel in an attempt to successfully conclude the transaction contemplated by the July Letter and supplemental oral agreements and to offer Tosco a formal agreement which it would exercise with possibly minor changes.

A vital element to be considered in consideration of this dispute is the fact that Tosco, at least until it filed its Brief with the Court, had never offered to execute any instrument which embodied the material provisions of the July Letter (TR-1 Pg. 144 L 13-18).

II. DEFENDANTS' RESPONSE TO TOSCO'S ARGUMENT C.

THE TRIAL COURT'S CONCLUSIONS 4 AND 5 AND FINDINGS 4, 5 & 7 ARE SUPPORTED BY THE EVIDENCE.

Tosco contends that the Trial Court erred in reaching Conclusions of Law numbered 4 and 5 and Findings of Fact numbered 4, 5 and 7, because the evidence does not justify such conclusions and findings. Conclusions of Law numbered 4 and 5 are:

4. Having permitted the option period to expire, the Plaintiff is not now entitled to an order of this Court adjudging that Plaintiff is entitled to an additional six months option covering the Larson lands.

5. Judgment should be entered herein dismissing the Complaint with prejudice and providing that Defendants are entitled to recover their costs of suit incurred therein.

Tosco also asserts that Findings of Fact numbered 4 and 5 are contrary to the plain language of the July Letter. Finding No. 4 is:

4. When they executed Plaintiff's Exhibit 2, the parties intended to prepare and execute formal instruments expressing the complete and entire transaction which they contemplated. Plaintiff agreed to prepare such formal instruments and submit them to the Defendants for their consideration.

Finding No. 4 is supported by the evidence and is not contrary to the language of the July Letter. An examination of the July Letter dispenses with Tosco's position in this regard. The letter states that its purpose is:

. . . to state the intention of Tosco and the shareholders of Larson Oil Co., *as modified on July 24, to hereafter enter into contracts and agreements giving expression to those understandings as they pertain to the holdings of Larson Oil Co.* (Emphasis supplied.) (See Page 1 of the July Letter.)

The last paragraph of the July Letter provides:

I have asked our attorneys to commence the drafting of the necessary documents to *carry out these understandings and reduce them to formal agreements and would appreciate your prompt reply.* (Emphasis supplied.)

Further, Finding No. 4 is unequivocally supported

by testimony of Mr. Koolsbergen, Tosco's president, who said, "There was no agreement as to term, because that was supposed to be negotiated in the option agreement and subsequently," (TR-1 Pg. 83 L 29-30) and by its attorney, Mr. Tweedy, who testified, "The memorandum of July 25 [July Letter] provided an agreement between the parties as to what the *option might contain*, but further provided that *drafts would be prepared setting forth the terms and transaction.*" (TR-1 Pg. 114 L 4-8.) (Emphasis supplied.)

Tosco argues that its commitment to prepare drafts setting forth the understandings embodied in the July Letter was not an agreement to do anything. This position is so incredible that it does not deserve comment.

As to its Finding No. 5, the Court could hardly have found otherwise. Finding No. 5 is:

5. Contrary to the terms of Plaintiff's Exhibit 2, Plaintiff did not prepare formal instruments expressing the transaction contemplated by the parties. In fact, at no time subsequent to July 25, 1963, did Plaintiff prepare, offer to prepare, or offer to execute any instrument which complied with Plaintiff's Exhibit 2.

1. The testimony of the same Tosco witnesses, Mr. Koolsbergen and Mr. Tweedy, supports the Trial Court. During cross-examination, Mr. Koolsbergen testified:

Q. Are you aware that Mr. Tweedy's draft arrived in my office on the 22nd of July?

- A. No, I am not aware of it. I would not be surprised if that was the case.
- Q. Now what other drafts did Mr. Tweedy prepare, what other drafts did he prepare in response to your instruction?
- A. I can't state for Mr. Tweedy's, so far as I know, none. (TR-1 Pg. 86 L 15-23.)
- Q. But there was no question, was there Mr. Koolsbergen, that it was Tosco's attorneys who were going to prepare the drafts?
- A. I don't think so, I think it was Tosco's attorneys and Larson's attorneys.
- Q. Well, I want to know from you, Mr. Koolsbergen, whether or not after July 25, 1963, Tosco's attorney prepared any drafts at all.
- A. So far as I know, they didn't, but that is my knowledge. (TR-1 Pg. 87 L 9-19.)

Mr. Tweedy, in response to questions propounded by Defendants' counsel, testified:

- Q. But you do agree, Mr. Tweedy, the draft that you mailed to me, which bears your office stamp of July 18, 1963, was not in compliance with the memorandums of July 25, 1963? [July Letter]
- A. No, Mr. Koolsbergen said that he had instructed his attorney to submit drafts. It was his understanding, and it was my understanding, that he was referring to the documents that had been transmitted to you for the purposes of initiating this particular transaction.

