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# Sherman Jones et al v. Alvie L. Thorvaldson et al : Brief of Respondents

Utah Supreme Court


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# In the Supreme Court of the State of Utah

SHERMAN JONES, MERLE JONES, BRYANT JONES and LARAINE JONES,
Plaintiffs and Appellants,

vs.

ALVIE L. THORVALDSON, E. NOREEN THORVALDSON, MERRILL OLDROYD and O. THAYNE ACORD,
Defendants and Respondents.

CASE NO. 10043

# RESPONDENTS' BRIEF

Appeal from Judgment of the Fourth District Court
of Utah County
Hon. Maurice Harding, Judge

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### STATEMENT OF THE KIND OF CASE

This is an action commenced by Plaintiffs, lessees, for declaratory interpretation of a document upon which part of a lease agreement was founded and a counterclaim by the lessors for termination of the said lease agreement for failure of consideration and for breach of contract. The defendants, in the alternative, cross-claimed against defendants Oldroyd and Acord for damages.

### DISPOSITION IN LOWER COURT

The case was tried to the Court. The Trial Court declared the disputed document a revokable license and dismissed the Defendants' cross-claims against Oldroyd and

Acord. The Court determined that the Plaintiffs had by their conduct forfeited the lease. From this judgment the Plaintiff appeals.

## RELIEF SOUGHT ON APPEAL

Defendants seek affirmance of the judgment of the Trial Court and additional award of attorneys fees.

## STATEMENT OF FACTS

The Respondent feels it is essential to restate the facts in their brief in order that the Court may have a more complete picture of the sequences and background to this particular litigation. Prior to December 11, 1957, the Defendants, Thorvaldson, owned and operated a gravel and sand deposit in the southern end of Utah County between the city of Spring Lake and Santaquin. The sand and gravel deposits were located on the side of the mountain southeast of U S. Highway 91, and the property itself fronted on U. S. Highway 91. It was an irregular piece, containing approximately 40 acres of land. In addition to this property, the Thorvaldsons occupied and operated a gravel pit owned by Merrill Oldroyd, under an oral agreement to do so. This gravel pit is known as the Oldroyd or Acord gravel pit in the present litigation and transcript.

Prior to December 11, 1957, the plaintiffs and defendants, Thorvaldson, negotiated for the sale of the defendants' ready-mix concrete business and the leasing of the property from which the sand and gravel was extracted. The plaintiffs were represented by Elden Elliason, their attorney, and the defendants, Thorvaldson, were represented by Allen L. Hodgson.

In order to make the lease from Thorvaldsons to Jones, it was necessary for a written document to be obtained, specifying the right that Thorvaldson had of the Oldroyd property. For this reason, Mr. Hodgson drew an agreement dated December 9, 1957 entitled "Consent and Agreement", and which was attached as Exhibit B to the plaintiff's petition for declaratory judgment herein. This agreement, together with the property owned by Thorvaldsons was leased to the Jones under a document entitled "Contract Assignment and Lease Agreement". Mr. Elliason drew the said agreement and at a later date, in his office,, Mr. Hodgson approved its form for the defendants, Thorvaldson. This portion of the trial has not been transcribed, but in the opinion of the Respondent, it is essential for an understanding of the issues herein.

During the year 1958 and prior to December 8, 1858, the Jones and Thorvaldsons had many disagreements concerning the operation of the property and their obligations under the agreement. They finally resorted to litigation and on December 8, 1958, a complaint was filed by Alvie L. Thorvaldson and E. Noreen Thorvaldson against the Jones. At this time, Mr. Hodgson represented the Thorvaldsons and suit was brought to evict the defendants for breach of contract. This case was filed as Civil No. 21419 in the District Court of Utah County, State of Utah. This was a complicated proceeding and numerous amendments were made and numerous counter-claims were filed; however, eventually a counter-claim was filed, wherein the lease was requested to be reformed in order to properly describe the property which the defendants in that action

claimed they had leased by adding to the description an additional thirty acres.

In that particular case, the plaintiffs raised the question of illusory consideration or failure of consideration claiming that under the lease agreement, the Jones had no requirements to take any certain quantity or any quantity at all of sand and gravel from the properties leased. At that time, they, the Jones, were hauling sand and gravel on to the property leased and manufacturing the concrete and selling sand and gravel to others and not paying Thorvaldson any compensation for such conduct. A perusal of the lease will show that the only compensation to be paid Thorvaldson is 25c a yard for sand, gravel and topsoil mined, and 1c a yard for fill dirt removed from the premises. The court reformed the contract, adding the additional property requested by defendants, but requiring the defendants, Jones, to pay 25c a yard for all materials "processed on" the property. It was the interpretation and contemplation of the court that the Jones would continue their operation on the property and that if the words "processed on" were interpreted as being in the agreement or was impliedly part of the agreement, that the lease would then not be defective (R. 115). In fact, in that case, counsel for the defendants, Mr. Young wrote a brief, wherein he agreed with the court as follows:

> "We agree that if the lease merely permitted the lessees to hold the premises and sell no sand, gravel and topsoil, it would be invalid." (R. 112)

On that basis, the court, in its findings of fact and decree, stated:

"Defendants are ordered to pay a royalty of 25c per cubic yard for all topsoil, sand and gravel processed on or produced from the premises leased by the plaintiffs to defendants and disposed upon the market."

