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

Utah Supreme Court

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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.

No. 7677

BRIEF OF RESPONDENT

FILED

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Salt Lake City, Utah

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INTRODUCTION

In commenting upon appellants' statement of facts respondents take the position that the statement is incomplete and misleading, being colored to reflect appellants' arguments and purposes, and it is particularly misleading and incorrect in that:

- (a) The respondents had not contracted to, nor did they, sell their own farm for \$50,000.00;
- (b) Appellants avoid reciting the most believable

testimony relating to appellant's statements and representations concerning ownership of the reservoir;

- (c) The respondents absolutely never examined the "River Bottom" land in Section 19 as contended by the appellants; and
- (d) The respondents did not request that interrogatories be submitted to the jury.

These discrepancies and others will be pointed out and explained in the argument hereinafter set forth.

In answering the contention of the appellants in the case before the court respondents are not going to attempt to secure a reversal of any of the findings of the jury or trial court or of the verdict as it now stands. It is maintained that the decision is reasonable and just and fully supported by the law and facts; and, merely because the findings or verdict are not assailed, respondents do not wish to create the impression that their case is weak. They actually feel that the judgment doesn't nearly compensate them for their actual loss and that the jury may have actually shown partiality to the appellants.

Because of the burden placed on the appellate court in reviewing this and other numerous matters before it respondents will, accordingly, simplify the argument as much as possible.

Since appellants are basing their appeal almost entirely on the evidence in support of the jury's findings this rebuttal brief will concentrate on those matters. Painstaking care and much research went into the preparation of the complaint and the instructions given to the jury, at least on the part of the

attorney for respondents and by the trial judge. It appears that neither item has been the subject of attack in appellants' brief or otherwise. And in denying appellants' motion for a new trial respondents take the position that Judge Cowley ruled correctly.

NATURE OF THE CASE

This is an action at law.

"The action of deceit is of very ancient origin. There was an old writ of deceit known as early as 1201, which lay only against a person who had misused legal procedure for the purpose of swindling someone. At a later period, this writ was superseded by an action on the case in the nature of deceit, which became the general common law remedy for fraudulent or even non-fraudulent misrepresentation which resulted in actual damage . . . "

Prosser on Torts (Misrepresentation), p. 704.

In the case of Taylor vs. Moore, 87 Utah 493, 51 Pac. 2d 222, plaintiffs brought an action for rescission of a real estate contract on the ground of fraud. The court pointed out that " . . . *this being an equity case*" equitable relief could not be granted since plaintiff was not promptly before the court (laches), therefore " . . . the respondents by delay waived the right to rescind, and they must be left to their remedy *at law for damages.*" In that case they quoted from Shappirio v. Goldberg, 192 U. S. 232 at p. 504:

"In other words, when a party discovers that he has been deceived in a transaction of this character, he may resort to an *action at law* to recover damages, or

he may have the transaction set aside in which he has been wronged by rescission of the contract . . ." (*Italics added.*)

Williston on Contracts, Vol. 5, Sec. 1526, states:

"Setting a fraudulent bargain aside, however, is an alternative right given on equitable principles to the injured party, and, therefore, if this remedy is desired, it must be sought with reasonable promptness after the fraud has been discovered."

Inasmuch as respondents asked for incidental relief in having the amount of the judgment deducted from the unpaid portion of the purchase price appellants have sought to convince this court that the case is one in equity. Throughout their brief they have indicated that the jury made a new contract for the parties and that the relief sought was the cancellation of notes. But this is not so. Respondents are standing by their agreement to purchase the ranch. And in view of the case of *Taylor v. Moore* (*supra*) it would appear that they had no other choice. The sole remedy they seek is an award of damages due to misrepresentation.

Appellants seek to have this court review the matter as a trial *da nova* on the record on the grounds that the case is entirely in equity. Respondents maintain that the action and the relief sought make it strictly a law action; that insofar as they ask the court to decree that the damages be deducted from the unpaid purchase price that portion of the action—and that only—moves into the realm of equity and is "cognizable in equity" as pointed out in appellants' cited case of *Forrester v. Jastad*, to which we shall return promptly. Thus,

since the action is one at law, this court should not disturb the findings unless there is insufficient evidence to support them under the well-recognized rule of this court.

Appellants cite the Utah cases of Jensen vs. Howell, 75 Utah 64; 282 Pac. 1034 and Greco vs. Graco, 85 Utah 241; 39 Pac. 2d 318, to support their contentions. However, those cases involved attempts to secure relief other than damages. In the former case fraud was alleged but the relief sought was to have an express trust impressed upon an absolute conveyance of real estate and transfer of personal property; the latter case was an attempt to cancel and set aside a deed. Admittedly such actions exist in equity, but they do not support appellants' contentions.

Appellants rely on the case of Forrester vs. Jastad, 167 Pac. 55 (Washington) throughout their brief in support of their claim that this is an equity case and for other purposes. Although somewhat identical insofar as involving similar subject matter that case actually is better authority for respondents since it is not in point on appellants' contentions but is in point for respondents.

Quoting the very sentence preceding that found on page 15 of appellants' brief the Washington court said:

"The appellants first contend that the action was one for damages for the breach of a contract, and therefore the allowance of equitable relief by the court was erroneous. The complaint was based upon the fraud of appellants; but, instead of seeking rescission on that ground, they sought to recover damages . . . Under Rem Code No. 153 (*one form of action under Code*) an

action may be maintained for both legal and equitable relief.” (Italics added.)

Quoting Utah Rules of Civil Procedure, Rule 2:

“There shall be one form of action to be known as ‘civil action.’ ”

And from Rule 8:

“ . . . Relief in the alternative or of several different types may be demanded.”

Thus, we have the situation of a legal action for fraud wherein respondents sought and secured damages, the matter being “cognizable in equity” for the purpose of specifying how damages should be paid by deducting the amount from the unpaid portion of the purchase price. This element of equity cannot be said to so reach back to the lawsuit itself so as to open all of the evidence to a trial da nova on the record. Had we sought to set aside the contract the result might be otherwise. In a non-code state respondents would satisfy the judgment by execution. Because the code permits equitable relief in a law action in the incidental manner sought in this case, to hold that appellate review extend to the limits proposed by appellants would defeat much of the purpose of the codes.

In fact the procedure sought by respondents in their complaint seems to be distinctly in line with proper procedure under the codes of code states. In preparing the prayer for relief in the complaint plaintiffs relied on the case of *Paolini v. Sulprizio*, 201 Cal. 683; 258 Pac. 380:

“If the contract remains executory, the damages which he is entitled to recover are no other and no

greater than those which would be awarded to a party who has fully executed his contract. From any award which may be made because of the fraud must be deducted any part of the purchase price.”

