

1951

Rex Pace, Byron Pace, Keith Pace and Harvey Pace v. Joseph A. Parrish and Ida E. Parrish : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Pace v. Parrish*, No. 7677 (Utah Supreme Court, 1951).
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IN THE SUPREME COURT OF THE STATE OF UTAH

REX PACE, BYRON PACE, KEITH PACE
AND HARVEY PACE,
Plaintiffs and Respondents

vs.

JOSEPH A. PARRISH and IDA E. PARRISH,
Defendants and Appellants.

APPELLANT'S BRIEF

Case No. 7677

FILED

00718 1951 L. TOM PERRY,

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and Appellants.

Appeal from the District Court of the Second Judicial
District, in and for Morgan County, State of Utah.

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IN THE SUPREME COURT OF THE STATE OF UTAH

REX PACE, BYRON PACE, KEITH PACE
AND HARVEY PACE,
Plaintiffs and Respondents

vs.

JOSEPH A. PARRISH and IDA E. PARRISH,
Defendants and Appellants.

STATEMENT OF FACTS

In the month of October, 1947 Defendants, Joseph A. Parrish, and his wife, Ida E. Parrish, were the owners of a farm consisting of approximately 640 acres, situated at Mountain Green, Weber County, Utah. The Plaintiffs, consisting of the father, Harvey Pace, and his three sons, Rex Pace, Byron Pace, and Keith Pace, had contracted to sell their farm in Boeneta, Duchesne County, Utah, for the sum of \$50,000.00 (Tr. 28) and were looking for another farm large enough to supply the needs of the three boys. Sometime during the month of October, the exact date being in dispute, Rex Pace, one of the Plaintiffs, interviewed the Defendants at their home in Mountain Green. In this interview the parties discussed the acreage, water rights, and fences on the Parrish farm, and the parties tentatively agreed on the sale of the property by the Defendants to the Plaintiffs for the sum of \$50,000.00. This tentative agreement was subject to inspection of the premises by the Plaintiffs and it being approved by the father and the older two sons. (Tr. 28, 29).

Witness Rex Pace in reporting the interview testified that at the conclusion of the same, Defendant Joseph E. Parrish told Plaintiff Rex Pace, "I own the reservoir. The resevoir is on my place." (Tr. 29). Defendant Joseph E. Parrish admits that at a later time while he was showing them the property he told the Plaintiffs that the reservoir was "on his property." (Tr. 130).

On October 17, 1951, Rex Pace, his father, and one brother, Byron Pace, came to the Parrish home for the purpose of inspecting the property. Mr. Parrish and the three defendants got in the Pace's car and were shown over the property. When they came to a point some distance below the reservoir, Mr. Parrish told them that a certain hollow belonged to the place. (Tr. 129). They then proceeded to the reservoir located on the Parrish property, inspected some of the property lying beyond and returned, according to the testimony of Rex and Byron Pace, to a point, marked "A" which is west of the reservoir and about one-half mile above the Rollins land. At this point, where they could see the south field, the river bottom, a tract of $11\frac{1}{4}$ acres belonging to one Lee Rollins, and across the valley, (Tr. 32) Mr. Parrish is alleged to have said, "Brother all you see below us belongs to me." They then proceeded down the hill to within 200 feet of the Rollins property, traversing their route over the so-called "bottom land" in Sec. 19. The plaintiffs got out of the car and inspected the river bottom land (Tr. 60) and also inspected the south field. (Tr. 44). While here Mr. Parrish is alleged to have said, "The ground in Section 19 is of the same texture as that in the south field." (Tr. 45). The parties agreed on the sale, and planned to go to Logan,

Utah, to sign the legal papers consummating the transaction.

On December 4, 1947, on arrival of the Paces at Logan, Mr. and Mrs. Parrish, Harvey Pace, Byron Pace, and Keith Pace met Attorney L. Tom Perry in the First National Bank of Logan, and agreed that he should prepare the following: (Tr. 76 and 83).

1. A warranty deed conveying the property to the father and his three sons, Harvey Pace, Rex Pace, Byron Pace, and Keith Pace.

2. A purchase money mortgage from the four Paces and their wives to secure the balance due on the farm and notes for \$40,000.00.

3. A bill of sale to the personal property that went with the farm.

4. A chattel mortgage on the personal property sold as additional security for the balance due.

5. An agreement that the warranty deed and Bill of Sale was to be held by the attorney until the chattel mortgage, real estate mortgage and abstract were placed in his hands. The mortgages to be signed by all parties including Rex Pace and the wives of the parties, delivered to said attorney, who was then authorized to deliver the deed and bill of sale to the Plaintiffs.

They then left the attorney's office agreeing to return when the papers were prepared.

In the meantime Wallace Parrish, a son of the defendants, took the Paces for a ride over Cache County. They were gone about 6 hours. (Tr. 193). While on this trip Wallace told the Paces that others had an interest in

the reservoir. (Tr. 165, 168, and 170) and that the 11½ acres belonged to Mr. Rollins. (Tr. 166-167). However, Byron Pace testified that during this ride they made no inquiries concerning the land they were about to buy. (Tr. 193-194).

The parties met in the attorney's office at about 3:30 p. m. on the same day. The warranty deed, describing the land and containing this reference to the water rights:

“Together with the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, including all water and water rights used in connection with the land.” (Record page A32).

was read by the Paces and signed by the defendants and delivered to the attorney to be held by him until the real estate mortgage and chattel mortgage were returned. (Exhibit H.) (Tr. 84.) The real estate and chattel mortgage and the notes for the balance of the purchase price were signed by Harvey Pace, Byron Pace, and Keith Pace (Tr. 84-85) and taken out of the office by the Paces for further signatures. A check for \$10,000.00 was given to the defendants by the plaintiffs as a down payment. (Tr. 76). The plaintiffs paid another \$10,000.00 in May, 1948 and \$2,000.00 in May 1950. (Tr. 61).

