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Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

LYRAD McCONKIE and
ILENE McCONKIE, his wife,
Plaintiffs and Appellants,

vs.

FLOID C. HARTMAN and
RUTH A. HARTMAN, his wife,
Defendants and Respondents.

Case No. 13614

Brief of Defendants-Respondents

Appeal from Judgment of the Fourth Judicial District Court for Duchesne County, Utah
Honorable J. Robert Bullock, Judge

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FILED
JUL 3 1 1974
Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

LYRAD McCONKIE and
ILENE McCONKIE, his wife,
Plaintiffs and Appellants,

vs.

FLOID C. HARTMAN and
RUTH A. HARTMAN, his wife,
Defendants and Respondents.

Case No. 13614

Brief of Defendants-Respondents

NATURE OF THE CASE

Plaintiffs complained on November 30, 1972, (R-1) that a deed which defendants delivered and which plaintiffs caused to be recorded on February 26, 1964, (R. 8) contained a reservation of mineral interests which was not within a uniform real estate contract dated November 1, 1960. Plaintiffs prayed for reformation of the deed, decree of quiet title and specific performance of the contract based upon fraud.

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Defendants alleged latches and the applicable statutes of limitations for actions upon oral and written contracts and for actions based upon fraud. They contended that the agreements prior to the conveyance merged into the deed and that the deed with the reservation was according to the contemplated agreement between the parties. (**R.** 38-52)

DISPOSITION IN LOWER COURT

The District Court for Duchesne County with the Honorable J. Robert Bullock presiding heard the evidence and arguments of counsel at trial of this matter and entered findings of fact and conclusions of law upon which judgment for defendants was entered. (**R.** 79-87)

RELIEF SOUGHT ON APPEAL

Defendants seek affirmation of the judgment of the District Court based upon its findings or based upon the contentions urged by defendants to the trial court that all prior agreements of the parties merged into the deeds delivered to plaintiffs or the deeds expressed the contemplated agreement between the parties.

STATEMENT OF FACTS

The plaintiffs' brief contains inaccurate statements of fact. They are contrary to the record and contrary to

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the trial court's findings of fact (R. 79-87) which are presumed correct.

Preliminarily, the subject matter of this suit is not the real property described in Exhibits 2 and 3. It is only that real property described in Exhibit 2. The only warranty deed the plaintiffs sought to reform by their complaint (R. 1-8) and amended complaint (R. 15-18) was plaintiffs' Exhibit 2 (R. 8, 448-450). Plaintiffs had no interest in the real property described in Exhibit 3. Plaintiffs conveyed the real property they had received by Exhibit 3 from defendants to a Mr. Roy Warren on February 13, 1967. Plaintiffs conveyed that property to Warren by defendants' Exhibit 12 (R. 52-55, 84). Interestingly, Mr. McConkie claimed he intended a reservation of the mineral interests in that real property when he conveyed to Mr. Warren but failed to write a reservation in the deed which is Exhibit 12 (R. 357-359). In other words, throughout this action the plaintiffs claim a reservation of mineral interests unto themselves when there was no written reservation and denied the validity of the written reservations in the deeds the defendants delivered to them, Exhibits 2 and 3. (R. 357-359)

The defendants additionally correct and expand upon plaintiffs' statement of facts in further support of the trial court's findings of fact and in support of the trial court's ruling in denying defendants' motion to dismiss "pro forma" and ordering that defendants did not waive any rights if defendants proceeded to produce

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evidence (R. 400). In connection with that ruling the trial court said:

> "I don't think you've shown any fraud."
> . . . I don't think there would be any factual basis that the court could find any fraud upon the part of any party to this action. (R. 396)."

On March 19, 1959, the defendants as sellers and Arthello Clark and his wife and Richard Titensor and his wife as purchasers entered into a uniform real estate contract which is Defendants' Exhibit No. 6. The Clarks and Titensors took possession of 292 acres of real property near Altamont, Duchesne County, Utah under that contract which was defendants' farm. Although 80 acres of defendants' farm was omitted from the legal description in the contract, the plaintiffs believed the 80 acres was included (R. 364-365, 378-380). Mr. McConkie had known the defendants for approximately 35 years (R. 314-315). He was familiar with defendants' farm and knew the Clarks and Titensors had possession of all 292 acres of defendants' farm under the contract of sale (R. 321-328). Defendants admitted the 80 acres had been omitted from the legal description by inadvertence (R. 410). There was no reservation of mineral interests in the March 19, 1959, contract (Ex. D-6).

