

1949

Vern Frailey v. John C. McGarry : Reply Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

VERN FRAILEY,
Plaintiff and Appellant,

vs.

JOHN C. McGARRY,
Defendant and Respondent.

FILED

MAY 7 - 1943

CLERK, SUPREME COURT, UTAH

REPLY BRIEF OF APPELLANT

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IN THE SUPREME COURT of the STATE OF UTAH

VERN FRAILEY,

Plaintiff and Appellant,

vs.

JOHN C. McGARRY,

Defendant and Respondent.

Case No. 2506

REPLY BRIEF OF APPELLANT

Some matters are discussed in respondent's brief which were not covered in appellant's original brief. That being so it is deemed necessary to file a reply brief.

It is stated on page 8 of respondent's brief that there is nothing whatsoever in the record to show what price defendant paid for the land. It is true that there is no direct evidence of such fact. The record does show that the sale of 1880 acres, which included the land in question, was confirmed for \$1.50 per acre or \$2,820.00 on October 9th, 1945. (R 51-58). The deed to Edward H. Parry has

attached thereto \$3.30 U. S. Revenue stamps. That deed is dated October 13th, 1945. (R 58). Parry conveyed to defendant the 1880 acres on November 27, 1945. The deed recites \$10.00 as the consideration. There are no revenue stamps attached to that deed. (R 60).

At the time defendant and plaintiff entered into the contract here involved defendant had been engaged in the real estate business specializing in the sale of real estate in and about Beryl. Unless Parry purchased the land for McGarry the deed from Parry to McGarry required revenue stamps if the sale was for more than \$100.00. Courts assume the law has been complied with in the absence of proof to the contrary. If, as the evidence shows, defendant has been in the real estate business dealing especially in lands in and about Beryl it is reasonable to assume that he would not pay much in excess of the market price for real estate. Moreover, when the court struck plaintiff's third cause of action, which ruling is assigned as error, it would seem that plaintiff was not entitled to show what defendant paid for the lands. We do not, however, deem it of controlling importance the amount defendant paid for the land or whether he received it by gift or purchase. What we do contend is that no matter how he secured title to the land it is against the public policy of this state for the defendant to speculate in its public water. The contract shows on its face that the defendant was to receive a profit of \$26,200.00 out of the contract without the expenditure of one cent of money or performing a moments work in developing the water. If, as defendant seems

to contend, there is sufficient water to irrigate the land described in the contract defendant will reap that profit no matter what plaintiff might do. If plaintiff should carry out the contract that is the profit he would receive. If plaintiff should default in the contract, defendants profit is \$26,200.00, plus the money which plaintiff paid for filing the applications, plus also any money that plaintiff might expend in developing water.

If that is not speculation it must be on the theory that defendant had a sure thing no matter what plaintiff might do or fail to do, or that defendant has a vested interest in the public waters of this state notwithstanding he does nothing towards developing or putting the same to a beneficial use.

Beginning on page 9 of respondent's brief it is argued that the fact, if it be a fact, that defendant made a large profit is no ground for the rescission of the contract and that the defendant was entitled to a lien on the water right applications as additional security. In making such argument it is apparently assumed that an application to appropriate water stands in the same category as property rights generally. Our law is to the contrary.

“All waters in this state whether above or under the ground are hereby declared to be the property of the public, subject to all existing rights to the use thereof.”

U. C. A. 1943, 100-1-1.

As we have pointed out in our original brief it is the public policy of this state to prohibit speculation in the public waters of this state because to do so will retard the development of the state.

It is apparently conceded on page 12 of respondent's brief that the only basis for defendant's claim to the water filing is the contract. Under the authorities cited in the original brief a contract which is rescinded leaves the parties thereto as if the contract had never been executed.

On pages 14 and 15 of respondent's brief it is argued that Thompson has no interest and claims no interest in the water filings which stand in his name. The evidence does not support such contention. The filings were made for Thompson and are in his name.