The word "on" was added so that the lease read "processed on or produced from." This made the lease valid and meaningful provided the Joneses intended to obtain their material from the Thorvaldson property.

Subsequent to the decree of the court, the Jones people moved their operation to property adjacent to that leased. They purchased five acres of land, sufficient for the operation of the concrete batch plant, and commenced operation, doing the same thing that they had done before on the operation of the Thorvaldson property, but since the plant was now operated on their own property immediately adjacent to Thorvaldson property, they paid nothing and have paid nothing to the Thorvaldsons for sand and gravel "processed" on their own property which did not come from the Thorvaldson pits. Mr. Jones, in his testimony, stated as follows:

Q. Mr. Jones, I want to read to you from your deposition — first of all, I'll ask you if you didn't testify under oath on the 29th day of October, 1962, did you?

A. That's right.

Q. Now, I will call your attention to page 21, line 28, and read these questions and answers from the deposition as follows:

"At the time of the last court hearing, were you manufacturing concrete on his property?

A. No, I don't believe — yes, we were manufacturing it on his property.

Q. Since then you have moved your batch plant to your own property?

A. Yes, that is right.

Q. Now, you manufacture only on your property, is that right?

A. Yes.

Q. You don't pay any royalty on that material you process and manufacture on your own property?

A. Only that that we remove from his property.

Q. Only that which you obtain from the property which you leased from Mr. Thorvaldson?

A. Right.

Q. Do you have any requirement to take any material from Mr. Thorvaldson's property?

A. You mean a determined amount?

Q. Yes.

A. No, there is no determined amount.

Q. You can take what you need?

A. That is right."

Now, this was your testimony, wasn't it?

A. That's right.

(R. 316, Line 5 to R. 317, Line 8)

In the spring of 1962, Mr. Oldroyd sold a great quantity of his property to Mr. Thayne Acord, and included within the sale was the property that had been used by Thorvaldson and the Jones under the agreement called "Contract Assignment and Lease Agreement". The Jones' arranged with Mr. Acord to pay Acord for the gravel removed from this property, the sum of 10c a yard as dis-

tinguished from the 25c they had been paying Thorvaldson for the same material. Thorvaldsons told Jones, Acord and Oldroyd that they would not recognize such contract and required that Jones pay them for the material mined from the Oldroyd property. Furthermore, there had been a series of breaches of contracts by the Jones people and on the 24th day of August, 1962, the defendants in this case, Thorvaldson, served upon the plaintiffs, Jones, in this case, a notice to quit (R. 27), specifying eight breaches of contract and requiring that said breaches be remedied and the said defaults be paid within five days from the date of service or an action would be brought for treble damages and for possession of the property. No performance was received to this notice except that on August 29, 1962, the Jones filed with the Fourth District Court a petition for declaratory judgment requesting that the Court interpret the document entitled "Consent and Agreement", which had been prepared by Mr. Hodgson. Mr. Hodgson, at this time, represented the plaintiffs, Jones.

Thorvaldson filed an answer, counter-claim and cross-claim against Merrill Oldroyd and Thayne Acord so that the respective rights of the parties could be litigated in one proceeding.

In the counter-claim, the defendants alleged action in unlawful detainer, that the Contract Assignment and Lease Agreement was void because it was inocmplete, indefinite and too uncertain for enforcement, that there was mutual mistake on the part of the parties as to twelve conditions that must have been considered by the parties, that there was a complete lack of consideration because of lack of mutuality of obligation, that in the alternative, the con-

tract should be reformed to conform with the true intent of the parties. Then the cross-complaint was filed against Oldroyd for damages. Denials were filed and upon these issues, the matter went to trial.

The court concluded that the agreement between Thorvaldson and Oldroyd was a revokable licence and that Oldroyd had elected to revoke the same, thereby reducing the property in which Thorvaldson had a right of royalty. This decision eliminated Oldroyd and Acord from the litigation.

The litigation then went forward on the defendants' counter-claim and the plaintiffs' answer. The court, in its memorandum decision (R. 65) and in the findings of fact (R. 67) found that the plaintiffs had violated their lease with Thorvaldson in the following particulars:

A. Failed to remove overburden on the sand and gravel pit on the leased premises.

B. Failed to make sales slips for materials sold reasonably soon after sale and delivery of materials to customers.

C. Removal and stockpiling of sand and gravel from the leased premises off the premises without accounting therefor.

D. Abandonment of the business of selling sand and gravel on the leased premises.

E. Removal of the business formally conducted from the leased premises.

E. Failure to account for sand and gravel removed from the premises and for which payment has not been made.

On the basis above stated, the court found that the plaintiffs had forfeited the lease and that defendants had elected and have heretofore declared the forfeiture as provided for in the lease. The court also found that the defendants were entitled to one thousand dollars for attorney's fees and the defendants, Thorvaldson, were directed to prepare the findings of fact.