Ten days later on March 29, 1959, the defendants and the Clarks and Titensors entered into an escrow agreement with First Security Bank of Utah as escrow (R. 410). The March 19, 1959 contract, the March 29, 1959, escrow agreement and two warranty deeds dated March 29, 1959, were deposited with the bank as escrow

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(Ex. D-7). The contract, escrow agreement and two warranty deeds did not contain a legal description of the 80 acres. Apparently, the omission in the original contract of March 19, 1959, caused the omissions of the 80 acres in the subsequent documents of escrow and conveyance. However, the two warranty deeds with the defendants as grantors and the Clarks and Titensors as grantees that were placed in the escrow file on March 29, 1959, contained reservations of mineral interests. (Ex. D-7) The warranty deed for the real property in Section 1 reserved unto the defendants three-fourths of all the oil, gas and mineral rights. The deed for the real property in Section 32 contained a reservation unto the defendants of one-fourth of all the oil, gas and mineral rights. (Ex. D-7) Curiously, a line had been drawn through those deeds in the escrow's file, (Ex. D-7).

Sometime in September, 1960, the plaintiffs became interested in taking an assignment of the Clarks' and Titensors' purchasers' interest in the March 19, 1959, contract, (Ex. D-6). Plaintiffs negotiated with the Clarks and conferred with the escrow, First Security Bank (R. 323-325, 364-366). The defendant, Mr. McConkie, had previous experience in purchasing real estate with First Security Bank as escrow of real estate contracts (R. 332-334). He knew deeds held in escrow would be delivered by the escrow to him or to the County Recorder who would mail the deeds to him (R. 333-334).

On October 31, 1960, the Clarks and Titensors assigned their interest in the March 19, 1959, contract to

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the plaintiffs (R. 328-332, 336, 364-366). That written assignment is defendants' Exhibit D-5. It was deposited with the escrow and filed in Exhibit 7.

On November 1, 1970, there was a meeting at the bank's or escrow's offices (R. 332). The March 19, 1959, contract had to be amended to reflect the settlement of a lawsuit between the parties to that contract (R. 437). As a result of their settlement of claims and counterclaims the provisions for personal property, for real property defendants had received from the Clarks and Titensors as part of the purchase price, for the balance owing on the contract, for the terms of payment and for the interest on mortgages of the sellers' interest had to be amended (R. 410-414, 420-423, 429-432, 437). Furthermore, the defendants wanted to correct the omission of the 80 acres from the description and they wanted a statement of their mortgage to Equitable Life included (R. 377-380). Naturally, the asignee of the March 19, 1959, contract had to approve the amendments which they did and plaintiffs and defendants signed a uniform real estate contract form prepared by one of the officers of First Security Bank of Utah to reflect the amendments. That document is Plaintiffs' Exhibit 1 which is dated November 1, 1960, (R. 378-380, 408-414, 420-423, 429-432, 437).

After plaintiffs became assignees of the Clarks' and Titensors' interest in the property they made payments to the escrow, First Security Bank, as assignees and according to the amended contract for three years (R. 338). The escrow's file contained the March 19, 1959,

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contract, the two warranty deeds to the Clarks and Titensors with reservations of Mineral interests, the assignment dated October 31, 1960, and the November 1, 1960, amendment to the March 19, 1959, contract (Ex. P. 7). There was not another escrow agreement executed when plaintiffs and defendants deposited the November 1, 1960, amendment (Ex. P-1) with First Security Bank as escrow but subsequently the plaintiff, Mr. McConkie, signed a release of escrow on February 26, 1964, (Ex. D-14) as assignee of the March 19, 1959, contract between defendants and the Clarks and Titensors (R. 381, 336-338). That release of escrow (Ex. D-14) signed by Mr. McConkie was deposited in the escrow file (Ex. D-7; R. 402-403).

