

1949

Vern Frailey v. John C. McGarry : Brief of Respondents

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Cline, Wilson and Cline; Attorneys for Respondent;

Recommended Citation

Brief of Respondent, *Frailey v. McGarry*, No. 7312 (Utah Supreme Court, 1949).
https://digitalcommons.law.byu.edu/uofu_sc1/1085

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

In the Supreme Court of the State of Utah

VERN FRAILEY,

Plaintiff and Appellant,

vs.

JOHN C. McGARRY,

Defendant and Respondent

Case No. 2506

FILED

APR 27 1946

CLERK, SUPREME COURT, UTAH

BRIEF OF RESPONDENTS

CLINE, WILSON AND CLINE,

Attorneys for Respondent.

INDEX

TOPICS

Preliminary Statement	1
Argument	2
The contract between the parties is not against public policy	5
The trial court did not err in striking the second cause of action	16
The trial court did not err in striking the fourth cause of action	18
Contract not impossible of performance	22
Judgment finds support in the evidence, findings and conclusions	25
Respondent's cross-assignments of error	27
Argument on cross-assignments of error	28
There is no sufficient evidence to sustain a finding of misrepresentation	49

STATUTE CITED

100-3-8 U. C. A. 1943	7
-----------------------------	---

CASES CITED

Ackerman vs. Bramwell Inv. Co., 12 Pac (2nd) 623, 80 Utah 52	61
Appleman, et al., vs. Pepis, 246 Pac. 225 (Okl)	35
Cattell vs. Denver State Bank, 225 Pac. 271 (Colo)	37
Croak vs. Trentman, 150 Pac. 1088 (Okl)	35
Cummings vs. Nielson, 129 Pac. 619, 42 Utah 157	20
Evans vs. Turney, 61 Pac. (2nd) 237 (Okl)	35
Farmers' State Bank vs. Harrington, 225 Pac. 705 (Okl)	35
Ferrell vs. Wiswell, 143 Pac. 582, 45 Utah 202	62
Greco vs. Graco, 39 Pac. (2nd) 318, 85 Utah 241	62
Hewitt vs. Andrews, 140 Pac. 437 (Ore)	39
Johnson vs. Jones, 164 Pac (2nd) 893, 109 Utah 92	21
Kneeland vs. Hetzel, 103 Okl. 3, 229 Pac. 218	17
Lane vs. Peterson, 251 Pac. 374, 68 Utah 585	62
LeVine vs. Whitehouse, 109 Pac. 2, 37 Utah 260	35-36-41
McKellar Real Est. & Inv. vs. Paxton, 218 Pac. 128, 62 Utah 97	39

Morse vs. Kogle, 178 Pac. (2nd) 275 (Kan)	37
Naylor vs. Jolley, 111 Pac (2nd) 142, 100 Utah 130	17
Nielson vs. Leamington, etc., 48 Pac (2nd) 439, 87 Utah 69 ..	58-62
Patterson, et al., vs. Chambers' Power Co., 159 Pac 568	
(Ore)	21
Paxton vs. Dearden, 45 Pac (2nd) 903, 86 Utah 408	40
Pearson vs. Gullans, 142 Pac 456 (Wash)	40
Taylor vs. Moore, 51 Pac (2nd) 222, 87 Utah 493	41-62
Whitney vs. Bissell, 146 Pac 141 (Ore)	41
Zuniga, et al., vs. Leone, et al., 297 Pac 1010, 77 Utah 494....	41

OTHER AUTHORITIES

26 C. J. S. page 1087, Sec. 25	61
12 C. J. S. page 996, Sec. 38	37
12 C. J. S. page 998, Sec. 38(b)	38
37 C. J. S. page 231, Sec. 11	61

In the Supreme Court of the State of Utah

VERN FRAILEY,

Plaintiff and Appellant,

vs.

JOHN C. McGARRY,

Defendant and Respondent

Case No. 2506

BRIEF OF RESPONDENTS

PRELIMINARY STATEMENT

The statement of the case as set forth in appellant's brief sets forth some of the material provisions of the contract sought to be rescinded by appellant, and discusses briefly the pleadings, findings, conclusions, decision of the court and judgment. Plaintiff's assignments of error do not attack any of the findings, and consequently none of the evidence is set forth or discussed in the appellant's brief. The respondent by cross-assignment of error will attack Conclusion of Law No. 1 that

the contract between appellant and respondent was subject to rescission because of misrepresentation by the respondent as to the availability of water for irrigation of the lands, and in discussing this cross-assignment of error will later in this brief discuss the evidence applicable thereto.

However, respondent believes it will be more orderly and convenient, both to court and counsel, to first answer the contentions of the appellant as they appear in appellant's brief, and then set forth the respondent's cross-assignments of error and discuss the same. If this Honorable Court should agree with the trial court's conclusions of law to the effect that the contract in question is not now subject to rescission and that the plaintiff is not entitled to any relief under his amended complaint, then it is not necessary to consider or determine or rule upon the respondent's cross-assignments of error.

ARGUMENT

The trial court sustained the respondent's motion to strike that portion of paragraph 8 of the amended complaint commencing with the word "and" on line eight and continuing through to and including the word "monopoly" at the end of subdivision (1) of said paragraph. The motion is at page 27 of the judgment roll, paragraph 1 thereof. At the commencement of the trial the court reinstated such portion of paragraph 9 (Tr. 2).

Whether or not the court erred in striking such portion of the complaint, or erred thereafter in reinstating the same, is of no importance whatever, because there is no proof to sustain such allegations and there are no findings of fact pursuant to such allegations. The portion of the complaint in question alleges that on a number of occasions prior to the execution of the contract the defendant attempted to file applications to appropriate water in the office of the state engineer to irrigate the lands in question; that his applications had been denied by the state engineer because there was not sufficient water available to irrigate the lands and because permitting the defendant to make such applications would be against public policy and for the purpose of securing to the defendant a monopoly. The only possible purpose of such allegations would be to show that the defendant had knowledge that the applications of plaintiff would not be allowed. The only evidence in the entire record concerning the rejection of any applications to appropriate water in the Beryl underground district is found at page 120 and 123 of the reporter's transcript. Mr. Ward, deputy state engineer, was testifying on direct and following is the extent of such testimony:

Q. Do you have in mind any particular filing made there that was rejected?

A. No, not in recent years. I have never rejected any in that area that I recall, but prior to my time there were some filings I think were filed in the name of Karla Louise McGarry that

were rejected.

Q. Do you know what relation she bears to Mr. McGarry?

A. Not definitely. I have always assumed - -

Q. Do you know the husband's name of this Mrs. McGarry?

A. I have understood that he was Ambrose McGarry.

MR. HANSEN: I don't suppose you deny he is a brother of John C. McGarry? If material?

MR. CLINE: If there is any materiality in it, I wouldn't deny it, no.

MR. HANSEN: I don't know that there is any materiality in it. (*Tr. 120-121*).

Q. I don't quite gather, Mr. Ward, whether you stated that in recent years at least, so far as you know, there have been no applications that have been filed for water in the Beryl area that have been rejected by your office.

A. I don't recall of any.

Q. And the one application to which you refer was made how many years ago approximately?

A. I don't know the filing date. When I arrived in the State Engineer's office in 1941 I was given the responsibility of answering some of the letters pertaining to these files after the application had been rejected.

Q. So that there have been no rejections of any water applications at least between 1941 and up to the time when these applications of Mr. Frailey and Mr. Thompson were filed in December, 1945?

A. I don't recall any that have been rejected. (*Trans. 123*).

The record not only shows affirmatively that no water applications or filings were rejected after a single rejection in 1941, but fails to show why that application was rejected. There is a complete absence of proof that any application made by defendant was rejected and there is a complete absence of proof that the state engineer ever rejected an application for the reason that to approve it would create a monopoly or would be against public policy.

THE CONTRACT BETWEEN THE PARTIES IS NOT AGAINST PUBLIC POLICY

Respondent confesses an utter and complete inability to follow appellant's reasoning when he argues that the contract is against public policy.

It seems that the appellant contends that the contract is against public policy because the defendant was making an unconscionable profit out of public waters and created a monopoly of public waters in favor of the respondent.

At the outset it may well be observed, and appellant seems to overlook, that it was he who made the applications for water and not the respondent. Respondent claims the water through and under the appellant by reason of the contract. The appellant could contract with reference to water applications he was to make before or after executing the agreement; and could, for that matter, contract to sell, rent or otherwise deal with the same.

If the water applications were not tainted with speculation or monopoly when appellant made the applications, how could they become tainted thereafter because of appellant's disposition of them? Appellant argues that the applications for water made by him were not tainted with monopoly and speculation when he made them but thereafter would become tainted if the respondent ultimately acquired them. He contends that he can enter into a contract to purchase land, thereafter make applications to appropriate water for irrigation thereof, and this his own applications create a monopoly in favor of respondent and for that reason give rise to a right to rescind—and this when respondent gets the water only in the event of a default by appellant.