Q. That is not answering my question.

THE COURT: It was his understanding, or your understanding?

A. It was my understanding.

Q. (By Mr. Dufford) My question was, did the draft that bears your date of July 18, 1963, did it comply with the terms and conditions of the memorandum of July 25, 1963? [July Letter]

MR. ASHTON: If the Court please, I don't see how it could. This agreement of July 25 had not yet come into existence.

MR. DUFFORD: I will withdraw the question.

Q. (By Mr. Dufford) Did you ever submit a draft, Mr. Tweedy, to either Mr. Larson or to me, which complied with the memorandum of July 25, 1963? [July Letter]

A. No, I had submitted my draft prior to that time.

Q. Did you have something to add?

A. Until I submitted drafts in February in response to your drafts. (TR-1 Pg. 143 L. 1-27).

Q. When did The Oil Shale Corporation, to your knowledge, ever tender an instrument to the Larsons for signature, that incorporated the terms of the July 25, 1963 agreement? [July Letter]

A. I don't think it ever did expressly incorporate all of those terms. (TR-1 Pg. 144 L 13-20.)

Tosco maintains that Finding No. 7 is not supported by the evidence. In its argument to sustain its position, Tosco ignores the testimony of Larson, who testified that he told Mr. Tweedy, in January of 1964, the Tosco option had expired and that Defendants did not intend to discuss any further deal unless and until they had been paid the \$20,000.00 consideration for the option which had expired. (TR-1 Pg. 28 L 11-25.) Although Tweedy and Koolsbergen offered conflicting testimony, Larson's statement is corroborated by:

(i) payment of \$20,000.00 by Tosco with four separate checks (Pl's. Ex. 7) each bearing a notation showing issuance for *options granted*, (Pl's. Ex. 7),

(ii) the written memorandum (Defs'. Ex. 19) of March 23, 1964, by another attorney representing Tosco, i.e., Mr. Winston wherein it was stated, "Fred Larson and I met this morning in Washington to discuss the possibilities of compromising the differences which have arisen between Larson and The Oil Shale Corporation concerning their respective rights under the option agreement dated *July 15, 1963 . . .*" (at Page 1), and

(iii) the term of Larson's employment agreement with Tosco, although not stated in the July Letter, was verbally agreed between the parties to commence on July 15, 1963 and end one year later on July 15, 1964, and was performed on that understanding. (TR-1 Pg. 72 L 18-25.) (Emphasis supplied.) According to Tosco, there was no testimony indi-

cating its recognition that the payment of \$20,000.00 was the result of an oral understanding (Plaintiff's Brief Pg. 41). However, Tosco overlooks the following portions of the record:

1. The four checks (Pl's. Ex. 7) issued by Tosco to Defendants, bearing notations as to options granted:

2. Larson's testimony concerning payment of the \$20,000.00, including his refusal to talk about any other deal until the payment had been made. (TR-1 Pg. 28 L 11-25.)

3. Payment by Tosco of \$20,000.00 in response to Larson's demand.

4. Tosco's acquiescence in Larson's repeated warnings that the Tosco option expired on January 15, 1964. (Pl's. Ex. 3 and Defs'. Exs. 20 & 21) (TR-1 Pg. 196 L 15-30, Pg. 197 & Pg. 198 L 1-10.)

5. The telephone request by Lenhardt, Tosco's executive vice-president, requesting an extension of the option period and the payment of \$20,000.00 following Larson's refusal to extend the term. (TR-1 Pg. 198 L 14-30.)

The Trial Court's Finding No. 7 is further supported by the memorandums (Pl's. Ex. 3 and Defs'. Exs. 20 & 21) written by Larson to Mr. Koolsbergen. Each of these memorandums clearly indicate to Tosco that its option concerning the Larson lands would expire on January 15, 1964. Also, Larson orally advised Tosco on several occasions that the option would expire on January 15, 1964. (TR-1 Pg. 196 L 15-30,

Pg. 197 and Pg. 198 L 1-10.) Although maintaining that it did not agree to the period of the option as stated by Larson, it is strange that no one employed by or associated with Tosco refuted the Defendants' position as to the option period, until after the option had expired on January 15, 1964. It is highly significant that the payment of \$20,000.00 was made to the Defendants by four checks, mailed with no transmittal letter setting forth the conditions (if, in fact, any such conditions existed as testified by Tosco's witnesses) under which such payment was made. It is difficult to believe that practices of this nature could be attributed to a large public corporation whose affairs were directed by individuals having the business experience of Messrs. Koolsbergen and Tweedy.

Perhaps the most astonishing positions taken by Tosco, however, relate to the circumstances under which the \$20,000.00 was paid and the conduct of their Executive Vice-President, Lenhardt.