On Dec. 4, 1947 an inquiry was made concerning the division of the water and Byron Pace asked, “How come that Lee Rollins divides the water. We thought we got all the water.” (Tr. 77).

Mr. Parrish then informed Harvey Pace, Byron Pace and Keith Pace that others besides himself had an interest in the reservoir.

The mortgage notes, and escrow agreement were then taken to Rex Pace. He signed these instruments on December 15, 1947, after he had learned that others besides the defendants had an interest in the water in the reservoir. (Tr. 63, 68, 85). Later the mortgages were signed by the wives of the parties, and the mortgages and agreements were returned to Logan. As soon as the abstract was secured the Federal Land Bank and brought up to date. It and the warranty deed and bill of sale to the personal property was mailed to them and the notes and mortgages were delivered to the defendants.

In January, 1950, the plaintiffs brought an action against the defendants for fraud and deceit in connection with the transaction praying for damages against the defendants in the sum of \$25,000.00. Alleging that he defendants had made the following misrepresentations:

A. That they misrepresented the amount and character of the water rights that went with the property.

B. That they had misrepresented the quantity of the land being sold.

C. That they had misrepresented the right, title and ownership of certain personal property.

D. The quality and condition of land in a portion of the property known as the "south field."

E. That they had misrepresented the quality of the "river bottom land."

F. That they had misrepresented the condition of the fences on the property.

The action was tried before a jury. The jury denied any relief on the alleged misrepresentation concerning the

right, title and ownership of certain personal property and any damages for the alleged misrepresentation of the quality of the land in the "south field." The court approving the answers of the jury to interrogatories submitted to them entered judgment against the defendants in the sum of \$8,650.00 and ordered that the "amount of said damages and costs shall be deducted from the unpaid part of the purchase price indebtedness now owed the defendants by the plaintiffs by reason of the defendants sale to the plaintiffs of that certain farm which was part of the subject matter of this action." Judgment entered December 12, 1950.

From this judgment the defendants appeal.

In the trial, the court, at the request of plaintiffs, called in the jury. At the conclusion of the testimony the court under Rule 49 of the Utah Rules of Civil Procedure in response to a request of the parties submitted to the jury certain interrogatories. These interrogatories did not cover every issue of fact. Under said Rule 49 where "the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY FOR REVERSAL OF JUDGMENT AND DECREE.

POINT III. THE COURT ERRED IN RENDERING A JUDGMENT AGAINST DEFENDANTS FOR THE ALLEGED FALSE REPRESENTATIONS CONCERNING THE QUALITY OF THE RIVER BOTTOM LAND IN SECTION 19.

In this connection the court erred in adopting and approving its own findings of fact the following answer of the jury:

1. That the defendant Joseph A. Parrish represented to the plaintiffs that the land in the river bottom is of the same quality as the land in the south field.
2. That such representation was false.
3. That the plaintiffs relied on the alleged statement of defendant as to the quality of the river bottom land and not upon their own inspection.

That the court likewise erred in making the following implied findings of fact.

1. That defendant intended to deceive the plaintiffs as to the quality of land in the river bottom.
2. That plaintiffs had the right to rely on any alleged false statements of defendant with reference to the quality of the land in the river bottom.

POINT IV: THAT THE COURT ERRED IN DENYING DEFENDANTS MOTION FOR A NEW TRIAL.

POINT V: THAT THE COURT ERRED IN APPROVING SPECIAL FINDINGS OF THE JURY, TO-WIT: VII A, VIIA(1), VII A(3), VII A(4), VII A(5), and VII B. (Record on appeal page A56-7).

ARGUMENT

This is an action in equity.

“It is frequently said in a general way that grounds for equitable relief exist in, or that chancery courts have jurisdiction over cases arising out of fraud. Indeed the statement is recurrent that there is no other ground on which equity jurisdiction is so readily and frequently entertained.” 19 Am. Jr. page 63.

“But equity jurisdiction is not conferred by a mere charge of fraud.” 19 Am. Jr. page 64.

“Equity jurisdiction is to be sustained unless the remedy at law is complete and will secure to the litigant the whole right involved in a manner as just and perfect as that attainable in a suit in equity.” 19 Am. Jr. page 65.

In the instant case it may be contended that if the plaintiffs had asked only for damages for the fraud and if that were all the relief asked equity would not entertain jurisdiction. But the plaintiff goes further. He fears that mere damages would not be adequate as the notes signed by the plaintiffs to secure the balance due on the contract may reach the hands of an innocent party so he prays that “the Court shall order the (damages) same to be deducted from the unpaid part of the purchase price yet to be paid by the defendants.” (Record on appeal page 5).

In so doing he seeks relief that can not be secured by a court of law and in seeking an equitable remedy he invokes the jurisdiction of equity and must be bound by the rules of equity.

The relief he seeks may be likened to the party who seeks an equitable set-off. In order to avoid a separate

action he seeks to have the rights of the parties consolidated in one action.

“Set-off by a bill in equity was recognized at an early date, the purpose of a court in chancery being to adjust in one suit conflicting demands, if, from the relations between the parties and the nature of their claims, equity and justice are shown to require complete settlement.” 19 Am. Jur. page 124.

Forrester vs. Jastad 167 P 55, was an action for damages for false representation in the sale of land. In response to the prayer of this complaint “the court assessed the damages of plaintiffs in the sum of \$500, and directed the cancellation of the note for that sum, which was past due, and further made its restraining order against the transfer of that note permanent.”