However, even though respondent made the applications, which is not the fact, he contends there would be no element of monopoly or speculation and the contract would not be void as against public policy.

It is elementary that the rules which hold a contract void as against public policy should not be unduly extended; that persons should not be unnecessarily restricted in their freedom to make their own contracts and that courts should act cautiously and not hold contracts void as being contrary to public policy unless they are clearly and unmistakably so. Certainly there is no presumption that a contract is against public policy unless it so appears from the face and provisions of the contract.

Section 100-3-8 U. C. A. 1943, provides:

“It shall be the duty of the state engineer, upon the payment of the approval fee to approve an application if * * * 4. The applicant has the financial ability to complete the proposed works and the application was filed in good faith and not for the purpose of speculation or monopoly.”

By this legislative enactment the state engineer is required to approve an application if, among other things, the application was filed in good faith and not for the purpose of speculation or monopoly. The statute does not define what is speculation or what is monopoly. We assume the terms are used in their ordinary sense. In the first place, the state engineer has not refused to approve any of the applications in question for any such reasons. Secondly, is the application for sufficient water to irrigate a section of land, and the granting of sufficient well rights for that purpose the creation of a monopoly? Thirdly, does the statute contemplate that procuring and using water for the irrigation of arid land, and the resultant enhancement of values because of the water is such a monopoly and speculation and prohibited? Fourthly, is the application by plaintiff for well rights to irrigate land which he is purchasing, the creation of a monopoly and a speculation? And may this court determine such matter in a collateral proceeding or is the right to determine whether an application creates a monopoly or is made for speculation left to the determination of the

state engineer?

Respondent insists that there is no evidence of monopoly or speculation in the record because he did not make the water applications and even had he done so, there is still no such evidence of monopoly or speculation as is contemplated by the statute.

The appellant further argues that the contract is against public policy and void because respondent was making an unconscionable profit out of public waters. Without doubt the evidence shows and the trial court found that the land without water was worth \$1.50 per acre, and when water is available for irrigation the land was worth \$30.00 per acre. Such evidence was admitted over the objection of the plaintiff (Tr. 121-123), the objection being that such evidence was immaterial and irrelevant and not within the issues. We are not assigning error respecting such ruling because even though the evidence stands it can have no bearing on the legal problems presented by this appeal.

There is nothing whatsoever in the record to show what price defendant paid for the land. Plaintiff admits that the price paid by defendant is not made to appear. Defendant was on the stand in the trial of this cause and no attempt was made by appellant to elicit this information. The record shows 1880 acres of land of which the land described in the contract was a part, was sold by

an estate to defendant's predecessor in interest for \$1.50 per acre. The record does not show how much additional defendant's predecessor in interest may have paid out in expenses in checking record, checking on the land, negotiating the purchase, etc. The record does not show what profit he made when he sold to defendant. The record does not show whether the 960 acres sold to plaintiff was the cream of the land and what value could be placed on the remaining land. The record does not show what profit defendant made from the sale of the land, even assuming the matter of profit is material. All the record does show is that 1880 acres of which the land in question is a part is worth \$1.50 without water and \$30.00 with water—all of which was known to the plaintiff when he entered into the contract. Plaintiff made no attempt to show what prices are being asked by owners of other and similar adjoining premises for the same type of land, without water. He is attempting to move the well rights for the irrigation of other land which he has purchased, but fails to state what he actually paid for this other land.

We have never understood that a large profit entitled a vendee under a contract to rescind. But appellant argues that the large profit came from the public waters. As pointed out previously, the appellant as a vendee made the water applications and not the respondent. Any profit made was from the sale of the land and not from the public waters, which respondent now claims

by virtue of a contract. In effect the right to the water in the event of a forfeiture of the contract was in the nature of so much additional security for the faithful performance of the contract. However, respondent submits that even though he himself had applied for the water and sold the land and water for \$30.00 per acre, still there is nothing objectionable and appellant could not rescind. Respecting profit, it is further pointed out that without evidence of the cost of the sale, and expenses in connection with his procuring the land and the price which he paid, this court cannot even find there was any profit, much less an unconscionable profit.

We cannot follow the appellant's reasoning in insisting that by the contract the defendant seeks to change the laws of the state because the contract provides that water represented by applications shall be considered appurtenant to the land. It is true, of course, this Court has held that water represented by an application to appropriate, (until the well has been drilled), is not appurtenant to the premises. But this court has never held that parties may not by contract make such water rights appurtenant. This court has held that certain permanent improvements made on realty become appurtenant, and that certain improvements not of a permanent character do not become appurtenant. But this court has never held that the parties may not by contract, as between themselves, agree that certain improvements shall or shall not become ap-

purtenant.

We also point out that it is immaterial whether the water under the contract becomes appurtenant to the land. The contract provides as follows:

“It is agreed that in the event the buyer or any assignee shall make application to appropriate water or shall procure a certificate of appropriation to appropriate water or shall procure a certificate to appropriate water from wells located upon the said premises and said buyer or assignee or assignees shall thereafter default in this contract, the seller shall immediately become the assignee of any such application or appropriation and the State Engineer of the State of Utah is hereby authorized to recognize said seller as the assignee of any such application and in the event a certificate of appropriation has issued to the said buyer, the water rights thereunder shall be considered as appurtenant to the said premises and in the event of default, the title thereto shall immediately pass to the seller.”

The agreement is that the seller, in the event of a default, shall become the assignee of any water application and the water rights shall be considered as appurtenant “and in the event of a default, the title thereto shall immediately pass to the seller.” In order for the respondent, after default, to become entitled to the water application it is not necessary for the water to be considered as appurtenant, although we do not recede from our position that it does become so under the contract. Title can pass under and by virtue of the contractual provision

that the seller on default became the assignee; and can pass under and by virtue of the provision that title thereto shall pass immediately to the seller—and we add, regardless whether the water application is or is not appurtenant. And the trial court could award the water application to the seller by virtue of the contractual provision that “in the event of default, the title thereto shall immediately pass to the seller” as well as by virtue of the provision that “the seller shall immediately become the assignee of any such application or appropriation,” and as well as by virtue of the provision that “the water rights thereunder shall be considered as appurtenant to the said premises.”

Moreover, if the defendant lived up to his contractual obligations, the title to the land and the water rights would eventually pass to him and he would become the sole owner thereof. Certainly there is nothing against public policy in such an agreement. But, argues the plaintiff, if he fails to perform under the contract and by the violation of his own contractual obligations permits the title to the water to pass to the defendant, then the contract is against public policy. Plaintiff further argues that nevertheless he should end up with title to the water. This is indeed a weird legal theory.

Complaint is made by appellant that the court awarded the defendant the applications to appropriate water filed by Jerold E. Thompson, who is not a party to the

action.

Plaintiff commenced the suit asking for a rescission of the contract and that it be declared null and void, and that plaintiff be awarded \$2600.00 credited as a down payment. The cross-complaint filed by defendant prayed that plaintiff take nothing by his complaint and that the contract be declared to have been breached by plaintiff and to be in default and declared cancelled and forfeited.

The judgment decrees that the contract is not subject to any rescission by the plaintiff and that he take nothing by reason of his amended complaint; and further decrees that plaintiff has defaulted in and breached the contract and declared the same to be forfeited and terminated. The pleadings and issues involved do not necessitate that the court decree the water filings made in the name of Thompson did not belong to the plaintiff but belonged to Thompson. As a matter of fact the water applications or filings do not belong to Thompson and were not intended to be the property of Thompson.

Thompson testified that in the discussion between Frailey and McGarry he was to work into the deal and have an interest in the land; that there was some doubt as to how the state engineer might feel about one man applying for nine wells and inasmuch as Frailey wanted Thompson to get started there they decided "to put five wells in my name, four pretty good sized wells and one

smaller well.” (Tr. 74-75). He testified also that since he did not have any money to put up Frailey assumed the financial obligation of the deal with the understanding or verbal agreement that he would work along on a salary and a bonus and a portion of the bonus would apply on what Frailey wanted to give him; that when he paid back enough money he was to be given 250 acres of ground, including the water, and therefore he signed the water applications. (Tr. 75).

Frailey testified that he made about half of the applications to his brother-in-law Thompson, who was there during the negotiations and who witnessed the contract; that he told Thompson that as they developed the ground he would sell Thompson a piece of the land “and allow him one or two wells.” That at the time the contract was signed Thompson was working for Frailey (Tr. 12-13). Frailey also testified that in the event Thompson did not purchase any of the ground he (Frailey) presumed the wells would be his. (Tr. 40); that Thompson was present during much of the discussions between Frailey and McGarry and witnessed the contract (Tr. 40).

It is alleged in paragraph 1 of the affirmative defense set forth in the answer (R. 33) that Thompson was well aware of the terms of the agreement and was interested in the purchase of the premises and was to receive a title to a portion thereof, and by the reply and answer of plaintiff thereto (R. 38-39) it is admitted there was

an oral understanding that if sufficient water to irrigate the land was secured, and if and when plaintiff acquired title to said lands, plaintiff would sell some of the lands to Thompson but that Thompson no longer claims any interest in the contract.