The foregoing rule applies to the case at hand quite clearly. While in the cited case the unpaid balance of the purchase price was reduced below the award for damages the rule should be the same in the case at bar where the damages do not measure up to the unpaid balance of the purchase price by any means.

The proposition advanced by appellants appears too elementary for further argument.

PLAINTIFFS SUBMITTED EVIDENCE PROVING ALL OF THE ELEMENTS OF FRAUD.

(a) *In General*

“Fraud may be found from a variety of circumstances. There is no general rule for determining what facts will constitute it, but it is to be found or not according to the special circumstances of each particular case.

With regard to modes of perpetration, methods of defrauding may be broadly classified as being misrepresentation, concealment, or false pretenses.”

23 Am. Jur. 762.

The Utah case of *Stuck v. Delta Land and Water Co.*, 63 Utah 495; 227 Pac. 791 clearly sets forth all of the essential elements of fraud to be proved in establishing a cause of action. In preparing their complaint and in conducting the trial plaintiffs were careful to cover each essential element, and the jury was so instructed (Instruction No. 2):

"Fraud consists of a misrepresentation of an existing fact or facts, which were material in inducing the plaintiffs to purchase the defendants' farm for the price agreed upon. The misrepresentations must have been made by the defendants, either knowing them to be false or being in ignorance of whether they were true or false, with the intention that they influence plaintiffs to so purchase the farm; and the plaintiffs must have relied on the misrepresentations to their injury in so purchasing the farm, and must have been entitled to rely on the misrepresentations under the circumstances."

(R. A-18)

This lawsuit involves the sale of a 640-acre ranch located at Mountain Green, Morgan County, Utah. At the time of sale the ranch consisted of a house, out-buildings, certain items of livestock and equipment, 63 acres of irrigated land, 30 or 40 acres of dry land and some 540 acres, more or less, of grazing land, covered with sage brush and grass. The area is set out on Exhibit A—to which plaintiffs will frequently refer.

Dissecting the ranch from northeast to southwest runs Cottonwood Creek. To the east of Cottonwood Creek the land slopes gradually to the south. On the west of the creek in the upper two-thirds of the farm the land rises rather sharply and is on a considerably higher elevation.

In this latter area, high above most of the farm, exists an imposing man-made reservoir of an area of approximately 20 acres which stores early spring water from a ditch leading into it for use during the summer months (Ex. D, F and 30). As the undisputed evidence shows the reservoir was used by

some four or more farmers in that area to water their lands and, in this connection, they had formed the Northwest Irrigation Ditch Company, a non-profit incorporated water association.

It is around the peculiar and novel facts surrounding this reservoir, and the representations (and concealment) connected therewith that the nub of this lawsuit is found. Although other representations were made to the plaintiffs concerning the farm the basis for their belief in such representations related directly to their belief that they were receiving the entire reservoir in the purchase of the farm. This fact of the inseparability of the misrepresentations complained of must be kept in mind at all times throughout this brief.

(b) *Defendant made actionable false representations material to plaintiffs' purchase of the farm.* Since the damages awarded plaintiffs in this case, with the exception of \$180.00, arose out of three items of misrepresentation, and inasmuch as defendants have centered their attack primarily on these three items, plaintiffs will not attempt to cover the smaller issues of fences (\$100.00 damage award) or hay removed from the farm (\$80.00 damage award). The evidence on those items is too clear to create controversy.

The representations made by defendant, all of which the jury found to have been made and to be untrue, while dealing with plaintiffs prior to their purchase of the farm in question, were as follows:

(1) AS TO THE RESERVOIR:

1. "I own the reservoir." (T. 29)

2. "The reservoir is on my property." (T. 29, 130)
3. "If the deal went (goes) through the reservoir went (goes) with the place." (T. 116)

That the reservoir was not owned by the defendant and that it did not go with the place were never denied. Defendant admits that he never told the plaintiffs that others had interests in the reservoir (T. 25, and Brief 21, 22 and 23):

- Q. (By Mr. Fuller) Did they know at the time of the transaction there was water stock or merely one-fourth of the reservoir or one-fourth of the water?
- A. (By Mr. Parrish) I suppose they knew that stock belonged to the northwest irrigation ditch company. *If they had asked me I would have told them.* (Italics added).

From 23 Am. Jur. 854, I quote:

" . . . Generally speaking, however, in the conduct of various transactions between persons involving business dealings, commercial negotiations, or other relationships relating to property, contracts, and miscellaneous rights, there are times and occasions when the law imposes upon a party a duty to speak rather than to remain silent in respect of certain facts within his knowledge and thus to disclose information, in order that the party with whom he is dealing may be placed on an equal footing with him. In such a case a failure to speak amounts to a suppression of a fact which should have been disclosed and is a fraud. As a matter of fact, in such circumstances a failure to state a fact is actually equivalent to a fraudulent concealment and amounts to fraud just as much as an affirmative falsehood."

Defendant further admits in his complaint making the statement, "The reservoir is on my property." This latter

remark standing alone, in the absence of suspicious circumstances or other explanatory statements, carries the innuendo of complete ownership. But let us examine further.

Although stipulated that the abstract was silent thereto plaintiffs introduced concrete evidence showing that the reservoir was not even on defendants' property although defendant testified (T. 8) that it was *entirely* so located. This evidence consisted of a Warranty Deed, signed by each of the two defendants (Ida E. Parrish and Joseph A. Parrish) on November 21, 1932 and recorded on March 16, 1934. It is found in Book M, page 373 of the Morgan County records and is completely set out on page 119-A of the transcript. In this deed the defendants conveyed to the Northwest Irrigation Ditch Company, grantee:

"All right, title and interest, amounting to nine-tenths (9/10) in that certain Reservoir and Reservoir Site known as the old "Pond Hole" situated in the Northwest quarter of Section 19, Township 5 North, Range 2 East of the Salt Lake Meridian."

In their brief defendants contend that plaintiffs must make out their case, if at all, on the two statements, "I own the reservoir. The reservoir is on my place." While claiming that they are quoting "all" of the evidence relating directly to the reservoir (Brief p. 19) they are carefully and deliberately avoiding what would normally be considered the most believable type of testimony—that overheard by a totally disinterested third person.