It is alleged in Paragraph 1 of the further and affirmative defense of the defendant "that such contract was witnessed by one J. E. Thompson * * * and whom said defendant was informed and believes and therefore alleges was interested in the purchase of said premises. (R 33). In paragraph 6 of the further answer complaint is made because plaintiff and Thompson sought to transfer the water right applications to other lands. (R 34)

In his reply plaintiff admits the allegations of paragraphs 5 and 6 of defendant's further answer. (R 39) Throughout the testimony of Mr. Ward it appears that Mr. Thompson was the owner of the filings which stood in his name. (Tr. 152, 150, 147, 146, 141, 137). It is of

course elementary that one may not be deprived of his rights in an action to which he is not a party.

On page 20 of respondent's brief reference is made to certain testimony received at the trial. Obviously such testimony cannot aid the ruling made by the trial court in striking the Fourth Cause of Action, which ruling was made before the trial was commenced.

RESPONDENT'S CROSS-ASSIGNMENTS OF ERROR ARE NOT SUFFICIENT TO RAISE THE QUESTION OF THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE FINDING OF FRAUD.

Respondent's 1st cross assignment of error is: "In making that portion of finding No. 9 which finds that representations made by defendant to plaintiff as to availability of water for appropriation were untrue." (R 72). Sub-division 2 of Rule VIII of this court provides that the brief shall contain: "a statement of the errors upon which he relies for a reversal of the judgment or order of the court below." It will be noted that no reason or basis for the alleged error is referred to by the assignment. This court has repeatedly held that such an assignment does not raise the question of the insufficiency of the evidence to support the finding. Among the cases so holding are:

Ogden Savings and Trust Co. vs. Blakely, 66 Ut. 229; 241 Pac. 221.

Thomas vs. Perry Irr. Co., 63 Utah 490; 227 Pac. 268.

Hansen vs. Oregon Short Line R.R. Co., 55 Utah 577; 188 Pac. 852.

Rosser vs. Broadwater Mills Co., 54 Ut. 522.

Penwarden vs. Penwarden, 54 Utah 129, 179 Pac. 988.

Stam vs. Ogden Packing and Provision Co., 53 Utah 248, 177 Pac. 218.

Holt vs. Great Eastern Casualty Co., 53 Utah 543; 172 Pac. 1168.

It will be noted that if finding No. 12 is permitted to stand no useful purpose would be secured by attacking finding No. 9. For a general discussion of the sufficiency of assignments of error see 4 *C. J. S.* page 1873.

What we have said about assignment No. 1 also applies to assignment No. 2. If assignment No. 1 fails it follows that assignment No. 2 must likewise be disregarded.

Moreover, nowhere in his pleading does defendant allege or claim that plaintiff has by delay or affirmance waived any right he may have to rescind the contract. A claim of waiver or estoppel is not available to a party who has neglected to plead it and the court cannot consider or take notice thereof. The adjudicated cases touching such questions will be found annotated in 120 A.L.R., pages 8 to 54.

The only allegations in defendant's pleadings are to the effect that defendant was not guilty of fraud and even if defendant was guilty of fraud plaintiff may not

rescind the contract without assigning his and Thompson's water filings to the defendant.

If the court should conclude that the assignments are sufficient and the claim of waiver, affirmance or estoppel is sufficiently pleaded to become an issue in the case then and in such event we submit the following facts and arguments in support of the trial court's finding No. 9.

THE EVIDENCE IS AMPLE TO SUSTAIN THE TRIAL COURT'S FINDING THAT PLAINTIFF HAD A RIGHT TO RESCIND THE CONTRACT.

On page 28 and 29 of respondent's brief it is contended that the plaintiff was not entitled to rescind the contract because:

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

THE PLAINTIFF IS NOT SEEKING TO RETAIN ANY BENEFITS OF THE CONTRACT.

Apparently the defendant claims that plaintiff is attempting to retain something that he was to receive from the defendant under the contract. Nothing is farther from the fact, unless defendant claims that he has some right in and to the public waters of the state. Independent of the contract the defendant has not the shadow of a right to the applications to appropriate water. As we have pointed out in our original brief the authorities teach that when a contract is rescinded the parties are placed in statu quo; that is in a position as if no contract had ever been entered into. Not only will the plaintiff not receive any benefits from the contract when the same is rescinded but by choosing such remedy he will be deprived of his right to recover the large damages he has sustained because of the fraud of the defendant.