There can be no question but that the water filings made in Thompson's name were for the benefit of plaintiff and that plaintiff was the real party in interest and the equitable owner thereof; that Thompson knew of the provisions of the contract making the defendant assignee of water filings made to irrigate the lands in case of default. At the trial of this case Thompson did not contend he was the owner of the water filings and under all the facts and circumstances cannot now successfully so contend. Not being a party to the suit the court was under no duty to declare such holdings belonged to Thompson or to declare otherwise. The court made its finding No. 7 (R. 72) that about half of the applications were put in Thompson's name because he was going to purchase some of the premises; that Thompson was to purchase 250 acres of land and have water to irrigate such land; that he was a witness to the contract and was well aware of the terms of the agreement and was interested in the agreement.

Since Frailey put some of the applications in Thompson's name, (particularly with Thompson's full knowledge of the provisions of the contract pertaining to water

being made appurtenant to the land) the court properly could require Frailey to procure Thompson's assignment of those water filings as a condition to decreeing a rescission of the contract. It would seem strange that Frailey could make applications in Thompson's name, and not be required to get Thompson's assignments as a condition precedent to a rescission of the contract.

THE TRIAL COURT DID NOT ERR IN STRIKING THE SECOND CAUSE OF ACTION

By plaintiff's second cause of action he claims the right to rescind the contract because it is alleged the plaintiff requested the defendant to furnish an abstract or policy of title insurance and defendant failed so to do. There is no allegation that the plaintiff tendered the balance due under the terms of the contract. The court sustained a demurrer to that cause of action.

The contract provides:

“The seller, on receiving the payments herein reserved to be paid at the times and in the manner above mentioned agrees to execute and deliver to the buyer or assigns, a good and sufficient warranty deed conveying the title to the above described premises free and clear of all encumbrances, except as herein mentioned and except as may have accrued by or through the acts or neglect of the buyer, and to furnish at his expense an abstract or apolicy of title insurance at the option of the seller brought to date at the time of sale or at time of delivery of deed at the option of the buyer.”

We agree that the seller binds himself to do two things on receiving the payments—to execute and deliver a deed conveying a good title to the buyer, and to furnish either an abstract of title or policy of title insurance *brought to date at time of sale or at time of delivery* of the deed at the option of the buyer. But he is only obligated to do those two things on receiving the payments agreed upon and not before. The buyer cannot demand that the seller do those things until full and complete payment has been made. The phrase “at the option of the buyer” clearly refers to the fact of whether the abstract or policy of title insurance shall show as of time of sale or time when the deed is delivered, and under ordinary circumstances the buyer would exercise the option to have the abstract brought to date of delivery of the deed.

The authorities cited by appellant to support his contention (page 26 of appellant’s brief) are not applicable. In the case of *Kneeland vs. Hetzel*, 103 Okl. 3, 229 Pac. 218, one of the cases cited by appellant, the question before the court was whether the abstract furnished showed a marketable title. In the case at bar the court made an express finding that plaintiff’s allegation that defendant did not have good title to the lands involved at the time the contract was entered into is untrue. (Finding No. 29, R. 76).

In the case of *Naylor vs. Jolley*, 111 Pac. (2nd) 142,

100 Utah 130, this court held that "under land contract calling for deferred payments and delivery of deed at time of final payment, marketable title in vendor at time he is required to deliver deed is sufficient." The trial court held as a matter of law that under the express provisions of the contract the defendant was not required to tender an abstract or policy of title insurance until payments due under the contract were made or at least tendered, and held also that the failure of defendant's wife to execute the contract was no grounds for rescission. Clearly such holding is correct.

THE TRIAL COURT DID NOT ERR IN STRIKING THE FOURTH CAUSE OF ACTION

It is contended by appellant in its fourth cause of action that the contract is so uncertain and vague it cannot be enforced. The trial court sustained a demurrer to this cause of action.

We admit freely that the language of the contract pertaining to payments is awkward, quite usual where the average layman attempts to formulate a legal document, and there is room for improvement by way of clearer expressions. However, when viewed in the light of the circumstances, the provisions in the contract concerning payments are capable of being construed harmoniously and reasonably.

It is true that the contract does not expressly obli-

gate the plaintiff to apply for any water to irrigate the lands. Only the defendant, not the plaintiff, could be injured because the contract did not expressly require the plaintiff to apply for water. It will be remembered, however, that either at the time the contract was executed or immediately thereafter the plaintiff did apply for water and all of the negotiations and discussions leading up to the execution of the contract contemplated that he should do so. We fail to see why the plaintiff should be concerned about the rights of the parties if he failed to apply for water, since he did actually apply for water to be taken from a number of wells.

Viewed in the light of the circumstances and negotiations leading up to the execution of the contract the meaning of the provisions concerning payment is reasonably clear. Each well application was for a definite amount and to irrigate a definite acreage. (Ex. 10 - and Trans. 158 to 161). Therefore when permission was given to drill a well under a certain application, it would permit the appropriation of water for a given and definite acreage. January 1st was termed the end of each harvest season. Consequently the only reasonable construction that can be given to the payment provision is this : When permission to drill under a certain application should be granted by the state engineer, the acreage for which that particular well was applied should be put into crops. On or before each January 1st thereafter

(which was termed the end of the harvest season) there would become due in cash the sum of \$10.00 for each acre which the application called for to be irrigated thereunder, together with interest at 5% per annum on the payments so becoming due, until the full purchase price with interest has been paid. The \$2600.00 down payment was to apply as a credit on the next payment which became due and payable on January 1st, 1947. Of course, if no payment should become due under the previous provisions of the contract, the court would construe such credit to apply on the first payment which would fall due. Payments of \$10.00 per acre on the acreage tilled and cropped were undoubtedly to become due each year until the purchase price was paid. No doubt the printed portion of the contract requiring monthly payments would be considered as surplusage and of no effect since the express written provisions would be controlling under all rules of construction.

The parties must have had a sufficient discussion concerning the terms of payment and plaintiff was satisfied with the language because he testified (Tr. 11): "This contract was drawn up by McGarry and in reading it over and signing it in the office, from what I got of it, I had asked to have that ("until the full purchase price, together with interest") put in. It seemed to me the best thing to do. And Mr. McGarry signed that."

The case of *Cummings vs. Nielsen*, 129 Pac. 619, 42

Utah 157, is somewhat analogous to the situation at bar. A contention was there made that the agreement was uncertain because no time was fixed within which the appellants were required to exercise an option. Answering that argument the court stated that "it is elementary that in equity that is certain which can be made certain." The court held also that definiteness under the circumstances could always be shown by extrinsic, parol or documentary evidence. Also that it was the duty of the court to scrutinize carefully the language used by the parties and in doing so ascertain therefrom, if possible, the intention of the parties and to enforce such intention.

See also *Johnson vs. Jones*, 164 Pac. (2nd) 893, 109 Utah 92.

We think the correct statement of law is set forth in *Patterson et al., vs. Chambers' Power Co.*, 159 Pac. 568 (Ore) wherein it is said: "It is a well recognized principle of legal construction that a contract will not be held void for indebtedness when by considering it as a whole and taking into consideration the surrounding circumstances the true intent of the parties can be ascertained."

However, it would seem that the question of whether the contract is uncertain is of no importance in this case since the plaintiff could never be confronted with how much acreage should be tilled and cropped and when and what payments would become due. Long before the plaintiff attempted to rescind the contract by serving

notice or otherwise, and at a time when he claimed the contract *was not in default* he filed applications to change the point of diversion of the wells and place of use of land to be irrigated therefrom, thus showing conclusively that he did not intend to make any future payments. The entire record shows that the plaintiff is attempting to avoid the agreement because of claimed misrepresentations as to availability of water, and not because the contract was indefinite. He tried to procure a modification of the agreement to reduce the acreage from 960 to 320 but made no complaint as to the other terms of the agreement.

Besides, the plaintiff having breached the contract by failure to till any acreage at all after having secured permission to drill several wells on the ground, and having breached the contract in the other respects found by the court, should be in no position to thereafter contend the contract is subject to rescission because of indefiniteness concerning provisions which need not be performed by him until after such breaches had occurred.