On or about December 8, 1960, the defendants realized they had not deposited warranty deeds with the escrow to replace the deeds with the Clarks and Titensors as grantees which contained reservations of mineral interests. They contemplated that the plaintiffs stood in the shoes of the Clarks and Titensors as their assignees. A reservation of mineral interests was always contemplated between the defendants and the Clarks and Titensors. Defendants thought that a reservation in the deeds on deposit with the escrow expressed that contemplation and that it was unnecessary to express it otherwise. Therefore, they instructed their attorney, Mr. George Stewart, to draft two warranty deeds to replace the warranty deeds on deposit. The only changes they requested in the warranty deeds were a change of the grantees from the Clarks and Titensors to the plain-

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tiffs and a change of one legal description to include the 80 acres which had been inadvertently omitted. The deeds were drafted, executed and deposited with the escrow on or about December 8, 1960 (R. 422-442).

On or about November 20, 1963, the plaintiffs wanted to borrow $75,000.00 from Travelers Insurance Company. They proposed to secure the loan with a mortgage on the real property they were purchasing from defendants (Ex. D-8; R. 339). The Travelers committed itself to loan $75,000.00 to plaintiffs on certain conditions which included that plaintiffs had good record title to the real property, that plaintiffs procure title insurance and that plaintiffs furnish an opinion setting forth the mineral interests in the real property (Ex. D-8; R. 339).

The plaintiffs negotiated with defendants for a discounted payoff of the balance owing defendants (R. 344-345). The plaintiffs also retained Security Title Company to cause record title in plaintiffs' names, to issue title insurance and to give an opinion setting forth the mineral interests in the real property according to the conditions in Traveler's letter of committment to loan which is Ex. D-8 (R. 343-344, 352-353, 360-363, 368, 390).

The defendants had instructed the escrow concerning the orally agreed discounted payoff and signed and delivered the release of escrow (Ex. D-14) to the bank which filed the correspondence and release in Exhibit D-7 (R. 344-345).

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Sometime before and on or about February 26, 1964, plaintiffs were contacted by a representative of Security Title Company for the purpose of causing record title in their names and complying with the conditions for the $75,000.00 loan from Travelers (R. 353, 360-363). The title company's representative, Mr. Anderson, visited plaintiffs at their home and plaintiffs signed the mortgage (Ex. D-10) which included an assignment of all rents and royalties from mineral interests (R. 350-351). Plaintiffs knew from past experience that mineral interests were involved and plaintiffs knew that Mr. Anderson was going to perfect record title in their name and obtain deeds to the defendants' property and record them (R. 352-353, 356, 360-363). Mr. McConkie who knew about the escrow file at First Security Bank signed the release of escrow (Ex. D-14) on February 26, 1964, in order that there would be delivery of the warranty deeds in escrow and in order that they would be recorded in the County Recorder's office (R. 381).

After plaintiffs were visited by Mr. Anderson at their home, he called from the offices of the escrow, First Security Bank. He advised plaintiffs that there was a problem with the title. Mr. McConkie went to the bank and may have signed the release of escrow releasing the deeds in its offices (R. 381). While he was at the offices of the escrow he additionally had conferences with officers of the bank and Mr. Anderson concerning the title. A major problem at that time was a stray deed. Mr. Anderson and Mr. McConkie went to Mr. Earl

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Dillman's office for the purpose of correcting the title problem to the satisfaction of Security Title. Mr. Dillman, Mr. McConkie and Mr. Anderson had a discussion concerning the title and Mr. Dillman caused a correction of the stray deed. On that same day, the warranty deeds containing the reservation of mineral interests (Ex. P-2 and 3) were delivered and they, along with the mortgage to Travelers, were recorded at the County Recorder's office at the request of Security Title Company. Mr. McConkie did not remember seeing the warranty deeds with a reservation of mineral interests which he caused Security Title to record. At that time Mr. McConkie was not concerned about mineral interests. His one concern was acquiring title in the defendants' farm and obtaining $75,000.00 from Travelers (R. 367-368).

Mr. McConkie paid Security Title for the title insurance, title opinion and other services that it rendered along with the recording fees it advanced (Ex. D-11; R. 355-356).