As shown by the evidence Rex Pace, at the time he first contacted the defendants, was with Mr. Reynold Blackington,

a former well-known resident of Morgan County. The latter introduced Rex Pace to the defendants and returned to the car while Rex Pace talked with the defendants as to whether they would sell their farm. When Rex Pace returned to the car Mr. Blackington overheard the third reference to the reservoir, which defendants avoid discussing (T. 116):

BY MR. FULLER:

Q. Did both of them walk out to the car?

A. They both came out together.

Q. Did you ever hear any of the discussion at that time?

A. Only part of it.

Q. Was any discussion made relative to the reservoir on the farm?

A. As we were getting ready to go Mr. Parrish said, "If the deal went (goes) through the reservoir went (goes) with the place." (Verb tense added).

The jury had good opportunity to observe Mr. Blackington's demeanor and the defendants had ample opportunity to cross-examine him fully. In such a sparsely populated county the jurists were also undoubtedly aware of Mr. Blackington's reputation for truth and honesty.

Although defendants contend in their brief that the statements made merely identify the extent of defendants' property we feel that more positive representations could hardly be made. The jury, too, felt so inclined.

Defendants in their brief refer to the statement incorpor-

ated in the Warranty Deed given plaintiffs by defendants wherein the water rights were conveyed as follows:

“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.” (See R. A-32).

Since the water was represented by stock certificates in an incorporated water association, it is contended that had Mr. Perry, defendants’ attorney, known of this fact he would have used a different method of transferring the water rights. Since the water was not appurtenant to the farm the purported method of conveyance passed nothing to the plaintiffs. And this situation exists to this very day. Water rights in the State of Utah are transferred as follows (Utah Code Annotated, 1943, as Amended by Laws of 1945):

Section 100-1-10:

“Water rights shall be transferred by deed in substantially the same manner as real estate, *except when they are represented by shares of stock in a corporation, in which case water shall not be deemed to be appurtenant to the land; . . .*” (Italics added.)

The water certificates, properly endorsed and re-issued, was the proper medium for transferring defendants’ share of the water to the plaintiffs. The method used merely put the plaintiffs off-guard and confirmed their beliefs; the proper method would have quickly clarified the type and amount of water right being received.

Defendants contend that plaintiffs should be barred from

recovering for the reason that Rex Pace signed the papers after his two brothers and his father were informed that the water rights were not as represented. But the evidence shows that plaintiffs believed themselves unable to extricate themselves from the situation upon the advice of legal counsel, which they immediately sought. Furthermore, defendants forget that the damage was done on and prior to October 17th, 1947—some 48 days before the papers were signed. In the meantime the plaintiffs sold their farm (belonging to plaintiff Harvey Pace) in the Uintah Basin for \$25,000.00 (T. 56)—obviously receiving less than would have been received had they had sufficient time to find a ready and willing purchaser under normal circumstances (T. 28). In this connection plaintiffs had uprooted and dispossessed themselves of all of their former associations and property in contemplation of purchasing defendants' farm.

Three of the four plaintiffs had signed the papers. Under the circumstances is it any wonder that the parties elected to continue under the agreement and seek damages when the full injury resulting from the fraud was determinable, rather than to immediately seek rescission of the contract? (See *Taylor vs. Moore*, *supra*, as to their right of election of remedies.)

(2) AS TO THE ROLLINS' FIELD:

“Brother, all of the ground you see down there belongs to me.” (T. 32, 92).

While standing at point “A” of Exhibit A on October 17, 1949 (the date of the inspection trip over the farm) Mr. Parrish held out his hand and made the foregoing statement.

Included within the "ground you see down there" was a tract of land containing $11\frac{3}{4}$ acres of choice ground. It was undoubtedly the most clearly visible tract of land in their view. This can be seen on Exhibit E (designated by an arrow) and in the reverse direction on Exhibit 7. It shows as Field "E" on Exhibit A. Although defendant contended at the trial that the statement was made only as to the "hollow" portion of what lay below their gaze, Byron Pace testified that the particular tract was definitely pointed to and that the defendant made specific reference (T. 92) to it.

This particular piece of ground, although once a part of the farm (T. 167), actually belonged to Lee Rollins, a neighbor. It was fenced, the ditch from the reservoir ran around it (and since plaintiffs believed they were receiving the reservoir and since this was irrigated land watered from no other source the assumption that it was the defendants' was very logical), it lay in a straight line with defendants' other fields on both the near and far side of the Rollins' land, the road from defendants' house to the reservoir (which they couldn't travel that day due to muddy conditions) ran around this particular field, and it lay in a "pocket" or valley along with defendants' land, bordered on one side by hills and on the other side by the tall cottonwood trees of Cottonwood Creek.

From 23 Am. Jur. 823 (Fraud & Deceit) the following rule is stated:

"Fraud may be predicated upon the fact that one dealing commercially in land falsely represents that certain land is included in the tract disposed of*, or misrepresents the lines or boundaries of the land, thereby

leading the representee to believe that a certain tract is covered by the deed where in fact it is not; . . .”

*Referring to Utah as following the rule in the case of *Hecht v. Metzler*, 14 Utah 408; 48 Pac. 37.

The Metzler case involved an action for damages on the grounds of fraud and deceit. The plaintiff had not examined the property, but relied on the defendants’ representations that the lots produced a definite rental per month, that they were in a definite location and that they were high and dry. The court held that

“ . . . a willful representation by an owner, in the exchange of real estate, that the property exchanged was high and dry, and located in a particular place, which representation was relied upon by the purchaser as true without an inspection of the premises, but which was false, and which operated to the purchaser’s injury, is an actionable fraud.”

From 23 Am. Jur. 819:

“It is a well-settled principle that false statements or misrepresentations as to the location of real property which is the subject matter of a transaction constitute actionable fraud and will sustain an action of deceit or constitute ground for rescinding the contract, provided they are of such a character and are made in such a way that the representee has a right to rely on them.”

Because the roadway leading around the Rollins’ field was muddy when the inspection was made (T. 41) the parties didn’t closely examine the field other than from the references made at point “A” of Exhibit A. 61 A. L. R. 527 states the rule further:

“(e) *Property at a distance or inaccessible.* Where the subject of a sale is at a distance or is otherwise inaccessible at the time of the sale, the purchaser has the right to rely upon the seller’s representations with respect thereto, and may assert as against the seller the latter’s fraud or misrepresentation concerning the thing sold, although it would have been possible for him to have investigated the matter for himself.”

The jury wisely found that the defendant made the statements concerning the Rollins’ field and that the facts and circumstances satisfied a case of actionable fraud.