During the course of the trial, the Plaintiffs, Jones, associated with Mr. Hodgson, Dave McMullin as co-attorney. After the findings of fact, judgment and decree were entered, Mr. Hodgson withdrew, and Mr. Dallas H. Young was associated as counsel for the plaintiffs. Mr. Young and Mr. McMullin had appeared as counsel for Jones when they were defendants in the prior case. The case of Thorvaldson vs. Jones, Civil No. 21419, was called to the court's attention and the court took judicial knowledge of that case. That case has been forwarded to the Supreme Court as part of the transcript herein.

## ARGUMENT

### POINT I

THE COURT DID NOT ERR IN FINDING THAT THE CONSIDERATION FOR THE AGREEMENT ENTITLED CONTRACT ASSIGNMENT AND LEASE AGREEMENT WAS ILLUSORY UNDER THE CIRCUMSTANCES OF THIS CASE.

As we have stated in the statement of facts, it was contemplated by all of the parties at the time of the previous litigation that Jones would pay Thorvaldson a royalty of so much per ton for materials "produced and/or

processed" on the property. The language was not a part of the agreement, however, counsel for the plaintiffs in the previous litigation had insisted that this was the intent of the parties and the court had interpreted the contract on the previous litigation to read "processed on" rather than "processed from" in order to satisfy the requirement of mutuality of obligation. It was the position of the Jones in that case that there could be no lack of consideration if the contract were interpreted to require them to pay for material brought on the property and processed thereon. Without that language in the contract, the court would have forfeited the lease on the previous occasion for failure of consideration (R. 112). Both Mr. Young in the previous case and in his brief therein (R. 112) and Mr. Hodgson in the present case and in his brief therein ((R. 112) stated respectively as follows:

> "**Mr. Young:** 'May we call attention to the fact that is not a contract which gives the lessees the right to hold the premises and to sell no sand, gravel and topsoil. We concede that such a lease would be invalid."
>
> "**Mr. Hodgson:** 'We agree that if the lease merely permitted the lessees to hold the premises and to sell no sand, gravel and topsoil, it would be invalid."
>
> "**Mr. Young:** "It is true, as a general rule, that if it is wholly optional with one party to a bilateral agreement, whether he shall perform or not, there is no legal contract. The promise of that party in such a bargain is illusory, that is though in form a promise, it is so qualified that the promissor really engages himself for nothing and his illusory promise is insufficient consideration to support a counter promise. A promise to buy such quantity of goods as the buyer

> may thereafter order or to take goods in such quantities 'as may be desired', or as the buyer 'may want', is not sufficient consideration since the buyer may refrain from buying at his option and without incurring legal detriment himself or benefiting the other party. * * * Even a promise to buy or sell only as much as the promissor chooses is a sufficient consideration for a counter promise when coupled with the agreement that whatever the buyer or seller choose to buy or sell, he will buy or sell to the promisee.
> To put the matter another way—the promise of a seller not to manufacture except for the buyer or the promise of a buyer not to buy except from a particular seller is clearly a promise to do something detrimental." (Emphasis added)

In Mr. Young's brief, the Jones were arguing that their duty and obligation was to buy exclusively from the Thorvaldsons in order to overcome the argument that Thorvaldson made at that time that the promise was illusory. The court concluded that that was the fact and construed the contract to mean "processed on" as well as produced. The appellant now contends that they do not have to purchase from Thorvaldsons except quantities "as may be desired or as they "may want". This is the very antithesis of their prior position and was well known by the court in addressing Mr. Hodgson concerning the matter as quoted above. (R. 112, 113)

Both attorneys for the defendants, Jones, admit that the lease would be invalid, and yet, the very facts that they state would cause it to be invalid are present in this case. Testimony of Mr. Jones himself has been quoted in the statement of facts and he has stated categorically and unequivocably that they do not have any requirement to

take any material from the Thorvaldson property. That they can take what they want, or not take any, and yet are able to hold the property for forty years (R. 111, R. 317).

The chief complaint of the appellants herein is that they claim the court required the appellants to maintain a batch plant on the property, otherwise there was a forfeiture (Appellant's Brief P. 13). This was not the finding of the court nor the position argued by the Respondent. The court merely stated that they had to operate their business on the property whether that was the sale of sand and gravel or the operation of a batch plant or whatever it was, for it was the contemplation of the parties that the materials for the operation of the business of the Jones would be obtained from the property of Thorvaldson, otherwise Thorvaldson would get nothing for having leased his property to the Jones for forty years. There is no attempt to put specific language into the contract, but merely to interpret the contract according to its explicit intent.

The removal of the plant from the property of the Thorvaldsons was done deliberately to circumvent the judgment in the first case and to avoid the payment of royalties on materials manufactured from other sources, which constitute the great bulk of the business of the Joneses (R. 291). The Joneses are taking sand which also contains a sizeable quantity of gravel, by their own testimony (R. 291) and stockpiling it. When they are making concrete, and if they take material from the pile that they have stockpiled from the Thorvaldson pit, they pay Thorvaldson a royalty calculated on the basis of three-tenths of

the concrete sold, it being their theory that three-tenths is made up of sand, which is principally the material they get from Thorvaldson's pit, even though they admit that there is gravel in it. The balance, or seven-tenths, they assume is made up of gravel, the quantity of cement added being absorbed as shrinkage (R. 163). Under the methods used by the defendants, it is impossible to tell the quantities of sand and gravel utilized by the appellants that is owned by the Thorvaldsons. They merely estimate on the basis that sand of that approximate amount must be used with each cement batch; however, they cannot account for the amount of the gravel that is contained in the Thorvaldson material or the sand that is contained in the matrial received from other sources.

