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Rex Holland et al v. Columbia Iron Mining Company et al : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT of the STATE OF UTAH

REX HOLLAND,
REX HOLLAND, Administrator with the Will
Annexed of the Estate of JOHN G.
HOLLAND, Deceased,

Plaintiffs and Appellants,

— vs. —

COLUMBIA IRON MINING COMPANY,
a corporation,
COLUMBIA STEEL COMPANY,
a corporation,

GENEVA STEEL COMPANY, a corporation,

UNITED STATES STEEL COMPANY,

a corporation,

UNITED STATES STEEL CORPORATION,

a corporation,

ARTHUR E. MORETON, ETHEL T.

MORETON, also known as E. T. MORE-

TON, JOHN R. MORETON, also known as

J. R. MORETON, ROSE ANN P. MORE-

TON, SUSAN MORETON TEVIS, WIL-

LIAM C. MURIE, JOHN DOE II-XXV,

Defendants and Respondents.

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COLUMBIA STEEL COMPANY,

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TON, JOHN R. MORETON, also known as

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TON, SUSAN MORETON TEVIS, WIL-

LIAM C. MURIE, JOHN DOE II-XXV,

Defendants and Respondents.

Case No. 8237

BRIEF OF APPELLANTS

PRELIMINARY STATEMENT

This is an appeal from a summary judgment entered in favor of the corporate defendants and against the plaintiffs. The judgment was entered prior to answer of the amended complaint by any of the defendants.

The action was brought by Rex Holland individually and as administrator with the will annexed of the estate of his father, John Holland, against Arthur Moreton, a lawyer and members of his immediate family and against five corporations, hereinafter referred to as the corporate defendants. The lower court denied the motion to dismiss and motion for summary judgment filed by the Moretons, but granted the motion for summary judgment filed by the corporate defendants.

The case arises out of a transaction wherein Moreton, acting on behalf of himself and the other owners, sold to the corporate defendants a piece of mining property made up from what had been three mining claims. Rex and John Holland and one Murie had owned the claims and transferred to Moreton a one-fourth interest therein to act as attorney in obtaining patents thereon and as agent in negotiating the sale. He made the sale and the corporate defendants paid to him \$287,500.00 for his one-fourth interest and \$33,333.33 to each of the others for their respective one-fourth interests.

The basis of the liability of Moreton is his breach of confidential relationship with the Hollands and Murie

by fraudulent misrepresentation as to the value and price of the mining claims and his fraudulent concealment from the Hollands and Murie of the amount which he received for his interest in said claims.

The basis of liability of the corporate defendants is their conspiracy with Moreton and their participation in and aiding Moreton in the fraudulent concealment of the amount being paid and paid Moreton for his one-fourth interest.

The record upon which the summary judgment was granted consists of the Amended Complaint, the Motions of the corporate defendants, Answers to Interrogatories, Affidavits of Rex Holland and the Depositions of Rex Holland, Clara Holland, Arthur Moreton and Dr. Walter Mathesius and Merrill Heald who handled the transaction for the corporate defendants.

The facts upon which plaintiff basicaly rely for recovery against the defendants, both individual and corporate, are simple.

The two Hollands and Murie employed Moreton as their attorney to obtain patents on the three mining claims in return for which he was to receive a one-fourth interest in the claims (Rex Holland, dep., p. 11). Moreton also agreed to follow the sale of the property (Rex Holland dep., p. 26). Acting in behalf of the co-owners as attorney and trusted agent and at a time when the Agree-

ment of Ownership (Ex. 3, Rex Holland dep.) was the controlling document Moreton negotiated a sale with and to the corporate defendants whereby he sold the one-quarter interest of each the Hollands and Murie for \$33,333.33 and his own quarter interest for \$287,500.00. The basis of the purchase by the corporate defendants was that the property contained 1,550,000 tons of ore and the price was 25c per ton (Mathesius dep., p. 11, 12). In other words, the property was sold for \$387,500.00 and Moreton took \$287,500.00 and each of the co-owners received \$33,333.33.

The Hollands and Murie were never told the amount which Moreton received for his interest. The liability of the corporate defendants is based upon their participation in and aiding Moreton in concealing this vital information thereby enabling him to consummate his fraudulent breach of confidential relationship with the Hollands and Murie.

The specific acts whereby they accomplished this are set forth in detail in the amended complaint (R. 23-28) and on pages 32-46 of this Brief.

Although the interest owned by the four was an undivided interest, nevertheless the corporate defendants did not follow their usual policy of handling the trans-

action as a single transaction but handled it as two separate transactions making out separate and distinct documents for the offer, acceptance, sale and transfer of the three-fourths interest and for the one-fourth interest (Heald dep., p. 14-29), thereby enabling the sale to be completed without disclosure of the amount received by Moreton. They did this even though they knew by virtue of the letter of September 14, 1948 (Appendix A) that the co-owners desired their fair share.

There is a genuine issue of fact on the question of disclosure. Both Rex Holland and Clara Holland testified that Mathesius made no such disclosure and they did not know until long after the amount Moreton in fact received.