(3) AS TO THE “RIVER BOTTOM” GROUND:

1. “It is pretty good land . . . ; here in the lower end of 19, right here, yes, or this one here is just as good; some of it is better” (than the land in the South Field). (T. 17)
2. “The ground in ‘19’ . . . was the same texture as that we had just seen . . . ” (in the South Field). (T. 45)

The first foregoing statement, together with more additional interrelated remarks, was volunteered by the defendant on direct examination as having been told to plaintiffs. The second statement was Rex Pace’s testimony as to what the defendant said regarding the land marked “Sec. 19—Pasture—River Bottom—Area ‘K’—on Exhibit A. The foregoing statements are the direct items of evidence introduced at the trial; however, throughout the testimony it is clear that considerable conversation occurred relative to the fact that plaintiffs could plow up and farm the particular area (with, as

plaintiffs believed, an ample supply of water from the reservoir they thought they were purchasing).

The representation made to plaintiffs concerning the particular area was made at the time they actually went into the South Field and dug into the ground at point "J" on Exhibit A. This land had been farmed and was represented as being "good" ground by numerous witnesses. However, when plaintiffs actually plowed part of the "River Bottom area (encircled as area "K" on Exhibit A) they found the land to be of a much different texture, being more rocky, gravelly and of such a type that their crops withered and burned (T. 46). It was of an entirely different type and quality (T. 48). And not having sufficient water—their actual interest in the reservoir being but one-fourth—they could not have grown crops anyway.

The neighbors who testified as witnesses for each side (rather reluctantly) were quite definite that the land in question in the "River Bottom" area of Sec. 19 was of a different texture and quality:

WITNESS ROLLINS (for plaintiffs):

"No, I would say not. It is shallower, more rocks, showing cobble rocks and gravel."

WITNESS WILKINSON (for defendants):

"Well, it is a little more gravelly."

Defendants, in their brief, have attempted to convince this court that the plaintiffs actually inspected the ground in controversy—marked Sec. 19, Pasture, "K" and River Bot-

tom. However, the jury was soundly convinced (8-0) that no inspection of the land in question was made (R. A-56). In fact, the representations and matters concerning this area were found for the plaintiffs by the jury by a unanimous concurrence—one of the few places in the trial where such complete unanimity existed.

The jury properly found that no inspection was made of the area (which lies east and to the right of the red line marking the fence going North from the South Field on Exhibit A). The record is ample to support such fact:

Witness Rex Pace on direct examination (T. 58):

A. I got out of the car at two different places.

Q. Where were they?

A. At point "A" and point "I."

Again (T. 66):

Q. When you and Mr. Parrish came down to the area immediately above the south field did you at any time actually inspect the soil in the river bottom area marked Section 19 and area K?

A. No, sir.

Q. You didn't actually inspect it?

A. No, sir.

Point "I" (located north of the South Field on the green line (roadway) on Exhibit A) was the only place in the area where the parties got out of the car other than at point A. It was near this point that the inspection of the South Field was made and also where the most distinct representation

concerning the River Bottom area of Section 19 was made. At no other points did the parties get out of the car for the purpose of making an inspection of soils. This was further admitted by the defendant himself (T. 132):

BY MR. PERRY:

A. So here we go, now we came down here (pointing to roadway east of field "C" on Exhibit A), we crossed the creek and then we came down through the little pasture and around here (east of field "G" on Exhibit A), and we stopped there (Point "I" on Exhibit A), and I told them "you better get out now."

Continuing further on page 132 of the transcript:

A. " . . . I said 'you better go over the south field and see for yourselves.' . . . "

Defendants are attempting to convince the court that by driving over the roadway that lies some distance *west* of the land in controversy the plaintiffs should have seen the character of the soil. But what they fail to tell the Court is that this was an obvious waste area—farmers usually put roads on waste ground if possible—and was nearer the rocky Cottonwood Creek. Furthermore, the ground in the area in question, lying to the east of them some distance, was covered with grass and sage brush, thereby preventing them from seeing possible rocks.

Witness Rex Pace, upon cross-examination, made it very clear that the river bottom area referred to by defendants in their brief was not the "River Bottom" area about which the representations were made (T. 60).

Q. You went over the river bottom ground twice?

A. *Along this road, yes.*

And at page 63 of the transcript:

Q. When did you learn the river bottom had more rocks than the south field?

A. That was also next spring.

Q. Couldn't you see them when you traveled over them?

A. I don't think I ever traveled over them.

(4) IN GENERAL.

Defendants take the position that in proving fraud it is necessary to establish an "intent to deceive." Such is not the true and correct rule. The only "intent" that must be established is that the defendant intend the plaintiffs be induced to purchase such property; the nature of the statement made must only be "knowingly false" or that the speaker be unaware of its truth or falsity (see *Stuck vs. Delta*, *supra*, and as cited in defendants' brief; also Instruction to Jury (quoted *supra*)).

Quoting from *Wigmore on Evidence*, Sec. 581, p. 721, note 7:

"In an action of malicious prosecution, where by the substantive law, intent is regarded as an element, evidence as to intent is admissible. If, however, the action is for false representation the defendant may not introduce any evidence as to his 'intent,' i.e. that he did not intend to defraud the plaintiff, because by the substantive law it is the fact of misrepresentation and not the intent with respect thereto that is regarded as material and relevant."

Plaintiffs will not content themselves with the law, however, but will show that the defendant actually had an "intent to deceive." While traveling between point "I" (just above the South Field) and the reservoir, the defendant, on direct examination, recites as follows:

A. Well, after we came from there we came to where the trees were down west, and he said to me he was going to push those over and farm that land. *I thought 'maybe you will or maybe you won't. I don't think he has done it to this day because that land there I used to pasture . . . "*

Again at page 145 of the transcript on cross-examination:

BY MR. FULLER:

Q. You stated on direct examination, "I thought that 'maybe you will and maybe you won't.'" Is that what you actually thought?

A. Will or won't what?

Q. Farm that area and root up the trees?

A. No, I won't. I won't.

Q. What I mean is, you stated when Rex made that statement you said "you thought to yourself, 'maybe you will or maybe you won't.'"

A. I might have thought that *but I didn't mention it.* I think he thought he would—I thought right. He hasn't to this day.

Q. Why did you think he possibly would?

A. Oh, I don't know as to that. I didn't understand him well enough, perhaps. I know I wouldn't, none of the land around the trees in there . . .