The appellant has cited numerous authorities with which we do not take serious exception except to say that they are not applicable to the particular issue before this court. For example, the appellant has cited 51 CJS 683 concerning the necessity for a foreclosure clause, but this provision only applies in respect to a situation where there is no provision in the lease or statute allowing termination of tenancy such as our unlawful detainer statute, Title 38, Chapter 36. In this case we have both contract and statutory provision. There is nothing mysterious about our rights for rescission in the event of illusory consideration or material breach. We call the court's attention to Williston on Contracts, Sec. 104, 104a and 105a and particularly to the language contained in those sections as follows:

> "And in any case where a promise in terms or in effect provides that the promissor has a right to choose

one or two alternatives, and by choosing one will escape without suffering a detriment or giving the other party a benefit, the promise is insufficient consideration."

See also, American Law Institute Restatement of the Law of Contrcts, Section 274 concerning failure of consideration as a discharge of duty; Section 275 of the same citation which concerns rules for determining materiality of a failure to perform; and Section 277, failure of consideration as a discharge of an existing right or of action. The American Law Institute Restatement of the Law of Contracts, Section 79 states as follows:

"A promise or apparent promise which reserves by its terms to the promissor the privilege of alternative courses of conduct is insufficient consideration if any of these courses of conduct would be insufficient consideration if it alone were bargained for." In its illustrations under Section 79, the restatement sets forth an example. 3. A offers to deliver B, at two dollars a bushel, as many bushels of wheat not exceeding 5,000 as B may choose to order within the next 30 days. B accepts, agreeing to buy at that price as much as he shall order of A within the specified time. B's acceptance involves no promise by him and is not sufficient consideration."

Compare that example with the situation here. Joneses have agreed to purchase from Thorvaldson sand, gravel and topsoil at the rate of 25c per yard and fill material at the rate of 1c per yard, in such amounts as they may choose to order, but they may not choose to order any. Under such circumstances, the Restatement says the consideration is illusory and unenforceable.

The Appellant in their argument spend numerous pages attempting to distinguish between covenants and conditions; however, we respectfully suggest that the distinction is not meritorious in this case for there are ample authorities that state under circumstances of this sort, the contract must fail. The concluding sentence that summarizes the position of the Appellant is that contained on page 19 of their brief wherein they state "This is not a contract where it was wholly optional with the Joneses whether they should perform or not." Then they quote Williston on Sales, Volume II, Section 464. We are in harmony with that rule therein stated. We would like the Appellant to tell use wherein the contract performance was not wholly optional with Jones. What was there in the contract that Thorvaldson could compel Jones to do? The answer to this question will tell the Court whether the consideration was real or imaginary. We believe that the only answer to the question is that the consideration was imaginary, unless the Joneses were willing to have the contract construed as requiring them to take all of their material from the property leased from Thorvaldson. Since they say that that was not their intent and since the contract itself is silent as to this subject and since their attorney, Mr. Elliason, drew that contract, we believe that it should be most strongly construed against the Jones' and the interpretation given to it necessarily means that there was no consideration.

In the case of Washington Chocolate Co. vs. Canterbury Candy Makers, Inc., 138 Pac. 2d, 195, there was a contract drawn between the parties wherein the Canterbury Candy Makers agreed to purchase from the Washing-

ton Chocolate Co. "all chocolate used by it at current price for chocolate at Seattle, Washington, and the same shall be paid for by the candy company in the ordinary course of business." The issue in that case was whether or not there was a lack of mutuality because of the indefiniteness of the contract. The court held that the consideration was illusory and unenforceable and declared the contract null and void.

It is a common rule of law in mineral development cases to require, by implication, that the Lessee utilize and develop the property to its fullest extent; otherwise, the consideration for the contract fails. Cases in support of this proposition are found in 76 ALR 2d commencing with page 710.

In the case of Darr v. Eldridge, 66 New Mexico 260, 346 Pac. 2d 1071, an action was brought to cancel a lease between the Lessors and the Assignee of the Lessee. It appears that the premises were leased for the development of a mineral water on the basis of a royalty of $100 per month for the first six months and thereafter a royalty on the basis of 5c per gallon for the first 4,000 gallons taken from the well each month. A dispute arose as to the amount of royalties to be paid for the mineral water used by the Lessees for the sale of vapor baths. After the litigation which was in favor of the Lessor, the Lessee abandoned the well and used city water supplemented with dry minerals. This practice was continued by the Assignee. The court held that under such circumstances the Lessee and his Assignee were bound by an implied covenant to use reasonable diligence in marketing the mineral water, and that for breach thereof, cancellation of

the lease was the appropriate remedy. The court stated that there were two propositions, to-wit: 1. "Lessors urge that the Lessee of the mineral well and his Assignee were bound by an implied covenant to use reasonable diligence in marketing the mineral wate. We agree." 2. "Assuming for the moment that the implied covenant was breached, the question arises whether cancelation will be decreed for such breach. The general rule in the cae of ordinary leases is that it will not unless the lease contains an express proviso to that effect. Shultz vs. Ramey, 64 New Mexco 366, 328 Pac. 2d 937. However, the decisions holding that cancelation will be decreed for breach of an implied covenant in oil and gas leases preponderate. Three Summers Oil and Gas, 453-468 Perm. Ed. Merrill, Covenants Implied in Oil and Gas Leases, page 362, (Second edition 1940). And this is the rule that has been estab-lshed in this jurisdiction. Libby vs. DeBuca, supra, has heretofore pointed out the lease in question should be governed by the principles applicable to oil and gas leases including the doctrine that such a lease will be canceled for failure to exercise reasonable diligence in marketing the product. And such cancelation will be decreed against the assignee of the lease."