We have no quarrel with the statement that a contract must be rescinded in its entirety. That is exactly what the plaintiff is seeking to do in the present action. To give the defendant the right to the water applications would be to allow him to profit by his fraud. He has paid nothing for the filings and the only possible claim that he has thereto is on account of the contract. When the

contract is rescinded every vestage of his claim vanishes as completely as if no such claim ever existed.

THE PLAINTIFF HAS NOT AFFIRMED THE CONTRACT NOR HAS HE DELAYED IN ITS RECISION.

The facts bearing on that phase of the case are these :

The contract is dated December 7, 1945. On March 2, 1946 the plaintiff received a letter from the state engineer informing him that the application to appropriate water would not be approved. Exhibit B (Tr. 67). Shortly after receiving the letter of March 2, 1946 the plaintiff went to the office of the state engineer to learn what, if anything, could be done about the applications. (Tr. 14). Upon his return to Cedar City he informed the defendant of what he had learned concerning the applications. He requested the defendant to furnish him, plaintiff, additional water. The defendant refused to do so. Some conversation was had about compromising the difference between plaintiff and defendant by reducing the amount of land that plaintiff was willing to buy. It is reasonable to conclude that when it became apparent that plaintiff could not raise a crop during 1946, contrary to what he was assured by the defendant, plaintiff foresaw that it would be difficult to make payments on the larger tract. Nothing came of the attempt to compromise. Contrary to defendant's contention such actions and statements by the plaintiff did not constitute an affirmance of the

contract. Quite the contrary. The defendant was then and there in effect informed that plaintiff did not intend to be bound by the contract, because he had been defrauded. The only reasonable conclusion that defendant could draw from such conversation was that the plaintiff would seek redress for the wrong he had sustained unless defendant made some satisfactory adjustment.

On or about March 29, 1946 a meeting was held at the Beryl School House with some of the farmers in that vicinity. Plaintiff was not at that meeting. Those present were not opposed to the drilling of additional wells. Nothing occurred at that meeting which sheds any light on the question of plaintiff's affirming the contract.

On April 21, 1946 and April 25th, 1946 plaintiff sent to the state engineer the letters referred to on page 30 of respondent's brief. Obviously the plaintiff could not and did not affirm the contract with defendant by writing a letter to the state engineer. It is apparent that plaintiff sought to secure the approval of some of his applications for the purpose of saving the same and removing them to other land, because on May 23, 1946 he wrote a letter to the state engineer concerning changing the point of diversion and after being advised by the state engineer plaintiff filed his application to change the place of use, and on August 9, 1946 a similar application was filed by Thompson. In due time McGarry received notice of these applications and filed objections to the granting of the same. These actions on the part of the plaintiff not only fail to lend support to the claim

that plaintiff affirmed the contract but shows in no uncertain terms that plaintiff was seeking as far as possible to save something out of the unfortunate predicament he was placed in on account of the fraud of the defendant. What has been said concerning the correspondence with the state engineer is equally true with respect to the letters written by Mr. Isom on June 13, 1946. Of course, the plaintiff, after he learned of the dilemma he was placed in by the fraudulent acts of the defendant, was seeking to retain his water applications in the hope that he might carry out his original plan to make his home in Utah and develop its resources. From the time plaintiff informed the defendant (immediately after he learned that water was not available in sufficient quantity to irrigate the land in question) nothing whatsoever was done which could possibly be construed to lead the defendant to believe that plaintiff had waived his right to take whatever proceeding he deemed necessary to redress the wrong which plaintiff had sustained.