Q. You didn't tell Rex that you thought he wouldn't?

A. No, I heard him make the remark. I didn't argue with him. That is as far it it goes.

Q. Didn't you consider it a little unfair not to warn him?

A. Maybe I did and maybe I didn't. I wasn't going to argue with him much. I took them over the land and they could see the land and judge for themselves.

From 23 Am. Jur. 854:

"The principle is basic in the law of fraud as it relates to non-disclosure, that a charge of fraud is maintainable where a party who knows material facts is under a duty, under the circumstances, to speak and disclose his information, but remains silent. Situations evoking the duty of disclosure may arise in various ways in different cases."

Again at page 195 of the transcript, Byron Pace testified:

Q. At any time you were having the discussion (while visiting with Mr. Parrish on May 6, 1950) was anything mentioned about the view you saw from point "A"? *Material in parenthesis added.

A. Yes, sir.

Q. What was said on that day?

A. Rex asked him, "Mr. Parrish, how come we didn't get this piece of ground?" (the large piece of ground he pointed to us from point "A," when he said: "Brethren, all the land below you belong to me.")

Q. What did Mr. Parrish say to that remark?

A. He was silent for two or three minutes, then he said: "You got what the deeds stated."

And on direct examination (T. 131) the defendant further spoke his mind:

A. " . . . They told me that time, 'We are going to farm all of that hill.' I never said much, I knew I hadn't been doing it, maybe they knew what they were talking about. I didn't know, that is up to them, *but that is how it was . . .* "

These young men, coming from a farm area entirely foreign to defendants' farm, being lead to believe that they had acquired a virgin area with great possibilities, and trusting implicitly in this man who referred to them as "Brethren, etc.", were entitled to be informed of the latter's knowledge of the peculiar nature of the farm. This is especially so considering the fact that he had lived on it all of his life and had farmed and owned it for 30 or 40 years (T. 7). The jury fairly found that the defendant was doing a bit of "sharp trading."

As to the matter of what type of "intent" is necessary in making a statement that is an element of actionable fraud our Utah court has gone far beyond the instruction given to the jury. In *Oberg vs. Sanders*, 111 Utah 507; 184 Pac. 2d 229, this Court said:

" . . . He failed to prove that defendants made a false representation that the poults were free from disease, and he consequently failed to prove that defendants made some statement with *knowledge of its falsity* or that defendants *knew of conditions which would make such a representation a reckless one . . .* "

And in the case of *DeFrees vs. Carr*, 8 Utah 488 (a fraud case) the Court went even further:

“And even if one misrepresents a material fact by mistake, relief will be granted; for the assertion of what he does not know or believe to be true is equally unjustifiable in law as the assertion of that which is known to be false.”

In the annotation found at 61 A. L. R. 508 we find this rule:

“(A) *Reckless misrepresentations*. A number of jurisdictions have adopted the rule that it is immaterial that the seller does not know his representations to be false, where he makes them recklessly or without knowing them to be true; in any event, the buyer is warranted in relying upon the seller’s positive statement of an existing material fact.”

In failing to inform plaintiffs that others had interests in the reservoir, in failing to clarify the fact that the Rollins’ Field didn’t go with the farm and in refusing to tell plaintiffs what he knew of the “River Bottom” ground, defendant was guilty of concealment. He told plaintiffs, in effect, half-truths. Their brief condemns plaintiffs for not having “suspicious minds” at all times. In other words, were plaintiffs required to inquire as to whether they were buying subject to an outstanding lease, whether machinery or animals were mortgaged, was there a mechanic’s lien on the reservoir or house, etc? We think that in the absence of suspicious circumstances (hereinafter discussed) no such unusual duty should be placed on any purchaser.

Defendants, throughout their brief, attempt to pick out flaws in plaintiffs’ presentation of evidence, forgetting that the defendant possessed the superior knowledge concerning the farm when the representations were made. Rather than

select flaws in the plaintiffs' evidence we believe that they had ample opportunity to pick out those flaws and to show them to the jury or to reveal the weakness of plaintiffs' case, if any, by thorough cross-examination.

From 23 Am. Jur. 861 the rule is stated regarding concealment:

"It is firmly established that a partial and fragmentary disclosure, accompanied with the willful concealment of material and qualifying facts, is not a true statement, and is as much a fraud as an actual misrepresentation, which, in effect, it is. Telling half a truth has been declared to be equivalent to concealing the other half. Even though one is under no obligation to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells, but also not to suppress or conceal any facts within his knowledge which will materially qualify those stated. If he speaks at all, he must make a fair and full disclosure. Therefore, if one willfully conceals and suppresses such facts and thereby leads the other party to believe that the matters to which the statements made related are different from what they actually are, he is guilty of a fraudulent concealment."

(c) *The plaintiffs were entitled to rely on the statements made by defendant concerning the reservoir, the Rollins' Field and the River Bottom ground.* Had the representations related to obvious facts, or had suspicious or warning circumstances existed, it would have been the duty of plaintiffs to investigate rather than to rely on the representations made. However, the peculiar facts of this case mesh together into such an unusually plausible situation that there was absolutely no warning circumstance present.

The reservoir was located entirely within the area of, and surrounded by, defendants' land. Its inlet and outlet ditches appeared to come from and end within the farm (since the Rollins' Field was believed part of the farm also). In view of the defendant's definite statements heretofore covered there was no fact that would cause the plaintiffs to inquire as to the ownership of others. This is especially so when viewing the statement of defendant, Ida E. Parrish, giving the reason why this farm was more valuable than that of one of the neighbors (T. 123):

A. "We told him what one of the neighbors had been offered, and we told him *our place was better than his, because it has got better water.*"

Viewing the Rollins' Field it appeared quite logical (see Ex. E and 7) that the 11 $\frac{3}{4}$ acres was part of the farm. The irrigation ditch from the reservoir ran around it, the roadway from the defendants' house ran around the field, it was fenced (T. 39, 143) much as the rest of the farm—the entire area being interwoven with a crazy-quilt pattern of cross-fencing (See Ex. A), and lay very vividly and clearly in line with defendants' land on the near and far sides between a long row of cottonwood trees of the creek area on one side and hills on the other. It appeared so logically a part of the farm that it is not surprising that the evidence shows it to have once been part thereof (T. 167).

To the person believing that the reservoir went with the farm, and seeing that this field was also watered from the same reservoir, we can again see the inseparability of the statements made and the acts of fraud complained of. Putting

the situation another way we could say that had the plaintiffs clearly understood that the Rollins' field did not belong to the place they were purchasing they would have then been put on notice of suspicious circumstances because the reservoir was the source of its water. They would have then known that others might have had interests in the reservoir.