In the case of Crystal George, et al vs. Ardith Jones, et al, 168 Nebraska 149, 95 Northwest 2d 609, 76 ALR 2d 10, an action was brought against the surviving widow and administratrix and the heirs at law of the deceased Lessee, and the person to whom the administratrix had granted certain rights to remove gravel under the lease in question for forfeiture and cancelation of a mineral lease and to quiet title to all mineral rights in certain lands of

the plaintiffs. Under the lease granted to the Lessee for a five-year term, the Lessee agreed to pay as rental a stated sum for each cubic yard of gravel removed. The lease also provided that its terms were binding on the parties, their executors, administrators, heirs and assigns. The plaintiff alleged that since the death of the Lessee the defendants had taken over and had assumed the lease but had failed to use any diligence in mining or extracting gravel and had failed to make reasonable effort to extract gravel, and although repeatedly warned, they had failed and refused to continue the efforts to mine and remove gravel from the premises. The defendants alleged affirmatively that they had diligently sought to operate the lease since the Lessee's death and that they had difficulty in keeping the machinery in repair, which fact was known to the plaintiffs and that she had agreed that any delay because of such difficulty would not place defendants in default. There was a sharp conflict in the evidence on the material issues. The court found that the lease had been forfeited that the plaintiffs were entitled to cancelation. The Supreme Court of Nebraska concluded that forfeiture of the lease was proper for the Lessee breached the implied covenant which exists in mining leases and which the only consideration is the agreement by which the Lessee will pay a royalty on the product mined, that he will develop and operate the pit with reasonable diligence. The court, in its decision, stated as follows:

> "We are cognizant that courts of equity abhor forfeitures, that they are odious in law and not favored by the courts and will not be enforced unless the facts which purport to require such drastic ac-

tion come clearly and plainly within the provisions of the law or the lease as the case may be. See Donnelly vs. Soverign Camp WOW 111 Nebraska 499, 197 Northwest 145.

We deem the following authorities applicable to the factual situation in the instant case."

The court then cited the cases of Phillips vs. Hamilton, 17 Wyoming 41, 95 Pac. 846, wherein it was held if the consideration of a lease is a royalty to be paid to the Lessor on the product of the mine, there is an implied covenant that the work of the prospecting and development shall be prosecuted with reasonable diligence. In Cotner vs. Mundy, 92 Oklahoma 268, 219 Pac. 321, it was held that where the only consideration for the lease of sand and gravel pit for a long period of years was a royalty on the sand and gravel removed and the lease contained no express provision for continuous operation or for forfeiture for failure to develop and operate the pit, there was an implied covenant on the part of the Lessee to develop and operate the pit with reasonable diligence. See also Freeport Sulphur Co. vs. American Sulphur Royalty Co., 117 Texas 439, 6 Southwest 2d 1039, 60 ALR 890; Mansfield Gas Company vs. Alexander, 97 Arkansas 167, 133 Southwest 873.

Cases showing the requirement for diligent operation of percentage leases, even though not mineral, can be found in 170 ALR at 1107. These cases, although not cases involving sand, gravel, oil and other minerals, which cases seem to fall in a category by themselves, also say in the citations mentioned that failure to operate the business leased so as to give maximum profit to the Lessor

can constitute a substantial breach for which forfeiture can be the remedy. The writer herein does not want to imply that all the cases in 170 ALR excated a forfeiture; however, all of them decided in favor of the Lessor concerning either forfeiture or damages.

A case that we believe is in oint in our particular situation is the case of Dickey vs. Philadelphia Minit-Man Corp., 105 A2d 580. In that case an action was brought to recover possession of the property leased. The lease required the Lessee to pay a rental of 12½% of the annual gross sales and charges, but not less than $1800.00 yearly. The agreement also contained language that the property was "to be used and occupied by Lessee in the business of washing and cleanng automobiles and * * * for no other purpose". The Lessee stopped washing automobiles, although it continued to simonize and polish automobiles. The Lessor brought an action on the basis of failure of consideration. The court held for the Lessee; however, the important consideration in its decision was the fact that there was a minimum lease requirement of $1800.00 per year. The court cited a number of cases wherein forfeiture was the proper remedy and indicated that had the defendant "moved any part of his business to another location" or if the lease had not had a minimum rental provided, then the Court inferred that forfeiture could have been the proper remedy. This we say is analogous to our situation for here there was no minimum rental or quantity to be taken by the Joneses and they, in fact, moved their business to other premises. The proposition in the instant case is the very proposition which the court by dicta inferred it would declare a for-

feiture in the Dickey case. The Respondent also cites the court to the dissenting opinion in the Dickey case wherein the minority would have worked a forfeiture regardless.