In rendering the opinion the court said:

“The essence of the action is to relieve respondents from liability on notes procured from them by fraud, and to restrain the negotiation of such notes to an innocent holder, whereby the liability of respondents would be confirmed, and the appellants enabled to place themselves in a position to defeat the enforcement of any judgment against them for damages. *The action is cognizable in equity.*”

One of the rules of equity by which plaintiffs are bound is that of the attitude of this court on appeal. It was said in the case of Jensen vs. Howell 75 (Ut.) 64 282 Pac. 1034:

“This case is one in equity. In this jurisdiction the binding effect of findings on the trial court in law cases is different from that in equity cases. In the

former, the findings as a general rule, are approved if there is sufficient competent evidence to support them, and ordinarily are not disturbed, unless it is manifest, that they are so clearly against the weight of the evidence as to indicate a misconception, or not due consideration of it. In the latter, our duty and responsibility in approving or disapproving findings when challenged are more comprehensive. In such cases, on an appeal and a review of questions of law and fact, and on a challenge of the findings, the review in effect is trial da nova on the record. On such a review, if after making due allowance as the better opportunity of the trial court to observe the demeanor of the witnesses, of determining their credibility and the weight of their testimony, we on the record nevertheless are persuaded that a challenged finding is against the fair preponderance or greater weight of the evidenc, or not supported by it, we disapprove it, and make or direct a finding or remand the cause for further proceeding; otherwise to affirm it.”

“In reaching the conclusion as we do that plaintiff has failed to establish his right to have the deed in question set aside we are not unmindful of the rule frequently announced by this court to the effect that it will not disturb the trial court’s findings unless it is reasonably clear that such findings are against the evidence. Such rule is in part founded on the fact that the trial court has the opportunity to see the witnesss and to observe their demeanor while testifying and is therefore in a better position to determine the weight which should be to the evidence than the members of this court who do not have that opportunity. The rule however does not relieve this court from the responsibility placed upon it by the Constitution and laws of this state of weighing the evidence

and determining the facts. In equity cases the parties are entitled to a judgment of this court as to facts." Greco v. Graco, 39 P 2nd 318, 85 Utah 241.

The above case was one of alleged fraud where the court reversed the judgment of the trial court.

The only essential facts in dispute in the instant case is where and what was said by defendant with respect to the ownership of the reservoir and whether plaintiffs were informed by Wallace Parrish that others had an interest in the reservoir before three of them signed the note and mortgage.

Also where the parties were when Parrish told plaintiffs that certain land belonged to him and whether Wallace Parrish on December 4, 1947 told plaintiffs that he 11½ acres belonged to Rollins.

Even though all of these facts are resolved in favor of plaintiffs yet on the undisputed evidence, they should not prevail.

Few primary facts are in dispute. It is the court and jury's deduction from these facts that we take issue. The intent of the defendant to influence plaintiffs when he made certain statements; the right of plaintiffs to rely on such statements; as to what tract of land defendants, had in mind when he is alleged to have said "all the land you see below us belong to me," the amount of damage are the important questions to be decided in this case. Such questions being but deductions from primary facts we submit that this court has equal rights with the trial court and jury to make such deductions.

ARGUMENT — POINT I

1. The elements of fraud are:

- (1) a representation
- (2) its falsity
- (3) its materiality
- (4) The speakers knowledge of its falsity or ignorance of its truth
- (5) his intent that it should be acted upon by the person in a manner reasonably contemplated
- (6) the hearer's ignorance of its falsity
- (7) his reliance upon its truth
- (8) his right to rely thereon
- (9) his consequent and possible injury.

Stuck vs. Delta Land and Water Co. 227 P. 791, 63 U 495; Campbell vs. Zions Co-op 148 P. 406, 46 Utah 1; Jones vs. Pingree 73 Utah 190, 273 P. 303; Kinnear vs. Prows 16 P2d 1094, 81 Ut. 135.

2. Each of the elements of fraud must be proved with reasonable certainty, and all of them must be found from the evidence to exist. The absence of any of these elements is fatal to the plaintiff. Jones vs. Pingree 273 P. 303, 73 U. 190.

3. The burden of proof is on he who asserts fraud and it must be proved by clear and convincing evidence. Campbell vs. Zions Co-op (Ante.); Farrell vs. Wishwell 143 P. 582 45 Utah 252; Taylor vs. Moore 51 P. 2nd 222, 87 Ut. 202; 55 Am. Jur. page 540.

The first allegation of fraud is that the defendants made certain false representations concerning the ownership of the reservoir.

Quoting from their complaint:

“4 (a) The defendant Joseph A. Parrish, showed plaintiff a large made reservoir, located entirely on the aforesaid premises and said, ‘The reservoir belongs to me.’

“That in truth and in fact the reservoir was owned jointly with three other persons.” (R. A2).*

The testimony of the plaintiffs supporting this allegation is very brief. I quote all.

Rex Parrish on his first visit to the farm in October, 1947, says that he and Mr. Parrish at that first visit “went over the deal, acreage, water rights, fences, and several other things.” (Tr. 27). Then this question was asked, “Was there any discussion relative to how much water was on the place while you were there?” And this was his answer, “He (Mr. Parrish) said, ‘I own the reservoir. The reservoir is on my place.’ ” (Tr. 29).

That is the sum total of plaintiff’s direct evidence to sustain this element of fraud.