Defendants' argument that the Rollins field was separated by fences can bear little discussion because the entire area was cross-fenced. And as pointed out heretofore, fences ran around this field also. Furthermore, viewing the field from the distance of some one-half mile, the evidence was ample to show that fence lines looked like breaks in crops from one field to another, particularly since fence lines were covered with weeds. If the Court entertains any doubt on this matter it need only look at Exhibits E and 7. The fence lines separating the property would have been visible but for three or four rods due to brush.

Although defendants' brief considers such a belief as plaintiffs entertained as fictional we contend that it is logical. Furthermore, they consider this $11\frac{3}{4}$ acres of land as a mere $11\frac{3}{4}$ part of 645 acres (2%). But the evidence shows that only 63 acres out of the 645 were irrigated. The testimony of Lee Rollins clearly indicated that this was more valuable than any of defendants' irrigated land and was larger than any of the irrigated pieces of defendants' farm other than the South Field (T. 103, 104, 105). In short, this piece stuck out like a sore thumb and its inclusion in the farm was of prime importance in the farm's purchase, far more so than the \$2,400.00 figure the jury indicated its value to be if standing alone.

And to remove the faintest possibility that plaintiffs might have found out that the land belonged to another they weren't furnished with an abstract of title until at least 60 days after the agreement was drawn up on December 4, 1947.

The inseparability of the statements becomes even more clear when we consider the representations made concerning the river bottom ground. The plaintiffs, believing that they had purchased an undeveloped farm with a plentiful water supply, intended to break up this area and farm it. From the conversation heretofore brought out the defendant knew of their intentions and remained silent as to his own views despite his peculiar knowledge gained from living on the farm all of his life. In fact (T. 95), the defendant encouraged this belief by pointing out other areas of the farm that he had cleared the year before. Plaintiffs did actually break up some land on the high ground east of the reservoir and are now dry farming that area (T. 42).

Upon viewing the misrepresentations as a whole and in their proper light we can see why no suspicious circumstances appeared. Although defendants have attacked each item piecemeal and thereby seek to confuse the entire picture, such does not give to this Court a true picture of the transaction.

The jury was well aware of the foregoing situation and properly found that the plaintiffs were entitled to rely on the representations under the circumstances.

At 61 A. L. R. 519:

"The buyer has a right to rely upon the seller's representation as to matters which are peculiarly within the

latter's knowledge and of which the buyer is ignorant, and the failure of the buyer to investigate the facts, although he has an opportunity to do so, does not in such a case preclude him from asserting against the seller the latter's misrepresentations with respect to such matters."

The Court's Instruction (No. 3) to the jury carefully embodied the foregoing rule.

In the leading Utah case of *Stuck vs. Delta Land & Water Co.*, 63 Utah 495, the plaintiffs came to central Utah and purchased land in an irrigation project after reading representations contained in a circular that the area was a "thoroughly proven general farming district." The Utah court held that the plaintiff could recover damages because the land actually contained alkali and was not as represented. The further fact that the plaintiffs made some investigation of the ground was held no grounds for barring their recovery.

Plaintiff Rex Pace testified that the plaintiffs "definitely" relied on each of the representations made by the defendant (T. 53) and that they could see no suspicious circumstances at the time (T. 71) they inspected the farm. Plaintiffs relied on the defendant's representations and trusted him, being total strangers to that area. Although the record indicates throughout that the parties referred to each other as "Brethren" and in other similar friendly terms, it does not indicate that the defendant was a former Stake Patriarch in the L. D. S. Church and, as such, subject to being believed by religious men of the same faith. This latter fact, along with its innuendo that the defendant was a man of high repute, was carefully brought to the jury's attention in argument by defense counsel.

At 61 A. L. R. 526 we find this rule:

“Where, by reason of the seller’s superior knowledge or experience with respect to the thing sold, or because of relations of *friendship or trust* existing between the buyer and seller, the buyer expressly relies upon the honesty of the seller and the latter’s representations as to the subject-matter of the sale without attempting to ascertain the truth of the representations the seller is bound to act honorably and deal fairly with the buyer, and is generally held liable for fraud or misrepresentations, although the buyer might have ascertained the facts by an independent investigation.” (Italics added.)

The foregoing rule was given to the jury, in substance, in Instruction No. 4. In fact, defendants’ proposed Instruction No. 8, to the effect that the parties were dealing with each other at “arm’s length” and that no confidential relationship existed between them, was wisely rejected by the Court after hearing the evidence.

Quoting from 23 Am. Jur. 956:

“It is well settled that a representee has a right to rely upon representations where a confidential relationship exists between the parties. In such cases a high degree of frankness and fair dealing is required, and the representee cannot be charged with lack of diligence in failing to make an independent investigation, either at the time or afterward . . . *The same principle has been applied where the representee has declared himself to be a stranger to the property which is the subject matter of the transaction, and where the representor enjoys a high reputation for integrity and honesty in the community in which he lives.*” (Italics added.)

As to what constitutes a "confidential" relationship we find the rule stated in 23 Am. Jur. 763:

"The term 'fiduciary or confidential relationship' is a very broad one. Courts of equity have carefully refrained from defining the particular instances of fiduciary relations in such a manner as to exclude other and perhaps new cases. The cases of parent and child, guardian and ward, trustee and cestui que trust, and principal and agent are familiar instances in which the principle of fiduciary relationship applies in its strictest sense. In operation, however, it is not confined to the dealings and transactions between the parties standing in these relations, but extends to all relations in which confidence is reposed, and in which dominion and influence resulting from such confidence may be exercised by one person over another . . . The relation and the duties involved in it need not be legal. It may be moral, social, domestic, or merely personal."

The defendant in showing plaintiffs' the farm instructed them where and when to stop for purposes of inspection. Because he used a cane he did not venture from the car very far, and this fact deterred plaintiffs considerably in going any distance from the car. As to making a more detailed inspection Byron Pace stated (T. 91):

A. "I guess we could of, if Mr. Parrish could have walked with us."

The defendant knew that these boys were trusting in his superior knowledge and that it would be unlikely that they would leave him alone while making their inspection. The defendant directed the investigation entirely as indicated by the following statement (T. 191):

“Well, you have seen the farm, now I guess we can go back.”

Despite the fact that defendant claims to have told the boys to investigate for themselves he cannot avoid paying the penalty for false representations. From 23 Am. Jur. 966, the rule is provided that:

“A representor cannot escape liability for his misrepresentations by advising the representee to investigate and to satisfy himself as to the property before acquiring it.”