CONTRACT NOT IMPOSSIBLE OF PERFORMANCE

Appellant takes the position that the contract is impossible of performance, and for such reason is invalid. If it is impossible of performance it is because there is no water available in the Beryl District for the irrigation of land. It cannot be said there is water available

in the district but not for the specific tract of land mentioned in the contract. The plaintiff's own course of conduct and his actions belie this present contention. Plaintiff has not drilled any wells on the ground under purchase although permission was granted by the state engineer to drill three wells. He never applied for permission to drill more, although permission could have been procured to do so. The state engineer testified that the wells in the Beryl district produced an average of from 2 to 2.5 second feet of water (Tr. 139). Each application was made on the basis of irrigating about 40 acres per second foot. Therefore the plaintiff might reasonably anticipate he could irrigate 80 to 100 acres from each well or about 300 acres from the three wells. He could have secured permission to drill more wells by asking for such permission and showing ability to put them down. Plaintiff purchased other land in the Beryl district and put down wells, and consequently he did not and does not believe the contract impossible of performance. It is reasonable to believe that plaintiff would not buy other land and go to the expense of putting down wells unless he had good reason to believe there was water available in the underground basin to justify such purchase and expense. If water is not available on other and adjoining ground the plaintiff could and would have produced proof to that effect in the trial of this cause. Not having put any wells down on the ground he pur-

chased from defendant he cannot say that the contract is impossible of performance because water is not available. It should be borne in mind that defendant offered to modify the contract by permitting plaintiff to purchase 320 acres of land and retain sufficient water filing to irrigate such land but plaintiff refused to assign to defendant the water filings for the irrigation of the premises not being purchased. This would indicate conclusively that plaintiff had faith in the value and worth of these water filings but wanted to use them elsewhere.

Finding No. 9 (R. 72) is to the effect that the Beryl underground basin was greatly over-appropriated at the time the contract was made *unless* many prior appropriators or applicants under then pending applications failed to use their appropriations or proposed appropriations. We call attention to Finding No. 24 (R. 76) that many wells were drilled in the Beryl area and in the vicinity of the premises described in said contract in the year 1946 and also during the years 1947 and 1948, nearly all of which wells are producing water for irrigation purposes. In other words, the evidence shows and the court found that in the three years following the making of said contract many wells have been drilled and are producing water for irrigation of premises in the vicinity of the premises in question. Bearing in mind that the contract does not provide for a sale of any water and plaintiff does not contend that defendant guaranteed or

even represented that a well would produce any given amount of water, and bearing in mind there is no proof that the district even three years after the making of said contract is over-pumped, it is difficult to see how the contract is impossible of performance.

JUDGMENT FINDS SUPPORT IN THE EVIDENCE, FINDINGS AND CONCLUSIONS

In its Memorandum of Decision the court concluded that the contract between the plaintiff and defendant was subject to rescission because of misrepresentation as to availability of water for irrigation of said lands. The court concluded that the defendant, however, should not be required the refund the down payment received by him unless the water filings made in connection with the contract be transferred and assigned to the defendant; that if the rights acquired under the applications to appropriate water should be transferred and assigned to the defendant, the defendant should be required to repay the plaintiff the \$2600.00 down payment, with legal interest and the fees and expenses paid by plaintiff to procure said applications; that if such transfers are not made then defendant should be released from any obligation to convey the real estate involved or to refund the down payment and the contract should be declared terminated. The court permitted plaintiff fifteen days to give notice as to whether such water applications would be transferred. (R. 68).

The trial court concluded that since the plaintiff took no steps to rescind the contract, after notice of the facts under which he claimed the right to rescind, and until long after the Governor's proclamation withdrawing the Beryl underground district from further water appropriations, he should not in equity be permitted to retain all water filings for use elsewhere against the express terms of the contract and receive back the entire down payment and be relieved from further obligation under the contract, thus leaving the defendant or defendant's successor in interest without the right to appropriate water. The court concluded that if the water filings did not accord to the plaintiff the water right to which he claimed he was entitled and as a consequence plaintiff should be relieved from his obligations under the contract with a return of his down payment, then the water rights represented by such filings, such as they are and for what they are worth, should be left to the defendant with the land in accordance with the express agreement of the parties. The court concluded that the plaintiff should either rescind the contract in its entirety or not at all. The court concluded the defendant, as well as the plaintiff, was entitled to be placed in status quo; and also concluded that if the plaintiff was entitled to relief *after* waiting many months to rescind the contract and *after* no further water might be appropriated for the irrigation of the land, then the defendant was entitled to

the filings which were made as a part of the deal between plaintiff and defendant. The court believed, and it could not believe otherwise, that the applications for filings were made as a direct result of the purchase of the land and for the benefit of the land being purchased and with the definite understanding and agreement that the water represented by such filings would become a part of the land and remain with the land in case of default, and therefore the plaintiff should not be entitled to rescind the contract and receive back his down payment because of an insufficiency of water without leaving at least the insufficient supply with the land.

RESPONDENT'S CROSS-ASSIGNMENT OF ERROR

The respondent and defendant assigns the following cross-assignment of errors committed by the trial court, to-wit:

1. In making that portion of finding No. 9 which finds that representations made by defendant to plaintiff as to the availability of water for appropriation were untrue. (R. 72).

2. In making its conclusion of law No. 1 concluding that the contract between plaintiff and defendant was subject to rescission by plaintiff because of any misrepresentation by defendant as to availability of water for irrigation of lands. (R. 77).

3. For failing to make an express conclusion that the failure of the plaintiff to rescind the said contract upon discovery of the alleged misrepresentation by defendant as to the availability of water for irrigation of said lands, or upon receiving information sufficient to put him upon notice that statements concerning the availability of water were not true, and the failure of the plaintiff to rescind after learning that the state engineer questioned the availability of water, waived his right to rescind, and that the attempt to rescind on January 5th, 1947, was not timely.

ARGUMENT ON CROSS-ASSIGNMENT OF ERRORS

Respondent will present his argument on the above cross-assignments in connection with his argument that the appellant was not entitled to rescind the contract because (Conclusion No. 2, R. 77) he has not offered to rescind the contract in its entirety but demands a return of the down payment and cancellation of the contract and asserts the right to retain all of the water filings and applications. We will discuss first the legal propositions involved and afterwards the factual situation.

It is the position of respondent that the plaintiff was not entitled to rescind the contract and cannot prevail in this cause for the following reasons:

1. One retaining benefits of a contract and continuing to treat it as binding is deemed to have waived fraud

and elected to affirm the contract, and a party cannot rescind on grounds of fraud when, after knowledge, he affirms it.

2. A contract must be rescinded in its entirety, and the complaining party cannot affirm in part and rescind in part.

3. One claiming to have been defrauded must act promptly and any action in delaying the rescission to obtain an advantage is a ratification of the original agreement.

4. One who has opportunity to know the facts constituting alleged fraud, or who learns the facts, cannot remain inactive and thereafter rescind the contract.

Propositions 1 and 2 as above stated, can, for the purpose of this discussion, be treated together.

A statement of events and dates will no doubt be helpful.

The contract was made on December 7th, 1945. (Pltf's. Ex. A). The applications to appropriate water were made immediately or within a day or so thereafter, and were received in the office of the state engineer on December 13th, 1945. (Tr. 90). On March 2nd, 1946, the state engineer sent a letter to Vern Frailey concerning all of the applications and stated among other things "I feel certain that your applications will not receive favorable consideration for at least a year." (Pltf's. Ex. B. Tr.

67). On or about March 29th, 1946, a meeting was held at the Wells School House at Beryl, in which the farmers expressed themselves as being willing to have the present outstanding applications approved and as believing sufficient water to be available without impairing the underground water basin up to that point. (Tr. 104-5). On April 10th, 1946, the Governor of Utah by proclamation suspended the right of the public to appropriate surplus or unappropriated waters in the Beryl area. (Deft's. Ex. 11; Tr. 134). On April 21st, 1946, Frailey sent a letter to the state engineer saying, "I believe it would be most advantageous to us if we be permitted to drill wells Nos. 17118 and 17121." (Deft's. Ex. 2; Tr. 51). On April 25th, 1946, the state engineer sent Frailey a letter saying, "We can now act upon the applications filed individually and it is believed that there is underground water that may be appropriated." (Deft's. Ex. 3; Tr. 52-55). This letter also states that it was the unanimous opinion of all water users present in the meeting that more wells could be drilled without seriously interfering with existing rights and again saying Frailey could drill two wells. On May 23rd, 1946, Frailey sent a letter to the state engineer saying he wanted to change the location of the wells and asking if McGarry could prohibit him from so doing. (Deft's. Ex. 4; Tr. 56-75). On May 31st, 1946, the state engineer sent a letter to Frailey saying there was no reason why such a change application could not be

filed if Frailey had not entered into a contract that would prohibit it, and advising there was nothing to prevent a change application *before* Frailey was in default under his contract. (Deft's. Ex. 5; Tr. 58-59). On June 13th, 1946, Mr. Isom, Frailey's attorney, advised the state engineer by letter that "Frailey has decided to let the land go back and forfeit the contract but he is not yet in default and wants to move the wells off first." (Deft's. Ex. 6; Tr. 59 to 61). On June 14th, 1946, the change applications were filed. (Tr. 94). On August 9th, 1946, Thompson filed change applications. (Tr. 95). On January 15th, 1947, notice of rescission was given by plaintiff to defendant, (Deft's. Ex. 1). All change applications were duly protested by McGarry.