Tosco contends that the \$20,000.00 was paid based upon Larson's assurance to Tweedy that documents would be executed (TR-1 p. 148 at L. 8-20) if Tweedy and Larson's counsel could resolve certain differences which then existed between Tosco and Defendants.

Tosco is obviously a large corporation, and its president has an impressive background. (TR-1 pgs. 63, 64 & 65). He does not allow the corporation to

spend substantial sums for title and property examinations unless formal documents have been signed (TR. 1. p. 71 L. 24-30), but he asks the Court to believe that he would authorize payment of \$20,000 without execution of formal documents and upon, as he and Tweedy testified (TR 1 p. 148 L. 23-28; p. 100, L. 17-20), the strength of a nebulous promise by Larson to sign documents still to be negotiated. Yet the checks issued to Defendants recited they were for options granted, (Pl's. Ex. 7).

Tosco had legal representation throughout this transaction by both Winston and Tweedy, their experienced and capable counsel.

It is therefore inconceivable that Tosco paid \$20,000.00 upon Larson's unqualified assurance that the Defendants would execute something to be negotiated and just as inconceivable that Tosco could, under such odd circumstances, pay \$20,000.00 to Defendants without a letter of Transmittal or some other writing specifying in detail the conditions under which payment was made, or by requesting Defendants' written confirmation of such conditions prior to payment. Logic compels the conclusion, after consideration of all circumstances which surround payment of the \$20,000.00, that Larson demanded payment of the \$20,000.00 as a debt which Defendants believed was due and payable. Tosco obviously agreed and paid with full knowledge of Defendants' position. Conversely, one would be forced to ignore the dictates of credibility to believe that Larson knew

and agreed, as Tosco contends, that Defendants' acceptance of the \$20,000.00 would create an obligation on the part of Defendants to sign some form of document which would provide Tosco with a future six-month option to lease the Larson lands. The Trial Court resolved these discrepancies in favor of Defendants.

At this point, it is interesting to observe that even at this late date, Tosco does not ask the Court for enforcement of a mining lease, but, rather an additional six months option, during which time it would have the right to lease the Larson lands upon exercise of the option. Even by giving full weight to all of Tosco's testimony, there is nothing in the record of this case even remotely suggesting that Tosco paid \$20,000.00 upon Larson's promise to give Tosco a further and additional six months option. (TR-1 p's. 121, 126, 147 & 148; p. 100 L 17-20.)

Compare the position of Tosco to the actions of their executive vice-president, Lenhardt. Lenhardt was the author of the July 11 portion of the July Letter, and served as executive vice president of Tosco. Lenhardt called Larson in January 1964 requesting an extension of the option period, and when Larson denied the request, assured Larson that Tosco would pay the \$20,000.00 due as soon as the necessary funds could be obtained (TR-1 p. 199 L 1-6). To explain these actions, Tosco attempts to point out three times in its brief that Lenhardt had allegedly no knowledge or participation in the Larson transac-

tion after July 11 and until his phone call to Larson. (Tosco Brief, p. 6, 10 and 27). This is the executive vice president of the company who officed with Larson in Beverly Hills, California subsequent to July 15, 1963. (TR-1 p. 198 L. 8-18). This is the executive vice president who called Larson from New York, where Koolsbergen officed. (TR-1 p. 198, L. 14-30). This is the executive vice-president of a company who considered the Larson transaction sufficiently important to involve two attorneys, Winston and Tweedy, and to directly involve the company president. This was a transaction involving 31,000 acres of land, and one which the executive vice president felt obligated to request an extension for, without allegedly conferring with either the company president or company counsel. This position is consistent with the strained interpretation of all facts of this case taken by Tosco throughout its Brief.

III. DEFENDANTS' RESPONSE TO TOSCO'S ARGUMENT D

A. TOSCO IS NOT ENTITLED TO A NEW TRIAL.

Tosco opines that it should be granted a new trial on the grounds that the Trial Court's Findings and Conclusions constituted "surprise." However, it is a foregone conclusion in any contested proceeding that one of the litigants must be "surprised" at the result. While Tosco may be entitled to some compassion as the unsuccessful party, its disagreement with the Trial Court's ruling does not entitle Tosco to a

new trial. Indeed, if "surprise" is justification for a new trial, any litigant who diligently avoids adequate trial preparation can be guaranteed surprise when the trial judge's decision is known.

Tosco's basis for its accusation of surprise appears to arise out of the Defendants' reluctance to accept, without question, the Plaintiff's assertion that the July Letter, of and by itself, is a complete and definite agreement which can be specifically enforced.