After plaintiffs became vested with title to the defendants' farm on February 24, 1964, they gave a second mortgage to First Security Bank in January, 1966 (R. 357) and they conveyed the property in Section 32 to Mr. Roy Warren in 1967 (R. 357-359).

In connection with the conveyance to Mr. Warren in 1967 the defendants had to obtain a partial release of mortgage from Travelers and plaintiffs had some difficulty in negotiating it (R. 358-359). After convey-

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ing to Warren, plaintiffs continued to cause considerable activity concerning the record title to the real property in Plaintiffs' Exhibit No. 2 which was attached to their complaint (R. 320, 351).

After all of the title work and conveyancing of the property in question by the plaintiffs during February, 1964, and after they exercised dominion over the property for approximately nine years under the recorded deeds with reservations of mineral interests, plaintiffs filed their complaint on November 30, 1972. (R. 1)

ARGUMENT

POINT I

NO FRAUD APPEARS IN THE RECORD AND NONE WAS FOUND.

A review of the plaintiffs' statement of facts, defendants' statement of facts and the record clearly reveals that the trial court was crorect when it inormed plaintiffs' counsel as follows:

> "I don't think you've shown any fraud.
>
> * * *
>
> I don't think there would be any factual basis that the court could find any fraud on the part of any party to this action. (R. 396)"

The trial judge's observations were correct in view of the decision by this court in *Pace v. Parrish,* 122 Utah

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141, 247 P.2d 273 (1952). Defendants motion to dismiss should have been granted.

POINT II

THE FACTS AND CIRCUMSTANCES EXISTING AT OR ABOUT THE TIME THE DEEDS WERE RECORDED ON FEBRUARY 26, 1964, INCLUDING THE RECORDING WERE SUCH AS TO FURNISH FULL OPPORTUNITY TO THE PLAINTIFFS FOR THE DISCOVERY OF THE MISTAKE, OR FRAUD, IF ANY EXISTED AND THE STATUTES OF LIMITATION COMMENCED TO RUN AT THAT TIME BECAUSE PLAINTIFFS KNEW OR SHOULD HAVE KNOWN OF THE RESERVATIONS. MORE THAN EIGHT YEARS HAVING ELAPSED SINCE THE STATUTES COMMENCED RUNNING, PLAINTIFFS' ACTION IS NOW BARRED.

The statutes of limitation for a cause of action based of an instrument in writing is six years, § 78-12-23, Utah Code Annotated 1953 as amended. The statute of limitation upon a contract or obligation not founded upon an instrument in writing is four years, § 78-12-25, Utah Code Annotated 1953, as amended. The statute of limitation for injury to real property or for an action for relief on the ground of fraud or mistake is three years, § 78-12-26, Utah Code Annotated 1953, as amended.

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If a written contract in the case at bar was breached it was breached on the date the deeds were delivered and recorded on February 26, 1964, at 11:12 a.m. If the contract were a written or oral contract the breach occurred at the same time. If any fraud occurred it occurred at the same time.

Plaintiffs did not file their complaint until eight years and nine months after the breach of contract or fraud occurred. The only statute of limitation which did not unequivocally run is the limitation concerning actions based on mistake or fraud. That statute of limitation of three years commenced to run when the fraud or mistake was discovered or should have been discovered.

Prior to plaintiffs becoming the assignee of the Clarks and Titensors they were familiar with the use of First Security Bank as an escrow in real estate transactions. Mr. McConkie discussed the escrow with Mr. Clark and with the officers of First Security Bank, the escrow. He knew the escrow file was at the bank. He knew the escrow would deliver the deeds upon payment of the balance owing on the contract and he knew the deeds were probably within the escrow's file. He executed a written assignment as assignee of the Clarks' and Titensors' interest. As assignee of their interest he and the defendants continued with the same escrow. When he negotiated a discounted payoff of the balance owing on the contract he retained Security Title to issue insurance, to give a separate opinion concerning mineral interests, and to cause title of record in his name. He had the documents concerning the title exposed to