Later, on a visit to the farm by three defendants, Harvey Pace, Rex Pace and Byron Pace, water rights were discussed. According to the plaintiffs, on this visit when they came to the reservoir, only this much is said:

Q. “What was the first thing you observed when you got up the dugway?”

A. The reservoir.

Q. While at the reservoir, did Mr. Parrish make any statements to you relative to the reservoir?

R. indicates Record on appeal.

A. None at all, no statements at that time, as I recall, other than he says, 'This is the reservoir.'

Q. Did you ask Mr. Parrish if any other parties owned any interest in the reservoir?

A. "No." (Tr. 30).

If a case of fraud is made, it must be made on that testimony.

Defendant admits that he told the plaintiffs that the reservoir was "on his property." (Tr. 130). And the jury found that such a statement was made. (Tr. 212 R. A53). The Court wisely did not submit to the jury the question of the truth or falsity of this statement for the determination of that question was not in issue, plaintiffs having admitted in their complaint that the reservoir was on the property of the defendant. (Record on appeal p. 2).

Admitting for the purpose of argument that defendant told plaintiff that "the reservoir was on his place," we must test that statement to determine whether it constitutes such fraud or deceit as will enable plaintiff to recover.

One element of fraud that is not sustained by either the preponderance of the evidence or by clear and convincing evidence is the fraudulent intent of the defendant in making the statement. It must ever be kept in mind that it is what the defendant actually said and not what the plaintiffs thought he meant that determines the question of fraud.

“Fraud is never presumed . *When a statement is explainable upon a theory of fair dealing, that theory should be adopted.*” Southern Development Co. of Nevada vs. Silva 125 U.S. 247, 31 L.Ed. 678, 55 Am. Jr. page 540.

“Futhermore, an alleged representation must be considered in the light of the conversation under which it is made, and may not be lifted out of its context nor considered apart from the circumstances or situation where it was made. Nor can an alleged misrepresentation be given a meaning which cannot be reasonably attached to it.” Oberg vs. Sanders 184 P2d 229, 111 Ut. 507.

The evidence is none too clear as to the circumstances under which plaintiff made the alleged statement, “I own the reservoir. The reservoir is on my place.” Mr. Parrish testifies that he told the plaintiffs the reservoir was on his place the day they made the inspection of the farm and viewed the reservoir:

“I told them the reservoir was on my property but I didn’t tell them that the water in the reservoir belonged to me. I was just showing them the property, that it was on my property, that reservoir, but I don’t remember that I told them the amount of water. I don’t believe that I did at that time, because I was showing them the property; then, we went from there out.

Q. Just a minute you say the water rights to the property were not discussed at that time?

A. No.

Q. You just pointed out where the land was with reference to the reservoir.

A. That is right.” (Tr. 130).

Witness Rex is not too clear on the point. He remembers that the statement was made while he and Parrish were in the automobile and the only time they were in the automobile was on the inspection trip. It is unlikely that a crippled man would follow Rex from the house and get into his automobile at that first visit. (Tr. 29). At the time of the inspection trip Rex testifies that Mr. Parrish showed them the reservoir but nothing was said as to the interest of others either in the reservoir or the waters therein. (Tr. 29 30, and 31).

Rex is too evasive in his answer to determine much about the circumstances of the conversation. When asked (Tr. 29). "Was there any discussion relative to how much water was on the place?" He made no direct answer, but replied, "He said, 'I own the reservoir. The reservoir is on my place.'"

In determining the intent of the defendant we must ever keep in mind defendant's exact language. He simply said, according to plaintiffs, "I own the reservoir;" (Tr. 29) according to defendants, "The resevoir is on my place." (Tr. 130). And that is all the jury found that he said. (R. A53, Tr. 212). He made no statement with reference to the ownership or the right to use the water in the reservoir.

It is true that the jury found that the plaintiffs would not have purchased the property had they known that others *had an interest in the water in the reservoir*. (Tr. 212). But that question should never have been asked. It was asked over the objection of the defendant. (Tr. 200). It suggested to the jury something the de-

fendant never said or intended to say. (Tr. 130). Being improperly asked the court should never have approved it as an implied finding and concluded from such answer that defendant intended to represent to the plaintiffs that he had the *exclusive right to use all of the waters in the reservoir*.

One determines the intent of a man by what he says; it is never safe to determine his intent by what one thinks he meant to say.

Considering the statement of defendant, and the circumstances under which it was given, one may well conclude that the reservoir was referred to to identify the extent of the property and with no intent to deceive. If defendant had said "I have the exclusive right to the use of the water in the reservoir," then, a different intent may have been inferred.

THE COURT ERRED WHEN IT FOUND THAT THE PLAINTIFFS IN PURCHASING THE PROPERTY RELIED ON THE ALLEGED FALSE STATEMENT OF DEFENDANT THAT THE RESERVOIR BELONG TO ME.

The evidence clearly shows that such an alleged false statement was made to plaintiff Rex Pace alone. According to plaintiffs' testimony, he alone was told that the reservoir belonged to the defendant.

While Mr. Parrish may have discussed water rights with the other plaintiffs, (Tr. 30) there is no evidence that he told them that the reservoir belonged to him. Likewise the record is silent on Rex ever informing the other plaintiffs that such a statement was made. But Rex Pace, the

plaintiff who knew of the alleged statement, was the last to sign the contract; and he knew before he signed, that others had an interest in the water stored in the reservoir. (Tr. 68, 85). He knew it on December 4th or 5th. He signed the contract on December 15, 1947. (Tr. 63, 68).

LIKEWISE THE EVIDENCE FAILS TO SUPPORT A THIRD ELEMENT OF FRAUD. Viz. Did the plaintiffs have a right to rely on the statement of defendants as to the extent of the water on the premises. Here again there is no finding of the jury on that question, nor was it ever submitted to them.