Assuming, only for purposes of argument, that Tosco's surprise theory is entitled to the Court's consideration, the Defendants' reluctance to accept Plaintiff's position with respect to the July Letter could hardly have come as a surprise to Plaintiff. This case was initiated by Tosco in October of 1964. The Defendants filed their Answer, which clearly indicated Plaintiff's position, i.e., that the transaction between Tosco and Defendants was expressed by the July Letter and other oral understandings which were not specified in the July Letter. Again, at the commencement of the trial in Provo, Utah on June 22, 1966, Mr. Ashton, one of the attorneys for Plaintiff, made the following remarks concerning the Defendants' position:

It was indicated, I think, at the first go around in chambers, that the Defendants apparently are relying on some kind of an oral agreement. We [Plaintiff] are relying on a written agreement which was dated July 25 . . . (TR-1, Pg. 5 L 5-10.)

The Defendants' position has always been that the transaction between the parties was expressed by the July Letter and the oral understandings that:

(a) Tosco's option to lease would commence on July 15, 1963 and terminate on January 15, 1964, during which period the Defendants would not negotiate or contract with other parties for the sale or lease of their lands,

(b) Larson's employment c o n t r a c t would be for a period of one year, commencing July 15, 1963 and

(c) Other essential and material provisions contemplated by the parties would be negotiated and resolved subsequent to July 25, 1963. (See Paragraph 1 of Defendants' First Affirmative Defense.)

Further, it has always been Defendants' position that the transaction expressed by the July Letter and the oral understandings did not, as of July 25, 1963, constitute a complete and definite agreement which was capable of being specifically enforced. (Defs'. Trial Memorandum, Pg. 14.)

Defendants maintained in their Trial Memorandum, filed with the Trial Court (also part of the record on appeal) that the actions of the parties from July 15, 1963 to January 15, 1964 created a situation under which Tosco had the benefit of an exclusive option on the Larson lands, which they failed to exercise and permitted to expire. (Defs'. Trial Memorandum, Pg. 14.)

It is significant that Tosco cites only one case

(*Nichols v. Whitacre*, 12 Mo. App. 692, 87 S.W. 594) in support of its position that Defendants' so-called change of theory misled Tosco and caused it to change its trial procedures. However, *Nichols* involved a jury and the improper instruction was not consistent with the evidence. Certainly one can appreciate the havoc which might result from granting of an improper instruction to the jury, which changed the entire tenor of a case before it. Similar situations are not encountered in a trial to the Court. Tosco forgets that it, not Defendants, dictated the tenor of this case. Therefore, it is incredible that the Plaintiff would allow statements by Defendants' counsel or their witnesses, to change the manner of their presentation or their theory of the case. Is it logical to believe that Tosco instantly changed its *modus operandi* upon hearing remarks of Defendants' counsel at the commencement of trial? To arrive at the proper answer here, one need only look at Tosco's Reply to the Defendant's Trial Memorandum and note that Tosco's alleged disadvantage, created by the so-called change of theory, was not a matter of concern until the Trial Court first decided this case in favor of Defendants, even though Defendant's position was specifically stated in their Trial Memorandum, at Pages 14 and 15 thereof.

B. PLAINTIFF IS NOT ENTITLED TO RESTITUTION.

In Section D of its Brief, Plaintiff contends that if the Court does not decree specific performance of the July Letter, then the Court must order the De-

fendants to return the \$20,000.00 they have received.

It is Defendants' position that there is no basis for restitution in this case, because the Trial Court found that the July Letter, and oral understandings of the parties and their actions and conduct created an agreement whereby Tosco had the advantage of an option on the Defendants' lands from July 15, 1963 to January 15, 1964, which option was permitted to expire by Tosco and for which it paid \$20,000.00 as consideration. (See Trial Court Findings 3, 6 and 7).

This involves a situation where Tosco chose not to acquire the Larson lands on the basis of the July Letter, as supplemented by the oral understandings of the parties. Obviously it wanted to reduce the cost of its acquisition of the Larson lands, but when that course of action proved unsuccessful, it then took the position that it had been wrongfully induced to pay \$20,000.00 to Defendants on the strength of Larson's assurance that Defendants would execute *some kind of document*, the contents of which were still to be negotiated. It is particularly significant that there was absolutely no behavior or statements on the part of Tosco's representatives which refuted Larson's testimony, until after the expiration of the Tosco option on January 15, 1964. Conversely, every memorandum and all of Larson's activities during the period from July 15, 1963 to January 15, 1964, corroborate Larson's testimony.

The Court's Findings were based upon evidence,

both oral and documentary, in which it accepted Larson's testimony over that of Tosco's witnesses, Tweedy and Koolsbergen. This conflicting testimony, was determined by the Trial Court in favor of the Defendants after a long and careful review of the record in this case. Those findings, being supported by the record, should be upheld by this Court.

Having paid for a six months option which it had on the Larson Lands and having ignored and rejected Larson's attempts to bring the transaction to the point of execution of formal agreements, Tosco is not entitled to now claim that its \$20,000.00 payment should be reimbursed.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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