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him at his home when Mr. Anderson of Security Title visited him. He went to the bank and signed a release of escrow on February 26, 1964, as assignee of the March 19, 1959, contract. He discussed the title with the officers of the bank and Mr. Anderson. He then discussed the title with Mr. Earl Dillman, an attorney at Roosevelt, Utah. He wanted the title to be cleared in order that he could deliver a mortgage satisfactory to Travelers and obtain $75,000.00. Further, the plaintiffs knew that Security Title would record the deeds and that they would probably be mailed to him. On February 26, 1964, the deeds (Ex. P-2 and 3) were recorded at the request of Security Title along with the plaintiffs' mortgage to Travelers Insurance Company. The plaintiffs received $75,000.00 from Travelers Insurance Company and they paid Security Title Company for their services, title insurance and opinion, and for the recording fees Security Title had paid. No one prevented the plaintiffs from reading the deeds which were probably present and exposed to them during all of the activity concerning the title to the property prior to the recording of the deeds. Certainly, the plaintiffs had every opportunity to examine the deeds prior to delivery, at the time of delivery, at the time they were recorded and since they were recorded on February 26, 1964.

Utah decisions clearly demonstrate that the plaintiffs had knowledge of the reservation of mineral interests in the warranty deeds (Ex. P-2 and 3) at the time the deeds were recorded and that said knowledge

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started the running of the three year statute of limitations for actions based on fraud. In *McKellar v. McKellar*, 23 Utah 2d 106, 48 P.2d 867 (1969) plaintiffs initiated an action to cancel a warranty deed executed in 1947 and duly recorded on the grounds of mistake. Plaintiffs filed their action in 1968. The trial court entered summary judgment upon defendant's motion and this court affirmed the summary judgment. One of this court's grounds for affirming the summary judgment was that the plaintiffs had constructive notice of the deed by operation of § 57-1-6 Utah Code Annotated 1953 and § 57-3-2 Utah Code Annotated 1953 which provides:

> "Every conveyance . . . shall, from the time of filing the same with the recorder of record, impart notice to all persons of the contents thereof; . . ."

In *McKellar v. McKellar, supra,* the court cited *Smith v. Edwards*, 81 Utah 244, 17 P.2d 264 (1932). In that case plaintiff sought an action to set aside conveyances as defrauding creditors. This court reversed the trial court and held that the action was barred under the three year statute of limitations for the reason that discovery of the conveyances was made, or the situation was such as to furnish full opportunity for the discovery of fraud, if any existed, more than three years before the action was filed. In reaching that conclusion, this court construed the three year statute of limitation and the recording statute. This court said:

> "Under the statute from the time of filing the conveyance with the recorder it shall impart no-

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tice to all persons of the contents thereof. From the time of recording these conveyances all persons, including plaintiffs, notice was imparted to them that the conveyances contained the statements above quoted. That the plaintiffs and all other persons had notice that such conveyances had been made and recorded seems to go without saying, for surely, if one is charged with notice of the contents, he must be charged with notice of the existence of the document itself. . . .

In this case the contents of the conveyances were of record and imparted notice of the contents and what the consideration was as shown thereby and all persons might be expected to inquire forthwith of what the 'other valuable considerations' consisted, if the truthfulness was doubted and failing to do so would cause the statute to run from the time when a reasonably prudent person would have acted and thereby discovered falsity if it existed.

* * * *

. . . Unless the notice referred to in Comp. Laws Utah 1917, § 4900, means what it says then one is left to trace out from the uncertainties of human activities, memories, and conflicting interests what the facts were. Evidently the statute was intended to constitute notice of the contents of the recorded document, without reference to place of residence or otherwise.

Under Comp. Laws Utah 1917, § 6468, the provision is clear that the limitation does not begin to run until the facts constituting the fraud are discovered. There is therefore a great deal said in the cases about what amounts to discovery.