## POINT II

## THE COURT DID NOT ERR IN FINDING THAT BREACHES OF CONTRACT ON THE PART OF THE JONESES WERE SUFFICIENT GROUNDS FOR FORFEITURE.

The appellants contend that there is no evidence in the record that Joneses failed to remove overburden. We respectfully suggest that this is not the fact. In the sand and gravel business the manner and care in which overburden is removed is a material factor in the preservation and perfection of the quarry. If overburden is not removed in a proper manner it will become mixed with the sand and contaminated so as to reduce it in quality and grade, or in the alternative, such as in this case, the overburden at one time becomes such a problem to remove in relationship to the sand to be acquired that it becomes financially better to abandon the pit and start at some other location, even though thousands of tons of sand are wasted in the purocess.

Evidence as to the careless and negligent excavation of sand at the expense of the owner of the property was elicited from Isiah Rex Allen, Bryant S. Jones, Grant E. Lloyd and Alvie Thorvaldson. Mr. Allen was called as a defendant's witness. Mr. Allen testified that he was familiar with this pit, that he was also acquainted with the Joneses and had done business with them when they were

in Delta (R. 135). He further stated that he had been in the concrete business himself (R. 135). Mr. Allen was acquainted with the property and had done work for the Joneses on the property in 1958 (R. 136). At that time he set up his crushing plant to make gravel for road material and ready-mix and had occasion to see the condition of the pit (R. 137), which was shortly after the Joneses took possession. Mr. Allen drew a diagram of one of the pits and stated that all of the pits were in the same condition, to-wit: "It was a very big area and was uncovered and the pits were in wonderful shape." (R. 139). He stated in 1958, at the time the Joneses took over the pits he was able to move his sand and gravel down to his crusher by pushing it with a dozer and that the bulldozer, under the circumstances the pits were in at that time, could feed the plant (R. 139). Thereafter, he testified as to the condition of the pits as he saw them prior to trial while they were still in the possession of the Joneses. His answer was:

"Q And what do the pits look like?

A. I would hate to move in there now." * * * * (R. 140).

Q. (By Mr. Howard, continuing) What was the condition of the sand pit?

A. I have been in the sand pit since that time since yesterday. I have acquired sand and gravel from the Joneses.

Q. You mean at what time?

A. Between the spring of '58 and two years ago.

Q. Have you had occasion to observe their management of the pits?

A. Yes. I couldn't help but see the difference in the way they managed the pit and the way Mr. Thorvaldson did.

Q. And what is the difference? * * * *

A. To my knowledge, they have never moved any overburden out. They have abandoned the one great big beautiful on account of the overburden slipping in. I'm speaking about the home place which is there by Mr. Thorvaldson's building.

Q. The home place is the big pit?

A. Yes.

Q. What has prevented further operation of that pit?

A. Simply because the overburden wasn't removed.

Q. Has the sand been taken out of the pit?

A. No. Plenty of the pit would be in good shape if the overburden was removed." (R. 141).

Mr. Allen went on in detail telling about how poorly the pits were managed and how much sluffing there was and how much sand would be lost because of contamination and what the time and cost of removing the oerburden was (R. 142, 143). It is his estimate that it would take at least 10 days with a D-8 Caterpillar to remove the overburden from the big pit. Mr. Allen also testified that there was gravel in all of the pits and that there was sufficient gravel in the pits to run a sand and gravel operation. Specifically in respect to the large pit, he stated:

"Q. Mr. Allen, if you were running the pit, is there sufficient gravel in the pit to provide for sand and gravel operation for concrete?

A. I would like to take it over and try it.

Q. Do you think that there is?

A. I certainly do.

Q. Do you think the gravel could be screened out for gravel operation?

A. I would want to do some work on the topsoil first.

Q. You mean the overburden?

A. That's right. I don't say that that pit is in the position right now to go in there and set up a ready mix or gravel plant in there without some work being done and go ahead and try to compete with Mr. Thorvaldson or some other company but it could be done with a little management and work."

Mr. Allen testified that no crusher would be needed and that all that would be required was just a grizzley to screen out the big rocks. And that the gravel could be screened out of the sand sufficient to run a ready mix business (R. 149 150).

Mr. Thorvaldson testified in respect to the problem of the overburden, (R. 186). He testified concerning how dangerous and costly it would be to remove the overburden under the circumstances (R. 186). He testified concerning the quantity of gravel available for removal when they took over the pit as compared to reduction of the pit as it then stood at the time of trial (R. 187). Mr. Thorvaldson testified concerning what the Jones' operation has done to the sand and gravel in detail (R. 189).

Mr. Grant E. Lloyd testified that the big pit was in bad shape at the time of the trial and that the overburden was hanging over the edge, that they have excavated

the pit in such a manner as to prevent getting the overburden off of a portion of the sand and that the location of the overburden in respect to that sand has eliminated the use of a few thousand yards of the sand and that if it were not impossible to get the overburden off because of the danger to a caterpillar operator, that it would in any event be "awful expensive to get in there and try to get the overburden off of there." (R. 245, 246, 247). He said this condition prevailed on all the pits that the Joneses were operating and that the Joneses would merely operate a pit until no further sand or gravel could be taken out of it without effort and then move to another pit and exhaust it. All of the pits have been left in a poor condition (R. 247, 248).