From the outline of events and dates it is very clear that the plaintiff brought the action for rescission of the contract, not because of any claimed fraud or misrepresentation or because he thought no water would be available to irrigate the ground, but because he did not want to proceed with the purchase of the entire tract and could not hope to avoid the provision of the contract which provides the seller would become the assignee of water applications in case of a default, unless the contract could be rescinded and held to be of no force and effect. The matter of water applications was then of paramount importance because Frailey could not file on additional water after the governor's proclamation, and

by the same token the defendant, or any subsequent purchaser of the land, could not file upon or procure other or additional water. It is also clear that after the state engineer gave the hint to Frailey that he could perhaps move the location of the wells and place of use, *before* his contract was in default, and after Attorney Isom gave him similar advice, Frailey and Thompson then filed their applications to get their wells moved before serving any notice of rescission. There would have been no lawsuit and no attempt to rescind the contract had there been no proclamation suspending the right to make more filings. That is shown conclusively by Attorney Isom's letter to the state engineer on June 13th, 1946, stating "Frailey has decided to let the land go back and forfeit the contract which is not yet in default and wants to move the wells off first." *At that time he had in mind to default and rescission was an afterthought.* When defendant protested the change applications on the ground that the contract prohibited such a removal, then and then only the idea of rescinding the contract occurred to him or his advisers. All that Frailey wanted in the first instance, after the contract was signed, was to reduce the acreage under his contract from 960 acres to 320 acres, and to keep all of the water filings. He made that very proposition to McGarry but at that time made no claim to a right of rescission or a return of his down payment.

The following provision in the contract is clear, definite and certain, nor is it contended either by Frailey or Thompson that they were misled into so agreeing, or that they did not know the clear purport of the language and its effect, to-wit:

It is agreed that in the event the buyer or any assignee shall make application to appropriate water or shall procure a certificate of appropriation to appropriate water or shall procure a certificate to appropriate water from wells located upon the said premises and said buyer or assignee or assignees shall thereafter default in this contract, the seller shall immediately become the assignee of any such application or appropriation and the State Engineer of the State of Utah is hereby authorized to recognize said seller as the assignee of any such application and in the event a certificate of appropriation has issued to the said buyer, the water rights thereunder shall be considered as appurtenant to the said premises and in the event of default, the title thereto shall immediately pass to the seller.

The applications represented something of value to the defendant in the event of a failure of the plaintiff to proceed under the contract. They represented something of value to the plaintiff and the plaintiff would *not* rescind the contract until after he and Thompson had procured permission to drill three wells and filed change applications on such wells and all of the other wells represented by their filings or applications, so that the land would be deprived of the benefit of water filings and water to be procured thereunder and so that the provi-

sion of the contract with respect to water would be rendered nugatory.

It will be recalled that the plaintiff was advised by the state engineer as early as March 2nd, 1946, that there was a grave question concerning the right to secure favorable consideration to drill wells for at least one year. Thereafter plaintiff asked permission to drill two wells and Thompson asked permission to drill one well and both secured such permission. Plaintiff is now asking that the contract be rescinded and held of no binding force and effect, which would permit him not only to recover back the down payment, but retain the benefits represented by the water applications and well rights, turning back the land after he had remained in possession for one year during which time the right to secure water for said land had been lost through the governor's proclamation suspending further applications.

In the offer of rescission plaintiff neither tendered back the possession of the premises nor offered to return the water applications, but on the contrary he has retained and used and intends to retain and use all of the benefits to be had from these applications.

Plaintiff has therefore elected to affirm the contract as to his right to the filings and applications, and has taken and used the water, (as has Thompson also), from two of the wells which have been drilled. He cannot be

permitted to affirm the contract in part and rescind as to part.

“It is well settled that, if the complaining party has allowed a change to take place so as to modify the situation with reference to the property involved, or, if he retains benefits under the original or new contract, then rescission will not be declared. In *Appleman, et al., vs. Pepis*, 117 Okl. 199, 246 Pac. 225, the rule is stated as follows: ‘Where a party to a contract pursues a course of action that expresses an intention to be bound by the contract and expresses an intention to enjoy the benefits of the contract, he cannot then escape the burdens of the contract.’ The rule is stated by the Supreme Court of Utah in the case of *LeVine vs. Whitehouse*, 37 Utah 260, 109 Pac. 2 (Ann. Cas. 1912C 407), as follows: ‘A party misled must, as soon as he learns the truth and discovers the falsity of statements relied on, disaffirm the contract with all reasonable diligence, and he cannot derive all possible benefit from the transaction and then claim relief from his own obligation by a rescission or refusal to execute.’ To the same effect are the following authorities: *Farmers’ State Bank vs. Harrington*, 225 Pac. 705; *Croak vs. Trentman*, 150 Pac. 1088.” *Evans vs. Turney*, 61 Pac. 2nd, 237.

The above case of *Evans vs. Turney* is also authority for the proposition that before there may be a rescission there must be a failure of the entire consideration of the contract.

In the case at bar plaintiff does not contend that he did not receive the right to drill some wells, nor does he contend that for the irrigation seasons of 1946, 1947 and

1948 the wells so drilled did not produce ample water or that water was not available from the wells. Neither does plaintiff contend that he and Thompson could not have secured permission to drill wells under their other applications had they so applied. Thompson and Frailey both admit they never requested permission beyond the three wells for which they obtained the right to drill, and Mr. Ward testified they could have gotten permission to drill *all* of the wells had they so applied and shown to the state engineer that they had the means of putting down the wells and would use the wells in the actual irrigation of land. (Tr. 132-133).

The case of *LeVine, et al vs. Whitehouse, et al*, 37 Utah 260, 109 Pac. 2, is very illustrative of the proposition that a person claiming to have been defrauded will lose his right to rescind if he takes any benefit under the contract or does any other act implying intent to abide by or affirm it, after he becomes aware of the claimed fraud. Also the LeVine case holds:

• A party misled must, as soon as he learns the truth and discovers the falsity of statements relied on, disaffirm the contract with all reasonable diligence, and he cannot derive all possible benefit from the transaction and then claim relief from his own obligation by a rescission or refusal to execute.

A party to a contract tainted with, and who is injured by fraud may either affirm the contract and sue for damages or disaffirm and sue for cancellation, but, if he rescinds, he must rescind the con-

tract in its entirety, and if he affirms, he must affirm wholly and not in part. *Cattell vs. Denver State Bank*, 225 Pac. 271 (Colo).

We call the court's attention to the very recent case of *Morse vs. Kogle*, cited at 178 Pac. (2nd) 275 (Kan), which tersely reviewing the authorities concerning the necessity of rescinding promptly upon discovery of the alleged fraud, holds that treating a contract as binding after having knowledge of the alleged fraud is an affirmation and is then not subject to rescission.

Where a party, with knowledge of facts entitling him to rescission of a contract, afterward, without fraud or duress, ratifies the same, he has no claim to the relief of cancellation. An express ratification is not required in order thus to defeat his remedy; any acts of recognition of the contract as subsisting or any conduct inconsistent with an intention of avoiding it, have the effect of an election to affirm. Indeed it has been declared that since the remedy of rescission is not held in high esteem by the courts, even slight circumstances showing a purpose or intent to waive it will preclude the allowance of such relief. * * * Sec. 38 Cancellation of Instruments, 12 C. J. S. page 996.

As a general rule the receipt of benefits under the contract, or acts of dominion or ownership exercised over the property received under the contract after knowledge of the ground of rescission amount to a ratification. This is especially true if plaintiff, with knowledge of his right to rescind, has so dealt with the property as to make restoration thereof impossible. * * * He cannot occupy the inconsistent position of going on with the contract

and at the same time claiming the right to rescind it, nor can he vacillate or delay. Sec. 38 (b) Cancellation of Instruments, *12 C. J. S.* page 998—citing numerous cases.

The authorities on the foregoing propositions are so numerous and universal, they could be multiplied almost without end.

Even though it could conceivably be held that applying for and receiving permission to drill wells long before any change applications were made, retaining the benefits of such wells for use on other ground, and as Frailey testified, making demand for an abstract of title in the fall of 1946, and applying for change applications, was not an affirmation of the contract, most certainly the position taken by Frailey on June 13th, 1946, was definite. On that date Mr. Isom sent a letter to the state engineer in which it was stated: "Frailey has decided to let the land go back and forfeit the contract, but he is not yet in default and wants to move the wells off first. He has casing on the ground and can get a driller." That definitely anchored his position and shows conclusively that he had no intention of claiming a right of rescission, but on the contrary was going to let his contract go into default and forfeit his rights thereunder, but would hold the contract in standing until he could move the wells off first.

Addressing our attention now to propositions 3 and

4, we submit the following authorities which are overwhelming and universally followed by the courts of all jurisdictions:

If a party has been defrauded by another, he must act promptly and at once restore or offer to return the property which he has received. After discovery of a fraud, if the party affected thereby does anything in procuring an extension of a performance of the terms of the agreement out of which some unjust advantage is undertaken to be obtained, his action in such respect constitutes a ratification of the original contract. *Hewitt vs. Andrews*, 140 Pac. 437 (Ore).

The general rule that the purchaser waives his right to rescind by failure to exercise it promptly on discovery of the grounds applies where the ground relied on is mistake, duress, failure to procure the conveyance within the limited time, or deficiency in quantity. *McKellar Real Estate & Investment Co. vs. Paxton*, 218 Pac. 128, at page 132, 62 Utah 97.