* * * *

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> The language of the Utah statute, Comp. Laws Utah 1917, § 6468, subd. 4 upon the provision referring to 'discovery,' contains the following language: 'The cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.'
>
> * * * *
>
> The evidence discloses: The deeds were made and recorded in December, 1920. The deeds contained, among other things, the statement 'for one dollar and other good and valuable considerations.' At least one of the deeds contained an agreement to asume and pay two mortgages against the property conveyed in the sum of $1,000 each. There was a change of possession within about six months after the conveyances. The property was mortgaged by the grantees. All of this information could have been obtained readily upon inquiry. No inquiry of any nature seems to have been made. . . .
>
> We are of the opinion that the action is barred under the statute of limitations for the reason that discovery was made, or the situation was such as to furnish full opportunity for the discovery of fraud, if any existed, more than three years before the bringing of the action. . . ."

All of the authorities, even those cited by plaintiffs, compel the conclusion that the circumstances in the case at bar were such that the plaintiffs knew or should have known of the reservation of mineral interests in the deeds (Ex. P-2 and3) at the time the deeds were recorded. Furthermore, if they did not know it then they undoubtedly knew it when they had all of the sub-

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sequent title work done in connection with the real property described in those deeds, including the actual conveyance of part of the property to Mr. Warren in 1967, five years before they filed their complaint.

Plaintiffs' attempt to bring themselves under decisions which cover persons vested with title in land for a considerable period of time is not relevant to the case at bar. The decisions cited by plaintiff support defendants' position in connection with the knowledge of fraud required to start the statute of limitations running on February 26, 1964. Up until that time the plaintiffs in the case at bar were not vested with title. Prior to February 26, 1964, the plaintiffs in the case at bar were only purchasers of land under an executory contract to convey when the conditions of the contract were performed. In other words, even under plaintiffs' authorities the statute of limitations for fraud commenced to run under the circumstances of the case at bar when the deeds in issue were recorded on February 26, 1964.

POINT III

ANOTHER CONTENTION THAT SUPPORTS THE JUDGMENT OF THE TRIAL COURT IS THAT THE PRIOR AGREEMENTS OF THE PARTIES MERGED IN THE WARRANTY DEEDS WITH THE RESERVATIONS OF MINERAL INTERESTS EVEN THOUGH THE DEEDS CONTAIN PROVISIONS WHICH ARE ALLEGEDLY INCON-

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SISTENT WITH THE PROVISIONS OF THE PRIOR AGREEMENTS. THE DEEDS SUPERSEDE THE AGREEMENTS.

The warranty deeds which were delivered to the defendants superseded all prior contracts of sale even though said contracts may have been inconsistent with the deeds. All of the prior contracts are deemed to have been merged in the deeds under the circumstances of this case. In this case there were prior written agreements concerning the sale of the real property under which the purchasers made payment in full according to the oral agreement of the amount of the unpaid balance and the seller delivered the deeds to the purchasers who remained in possession under those deeds for approximately nine years before complaining about the reservations of mineral interests in the deeds. During that period the plaintiffs caused the deeds to have been recorded, mortgaged the property as owners, purchased title insurance, farmed the property, paid taxes, probably inspected the deeds during all the times they were available to them after recording and did all other acts of dominion over the real property as though they were the owners under the deeds reserving the mineral interests in the defendants. Clearly, the plaintiffs accepted delivery of the deeds which caused all prior negotiations and agreements to merge into them and supersede them. The application of the doctrine of merger is further warranted and compelled by estoppel and latches. Plaintiffs are estopped or prohibited from claiming fraud or mistake because of latches. See

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Herminghausen v. Pierce (Okla.) 104 P.2d 252 (1940); *Knight v. Southern Pacific Co.*, 52 Utah 42, 172 Pac. 689 (1918); *Reese Howell Co. v. Brown*, 48 Utah 141, 158 Pac. 684 (1916); *Savings & Trust Co. v. Stout,* 36 Utah 206, 102 Pac. 865 (1909); *Percifield v. Rosa* (Colo.) 220 P.2d 546 (1950); *Schillinger v. Huber* (Mont.) 320 P.2d 346 (1958); *Eisenberg v. Goldstein* (Ill.) 195 N.E.2d 184 (1964); and *Powell v. Esary* (Wash.) 224 P.2d 323 (1950).

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF MAILING

Copies of the foregoing Brief of Defendants-Respondents were mailed, postage prepaid, to Brant H. Wall, Attorney for Plaintiffs and Appellants, Suite 500 Judge Building, Salt Lake City, Utah 84111, this

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