Thus by the co-operation of the corporate defendants acting through Mathesius and Heald, Moreton was enabled while acting as attorney and trusted agent to walk off with \$287,500.00 while his clients principals and equal owners received only \$33,333.33 apiece.

STATEMENT OF THE CASE

In 1946 or 1947, the Columbia Iron Mining Co., hereinafter referred to as "Columbia", one of the corporate defendants herein, was thinking about opening negotiations towards the purchase of a piece of property

containing a large deposit of iron ore. This property, located in Iron County, Utah, was known as the "Milner" property.

Three prospectors, John Holland, his son Rex Holland, and William C. Murie, hereinafter sometimes referred to as the "co-owners", had jointly located three mining claims which happened to adjoin the Milner property. These claims were known as the "M & H" claims.

Columbia knew about the M & H claims and knew that the iron ore body in the Milner property extended into them (Mathesius' dep., p. 6, lines 2-4; p. 44, lines 1-4). Even though the M & H claims contained substantial deposits of iron ore, they were only of moderate value standing by themselves. However, because the M & H claims adjoined the Milner property and therefore could be mined by the same single facility used to mine the Milner property, they would be easy and cheap to mine along with the Milner property. Therefore, the M & H claims would be extremely valuable to Columbia in the event, but only in the event, that Columbia acquired the Milner property (Mathesius' dep., p. 7, lines 13-16; p. 44, lines 1-13).

All of this was unknown to the co-owners. They had no idea even as to the amount of tonnage contained in their property or its value per ton. It was impossible for them, or at least they knew of no way, to find out what their claims were worth (Moreton's dep., p. 72, lines 6-11; R. 90, 91). They believed their claims had a maximum worth of somewhere around \$5000.00 (Moreton's dep., p. 26, lines 28-30; p. 27, lines 1-25; p. 193, lines 1-5).

Either in 1946 or 1947,¹ Walter Mathesius became the president of several of the corporate defendants, including Columbia. Mathesius knew Arthur E. Moreton, a Utah lawyer. They both belonged to the Alta Club in Salt Lake City (Moreton's dep., p. 132, lines 10-23). Neither one of the men will state exactly how, when or where they first met or their first meeting took place (Mathesius' dep., p. 5, lines 9-23; p. 45, lines 16-22; p. 46, lines 10-18; p. 49, lines 15-18; Heald's dep., p. 10, lines 19-22). While they do not agree as to how, where or when it took place, it probably occurred either in 1946 or 1947,² but quite apparently BEFORE Moreton had any connection at all with the claims (Mathesius' dep., p. 50, lines 8-17).

¹ In one place Mathesius said it occurred in 1946 (Mathesius' dep., p. 4, lines 21-22) and in another he said it occurred in 1947 (Mathesius' dep., p. 32, lines 3-5).

² On page 78, lines 7, 21-27 and on page 89 of Moreton's deposition, lines 15-17, Moreton testified that his first contact with Mathesius on another deal (Sunbeam No. 8) was in July of 1947 and it was at that time that they talked about the M & H claims. On line 28 of the same page he decides that it was in January, 1947. On page 90, line 1, he says it may have been April of 1947. On line 4 of the same page, he says it was more likely in May of 1947. In another place he says he cannot tell what month or even what year it was (Moreton's dep., p. 133, lines 23-25).

At this meeting Mathesius advised Moreton of Columbia's tentative plan to acquire the Milner property and instructed the lawyer to contact the prospectors and get the prospectors to employ him as their attorney³ to patent the M & H claims and to authorize him to later act as their attorney and agent in selling the property to Columbia (Mathesius' dep., pp. 5, 6, 7; p. 8, lines 5-6; Defendants' Exhibit #5 of Rex Holland's deposition).

"I (Mathesius) said (to Moreton) that Moreton might suggest to the holders of these (M & H) claims, that they get them patented . . ." (Mathesius' dep., p. 8, lines 5-6).

". . . So I (Mathesius) told him (Moreton) I would suggest he (Moreton) tell the holders of these claims to proceed with the patenting, bringing their title to date, and after that I would be willing to talk business with him.

Q. And did he at that time state what his connection with these claims was?

A. No.

Q. Did he at any time state that he was representing the people who owned these claims?

A. No." (Mathesius' dep., p. 50, lines 8-17)

It is apparent that at the first and second times that Mathesius mentioned the M & H properties to Moreton, whether it was 1946 or 1947, Moreton obviously was not yet representing the co-owners and had no interest in the

³ Inferentially

properties. If at that time Moreton was already representing the co-owners, he would have told Mathesius so and that he had an interest in the property (Mathesius' dep., p. 49, lines 8-18). Moreton, apparently following out Mathesius' instructions, went to Cedar City, Utah⁴ (Rex Holland's dep., p. 8, lines 16-20; p. 9, lines 1-20), where the three prospectors were living, and sent for them to come to his hotel. These prospectors were extremely naive, of trusting dispositions and completely lacking in business experience (R. 2, 90).