In this connection it must be remembered that the plaintiff went into possession of the premises described in the contract, (Tr. 163), did some work thereon, and at no time offered to return possession of the premises to the defendant. As a matter of fact, even the notice of rescission served about January 15th, 1947, did not offer to return the possession of the premises to defendant. Had the defendant entered into the possession of the premises, at least at any time up to the service of the notice of rescission over a year after the contract was made, he would have been guilty of an unlawful and forc-

ible entry and detainer. See *Paxton vs. Dearden*, 45 Pac. (2nd) 903, 86 Utah 408.

Concerning the matter of possession of the premises, at the trial the plaintiff attempted to discount the legal effect of having retained possession for over a year after entering into the contract by contending that he and Thompson were not in physical possession and the ground was open where defendant could have gone on it and taken the possession. It is not explained just how plaintiff could have expected defendant to take possession until plaintiff had served a notice of rescission and thus advised defendant that the contract was being abandoned. The letter of plaintiff's counsel to the state engineer in June of 1946 stated that the plaintiff was not in default, which is equivalent to claiming he was entitled to possession of the premises under the contract. Before serving notice of rescission, the entire course of conduct indicated that he was proceeding under the contract.

This court (Wash.) has been more than liberal, even generous, in allowing a rescission of fraudulently induced contracts for the purchase of land, but our attention is called to no cases holding that a vendee can, after ample time to ascertain the facts, and after undertaking to turn the land into a fair bargain on his own account, and after a lapse of several months rescind his contract. *Pearson vs. Gullans*, 142 Pac. 456.

A party misled must, as soon as he learns the truth and discovers the falsity of statements relied

on, disaffirm the contract with all reasonable diligence. *LeVine vs. Whitehouse*, 109 Pac. 2, 37 Utah 260.

The justify the rescission, the party seeking to avail himself of that remedy must move promptly and with all reasonable diligence to disaffirm the contract upon discovery of the fraud. He must restore both parties to their original position. He is not allowed to go on deriving all possible benefit from the transaction, and then claim to be relieved from his own obligations by seeking its rescission. *Taylor vs. Moore*, 51 Pac. (2nd) 222, at page 227, 87 Utah 493.

The Taylor case above cited also holds: The means of knowledge is equivalent to knowledge. A party who has opportunity of knowing the facts constituting the alleged fraud cannot be inactive and afterwards allege a want of knowledge that arose by reason of his own laches and negligence.

Notice of acts and circumstances putting a man of ordinary intelligence and prudence upon inquiry is equivalent to knowledge of fraud necessary to an acquiescence in the fraud. *Whitney vs. Bissell*, 146 Pac. 141.

The case of *Zuniga, et al., vs. Leone, et al.*, 297 Pac. 1010, 77 Utah 494, sets forth the established law on this subject wherein it is held the right to rescind a contract is gone after ratifying it. This court upheld the lower court in refusing to permit a rescission, even though it appeared there had been a misrepresentation concerning the value of a stock of merchandise. This court an-

nounced the universal rule as follows :

A purchaser has merely an election to rescind for fraud or misrepresentation of the vendor, the contract being voidable and not void, and his right to rescind is gone after he has once ratified or affirmed the contract, either expressly or impliedly, as to recognizing or treating it as binding or accepting benefits under it with full knowledge of the fraud or misrepresentation and of his legal rights.

In the Zuniga case above cited the plaintiff with knowledge of the facts about which they complained, retained the occupation and use of the real property for over a year, sold the merchandise and entered into an agreement modifying the original contract. It was held this amounted to a recognition and treatment of the contract as valid which precluded a rescission. In the case at bar, the plaintiff did not attempt any rescission for over a year, and while he did not enter into an agreement for a modification of the original contract, he did negotiate for such modification and offered to proceed with the purchase of a part of the land.

We do not know whether the plaintiff is urging that there is not sufficient water available to irrigate the land *at this time* or whether there may not be sufficient water available in the years to come; but in either event, the information upon which plaintiff now relies was available to him at all times. Particularly after receiving the state engineer's letter of March 2nd, 1946, plaintiff could

have secured and had the benefit of all such information. In his letter to Frailey dated March 2nd, 1946, the state engineer said: "It is true that there appear to be large quantities of water that are stored in the ground in this valley that would perhaps satisfy the proposed diversions for a year or two, but with the state engineer's office this is a serious problem * * *" Frailey discussed with the state engineer on the occasion of his visit on March 20th or thereabouts the number of outstanding applications, (Tr. 14-77) and knew or could have learned from the records while there what he might expect as to the availability of water. The state engineer could have told him as much then as now, and Frailey knew, or could have learned from the state engineer's office, as much about the availability or lack of availability of water to irrigate the tract of land in question on March 20th, 1946, as he knows now or learned at the trial. Any simple inquiry from and discussion with the state engineer would develop all of the information testified to by Mr. Ward. In fact, in the light of the state engineer's letter of March 2nd, 1946, which resulted in Frailey and Thompson going to see him, it seems inconceivable that Frailey did not discuss the question of availability of water and was advised of the matters upon which he now relies for a right of rescission.

If there was no water available to irrigate the tract in 1945 when the contract was made, and in 1946, the fol-

lowing irrigation season, then Frailey either knew of such facts as early as March of 1946, or was on notice that he could have ascertained the facts. What did he do about the matter? He failed to attempt to rescind for about a year. Meanwhile he tried to have the contract modified by taking and keeping 320 acres of land with *all* of the water applications. He applied for and received permission to drill three wells. During the summer or fall of 1946 he demanded, so he says, that McGarry furnish him with an abstract of title covering all of the lands, so he could determine if the title was good. He was not particularly concerned about the water situation when he drilled a well at considerable expense and when Thompson also drilled a well. He applied for the right to change the point of diversion and place of use of all of the water applications. And then about a year later he claimed the right to rescind on the theory that water is not available.

That the claim for rescission was not made timely is amply borne out by his own direct testimony and we need not rely only on his acts. In January, 1946, about a month after entering into the contract he began to hear rumors and stories about not having his applications allowed; that he was worried because the applications were not being advertised and he came to Utah from California and discussed with various people the matter of his applications not being approved and discussed it with McGarry; that McGarry said it would be best to go to Salt

Lake to find out about the matter; that he did so and talked with Mr. Ward; that Mr. Ward clarified his mind about the matter and he learned that the applications were not going to be approved (Tr. 13-14); that after talking with the state engineer it took a good deal of thought on his part to decide what to do and he had a talk with McGarry and could not arrive at anything definite where he could feel secure in going ahead with the development of the ground. He then talked with Mr. Isom, an attorney at Cedar. (Tr. 16). He then told McGarry he was willing to go ahead with about 320 acres and narrow the contract down to something he could handle; he wanted to farm what land he could get water for but could not go ahead on the entire tract of land (Tr. 16). Shortly after that he found he could not negotiate with McGarry and he thought it was better to go into litigation; that he made a trip to Salt Lake and located a section of state land on advice from the engineer, and then attempted to move all of the well applications; that he bought 640 acres from the state, and that he put down a well on the land being purchased from the state (Tr. 16-17).

In answer to a question concerning whether he could get permission to drill more than two wells, Frailey stated:

- A. I didn't want to get in any more trouble than I had. I didn't want to go ahead and not have any understanding how much ground there was. I offered to buy as much ground as I had water

to put on it, what I could obtain for it, buy the ground. If at a later time I was allowed more water I would purchase more ground, either way. We couldn't come to any terms on it.
* * * (Tr. 29).

- A. That is when I came to McGarry and offered to purchase 320 acres, insofar as I was allowed tentative permission to drill, I wanted to segregate 320 acres which I could pay for and obtain a deed for. (Tr. 30).

That in March, 1946, when he secured permission from the state engineer to drill two wells he then intended to go through with the McGarry contract, and that was the time when he thought it best to try to buy only the 320 acres; that when McGarry said he didn't want to change the contract Frailey then changed his mind; *that it was after permission was given to put down the wells that he concluded he was not going to proceed with the McGarry contract.* (Tr. 33-34). That McGarry offered to cancel the contract and return the money if Frailey would assign the water applications but that Frailey wanted to cancel the contract and keep all water applications; that he did not want to assign the water applications because after visiting the state engineer he was advised by that office the water was not appurtenant to the land. (Tr. 35).

Frailey concluded he was not going through with the McGarry contract as early as April or May, 1946, but failed to serve notice of rescission for some eight months

thereafter. Application to relocate the wells for which permission to drill was granted as in June. Frailey testified as follows:

Q. Now, when you concluded you was not going through with this contract, you filed applications with the State Engineer, did you not, to change the point of diversion and place of use of some of these applications?

A. That is right.
(Tr. 36).

Q. From April, until, I think, January 12th (following) you made no demand upon Mr. McGarry for either a return of the money or advising him that you was going to rescind the contract.