Wallace Parrish testifies that they knew that others had an interest in the reservoir before they made the down payment. (Tr. 165, 168, 170, and 173). They read the deed which contains no reference as to the amount of the water. (Tr. 71 and 84).

Plaintiffs were farmers. (Tr. 26). They had experience in the operation of irrigated lands. (Tr. 87). Defendant in showing them the property points out the reservoir to them. They make no inquiry as to the ownership of the waters in the reservoir or of their right to the use thereof. They then wait six weeks to think it over. If they had once taken the time to follow the ditches which lead from the reservoir during one of their visits to the property they could have seen where the water was being used.

Then they spend an entire day with the seller or his son. According to their statement they still make no further inquiry.

“If the plaintiff ought, by reasonable diligence, to have known the truth or falsity of the statements, or had equal facilities for knowing as the defendant, he cannot, by blindly believing what he ought to have believed, or trusting where he ought not to have trusted, or by shutting his eyes where he ought to have had them open, charge the defendant with the extent of his folly.” (Stuck vs. Delta 63 Ut. 495. Ante.)

“If a purchaser blindly trusts where he should not have trusted, and closes his eyes where ordinary prudence require him to see, he is willing to be deceived and the maxim “volenti noo fit injuria” applies.” 55 Am. Jur. 538.

It would seem that four men pondering over the statement “the reservoir is on my property” for six weeks would have thought to have asked the defendant a simple question as to how much water went with the property, or whether there was sufficient water to irrigate that portion susceptible of irrigation? If they had inquired they would have received the answer made, which they say came too late, viz: “Others have an interest in the reservoir.”

This excerpt from Clarke vs. Baird, 7 Barb. 66, is quoted with approval by our own Court in Gudmundsen vs. McEntyre 259 P 196, 70 Ut. 175:

“The common law affords to every one reasonable protection against fraud in dealing, but it does not go the romantic length of giving indemnity against consequences of indolence and folly, or careless indifference to the ordinary and accessible means of information. * * * If the purchaser be wanting of attention to these points where attention would have been sufficient to protect him from surprise or imposition, the maxim caveat emptor ought to apply.” See also MaWhinney vs. Jensen 232 P2d 769.

An inspection of the property was all that was necessary to show the amount of land under irrigation—for them now to say they were deceived into believing they were buying water right to permit them to water sage brush land and without a better showing is a fraud and deceit on the seller and neither they nor the jury have a right to reform the contract and make a new contract between the parties to any such effect.

THE COURT SHOULD NOT HAVE ADOPTED AS ITS FINDING THE ANSWER OF THE JURY THAT PLAINTIFFS SUFFERED DAMAGE BY REASON OF A FALSE REPRESENTATION CONCERNING THE RESERVOIR IN THE SUM OF \$4,320.00, FOR THERE IS INSUFFICIENT EVIDENCE TO SUPPORT SUCH A FINDING.

Here is the evidence, Witness Rex Pace testifying:

“Q. You have enough water from the reservoir to farm the land you and Mrs. Parrish referred to as having been a farm?

A. No.

Q. You could use more?

A. Yes.

Q. How much of the reservoir do you believe you need to water what you are now farming? (They are now (Tr. 47) farming part of the river bottom land.)

A. Well, I would use near half of it.” (Tr. 48).

Witness Rollins testifying:

“Q. From your knowledge of the farm and its buildings, including the water stock or right it had in 1947, could you give an estimate of what you consider the entire unit would be worth in the month of December, 1947?

- A. Well, I believe, the way farms were selling that time and in this locality, we didn't hear of any farms selling at the price this farm sold for. We thought thirty or thirty-five thousand dollars was a good price at that time.
- Q. If the farm had all the water rights on the place, 11¼ acres of yours, the south field with high state of productivity and 30 acres of river area that could have been as good as the south field, what would you say the farm would be worth?
- A. There is a lot of 'ifs' there.
- Q. Well excluding the personal property and including just the real estate, the land and buildings on the property, and assuming the entire reservoir went with the farm, and your 11¼ acres went with it, and the south field was in a high state of productivity * * * and assuming there were 30 acres of river bottom land that could be farmed, and assuming the land in Section 19 was of the same quality of soil, what would you value the farm at?
- A. That would make quite a farm of it. It would be worth forty or forty-five thousand.
- Q. for the land?
- A. You are excluding the machinery and personal property?
- Q. Yes.
- A. I would say \$40,000.00.
- Q. \$40,000.00.
- A. Yes." (Tr. 108, 109).

It would have been easy to have put to Witness Rollins these questions: What is the value of the water right sold? What could a fourth interest in the water right be purchased for?

How much is the place worth with restricted water rights? That is $\frac{1}{4}$ of the stock in the North West Irrigation Company?

What would be its value if the place had full use of the reservoir?

If answers to these questions had been given there might be some basis on which the jury could have assessed damages. But not having been asked the jury had no basis on which it could determine the damage. There was no attempt to segregate the damage for alleged misrepresentation of the ownership of the reservoir from the damages from the alleged misrepresentation of the quality of the land in the south field. When the jury decided that there was no misrepresentation of the quality of the land in the south field they could only guess as to the damage for misrepresentation of the ownership of the reservoir. That seems exactly what they did. But the court in an equity case is not bound to accept that conjecture as its finding. If there is no direct evidence to sustain it; then it should be disregarded.

Witness Rollins was the only witness as to values. When asked what the place was worth as sold he did not give his opinion but said *we thought* the place worth 30 to 35 thousand.