It is indicated in the brief of defendant that because plaintiff requested defendant to furnish an abstract that he thereby affirmed the contract. Before plaintiff could determine whether it was worth while to further negotiate with the defendant concerning an adjustment of his difficulties with defendant it was necessary for him to ascertain if defendant in fact had title to the land he was seeking to sell. Without such information he could not safely proceed to deal with defendant under any circumstances. No one in his right senses would pay out Twenty Eight Thousand Eight Hundred dollars for a tract of

land in the absence of some assurance that when the money was paid he would be able to secure a good title to the property, which he was intending to purchase, especially from one who had already demonstrated that he was not reliable. In our original brief we have discussed what we believe to be the proper construction of the contract touching the furnishing of an abstract or policy of title insurance and shall not enlarge on what is there said.

On the matter of the claimed delay in rescinding the contract it should be kept in mind at the outset that this is not a case which permits of a ready ascertainment of whether or not there is sufficient water available to supply the needs of the land which plaintiff sought to purchase.

An examination of the cases cited by the defendant show that the facts there involved are so unlike the facts in this case as to render them valueless in this case.

Thus in the case of *LeVive vs. Whitehouse*, 37 Ut. 260; 109 Pac. 2. At page 271 of the Utah Reports the court recites these facts. "The record, however, also shows that Whitehouse must have known that the stock had only a speculative value, and according to his own testimony he discovered, about a month after the agreement was entered into, that the stock had no actual or market value and that he thereafter, without protest, continued to accept payments (aggregating \$600) on

the contract until the 8th day of November, eleven months after he learned that the stock was practically without value. In fact the first information the plaintiff had that the Whitehouses intended to base their rescissions of the contract on the ground of the alleged misrepresentations made to them respecting the value of the stock so far as shown by the record was when they filed their amended answer, March 12, 1947, nearly two and one-half years after they discovered the fraud which they claim was practiced upon them.” How the facts in that case are unlike the facts in this case is apparent. The defendant in this case was informed of plaintiff’s claim that he had been defrauded within a few days after the plaintiff received information that his applications would not be approved.

The other cases cited by defendant, as we read them, lend even less support to defendant’s contention. It might have been enlightening to the court if defendant had included in his quotation from 12 *C. J. S.* 996, Sec. 38 the following statement:

“Nevertheless it has also been held that affirmance in such a case must be a solemn and deliberate act and where fraud exists as a ground for cancellation any equivocal acts on plaintiff’s part which do not clearly evince a purpose, with complete knowledge of the fraud to affirm or to retain the property as his own will not defeat the right of person defrauded to rescind.”

The law touching the rescission of a contract is thus stated in 12 *Am. Jur.*, pages 1028 and 1029, Sec. 445, 446 and 447:

“Ignorance of facts warranting a rescission of the contract does not affect the right to assert such facts as a justification for rescission. One may justify an asserted rescission by proving that at the time there was an adequate cause although it did not become known to him until later. One cannot waive or acquiesce in a wrong while ignorant thereof, and the wrongdoer cannot make extreme vigilance a condition of rescission. The person wronged upon being fully advised must, however, decide and act with reasonable dispatch. (Sec. 446). The failure of a party to perform his part of a contract does not per se rescind it; the other party must manifest his intention to rescind within a reasonable time. A formal or written notice is not necessary but the law requires on the part of him who would rescind some positive act which shows such an intention. Rescission of a contract may be a matter of acts as well as of words. Where the object of a suit is to obtain a decree of rescission no positive act manifesting an intention to rescind is necessary prior to suit, the bringing of the suit being a sufficient manifestation of such intention.”

Sec. 447:

“A right to rescind, abrogate or cancel a contract must be exercised promptly on discovery of the facts from which it arises; it may be waived by continuing to treat the contract as a subsisting obligation. The general rule is that the right to re-

scind must be exercised within a reasonable time, although there is authority to the effect that the mere question of how much time a party to a contract has permitted to elapse is not necessarily determinative of the right to rescind the important consideration being whether the period has been long enough to result in prejudice to the other party.”

“In action with respect to rescission of a contract, without more, is not tantamount to a choice to continue it in existence.” *Richard vs. Credit Suisse*, 242 N. Y. 346, 152 N. E. 110; 45 A. L. R. 1041.

