

1951

# Rex Pace, Byron Pace, Keith Pace and Harvey Pace v. Joseph A. Parrish and Ida E. Parrish : Appellant's Reply Brief

Utah Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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REX PACE, BYRON PACE, KEITH PACE  
AND HARVEY PACE

Plaintiffs and Respondents,

vs.

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

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## Appellant's Reply Brief

CASE NO. 7677

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**FILED**  
DEC 31 1951

Clerk, Supreme Court, Utah

L. TOM PERRY,  
PRESTON AND HARRIS,  
Attorneys for Defendants  
and Appellants.

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Appeal from the District Court of the First Judicial District  
of the State of Utah, in and for the County of Cache.

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55 Am. Jur. ....	p. 531
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Farrer vs. Churchill .....	135 U.S. 609, 34 L. Ed. 246

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## INTRODUCTION

A few comments on the brief submitted by respondents seem necessary.

POINT I: APPELLANT'S BRIEF CONTAINED A FAIR STATEMENT OF THE IMPORTANT FACTS IN THE CASE . . .

A. There was no intention of misleading the Court when we made the statement that plaintiffs had contracted to sell their farm in Boeneta, Utah, for \$50,000.00. The record is clear on this point, (Tr. 28). If there was only an offer and not a contract, we apologize for our lack of care in setting forth this relatively unimportant matter.

We think that plaintiffs also, in the heat of their argument, unintentionally colored other facts. On page 16 of their brief, they have Mr. Parrish standing at point A and pointing to the Rollin's land, whereas the testimony

shows that they were all seated in the car when Parrish is alleged to have said, "Brethren, all the land you see down there belong to me," (Tr. 32).

Likewise, on the top of the next page of their brief, plaintiffs would have us believe that the Rollin's tract of  $11\frac{1}{4}$  acres,  $\frac{1}{2}$  mile away was "the most clearly visible tract of land in their view," they represent that a tract of land  $\frac{1}{2}$  mile away was more clearly visible to the parties than the land surrounding the car in which they were seated.

B. We are accused of attempting to mislead the Court by failing to make reference to a statement of one Reynolds Blackington to the effect, "If the deal went through, the reservoir went with the place." This accusation deserves more serious consideration.

We admit that the Blackington statement was denied a place in our brief. Our reason was. It did not deserve serious consideration.

It was Blackington, friend of Rex Pace, who remained in the car while Rex inquired of the defendants if their land was for sale. It was Blackington who said that Parrish, crippled as he was, walked out of the house, down the steps and out to the car to discuss a deal that had already been made. It was witness Blackington who conveniently overheard this one single statement (now relied up by respondents) as the most vital in this entire dispute. It was Blackington whom Parrish testified he had never seen prior to the date of the trial. It was Blackinton who overheard a statement that was neither pleaded nor testified to by either of the plaintiffs.

We suggest that the statement is very similar to the statement that the reservoir is on my land. It is not a direct statement that, "all of the water rights in the reservoir are used on my land" or, "that I own all the water rights." For the purpose of establishing fraud there should be a distinction between a reservoir itself and the water rights in that reservoir. So first the statement has to be enlarged to make the reservoir include all the water rights in the reservoir. But the plaintiffs' own evidence is that they could not put to beneficial use more than half the water rights from the reservoir in this farm, (Tr. 48). Plaintiff is here attempting to establish fraud by producing a witness who is willing to put the general statement in the mouth of the defendant that the "reservoir went with the place." It should be remembered that such a statement is very easy to make but it goes all too far. The plaintiff had no right to believe it under the circumstances any more than he had a right to establish fraud by the statement, "I own all the land you can see down there." The slightest investigation would have shown there were neighbors to the land, that the ditches from the reservoir reached the premises of the neighbors and that part of the water rights in the reservoir were owned by these same neighbors.

May we not be pardoned for thinking this testimony of little importance? Even plaintiff realizes its weakness, for he feels the need of it needing support by inserting something entirely foreign to the record. That the Jury, "Were undoubtedly aware of Mr. Blackington's reputation for truth and honesty."

C. If, "Respondents absolutely never examined the river bottom land in section 19," then what is the meaning of their testimony, (Tr. 60) where they testify they rode over the river bottom land twice and got out and made an inspection of the river bottom land? If they never examined the land, how did they know that it had never been plowed? (Tr. 45), and that it was covered with sage? (Tr. 46).

D. On page 4 of respondents' brief, they say they made no request for special interrogatories, but on page 41, of the same brief, they say they requested them. (A. 37-41).