Who *we* were he did not explain; neither was he clear whether it was worth thirty-five thousand or more. His only positive statement was that the place with the south field in high state of productivity, (and the jury found it was not.) (Tr. 213) and all of the reservoir (when plain-

tiffs could only use one-half) (Tr. 48) and 30 acres of land that could be farmed, (there is no evidence that it could not be) then it would be worth 40 thousand.

Such testimony does not approach that degree of certainty and exactness which would occasion a loss of \$4,320.00 to these defendants.

Compensatory damages must be proved in a tort action for deceit. 23 Am. Jr. 987, P 172.

The evidence must afford data, facts and circumstances reasonably certain from which the jury may find actual loss; and the plaintiff must show by a preponderance of the evidence the damages caused by the injury complained of. 15 Am. Jur. page 796 Par. 356.

The damages must be susceptible of ascertaining in some manner other than by mere speculation, conjecture or surmise. 15 Am. Jr. page 415; Stevens vs. Mitchell 186 P2d 386, 103 ALR 546.

A jury cannot mulch a suitor in damages where the evidence shows no reasonably accurate method or substantial basis for the ascertainment and compensation for the loss ascertained by a breach of the duty complained of. Otherwise their verdict must be deemed to have resulted from the exercise of a mere arbitrary conclusion, one based on no substantial foundation. Grass vs. Big Creek Dev. Co. 75 W.V. 719, L.R.A. 1915 E 1057 quotation from 15 Am. Jur. 796.

However to authorize a recovery of more than nominal damages facts must exist which afford a basis of measuring the plaintiffs loss with reasonable certainty, and the evidence must be such that the jury may find the amount of his loss, not be conjec-

ture, speculation and surmise, but by reasonable inference from established facts. *Western Union Tel. Co. vs. Ramsey* 103 ALR 541; 261 Ky 657; *Epp. vs. Hinton* 138 P 576.

We must therefore conclude that finding VII A 5 is not supported by the evidence and would not have been approved by the court as its finding to support its decree.

Thus in the first cause of complaint there are at least five elements of fraud not supported by the evidence:

1. The falsity of the statement.
2. The speaker's fraudulent intent.
3. Plaintiffs reliance upon the statement.
4. Their right to rely thereon.
5. The consequent damage or injury.

Three and five were adopted by the Court from the answers of the jury, and one, two and four were implied by the court in entering its judgment.

If the appellate court should decide that any one of the five is not sustained by the evidence, or if in any one of the five the plaintiffs have not sustained the burden of proof then the judgment must be reversed so far as it pertains to damages for fraud and deceit by defendant in his representation as to the ownership of the reservoir.

ARGUMENT — POINT II

Before we review the evidence concerning the misrepresentation concerning the 11 ¼ acres of Rollins land, let us view the general situation. Parrish's had little thought of selling their property. Rex Pace who was looking for a large tract finds the Parrish farm. They discuss the area of 645 acres and agree on a price subject to

the approval of the father and other brothers. They had sold their place for this amount. The price of \$50,000.00 had been agreed upon and they were out looking over the farm. There is no evidence that the purchasers were wavering and had to be persuaded to take the property or that any deceit was necessary to get them to buy. See *Southern Development Co. v. Silvia*, ante. Defendant had lived on farm since boyhood and had owned it for over thirty years. (Tr. 127). He knew where his lines were. (Tr. 131).

Now the testimony. Rex Pace testifying:

“Q. What happened then?

A. We moved down, you still could see the river bottom, the south field, as he called it, got a fairly good view of the ground, and, as we were sitting there in the car, he (Jos. A. Parrish) said, ‘Brother, all you see below us belongs to me.’ ” (Tr. 32).

Byron Pace testifying:

“Q. Now, while you were going over this farm, did you stop at point “A” with Mr. Parrish and Rex?

A. Yes. (Parrish denies they stopped at “A” and he made the remark attributed to him at that place. Tr. 131).

Q. Did you hear Mr. Parrish make a statement that he has previously referred to.

A. Yes, sir.

Q. What was the statement you heard at this time?

A. He said, ‘Brother all the ground you see down there belongs to me.’

Q. Did he make specific reference to the ground down there?

A. Yes, I think so.

Q. What did you ask him?

A. If that large tract of ground was his.

Q. What tract of ground do you refer?

A. I think it is marked "E."

Q. On Exhibit "A."

A. Yes.

Q. Is that the field you found out belonged to Rollins?

A. Yes sir." (Tr. 92).

That is not all but it is the substance of the evidence regarding the Rollins land.

It is to be observed that point "A" where the alleged misrepresentation took place is about $\frac{1}{2}$ mile or 160 rods from the nearest boundary to the Rollins land. (Exhibit "A.")

It must also be remembered that the conversation with reference to the Rollins land took place while the parties were seated in an automobile, one-half mile away. (Tr. 32). The land is designated by pointing (Tr. 195 and 197), by land you see below (Tr. 190), by land down there (Tr. 92), and by large tract (Tr. 195). Its location is not fixed by any physical markings. There is no specific reference to it. (Tr. 92). It is not described as the land covered by stubble, cultivated land, or the land just south of that unplowed, or that west of the fence on the township line. We must also remember that Mr. Parrish owned 160 acres of land that could be described as below point "A" where the parties were sitting and in the gen-

eral direction of the pointing that they could see. One tract of 16 acres is contiguous to and on the same line or direction as the Rollins field. (See Exhibit "C.")

In view of the fact that the sale had already been agreed upon and the seller had no motive in misrepresenting the land that he owned would it not be more charitable to conclude that Paces were thinking of one tract of land and Parrish talking about another?