On page 32 of respondent’s brief it is said that 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. It may be that if plaintiff had been able to secure a water right by the simple process of filing on additional water he would not be so concerned about the applications here involved. But we are at a loss to see how that fact aids the defendant. The governor’s proclamation prohibiting the filing on additional water in the Beryl area was issued on April 10, 1946. When the proclamation was issued it became apparent that the only hope of plaintiff to carry out his plan to engage in farming in the Beryl area was to secure some sort of water right from somewhere. Were it not for the governor’s proclamation the defendant might well argue that he could not rescind the contract because he could go and file on additional water and that his remedy was for damages and not for the rescission of

the contract. Plaintiff was in no sense responsible for the governor's proclamation nor may it be said that plaintiff was obligated to rescind the contract prior to April 10, 1946.

On pages 30 and 32 of respondent's brief considerable is said about the motives which prompted plaintiff to seek a rescission. It would serve no useful purpose to discuss what plaintiff did or did not have in his mind at and before he concluded to seek a rescission of the contract. His right must be determined from what he said or did and not by what he may or may not have had in his mind.

On page 34 of respondent's brief it is said that plaintiff has heretofore elected to affirm the contract as to his right to the filings and application, and has taken and used the water (as has Thompson also) from two wells which have been drilled. If it is meant by such language that plaintiff has affirmed his right to his application to appropriate water then we are agreed. But if defendant claims that the effort of plaintiff to remove the application to other lands and there use the water constitutes an affirmance of the contract then we certainly cannot agree with any such a conclusion because such acts were calculated to affect a rescission and not an affirmance of the contract.

On pages 42 to 49 of his brief respondent reviews the evidence touching what plaintiff did after he entered into the contract with defendant. Such evidence shows that plaintiff was in doubt as to what he could or should

do to escape from the situation in which he found himself because of what was falsely represented to him by the defendant. Of course the plaintiff sought advice and information from the state engineer and others as to what were the facts and as to his rights in the premises. To do that was the wise thing to do and that which he had a legal right to do. When the court examines the evidence we believe that it will find that the plaintiff did absolutely nothing which could lead the defendant to believe that plaintiff intended to live up to the contract after he discovered that there was not available a sufficient supply of water to irrigate the lands described in the contract.

So far as the record discloses the defendant was not prejudiced because of any claimed delay on the part of the plaintiff in serving a formal notice of rescission or beginning an action to accomplish that purpose. As heretofore pointed out defendant had timely and repeatedly been warned that plaintiff did not intend to be bound by the contract.

It is further contended by defendant that plaintiff retained possession of the land. The evidence shows and the court found that plaintiff did absolutely nothing with the land after he learned that there was a serious question about the availability of water with which to irrigate the same. Moreover it is obvious that it would have been a useless thing for plaintiff to have made a formal statement to the defendant to go and take his land. That such an offer would have been immediately re-

jected is quite apparent. So far as appears defendant is not and has not been interested in having possession of the land. What he seeks to secure is the enormous profit which he hoped to secure from the plaintiff on account of his false and fraudulent representations.

The law does not require the doing of a useless thing. It is quite apparent that defendant was not concerned with the possession of this property, nor is there any pleading on his behalf that plaintiff was retaining possession of the land. Under such a state of facts the defendant may not be heard to complain. 52 *Am. Jr.* 223.

That the offer contained in the amended complaint meets all the requirements necessary to maintain an action for rescission finds support in the adjudicated cases. *Walsh vs. Majors et al*, 49 Pac. (2d) 598 (Cal.); *Buhler vs. Lofters*, 165 Pac. 601; 53 *Mont.* 546; 12 *C. J. S.* 1042, Sec. 57.

It may well be that plaintiff is, if the contract is ordered rescinded, entitled to a lien upon the land to secure the payment to him of the \$26,000 which he has paid. (2 *C. J. S.* 1103). However, if and when the contract is rescinded the defendant is entitled to the possession of the land. The only right the plaintiff ever had to the possession of the land was by reason of the contract. It follows as a matter of law that when the contract is rescinded plaintiff no longer has any right to the possession of the land.