For the most part, the issues are clearly set forth in the principal brief. We assert error, and they deny it. Where the issues are thus clearly set forth, there is no need of further comment.

But on page 13 of their brief, a new doctrine is introduced. Respondents contended that there may be fraud and deceit by innuendo. We submit that if the doctrine of fraud and deceit by innuendo ever finds a place in the jurisprudence of this State, it should not be introduced when mature men are making a land contract.

The second new element introduced by respondents is a statement of the general rule that where a confidential relationship exists, fraud may be practiced by suppressing facts, or by the telling of a half truth. The insertion of this new element in the case is at least a tacit admission by the plaintiffs that there was no actual, direct misrepresentation.

We find no fault with this general statement of a law, even though it cannot be found at 23 Am. Jur. 956. We differ with respondents in their application of this general rule to the facts in the instant case.

**POINT II: THERE WAS NO CONFIDENTIAL RELATIONSHIP BETWEEN THE PARTIES TO THE CONTRACT . . .**

Was there a confidential relationship existing between these parties? The only evidence cited by respondents in their brief is that the defendant called the plaintiffs "brethren." Surely the Court is not going to lay down a rule of law for this state, that when ever one party calls the other "brother" a confidential relationship exists.

We find that Courts have upheld that a confidential relationship exists in case of dealings between physician and client, land broker and agent, and, in some cases, where director and stockholder are dealing with each other. Where Bolander vs. Thompson, 134 Pac. 2nd, 924, a patient and nurse were dealing with each other, and in Anderson vs. Lloyd, 139 P. 2nd 244, former partners were dealing with each other, in Baker vs. Baker, 171 A.L.R. 447, a divorced couple were dealing with each other. In all these cases, under the circumstances, the Court found a confidential relationship, but these cases are entirely different from strangers dealing with each other, and one calling the other "brother."

**POINT III: THERE WAS NO FRAUD OR DECEIT BY WILFUL CONCEALMENT OF MATERIAL FACTS OR STATEMENT OF A HALF TRUTH . . .**

Assuming no confidential relationship, is there deceit by wilful concealment of material facts?



## THE RESERVOIR

Suppose we refer to the general picture. A tentative agreement had been made between Rex Pace and Joseph A. Parrish for the sale of the Parrish farm. This agreement was to be binding, if approved by the father and the other two sons, after an inspection of the farm. Three plaintiffs, all matured men, one from Ogden, a nearby town, and the others from Duchesne County, in the same state, all experienced in operating irrigated land, call on the owner, and aged farmer, 75 years of age, and invite him to accompany them on an inspection trip. In the course of their inspection, they come to a large, man-made reservoir and there, according to the plaintiff, (Tr. 30), Parrish simply said, "This is the reservoir." In that simple statement, there was no wilful concealment of material facts, or the wilful telling of a half truth. Was the defendant under any duty, because of this casual statement, to go on and explain that others had an interest in the water in the reservoir, when that question was never put to him?

Admitting, but not concealing, there was another discussion as to the ownership of the reservoir on a previous occasion. Was there a wilful concealment of a material fact in that first interview?

This is the testimony: Question by Mr. Fuller, "Was there any discussion relative to how much water was on the place?" Answer by Rex Pace, he said, "I own the reservoir; the reservoir is on my place."

We know nothing of the circumstances surrounding this statement. The record is silent as to what question

called for such a reply. Knowing nothing of the circumstances, can we charge defendant with a wilful concealment of a material fact.

An another occasion, prior to the signing of the agreement, three of the plaintiffs were conversing with Wallace Parrish concerning the construction of the reservoir. There was a frank and complete revelation of all of the facts. Wallace told them that others had an interest in the reservoir, (Tr. 165, 168, 170).

If respondents had listened to Wallace Parrish they would have known; if, in that six weeks period between the inspection trip and the signing of the contract they had investigated, they would have found out; and if they had inquired of defendant, Joseph A. Parrish, at any time, they would have been told, that others had a right to use some of the water in the reservoir.

Having neither listened, investigated, or inquired, they cannot now complain.

## THE ROLLIN'S LAND

The position of the parties, when the alleged statement was made concerning the Rollin's land, is important, and that fact is in dispute. Parrish remembers pointing to a tract of cultivated land on the sidehill and making a statement concerning the land he owned as the parties ascended the road to the reservoir, (Tr. 129). He is positive that the parties did not drive to point "A" during the inspection, (Tr. 141). The physical facts support his statement; the road around Rollin's field was too muddy to

travel, if this road was too muddy, how could the parties have ascended to point "A" where there was little or no road? If they were at the point fixed by Mr. Parrish, there is no deception for the Rollin's tract would not be in the direction of his pointing.