Under the rule that the evidence of fraud must be clear and convincing and the burden of proof is on the one asserting the fraud, See *Campbell vs. Zion Coop* (ante), *Taylor vs. Moore* (ante.) *Farrell vs. Wishwell*, (ante) we must conclude that the judgment for damages for misrepresentation by defendant as to the land he owned is not sustained by the evidence and must be set aside.

It must also be observed that if a fraud was committed it was committed on October 17, 1947. What plaintiffs thought about the land in 1948 or in July 1950 is immaterial. If they were deceived at all it was in October, 1947. We submit that no buyer can tell by viewing from a car a 11¼ tract of land ½ mile away in Mountain Green, Utah, in the month of October, whether it is gravelly, run down, full of weeds, or anything about its productivity. No man at that distance can tell whether it is the most choice land or least desirable in Morgan County. In fact I question that one can even guess its acreage. To say that a prospective purchaser of a 645 acre farm was influenced in buying because he believed that a tract of 11¼ acres was part of a 645 acre farm, a tract about which he knew nothing as to productivity, or the

character of the soil, is beyond belief. Such a conclusion may pass in fiction, but cannot be justified in a legal forum.

The plaintiffs bought 645 acres of land and they got 645 acres of land. If the judgment stands giving them damages for the 11¼ acres they did not buy it in effect would give them 656¼ acres.

A further reason why the judgment should be set aside is that the plaintiffs did not use due diligence to determine whether or not they were buying the Rollins tract. After the party left Point "A" they drove down the hill to point "Y" where they were within 30 rods of the Rollins land. (Tr. 191 and Exhibit "A").

Concerning their observations at this point Byron Pace asked:

"Q. When you came back to the main road you were pretty close to the Rollins property were you not?"

A. Yes sir.

Q. You could see it very plain?

A. We didn't know, but what is was, —

Q. I am not asking you that question, I asked if you could see it?

A. Yes, we could see that piece of ground.

Q. You made no inquiries as to who it belonged to there, when you could see it plain?

A. No." (Tr. 193) .

"Q. Did you notice clearly from point A the fence between your land and Rollin's field E that goes down on the map?

A. No, I didn't.

Q. Did you see any designation between the fields to indicate there might be an obstacle?

A. Just a separation, plant one crop for fall and start another crop.

Q. But the fence didn't appear clearly from point A?

A. No sir.

Q. Did you observe the fence as you progressed farther down?

A. No sir, I didn't. (There was a fence line between the fields. (Tr. 139).

Q. You didn't bother to look at that?

A. No." (Tr. 198).

"If the plaintiff ought, by reasonable diligent, to have known the truth or falsity of the statements, he cannot, by shutting his eyes when he ought to have had them open, charge the defendant with the extent of his folly." *Stuck vs. Delta*, ante. *Gudmundsen vs. McEntyre*, 259 P 196 at page 198; *Shippman vs. Goldberg*, 192 U.S. 232, 48 L. Ed. 419.

In no event can the plaintiffs recover more than \$2350.00 for damages for misrepresentation of the Rollin's land. Rollins, the only witness on values testified that the 11¼ acres were worth \$200.00 per acre, or \$2350.00. (Tr. 103).

ARGUMENT — POINT III

The Court erred in approving and adopting as its finding the answer of the jury to interrogatory V (b) and V(c), and VII (a,3). (Tr. 214). (R. A 55-6).

As one of the grounds of fraud plaintiff complains that while defendant was standing in the south field he

took a shovel and digging in the ground said, "The ground in the river bottom in Sec. 19 is the same quality as this ground. It is just like you see here;" that the ground in the 'river bottom' was greatly inferior to the south field. (R. A 3).

The jury found that defendant represented that the land in the river bottom was of the same quality as that in the south field; that said statement was false; that the plaintiffs when they purchased the property did so believing that the ground in the two tracts were alike; that they did not rely on their own inspection when they purchased the property, but relied on the defendant's statement and they were damaged in the sum of \$1750.00. (R. A. 56, Tr. 214). The court adopted these findings as its own and impliedly concluded that the plaintiffs had the right to rely on the alleged statements and rendered judgment for damages against the defendants. In this we submit the court erred.

The evidence showed that it was plaintiffs who did the digging in the south field. (Tr. 44). That they went over the river bottom land twice, (Tr. 60) and could have dug in the river bottom land; that the only representation that defendant made was that the lands in the two fields were of the same texture, and not the same *productive* texture (Tr. 45); that they knew the land in the south fields was gavelly and contained rocks (Tr. 45); that the river bottom land had never been plowed (Tr. 46); and was covered with sage and Parrish had only used it for pasture (Tr. 45); that they were not restrained from making an inspection of the property by the defendant, in fact they were invited to inspect it; (Tr. 91); that there

was no snow on the ground (Tr. 60); that as a matter of fact the only difference between the land in the south field and that in the river bottom was that it had more rocks in it (Tr. 62); and they could see the rocks (Tr. 63); that they got out of the car and made an inspection of the river bottom land. (Tr. 60).

It must be observed that there is no representation as to the productivity of the soil in the river bottom land, but only a representation of its texture. It would seem to farmers this would be immaterial. They did not wish to use the land for a gravel pit, but only to produce crops, and as to its ability to produce crops no representations were made.

We fail to see how a court can relieve the plaintiff of relying on their own observation. They were on the land and made an inspection thereof and were in no way restrained. They knew that defendant had never farmed the land.

“Where the means of knowledge are open and at hand, it has been held that a purchaser cannot assert fraud against a vendor based upon the latter’s false representations if he does not take the opportunity reasonably afforded to inform himself of the value of land by going upon it and making examination for himself.” 55 Am. Jur. 538-539.