The plaintiff may not rescind the contract without the consent of the defendant. Because the defendant

would not so consent the plaintiff brought this action. It may be asked what more could the plaintiff do? He could not force the defendant to go upon the unimproved land.

Defendant alleged in his answer and cross complaint and the court found that plaintiff had abandoned the contract. If plaintiff had abandoned the contract he was not in constructive possession of the land described therein.

THERE IS AMPLE EVIDENCE TO SUSTAIN THE COURT'S FINDING THAT DEFENDANT SECURED THE EXECUTION OF THE CONTRACT BY FRAUD.

In the main the law applicable to the facts disclosed by the evidence is well settled. To constitute actionable fraud sufficient to sustain an action for damages or for rescission of a contract it must be made to appear:

1. There must be a false statement of a fact or by many authorities of an opinion.
2. The statement must be material.
3. It must be made with intention that it be acted upon.
4. The person to whom it is made must believe the statements to be true.
5. The person to whom the statement is made must sustain an injury or a damage.

Apparently defendant makes no claim that the elements of fraud mentioned in the above paragraphs 2, 3, 4 and 5 have not been established by the evidence, nor could such a claim be successfully maintained. We shall therefore, confine our argument to the question of whether or not the defendant made a false representation of a fact or fraudulently expressed an opinion which he knew or should have known was false.

The authorities teach that the discrepancy in the value of the property sold and the price for which it is sold is in itself evidence of fraud. *Wachowski vs. Lutz*, 184 Wis. 84, 301 N.W. 234. In this case defendant sold property worth \$1.50 per acre for \$30.00 per acre.

When defendant's attorney filed the application in the office of the state engineer he was informed that such application would not be allowed. However, such information was not conveyed to the plaintiff. The testimony of plaintiff and Jerold E. Thompson is that at the time of the negotiations the defendant assured them that there was ample water available to irrigate the land and that it was a mere formality to secure a permit from the state engineer to bore a well. (Tr. 8-27-73). Plaintiff testified that he had read some circulars from Mr. McGarry. Tr. 7) J. C. McGarry testified that: "I would think I made the representations they would have ample water for a certain amount of acreage."

Q. Did you tell these men there was ample water to take care of this land?

A. I had no reason to believe there wasn't for the reason no applications had been denied, never been any wells denied. (Tr. 164).

Q. On these advertisements that you had made have you advertised there was ample water to irrigate lands out in that area?

A. Yes Sir, that is right.

Q. You did so advertise?

A. Yes, that is right.

Q. Are you still so advertising?

A. Only under applications which are in good standing. (Tr. 165).

Defendant further testified that the advertising similar to that contained in plaintiff's Exhibit "E" had been used prior to 1945. It will be noted that among other things it is said in that exhibit:

"We are confident that there is sufficient underground water within the valley to sustain 1000 farm families and considering there is an average of five to the farm family would indicate that we have the building of a city of 15,000 people at 'Garryville'—our new city which is located at the junction of two important highways, etc."

Garryville is in the vicinity of the land described in the contract and the source of the water supply for the 1000 families and 15,000 people is the same as the water supply for the land described in the contract. (Tr. 166).

It will be noted that the defendant continued to advertise that there was ample water in the Beryl area even after the governor had issued his proclamation prohibiting the filing on additional water.

In his brief, pages 53 to 57, respondent has directed the attention of the court to the testimony of Mr. Ward. We shall not repeat what is there said as the court will doubtless read all of his testimony. In its memorandum of opinion (R 64) the court observed that to supply the application filed in the office of the state engineer on July 1st, 1945 and December 13, 1945, would require a flow of at least 580 cubic feet per second. Is it any wonder that Mr. Ward was of the opinion that there was not sufficient water in the Beryl area to supply the filings of said applications.