To say that no proof was elicited concerning the mismanagement of the pit and the status of the overburden is to ignore tens of pages. The court properly found that the overburden was poorly and inadequately removed and constituted a breach of the contractual provision which stated: "If the Lessees fail to operate the business in a proper businesslike and workmanlike manner **and/or** fail because of business practices to keep up with the demand, the same will constitute grounds for forfeiture of this lease." (Emphasis added.) The court will note the disjunctive use of "and/or." This language clearly shows that if the Lessees fail to operate the business in a proper businesslike and workmanlike manner that forfeiture would be the proper remedy. The evidence that has been submitted in respect to the failure to remove overburden in a workmanlike manner we believe,

contrary to the statement of the Appellants, has been proven by competent evidence.

Appellants make the same gross charge in respect to the court's finding that the Joneses failed to make sales slips for material sold reasonably soon after sale and delivery of the material to customers and that they failed to account for sand and gravel stockpiled and removed from the premises. To say that there wasn't evidence in this respect is to ignore the fact. The Respondent called as a witness Mr. Leon Woodfield, a Certified Public Accountant and Professor of Accounting at the Brigham Young University. Mr. Woodfield testified that he made an audit for a six-month period from January 1st through June 30th, 1962. Mr. Woodfield was the second accountant employed by Mr. Thorvaldson to make an audit. There had been one previous audit, which also found discrepancies (R. 127. R. 190). Mr. Woodfield testified that on the basis of the books kept by the Joneses he was unable to determine whether all of the sales were recorded or not. His answer was:

"Q. You couldn't tell whether all the sales were recorded?

A. No, because of the state of the records, there was no way of determining if all sales had been recorded. There was nothing to tie them into other than the document that was there. I have no way of knowing if a sale of gravel was sold but not recorded.

Q. Did you have occasion to look at the accounting records to determine whether adequate Accounts Receivable or the cash receipts record were maintained so that you could cross-check them?

A. To my knowledge the Accounts Receivable is not complete and the sales of cash receipts is not in such a fashion for me to check that. I was mainly interested in the sales area, but in connection with this, in examining the sales documents and in discussion with the Jones people, I was unable to find these records." (R. 126).

He stated that the Joneses took their personal living out of the till and made no accounting for the money that came in or left; and consequently, it was impossible to tally sales made with cash received or sales slips (R. 128). He also testified that the majority of the sales invoices were unsigned by the customer; and, consequently, there was no verification that the sales ticket conformed with the quantity delivered on the sales tickets that they did have (R. 128). He further testified that the invoices during the audit period were not in numerical sequence. He stated that they jumped back and forth indicating that they were not made at the time of the sale (R. 129). His records disclosed that even by the sales slips kept by Mr. Jones that he had failed to account for 1,087.83 yards of material sold for which he owed Thorvaldson a royalty (Exhibit No. 23). Mr. Jones himself testified that they did not make the sales slips out as the sales were made, that he relied upon memory in making sales slips or relied upon somebody telling him of the sale that was made (R. 171).

Under the circumstances of these facts the court could do nothing more than conclude that the Joneses failed to maintain ordinary business records by which Thorvaldson could make an audit to verify the royalties that were being paid. Even an audit, although of great ex-

pense to Thorvaldson, would not establish the truth or falsity of the accounting tendered because of the defective record keeping of the Jones'. The whole basis for payment as established by the contract was upon quantity sold, which necessarily implied that the lessee would maintain proper methods of accounting. This failure to keep records was a breach of the contract provisions requiring the Lessees to keep books accessible to the Lessor for the purpose of computing the output of marketed sand, gravel and dirt at all times. It further breached the contract provision requiring them to operate the business in a "businesslike" manner.

The contract required, as determined by the amended decree, that "the defendants are ordered to pay a royalty of 25c per cubic yard for all topsoil, sand or gravel processed on, or produced from, the premises leased by the plaintiffs to defendants and disposed of on the market." The accounting record shows that they did not pay a royalty on at least 1,087 yards that were sold during the year ending June 30th, 1962, and based upon accounting extension, probably an equal amount for the years previous thereto. The record further discloses that the Joneses had removed hundreds of yards of sand and other materials and stockpiled it on their own property, for which they paid no royalty. Mr. Lloyd testified that, in his opinion, 1500 yards or so were stockpiled and unpaid for (R. 255).

The record discloses that by Mr. Thorvaldson's own tally sheet of cement deliveries that he noted, the Joneses purchased during the accounting period sufficient cement to make 2800 yards of concrete (R. 194). Since the ce-

ment added is offset by the weight (R. 163) all of the material that went into the concrete of 2800 yards should have come from the Thorvaldson pit, although during the same period of time he was paid for 1140 yards (R. 194).