A. Nothing official. It took a good deal of thought to decide to completely sever the deal.

Q. In other words, you was thinking about whether you would or would not rescind the contract from April, 1946, until about the middle of January, 1947?

A. Sometimes it takes a good deal of time to locate an attorney you feel you can go ahead with. I had tried in Cedar City. I didn't know how long I could go alone and the attorney not going here to take the case. I was cogitating a good deal trying to determine whether to go through with it or have a lawsuit.

Q. That is your explanation of the delay?

A. Yes, sir. I was extremely busy.

* * * * *

Q. Weren't you advised by your counsel in the

summer of 1946 that your contract was not yet in default and that you had better move this water before it was in default?

A. I believe I was.

Q. Surely. Isn't it a fact that you deliberately held back from attempting to rescind this contract until you had the advantage of moving this water while your contract was still alive and in force?

A. Well, the transactions all went on at that time. I don't know whether I deliberately held back. I was deliberating, negotiating, studying it. There was quite a bit of business going on at that time.

* * * * *

Q. During the year (1946) no wells were drilled on this McGarry ground?

A. That is right.

Q. Since about April of 1946 you have had no intention of drilling any wells on that ground.

A. I don't recall the exact date, as I say, that I had any intention of drilling wells, it was after my meeting with McGarry, I went to Mr. McGarry with Mr. Isom and tried to negotiate on some smaller tract of ground, some time after that, why I decided there was no soap.

Q. When you was advised that you would be allowed three wells and you had no assurance any others would be allowed, why didn't you rescind the contract then and there?

A. Well, it took a good deal of thought to decide, that is why I tried to negotiate for a smaller piece of ground.

(Tr. 39).

We call particular attention to the testimony of Frailey on pages 41 to 50 of the transcript or bill of exceptions, from which it becomes apparent that Frailey wanted his cake and wanted to eat it too—that he wanted to go through with the deal when he demanded an abstract as late as September; that he decided not to go through with the deal when he filed the change applications in June; that he wanted to modify the contract so he could keep all the water and buy 320 acres of ground, but keep an option on the balance; that when he filed the change applications he might decide to move the wells back to the McGarry ground, etc. etc.

THERE IS NO SUFFICIENT EVIDENCE TO SUSTAIN A FINDING OF MISREPRESENTATION

Up to at least July of 1945, and perhaps for several months thereafter, water was appropriated merely by having prepared and by filing with the state engineer a formal application therefor and permission to drill a well was given quickly thereafter. (Tr. 123).

The extent of the representations as to availability of water is as shown by Frailey's testimony. McGarry said there was an underground lake and an abundance of water flowing underground and that there had never been any trouble in obtaining plenty of water for irrigation. (Tr. 8). That McGarry told him of the amount of water available in the valley, that there had been no

draw down in thirty years; that they had a large lake underlying the valley and an underground stream feeding it from the hills. (Tr. 19). That McGarry told him he might drill a well and produce water from it but McGarry did not say and he did not inquire as to the procedure thereafter; that if permission was granted to drill a well, that would give him all McGarry promised or told him about. (Tr. 27). It is quite obvious that Frailey was not concerned particularly about any failure of water supply because after having received permission to drill two wells Frailey wanted to purchase 320 acres of the tract in question and obtain a deed therefor, and, 'if more wells were allowed, I could go ahead and get more land,' and at that time Frailey had no intention of applying for more wells or putting more down. (Tr. 43-44). McGarry testified that when the contract was signed it was rumored there was a little concern in the state engineer's office that because of applications coming in at quite a heavy rate they might be slow in allowing the applications and for that reason the clause in the contract "on any and all lands where water well permits are granted and allowing water for any given acreage, said acreage is to be tilled and cropped" was inserted. (Tr. 156). McGarry denied that he represented to Frailey that all of the applications would be allowed by the state engineer or that he would be given permission to drill a well for each of the applications in sixty days after the date of

filing them. (Tr. 157).

The express provisions in the contract concerning payments thereunder only on lands for which well permits have been granted not only lends credence to the defendant's testimony, but there would be absolutely no purpose in such a provision if it was agreed and intended that all of the well permits would be allowed within sixty days.

In any event Frailey received permission to drill all the wells he intended to put down during 1946. He has never since requested permission to drill more wells and Mr. Ward testified that such permission could be secured upon proper showing of ability to put them down and put the water to a beneficial use. In fact the state engineer "was anxious" to have all applicants in the Beryl district get their wells down so he might have future data as to the availability of water. (Tr. 132).

There is not one word of testimony in the entire record to the effect that McGarry knew or that it was impossible to secure water rights to irrigate the lands. Mr. Ward testified that until about July 10, 1945, and perhaps as late as September 10, 1945, applications were approved as a matter of course within a few days after being received in his office; that sometime thereafter the state engineer's office adopted the policy of withholding permission to drill wells, but he did not know and had no

record of when that policy was adopted; that no public announcement was made of such policy. (Tr. 104 and 124). The record does not disclose whether the change of policy was before or after the Frailey contract was executed.

The only serious charge of misrepresentation in the amended complaint which can possibly stand as a basis for an alleged fraud is the allegation that defendant represented there was ample water available and that he knew it was impossible to secure a sufficient water right to irrigate the lands described in the complaint. It is, therefore, important to discuss this charge at some length. We submit there is no sufficient proof as to lack of ample water available to irrigate the land, and ni sufficient proof that the defendant knew it was impossible to secure a sufficient water right.

In his letter of April 25, 1946, after the governor's proclamation suspending further applications, the state engineer stated "it is believed that there is underground water that may be appropriated." (Tr. 54). The letter also gave permission to drill two wells and stated it was the unanimous opinion of all water users present at the meeting on March 20th that more wells could be drilled without seriously interfering with existing rights.

In commenting on the following testimony we do not set forth the specific transcript page reference to each bit of testimony since it is not practicable to do so, but

these facts are all shown by Mr. Ward in his testimony which is not very lengthy.

Frailey and Thompson never applied for permission to drill more than three wells. If they had, such permission would have been granted, providing they were in a position to put down the wells and put the water to a beneficial use. None of the applications have ever been rejected. They were all advertised as required by law and no protests were filed. About 40 wells were put down in 1946, about 40 more in 1947, and still more in 1948. There is no evidence that such wells did not produce water or that water was not available therefrom. Many applications were filed *after* the Frailey and Thompson applications were filed. As the water table is lowered in the Beryl district Mr. Ward would expect a lesser drop thereafter because the sage and other vegetation and wild plant life would not then use up and take from the ground a considerable amount of water. Neither Ward nor Frailey nor anyone else has claimed that the numerous wells which were put down in 1946, 1947 and 1948 were dry holes or produced but a minor quantity of water. No one, including Mr. Ward, claims that wells have been abandoned because there is no water available, or even that water rights have been affected through an overpumping of the valley. No wells have been ordered shut down or have voluntarily ceased operations through lack of water. The water table between the years 1936

to and including 1946, a period of eleven years, has gone down less than three feet—2.80 feet to be exact. Some of the years there was a lowering of the water table and some of the years it was raised. Mr. Ward did not claim, nor did anyone else, that such a lowering of the water table constituted a serious depletion of the water supply, or left any of the lands for which water was applied without an adequate or available supply. On the contrary, all of the figures, excepting perhaps the year 1946, were available and known to the state engineer when he held the meeting with the water users at the Wells school, and when the water users unanimously expressed the belief that more wells could be drilled without interfering with existing rights. Moreover, these figures were available when the state engineer granted permission to drill wells in 1946, 1947 and 1948, and when he advised Frailey that he believed there was underground water that might be appropriated. True it is that Mr. Ward gave it as his opinion there was not sufficient water “to take care of all of the filings made prior to December, 1945.” But he also testified that only a small number of wells under such applications had been put down or were being pumped, and that the wells which were being pumped when the Frailey contract was signed had “hardly any effect on the water table—that the effect was negligible.” Mr. Ward did not profess to know how many of the prior applications will ever be used, and if so whether in sev-

eral years from now or twenty years from now. It is significant that the state engineer is anxious for all applicants, including Frailey and Thompson, to get their wells down, so the effect on the water table may be determined. If the state engineer is at all sure there is no water available for these additional wells, or that no water was available in 1946, it was clearly his duty to reject all such applications. It is also to be noted that the availability of water, so far as future years are concerned, is greatly enhanced, and the Frailey and Thompson applications made more secure by the subsequent proclamation of the governor suspending further applications until this question can be definitely answered at some time in the future.

• It is pertinent to ask—was water available to irrigate the land in December of 1945 when the Frailey contract was written? The answer must be in the affirmative, since in the neighborhood of one hundred wells were subsequently put down—about forty in 1946, about forty in 1947 and a number in 1948. The following question and answer sums the entire situation up in a nutshell.

Q. (Asked of Mr. Ward). When these Frailey and Thompson applications were made in December, 1945, and had you granted permission to drill those seven wells, and had they (Frailey and Thompson) drilled those seven wells in the spring of 1946, is it your judgment there was water then and there available to irrigate the acreage mentioned in those applications.