In connection with defendants' cited case of *Forrester vs. Jastad* plaintiffs contend that it might be good law, but wholly not in point because that case involved a personal inspection of the kind of soil involved. Having cleared this issue by showing that the River Bottom area, in particular, and the Rollins' land were never investigated by plaintiffs, that case can serve no point in this lawsuit.

The general law is well summarized in 23 Am. Jur. 970:

“The rule is followed at the present time in practically all American jurisdictions, in respect of transactions involving both real and personal property, that one to whom a positive, distinct and definite representation has been made is entitled to rely on such representation and need not make further inquiry concerning the particular facts involved. This rule is a corollary to the broad principle of a general right of reliance upon positive statements. Under this rule it is sufficient if the representations are of a character to induce action, and do induce it, and the only question to be considered is whether the misrepresentations actually deceived and mislead the complaining party. Under such circumstances, it is immaterial that the

means of knowledge are open to the complaining party, or are easily available to him, and that he may ascertain the truth by proper inquiry or investigation.”

.

That the representations were material, that they were made for the purpose of inducing defendants to purchase the farm, that plaintiffs were ignorant of the falsity of the statements is implicit from volumes of evidence in the record. Rex Pace, on direct examination (T. 53), made this quite clear:

Q. You have stated certain statements he has made to you. Did you rely on each of those statements?

A. Definitely, we did.

Q. Did they influence you in purchasing the place?

A. To a great extent.

Q. Did they influence you as to the amount of money you paid for it?

A. Yes.

(d) *Damages were proved.* The sole remaining element to be established in this case is whether the damages awarded are supported by the evidence. Inasmuch as \$8,470.00 of the award of \$8,650.00 related to the reservoir, the Rollins' field and the river bottom area in question plaintiffs will confine the discussion to those items, particularly since the other \$180.00 of damages so clearly sustains itself. In supporting the jury's verdict plaintiffs are not attempting to show how the jury arrived at its figure—only they themselves know that fact—but will show the evidence introduced by which the jury could arrive at the figure.

At the time the complaint was prepared this writer reasoned that the case would stand or fall upon proving fraud concerning the reservoir. Investigation showed no one in the vicinity had any definite idea of the actual value of a share of stock in the Northwest Irrigation Company. Lee Rollins, Secretary of the company and possibly the most competent to testify, admitted on cross-examination that the only experience he had had was with this little irrigation company of four members (T. 108).

As pointed out previously the representations concerning the Rollins' field and the River Bottom area were so inter-related and dependent upon the representations with respect to the reservoir that no one item could exist in this case without the other two. In short, the land without the water was practically valueless and the water without the land was almost equally so. This reservoir did not serve a large area where a share of water stock had any established value.

Thus, it appeared that damages would have to be proved as a single unit. Here again, the theory of inseparability heretofore mentioned was all important. And in realizing that the jury might find against plaintiffs on some particular item it was necessary to put in evidence of value on those items so that a proper amount could be deducted from the damage evidence given on the place as a unit.

Therefore, the complaint was worded as follows (R. A-4):

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"That the value of the aforesaid ranch as it actually was when purchased was Twenty-Five Thousand (\$25,000.00) Dollars, whereas it would have been

worth Fifty Thousand (\$50,000.00) Dollars if it had actually been as represented . . .”

The foregoing allegation correctly states the “benefit of bargain” rule of damages followed in Utah, and the writer referred directly to two Utah decisions:

DeFrees v. Carr, 8 *Utah* 488:

“The proper measure of damages in such a case (fraud) is the difference between the actual value of the land purchased by appellant as it would have been if as represented and as it actually was.”

Kinnear et al v. Prows, et al. (1932), 81 *Utah* 135; 16 *Pac. 2d* 1094:

“The measure of damages for fraud is the difference between the value of the property purchased and the value it would have had if the representations were true.”

See also 24 *Am. Jur.* 63, citing *Hecht v. Metzler*, *supra*, as standing for the same rule.)

And the jury was properly instructed in Instructions attached to Interrogatory No. VII (T. 208) as follows:

“Measure of Damages: The measure of damages in a case of this kind is the difference between the value of the property purchased and the value it would have had if the representations had been true.

A. Total Damages pertaining to the farm property
\$—————

In following their theory of damages plaintiffs asked Lee Rollins, whose qualifications are not challenged, the value of said farm in 1947, including buildings and water stock or water right:

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 \$30 or \$35 thousand as a good price at that time."

There was considerable other evidence, in detail, as to the actual value of the place by computing the total of the various parcels of land and buildings making up the farm unit given by Mr. Rollins and by the defendant himself (See transcript 14, 15, 16, 17, 18, 19, 20, 21, 107, 108 and 109).

In determining the value of the farm as it would have been if the representations were true Mr. Rollins was asked (T. 109-110):

Q. "Well, excluding the personal property, the machinery and personal property on the premises and including just the real property, the land and buildings on the place, and assuming the entire reservoir went with the farm, and your eleven and three-fourths acres of land went with it, and the south field was in a high state of productivity . . ."

(At this point counsel was interrupted and it was claimed there was no evidence of the "high state of productivity" of the south field, and the Court indicated a condition comparable to "good.")

" . . . and, assuming there were 30 acres of the river bottom that could be used or farmed, and assuming the land in Section 19 was of the same quality of soil (as the south field), what would you value the farm at?"

A. "That would make quite a farm of it. It would be be forty or forty-five thousand."

Q. For the land? You are excluding the machinery and personal property?

A. Yes, I would say \$40,000.00."

The foregoing testimony of Mr. Rollins and the other witnesses established a basic difference of \$10,000.00 as measure of damages, assuming the south field to be in "good" condition. It was later established that the south field was in "good condition" (T. 240, 161) and plaintiffs were unable to introduce any valuation showing a different condition. Consequently, the figure arrived at was the total damages to the farm based on the fraudulent statements concerning the reservoir, the river bottom ground and the Rollins' field.

The findings of the jury were consistent in every respect with the evidence given. In reading the 5½ pages of questions propounded to them it can be seen that the jury made findings entirely consistent with the evidence and plaintiffs' theory of the case. In denying defendants' motion for a new trial and upholding the damages award Judge Cowley felt that the damages awarded and plaintiffs' theory of the case were entirely proper.