If, however, in their eagerness to win, plaintiffs have used a simple expedient of changing the place of conversation to a different point, and reported that the parties were facing downhill instead of uphill, then there is something to argue about, otherwise not.

In a fraud case, the burden of proof is on the parties asserting the fraud. Is that burden shifted when there is a direct conflict in the evidence? Is the burden shifted when the facts argue for the defendant? It must be remembered that it was the plaintiffs who were eager to buy, and not the defendants who were eager to sell; there is no motive for a wilful concealment.

Further comment is necessary only to show the weakness of plaintiffs' position. It is only when one party cannot ascertain the facts that a wilful concealment by the other becomes fraudulent. "It is a general rule of fraud that nondisclosure can form the basis of a charge of fraud only if there is a duty of disclosure. Accordingly, where the facts or means of information concerning the condition and value of the land are equally accessible to both the vendor and the purchaser, and nothing is said or done by the vendor which tends to impose on the purchaser, or to mislead him, there is no fraud which the law can notice arising from the failure of the vendor to disclose facts affecting the value of the land. (55 Am. Jur. 531).

The parties were out on an inspection tour. If the inclusion of the Rollin's tract was of vital importance, as contended by plaintiffs, they would have walked to the Rollin's tract and used the shovel as they did in the South field. Fraud is never presumed. We must assume that if the plaintiffs had even started toward the Rollin's tract, there would have been no misunderstanding for they would have been told the truth, or had they even inquired whether the Rollin's tract belonged to Parrish when they drove near to it, they would have been told the true condition and there would have been no deceit. Having made no inquiry or given any indication that they thought the Rollin's land was included in the land to be sold, they cannot now complain.

It must also be remembered that Wallace Parrish, son of the vendor, testified that on the six hour ride, prior to signing the contract, he told them that his father no longer owned the 11¼ acres. (Tr. 166-157).

## RIVER BOTTOM LAND

Plaintiff's are either confused as to the exact location of the river bottom land or they are deliberately attempting to mislead the Court. Whether confusion or intentional unfairness the evidence is clear that the road over which the parties traveled twice while on the inspection trip runs directly through the river bottom land.

In the course of the cross examination of Rex Pace he appeared to be a little confused and his attorney prompted him by asking:

“Q. The river bottom land?

A. That is right.

Q. You went over the river bottom land twice?

A. Along this road, yes.”

Attorney Perry then continued his cross-examination.

“Q. You got out of the car and made an inspection of the river bottom land?

A. Yes sir.

Q. There was no snow on the ground?

A. No sir.” (Tr. 59-60).

For plaintiff to argue now that the river bottom land was “east some distance” from the road over which they had twice traveled seems very unfair.

In a desperate attempt to sustain the verdict they present a new and unusual argument. That fraud may be practiced on another by a secret thought that is unexpressed.

This is the argument: That while the parties were on that inspection trip and Rex Pace was telling Parrish, that they were going “to push down the trees” and farm that portion of the river bottom land that was *west* of the road, Parrish thought “Maybe they will and maybe they won’t.” (Tr. 133). There can be no deceit because of this thought.

If he had told them it was good farming land when he had never plowed it, and it later proved deficient, he would have practiced deceit. If he had told them it was incapable of being farmed when he had never tried it, he would likewise have been in error.

The case of *Farrer vs. Churchhill*, 135 U.S. 609, 34 L. Ed., 246 seems in point and this issue. In this case, plaintiff alleged damages because defendant had misrepresented the amount of land overflowed by the Mississippi River, the Court denied relief because plaintiff had inspected the property. In the opinion, the Court quoted from an early English case of *Hill vs. Thompson*. Thompson had sold a tract of land to Hill and he had reported that only 50 to 60 acres were untillable, whereas 300 acres were unfit for cultivation, the Court refused to grant relief. An examination had been made by the vendee. The Court, in its opinion, said:

“Misrepresentation entitled to relief must be in reference to some material thing unknown to the purchaser, either from not being examined, or for want of opportunity to be informed, or for entire confidence reposed in the vendor: and a concealment of material facts known to the vendor and unknown to the vendee, which are calculated to influence the action or operate to the prejudice of the vendee, if fraudulent.

But where the facts be equally open to both parties, with equal opportunities of examination, and the vendee undertakes to examine for himself, without relying on the

statements of the vendor, it is not evidence of fraud that the vendor knows facts not known to the vendee and does not disclose them to him.”

The judgment should be reversed.

Respectively submitted,

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