A. If you exclude all the wells that weren't drilled covered by applications filed prior to December 13th, I would say yet. If you don't I would say no.

(Tr. 137).

This case was tried in the fall of 1948. About 100 wells were drilled subsequent to the execution of the contract in 1946, 1947 and 1948, and the average well produces 2 to 2.5 second feet of water. Yet three years after the drilling of about forty of these wells, two years after the drilling of about eighty of these wells, and after the irrigation season of the third year, neither the state engineer's office nor the plaintiff can make any claim that the wells were going dry or had depreciated in water supply or that the general availability of water was questioned.

It is not claimed that McGarry guaranteed or that it was intended or expected he would guarantee water would remain available for a definite number or for all future years. He did not guarantee nor was it intended or expected he would guarantee that the state engineer would not thereafter permit many other and later applicants to put down wells and perhaps deplete the water supply. The contract does not provide nor was it intended that McGarry would or could in future years control the availability of water. Is there any claim that McGarry assured plaintiff the water supply would hold

up in the future years, irrespective of contingencies, drouth, or what not? The fact remains that in 1946 and up to the present time there IS available water. The fact remains that the state engineer does not now claim there is no water available for the Thompson and Frailey applications, nor does the state engineer make any pretense that he knows when water will *not* be available. The most that can be said about the engineer's concern over the availability of water is that *if* everyone with an application actually puts down a well and pumps water consistently therefrom, and if all previous well rights are in use, there will not be a sufficient supply. Apparently there were 371 wells in existence when a survey was made between 1939 and 1940, and covering wells drilled before 1935. Only 23 of that number were being used for irrigation purposes in March, 1946, when the state engineer met with the farmers. The remaining wells were drilled and dug primarily to satisfy homestead requirements. Many of the 284 remaining wells had only irrigated a very small acreage of ground and the limit of the right of the well owners would be the small acreage which had previously been irrigated, a very small water right. Many have not been pumped in twenty years. Eighty-seven of the remaining 284 wells were domestic or stock watering wells that are no cause for concern. (Tr. 128 to 130). Of course numerous wells have been drilled and in use since 1940, but in expressing the opinion that there

is not sufficient water to satisfy all well rights the state engineer takes into consideration the use of *all* of the foregoing 371 wells, notwithstanding in 1946 only 23 were being used as irrigation wells and many had not been used for upwards of twenty years.

It is well settled that the fraud involved must relate to facts then existing or which have previously existed. Citing 12 R. C. L. 254; annotation in 51 A. L. R. at page 49. *Nielson vs. Leamington Mines and Exploration Corporation*, 48 Pac. (2nd) 439, at page 442, 87 Utah 69.

Since there was no shortage of water in 1945 when the contract was made, and in 1946 when permission to drill wells was given to Thompson and Frailey, and since all the evidence shows without doubt that water was available *at that time*, irrespective of what might happen in the years to come, the above principle of law laid down by this court in the above cited Nielson case is applicable.

We insist that the plaintiff himself believes water is available for the irrigation of the lands in question. If he did not and does not think so then why did he and Thompson drill the wells that have been drilled? Why have they so strenuously insisted on the right to retain all of the water filings? If there is no water available to irrigate land, the applications have no value, yet plaintiff thinks they have a value of excess of \$3000.00, because under the decision of the court he could collect such an amount which is the down payment with interest to

date, by assigning the water applications. Plaintiff contends there is no water available *under* the ground purchased from McGarry but available under the state ground and Sevy ground which he has purchased. He seems to contend there is no water available under the application for use on the McGarry ground but that the water is available under the same applications for use on other ground.

The very actions and course of conduct of plaintiff belies the contention that he ever believed his present claims to be true. Why did he not rescind the contract in March, 1946, when the state engineer advised him the applications would not be approved? Why did he request permission to put down the two wells? Why did Thompson apply for and procure a homestead entry, and why did plaintiff purchase state land and other land, and then apply for a change of place and use and point of diversion and subsequently drill wells on such other land? Why did plaintiff make a proposition to defendant to modify the contract and purchase only 320 acres? Why did he write the state engineer, through his counsel, that he had decided to let the land go back and forfeit his contract, but first he wanted to move the wells from the ground? Why did he write the state engineer on May 23rd, 1946, as follows: "I would like to write you in reference to the two wells you have allowed me to drill. Insofar as transferring location from some ground I am

under contract to McGarry for, to some ground I am buying from Heber Sevy of Cedar would this distance of change of location be permissible. Could McGarry prohibit me from doing this. I am now hauling pipe and well pumps * * * ?” Why did he write the state engineer on July 19th, 1946, “enclosed is letter from Isom. It is also the reason I need some good advice whether to try to purchase some of the land from McGarry or to forget it entirely and try and put the two wells you are allowing me on some other ground I can purchase from Mr. Sevy?” Why did plaintiff make demand on McGarry as late as the summer or fall of 1946 to produce an abstract of title, with the idea, so he said, that if the title was all right he could always change the wells back to the McGarry tract? Are these things consistent with the belief that there was no water available? And do they not show an utterly inconsistent and vacillating policy?

It is extremely doubtful whether the statements made by defendant concerning availability of water, under all the circumstances in this case, can be classed as anything excepting mere expressions of opinion, or trader’s talk, and therefore not actionable. The general principle of law that a mere expression of opinion, however erroneous, will not warrant cancellation of a contract, is so well established that citation of authority is unnecessary. However, it is not necessary to invoke this doctrine because we fail to find any statements or representations made by

defendant that are untrue. The testimony is to the effect that whenever and where in the Beryl district wells were drilled, long after 1946, water was found available. Frailley does not contend otherwise. He drilled wells himself and found water available. We reiterate—that alleged fraud involved in claimed fraudulent representations must, to be actionable, relate to facts then existing or which have previously existed. See Nielson case, *supra*. This case also holds, citing ample authority therein, that a statement as to a future act or as to the future conduct of a person would be in the nature of a mere opinion and therefore not actionable. See also *Ackerman vs. Bramwell Inv. Co.*, 12 Pac. (2nd) 623, 80 Utah 52.

An actionable representation must relate to past or existing facts and cannot consist of unfulfilled predications, or erroneous conjectures as to future events. 26 *C. J.* page 1087, Sec. 25, citing many cases from all jurisdictions. Also, 37 *C. J. S.* page 231, Sec. 11.

As heretofore pointed out, the only testimony in the record concerning the claimed misrepresentations, is the evidence of the plaintiff which was controverted by the defendant. It does not meet the legal requirement that fraud must be proved by evidence that is clear and convincing.

To support a rescission of the contract or cancellation of the mortgage, the evidence should be clear and convincing in character, and the preponderance of evidence support him who claims the

right to rescind. The rule is stated in *Ferrell vs. Wiswell*, 45 Utah 202, 143 Pac. 582-3 as follows: We have no right to overlook the wholesome rule that where deeds or contracts are sought to be vacated and set aside upon the ground of fraud and deceit, the burden of proving the alleged fraud is upon him who asserts it; moreover, that the fraud must be established by clear and convincing evidence. *Taylor vs. Moore*, 51 Pac. (2nd) 222, 87 Utah 493.

See also:

Greco vs. Graco, 39 Pac. (2nd) 318, 85 Utah 241.

Lane vs. Peterson, 251 Pac. 374, 68 Utah 585.

Nielson vs. Leamington, etc., 48 Pac. (2nd) 439,
at pages 441-2, 87 Utah 69.

By defendant's cross-complaint he seeks the judgment of this court that the contract be declared and determined to have been abandoned by plaintiff. It is alleged that plaintiff has not paid the taxes on the premises, and that he failed to crop and till the acreage contemplated by the applications for appropriation of water for which drilling permits have been issued, and has failed to make any payments due under the terms of the contract. By his reply the plaintiff admits he did not pay the taxes and admits he has not tilled or cropped any acreage or paid any money in excess of the down payment, but alleges he is not obligated to drill any wells on the land described in the contract or to harvest any crops. (R. 40). Clearly the defendant was entitled to the holding of the trial court that the contract has been abandoned by plain-

tiff and should be determined to be forfeited. In fact, plaintiff testified that he had no intention of proceeding further with the contract.

Defendant submits that there has been no fraudulent misrepresentations and no actionable misrepresentations; that the plaintiff has failed in the burden of proof; that by his actions and conduct he has affirmed the contract even though it be found there were fraudulent misrepresentations; that plaintiff cannot retain some of the benefits under the contract and then repudiate the contract; that any right of rescission, if there ever was such a right, has been lost and waived through failure to act timely and that plaintiff cannot prevail in this cause on any theory whatsoever. Defendant submits, moreover, that to permit the plaintiff to regain the money paid some two years ago, and repudiate the contract so that he might evade the provisions thereof and retain all of the water applications and filings, would be inequitable and permit plaintiff to enrich himself at the expense of defendant.

Respectfully submitted,

CLINE, WILSON AND CLINE,

Attorneys for Respondent.