“The rule has been laid down in many cases where it is possible for the purchaser to inspect the land it is his duty to do so, and it is his own mistake or negligence if he relies on the representation of the vendor as to the quality and character of the land.” 55 Am. Jur. 553.

Again referring to *Forrester v. Jasted* 167 P. 55 where the trial court gave plaintiffs judgment for damages in an action where plaintiff, a shipcarpenter, noticed an advertisement in the newspaper which read in part:

“Complete dairy and hog ranch. 60 acres of rich mellow soil. Not a rock or gravel.”

“The respondent repaired to the Seattle office of the realty company, where he was shown a sample of soil from the farm advertised, and was assured that the place was as represented. He was sent down to the Centralia office of the company the latter part of November, 1913, and was conducted by its local officers to the farm of the appellants Jastad. The day was cold and rainy, and only a couple of hours were spent in an inspection of the place, principally occupied in looking at the cleared portions of the land and the buildings and stock.”

The court reversed the judgment saying:

“Likewise the rocky and gravelly character of the soil is not an element of fraud, as the buyer made personal inspection of the premises, and its gravelly condition was as apparent to a shipwright as it would be to any other person. The statement in the advertisement that the farm had ‘a rich, mellow soil, without rock or gravel,’ was of course a pure fabrication, probably invented by the realty agents, rather than the owner.”

The facts above quoted are so nearly alike the facts in the case in question as to be decisive of the issue involved. Our court should follow the precedent of the Washington Supreme Court and reverse the judgment which gave \$1750.00 for misrepresentation of the quality of the land in the river bottom.

ARGUMENT — POINT IV

The court erred in denying defendants motion for a new trial made on December 19, 1951, and overruling it on March 10, 1951.

The jury was prejudiced when it gave plaintiffs damages in the sum of \$8750.00. We are frank to admit that defendants made a good bargain when they sold their property plaintiffs for \$50,000.00, but just because they made a good bargain is no reason for the jury to make a new one for them that more equitably met the minds of the jury.

Here and there through out the trial there is evidence of the biased attitude.

For example Lee Rollins testified that in December 1947, his 11¼ acres was worth \$200.00 per acre. (Tr. 103). Yet the jury awarded \$2400.00 for the 11¼ acres. (Tr. 214, R. A56)).

Rex Pace testified that he could repair that part of the fence that was down for \$100.00. (Tr. 214). The jury gave the plaintiffs \$200.00. (R. A56). This prejudice was influenced by an unwarranted remark of the trial judge when he asked defendant Ida E. Parrish if she wanted to buy the place back. (Tr. 125). The appellate court should correct this misapprehension of a jury who wish to make a new contract for the parties.

In this connection the trial court committed error when it ~~permitted~~ the plaintiff (over the objection of the defendant) to cross-examine defendant Joseph A. Parrish as to the value of the property sold. (Tr. 14 and 15).

(R. A58) At that time no foundation had been laid for such testimony and it was not connected up until the testimony of Lee Rollins as to the value of the property if it had been as represented. Permitting testimony as to values at that stage of the proceedings was highly prejudicial. Its only purpose was to make the jury believe that plaintiff had paid too much for the property.

In adopting such a procedure it seems that the court took it for granted that a fraud had been committed and that the only province of the jury was to determine whether the plaintiffs had made a good buy and if they felt that he had paid too much for the property they were called upon to make a new contract for the parties and to sell the defendants form to the plaintiffs for such price as to the jury might seem proper.

This court surely will not put its stamp of approval on such procedure and thus establish a precedent for the future.

The trial court likewise erred in permitting the jury over the objection of the defendants to view colored slides of photographs taken of the Rollins land in the autumn of 1950. Especially when it was admitted that these photos did not represent a true picture of the Rollins land on the day it was inspected by the plaintiffs. The slides show the Rollins land a bright green because of a newly planted crop of alfalfa whereas on the date of the inspection of the premises the Rollins property was covered with stubble. (Tr. 4, 5, 34, R A58).

ARGUMENT — POINT V

We have already called attention to the lack of evidence to support the judgment for \$2400.00 damages for alleged misrepresentations of the quantity of land, \$1750.00 damages for alleged misrepresentations of the quality of the river bottom land, and \$4320.00 damages for alleged misrepresentations of water rights. There are two minor items of damages that are not sustained by the evidence.

1. With respect to the fences. The only evidence in the record is that defendant told Plaintiffs that the land was fenced and cross-fenced (Tr. 51). There is nothing in the record to show that this was untrue. There is evidence showing that about one-quarter of a mile of fence was out of repair, but it was fenced. (Tr. 52). Plaintiffs Exhibit "A" clearly shows a red line around the entire farm and the red line indicates fences.

2. The jury found that there were no items of personal property included in the sale that were not particularly itemized in the bill of sale. (Tr. 213). (R. A54) Plaintiff is bound by that finding.

The Court permitted testimony to show that between the date of the down payment on the purchase price of the property and the date the plaintiffs took possession of the same that some of the hay had been removed from the property. (Tr. 70, 80). The jury after finding that plaintiffs had received a bill of sale to all the personal property that defendants had represented was included in the sale rendered a special verdict for \$80.00 for damages pertaining to personal property. Finding VII B. and explained

that it was for damages for hay removed by some one after the sale had been made. (Tr. 215). The court approved this finding and included the \$80.00 in the judgment. In this the Court erred. It is not permitted to render judgment on such inconsistent findings.

Inconsistent and conflicting findings in special verdicts and answers to interrogatories neutralize each other and should be disregarded. 53 Am. Jr. page 750 Par. 1082.

WE SUBMIT THAT THE JUDGMENT SHOULD
BE REVERSED.

Respectfully submitted,
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