That defendant knew or should have known that there was not sufficient water available to supply the water right applications on the land described in the contract is made evident by his own testimony. (Tr. 167)

On page 55 of appellant's brief the question is poised: "Was water available to irrigate the land in December, 1945 when the Frailey contract was written?" It seems to be defendant's contention that if water was then available no matter for how short a period of time there could be no fraud. Plaintiff was not interested in acquiring a water right for a day, a week or a year. Defendant knew or certainly should have known that one who buys a tract of land with a water right has a right to assume a water right is permanent and available from

year to year. It is inconceivable that any sane person would purchase land with the understanding that it had or there could be secured a good water right with which to irrigate the same and go to the expense of digging a well if such person knew or believed that the water right which he was to receive was only temporary. Successful farming in the Beryl area as well as elsewhere in this arid region requires that water rights be permanent. Defendant must have known that plaintiff was not obligating himself to pay \$28.50 an acre for a water right that was to last only a day or a year.

The statement that there is sufficient water available to irrigate land, if it means anything, must mean that under normal conditions there is and will be sufficient water for such purpose. Fortunately the amount of water available from a given source of supply in Utah is more or less constant. If it were not so Utah would become uninhabitable.

Moreover the authorities teach that there are exceptions to the general rule that one is not liable for the expression of an opinion as to future events. 23 *Am Jur.*, page 798; 37 *C. J. S.* pages 234 and 237, and cases there cited. So also it is well settled that the suppression of a material fact which a party is bound in good faith to disclose is equivalent to a false representation. 37 *C.J.S.* 244. Other rules of law applicable here are stated in 37 *C. J. S.*, pages 245 to 247 which are to the effect that if a fact is peculiar within the knowledge of one party and **of such a nature that the other party is justified in assuming its non-existence there is a duty of disclosure and**

one who conveys a false impression by the disclosing of some facts and the concealment of others is guilty of fraud although his statement is true as far as it goes.

Considerable is said in respondent's brief about plaintiff not believing that there is insufficient water available to irrigate the premises described in the contract. It is argued that because he is seeking to have the applications transferred to other land he must believe there is ample water. It must be kept in mind that plaintiff has ceased his farming operations in California and is attempting to establish himself permanently in the Beryl area. If he is to carry out his venture he must have a water right. That he entertains a hope that he will, with the water applications applied for, together with other water that he may acquire, be able to permanently establish himself at Beryl, is a reasonable conclusion. However, such fact does not preclude him from the relief which he seeks in this suit. The authorities are to the effect that if a fraud is such that the defrauded party would not have entered into the contract had he known the true facts then and in such case he is entitled to rescind the contract, unless he has an adequate remedy at law. No claim is made or can be successfully maintained that a remedy at law would be adequate.

On pages 62 and 63 of respondent's brief it is argued that plaintiff has abandoned the contract. If plaintiff's suit to rescind the contract constitutes an abandonment then obviously he has abandoned the contract.

It is also argued that because plaintiff failed to pay the taxes he has forfeited all of his rights under the contract. Here again if plaintiff had paid the taxes the defendant would doubtless be here contending that plaintiff had ratified the contract because he had paid the taxes.

Before concluding this brief the attention of the court is again directed to the fact that the trial court in its memorandum of decision stated that if the plaintiff would within fifteen days assign his water right applications and prevail upon Thompson to assign his applications to the defendant then and in such case the plaintiff was entitled to a return of the money paid to defendant, together with the cost of making the filings and legal interest thereon. Of course if plaintiff had complied with such an option he would have been deprived of his right to a review by this court of the question of whether or not he is entitled to the water filings.

It would seem to be contrary to justice and equity to hold that plaintiff should be deprived of the money to which the trial court held he was entitled to because he elected to exercise his constitutional right to appeal to this court and here seek a review of the entire cause.

If the trial court believed that plaintiff was entitled to the return of the money he had paid out and defendant was entitled to the water right applications there was no reason why the trial court should not have so adjudged. Plaintiff should not be deprived of that to which the trial court found he is entitled to because he failed

voluntarily to surrender that to which he believes he is entitled to.

We submit that the judgment appealed from should be reversed and the trial court directed to amend the Findings of Fact, Conclusions of Law and Decree as prayed for by plaintiff.

Respectfully submitted,

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