Defendants condemn plaintiffs' position in failing to segregate damages concerning the reservoir from the other items. However, as has been pointed out, the entire lawsuit was so interrelated as to make this practically impossible. In this respect they once again seek to attack the damage award in piece-meal fashion. They argue that in breaking down the damage award there is insufficient evidence to justify \$2400.00 for the Rollins' field, \$1750.00 for the River Bottom area and \$4320.00 "in respect to the 'Reservoir' and 'Water Rights'."

Plaintiffs originally asked for a general verdict only (R. A-37), which was denied by the Court. Then, realizing that interrogatories were to be submitted—and wishing to protect themselves—requested a general verdict with special interrogatories. This latter request, also, was denied, but the Court accepted plaintiffs' interrogatories almost without exception instead of those submitted by defendants (R. A-41 & 42).

The Court then accepted plaintiffs' proposed instruction on measure of damages; but, in so doing, also attached sub-questions 1, 3 and 5 (T. 214):

A. Total Damages pertaining to the farm

property	\$8,750.00
1. Does this figure include anything for the Rollins piece containing 11¾ acres. If so, how much?.....	2,400.00
3. Does the total figure include anything for the "River Bottom Land?" If so, how much?	1,750.00
5. Does the total figure include anything <i>in respect to the "Reservoir" and Water Rights</i> ? If so, how much?.....	4,320.00
(Italics added.)	

In arriving at the figure of \$8,750.00 we can see that it is well within the evidence. The lesser figures of \$2,400.00 (for 11¾ acres of Rollins' ground at approximately \$200.00 per acre [T. 103]) and \$1,750.00 for the "River Bottom" ground (worth \$100.00 per acre if as good as the south field [T. 14]—less \$10.00 an acre actual value [T. 105]—or \$90.00 x 20 actual acres that could be farmed if as good as

the south field [T. 94], or, in all, \$1,800.00) were arrived at very logically. Then, in arriving at the figure "in respect to the 'Reservoir' and 'Water Rights' the jury possibly simply subtracted from the basic damage figure they originally determined. However, this latter conclusion may not have actually been the case since the reservoir used up over 20 acres of land (which was represented as belonging to the place) and since it was worth well over the \$7,000.00 expended in 1943 (T. 101) in enlarging it.

Considering the further fact that plaintiffs required twice the water they now have for the land they now farm (T. 48), plus what they would need for the 20 acres of River Bottom ground actually available and the water needed for the Rollins' land (the value of the Rollins' land being \$200.00 per acre, but "not with its permanent water right" [T. 103]) there should be sufficient evidence.

Under plaintiffs' theory that there can be no proper segregation of the statements of fraud it is contended that there can be no segregation of damages. The Court agreed with this contention in denying defendants' motion for new trial based upon the damages awarded in respect to the reservoir and water rights. In fact (T. 201), when the Court and counsel discussed the matter of damages pertaining to water before submitting it to the jury this matter came up:

MR. FULLER: We have it on the general statement of the evidence on the farm. I didn't make issue of the stock, certificate of stock.

THE COURT: That would give the value.

THE COURT (to Mr. Perry): You just take an

exception to . . . the interpretation on the question
. . .

THE COURT (referring to the reasons for having the jury individually itemize damages as to the reservoir, Rollins' field and River Bottom area):

"I am making a backward approach."

Actually, the sub-questions 1, 3 and 5 on damages were superfluous and the Court so recognized them. They were merely given for the purpose of determining whether the jury considered a damage figure for the different items. This is particularly so when we view their wording—"in respect of" and "does the figure include anything for"—plus the fact that the Court upheld the total damage figure on these items as against defendants' motion to have the verdict reduced or a new trial granted.

In requiring that plaintiffs theorize the exact method used by the jury in determining damages the answer is best set forth in the fraud case of *Stuck vs. Delta Land & Water Co.* (supra). In that case, too, the damages were not segregated since there was no showing that the land or water had value apart from each other (See T. 201):

" . . . It is perhaps sufficient to say that verdicts of juries, especially in actions for damages, can seldom be determined with mathematical precision even by the jurors themselves. If their verdicts can be set aside simply because the party in whose favor the verdict is rendered, or the court, is unable to mathematically determine how the jury arrived at its conclusion, a very large percentage of verdicts would be set aside as unsupported by the evidence. If the verdict is within the evidence and not obviously inconsistent therewith, that

is sufficient and oftentimes all that can reasonably be expected."

Mr. Rollins, being a lifetime neighbor of the defendants and a present neighbor of the plaintiffs, was reluctant to testify too favorably for either. His estimate on the difference in value of the property is, in plaintiffs' opinion, very conservative. The jury's verdict was well within his estimate. Had defendants been in an "out of pocket" jurisdiction such as California the measure of damages would have been the difference between the actual value of the property and what plaintiffs paid for it (\$45,000.00). The award for damages in such a case would have been \$5,000.00 greater. As it is the plaintiffs are not nearly recovering damages commensurate with their out-of-pocket loss.

Defendants overlook another important fact long recognized in partition suits—that the whole of a farm is greater than the sum of all its parts. In other words, the Rollins' field, standing alone was worth \$2,400.00, but its importance as a part of an existing farm *unit* was much greater.

III

DEFENDANTS HAD A FAIR TRIAL.

It must be remembered that the defendant had the benefit of living in Morgan County all of his life. He occupied a prominent position in the church. The defense constantly and obviously pointed out the defendants' infirmities and ages (T. 125, 126, 132, 187).

On the other hand the jury could see that the plaintiffs were fair and honest, answering each and every question put

to them. The defendants had a poor memory of all of the transaction other than events and conversations which *did not* occur in a manner detrimental to them.

The jury deliberated carefully for six hours in answering 5½ pages of interrogatories insisted upon by defendants for the purpose of reaching each issue of the case. It would appear, as stated by Mr. Justice Crockett of this Court in a recent Utah Bar Bulletin that:

“ . . . Sometimes these requests are so framed that it appears that counsel is hoping, or perhaps actually attempting to invite error on the part of the court so that if the defendant suffers an adverse judgment he may have the possibility of reversal on appeal.”

The jury was instructed in a maner most fair to defendants:

Instruction No. 5

“It is a well-established rule of law that fraud is never presumed, that when a transaction is explainable upon the theory of honesty and fair dealing that theory should be adopted.

Hence is you can explain any of the alleged misrepresentations of defendant on the theory that he was acting fairly and honestly, with no intention to induce the plaintiffs to purchase the farm by any alleged misrepresentations, then it is your duty so to do.”

THE JUDGMENT SHOULD BE AFFIRMED.

Respectfully submitted,

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