It is further shown by the record that the Joneses had no way of estimating accurately the amount of gravel and sand obtained from Thorvaldson as distinguished from the amount of gravel and sand taken from the Summit Creek Irrigation Company and/or Santaquin City. Their method of handling the sand and gravel was to dump them in separate piles and assume that all of the material in the Thorvaldson pile was sand and that all of the material in the other pile was gravel, although admittedly, (R. 160) both piles contained sand and gravel for no screening was used. On the basis of the two stockpiles they paid Mr. Thorvaldson for sand processed at the ratio of three quantities for every seven quantities used of the material obtained elsewhere. This is understandable, for the material that was being obtained elsewhere was costing them 7c a yard as distinguished from 25c that had to be paid Thorvaldson. Whether they used three-tenths of a yard of Thorvaldsons or four-tenths or nine-tenths is unknown, except by the estimate of Mr. Jones (R. 159, 160, 161). The only time that they make a record of the quantities sold that belong to Thorvaldson is at the end of the quarter when they calculate how many yards of concrete they have sold and then determine that three-tenths of that quantity was sand and gravel taken from the Thorvaldson pit for which they owe Thorvaldson 25c per yard (R. 161).

For the court to conclude that this method of accounting was less than accurate and highly speculative, and certainly not a record kept in a businesslike manner, was justifiable. It is further obvious, and apparently the court believed, that by this method the Joneses had failed to account to Thorvaldson for sand and gravel removed from his property and sold.

It is interesting to note that the Joneses moved their sand and gravel operation from the premises of Thorvaldson for the purpose of getting financial advantage. Mr. Jones has testified that he obtained sand and gravel from the Summit Creek Irrigation Company for 7c a yard (R. 173), and from Acord and Oldroyd for 10c a yard. The record containing his statement as to the amount that he paid Acord and Oldroyd is in the portion of the transcript not printed for the court, however, since the Appellant has not seen fit to print that portion of the transcript, it would seem authoritative to set forth the fact in this brief. By the interpretation placed on the agreement by Joneses, every yard of material that could be obtained from anyone other than Thorvaldson saved the Joneses money. This is the reason that they moved off the property so as to circumvent the court's decision wherein the decree required them to pay on material "processed" on the property. Their conduct in moving from the premises was not only a breach of contract, but an act of bad faith, for their contention at the prior trial was that the consideration was not illusory because they were required to get all of their material from Thorvaldson. Their statements to the court in that instance apparently were for expedience.

## POINT III

THERE WAS COMPETENT EVIDENCE THAT THE JONESES OBTAINED SAND AND GRAVEL FROM OTHER THAN THE LEASED PREMISES, WHEN THE LEASED PREMISES COULD HAVE ADEQUATELY AND SATISFACTORILY SUPPLIED THEIR NEED.

The evidence in respect to the overburden explains that the Joneses exhausted the pits without developing them. When the pits were exhausted for gravel purposes, they went to a source that was more economical and cheaper and claimed, therefore, that the Thorvaldson pits would not supply gravel. The assertion under Point III of the Appellant's brief is based upon the sole and self-serving assertion of Mr. Bryant S. Jones. This testimony was in stark and diametric opposition to the testimony of Mr. Alvie Thorvaldson, Mr. Grant E. Lloyd and Mr. Isiah Rex Allen. The transcript pages concerning their testimony in respect to gravel available out of these pits has been set forth above.

## POINT IV

THE RESPONDENTS ARE ENTITLED TO AN ADDITOR IN AN AMOUNT SUFFICIENT TO COMPENSATE THEM FOR THE EXPENSE OF THEIR ATTORNEY ON APPEAL.

We believe that the Supreme Court has authority under Rule 76 of the Utah Rules of Civil Procedure to direct the trial court to take additional testimony in respect to time and effort spent by the attorneys for the Respondent on appeal and to modify the judgment ac-

cordingly, or in the alternative that the Supreme Court, in the exercise of its sound discretion, may enter judgment in accordance with corrected findings as it shall determine. The Supreme Court has heretofore announced that there are inherent and implied powers to do just this and the Court exercised such powers in the case of Bodon vs. Suhrmann, 8 Utah 2d 42, 327 Pac. 2d 826.

## CONCLUSION

Point 1 of the Appellant's brief raises no issue before this court for the reason that it is an argument addressed to an alleged finding which the court did not in fact make. The court did not make a finding that there was no consideration or that the consideration was illusory. We have argued that point because we believe that there was no consideration. Replying to Point 1 gave us an opportunity to point out a basic defect in the contract, however, even if this court found that there was consideration, it would not affect the judgment of the trial court, for its judgment was based upon breach of contract, and forfeiture was exacted because that was the remedy provided in the contract, and was the only satisfactory remedy at law.

The Respondents respectfully urge that the decision of the trial court should not be lightly considered nor the findings set aside unless there are flagrant or obvious deects in them. We respectfully state that the findings of the trial court are supported by substantial and real evidence and, therefore, should not be disturbed on appeal. See O'Gara vs. Finlay, 6 Utah 2d 102, 306 Pac. 2d 1073. Lawrence vs. Bamberger Railroad Company, 3 Utah 2d 247, 282 Pac. 2d 335; Gattavera vs. Scheuman, 51 Wash-

ington 2d 55, 315 Pac. 2d 649; Winnegar vs. Slim Olsen, Inc., 122 Utah 47, 252 Pac. 2d 205. It is respectfully recommended that the judgment be affirmed and that an appropriate order be entered for the award of additional attorneys fees to the Respondents.

Respectfully submitted,

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