⁴ This was in the spring of 1947, according to Rex Holland (Rex Holland's dep., p. 8, lines 16-20; p. 9, lines 1-20) or in the spring of 1946, according to Moreton. Moreton claims that his first meeting with the co-owners was on April 6, 1946, that he just happened to be in Cedar City and that he just happened to run into one of the co-owners and without knowing anything at all about the property, agreed to patent the property for a one-fourth interest and took an option on the remaining three-fourths interest for \$100,000.00 (Moreton's dep., p. 9, 10, 11; p. 26, lines 13-15). However, he could not produce and has not to this date produced an agreement or option dated April 6, 1946, his excuse being that he cannot find them (Moreton's dep., p. 1, 10, 11). He never again saw the alleged document of April 6, 1946 (Moreton's dep., p. 17, lines 6-7) and there is no written record to substantiate Moreton's claim that his first meeting took place in April, 1946 (Moreton's dep., p. 13, lines 9-12).

Rex Holland's original recollection of the first meeting with Moreton was that it took place in 1947. While it is true that Moreton obtained the signatures of the co-owners to a document dated September 1, 1946, it may well be that the document was not signed on the date stated. Additionally, its reference to the "lost" option (Moreton's dep., p. 9, 10, 11, 12), without stating any definite sum of money, renders it suspect.

As against that, there is a written record that the co-owners appointed Moreton their attorney to act in the patent proceedings on March 11, 1947 (Moreton's dep., p. 123, lines 13-15) and Moreton admits that his first work on the patent began on that date (Moreton's dep., p. 29, lines 14-16).

However, it is not necessary in order to hold the corporate defendants liable to prove that they instigated the conspiracy or for them to have been in the conspiracy with the Moretons from its inception (*Franck v. Moran*, 36 Cal. App. 32, 171 P. 841, 1918).

One of the prospectors, Rex Holland, was partially blind (Moreton's dep., p. 220, lines 1-3). John Holland and William C. Murie were both elderly men and quite ill (Moreton's dep., p. 247, lines 9-13; Mathesius' dep., p. 9, lines 7-9). The lawyer concealed the fact that Columbia had sent him or had told him to suggest to them that they employ him to patent their claims and the fact that the property contained a large deposit of ore, that Columbia might buy the adjoining (Milner) property, in which event it would want their property and that the ore was or would then be worth at least 25 cents per ton, and so very easily got them to employ him as their attorney (Rex Holland's dep., p. 110; p. 111, line 20 through p. 112, line 5; p. 113, line 3) and to agree in writing that he, Moreton, should receive a one-fourth interest in the property for getting the claims patented (Rex Holland's dep., p. 10, lines 25-30; p. 11, lines 1-30; p. 113, line 17 through p. 114, line 1).

At that first meeting,⁵ the co-owners placed their confidence and trust in Moreton. They agreed, at Moreton's instruction, to discuss the property with no one else. (Rex Holland's dep., p. 111, line 20 through p. 112, line 5; p. 112, lines 14-18; p. 112, line 22 through p. 113, line 3; p. 113, line 17 through p. 114, line 1). Mathesius and Moreton then had another meeting.

⁵ According to Rex Holland, nothing at all was said about any option at the first meeting (Rex Holland's dep., p. 17, lines 19-26).

Neither Mathesius nor Moreton will fix the time or place with much certainty, but the meeting seems to have also occurred in 1947, although possibly in 1948. At this meeting, Mathesius advised Moreton that Columbia had in fact acquired the Milner property and that he, Moreton, should complete the patenting of the property as Columbia was ready to buy it (Mathesius' dep., p. 7, lines 20-25; p. 8, lines 1-9).

Moreton, over a period of one and one-half or two years and sometimes at the direction of or with the assistance of the corporate defendants, prepared a great number of different kinds of additional documents pertaining to the property, including offers to sell, deeds, contracts, letters, agreements, options (one undated [Defendants' Exhibit 2, Rex Holland's deposition]); another allegedly lost (Moreton could not produce the original document which purportedly gave him a one-fourth interest and option to buy for \$100,000.00 Moreton's dep., p. 11, lines 11-12); third option which did not recite any purchase price, etc. The lawyer obtained the signatures of the prospectors to all of them. The prospectors were never left with copy of what they had signed (Rex Holland's dep., p. 29, lines 25-26; p. 36, lines 20-27; p. 37, lines 14-15). Moreton never paid them for any of the purported options (Moreton's dep., p. 20, lines 13-14; p. 24, lines 12-20).

One of the documents was a so-called "Agreement of Ownership", dated July 20, 1947, which was to replace and supplant one of the purported options (Rex Holland's dep., p. 73, lines 13-26; Defendants' Exhibit 3, Rex Holland's deposition). The lawyer had told the prospectors that their property contained 1,333,000 tons of ore or maybe a LITTLE more and that they couldn't expect more than 10 cents per ton because of the depth of the ore body (Overburden) (Rex Holland's dep., p. 121, lines 5-9; p. 122, lines 3-8) and that he would try to sell the property on that basis (Rex Holland's dep., p. 21, lines 1-4; p. 23, lines 6-12; p. 28, lines 1-7; p. 121, lines 5-19; p. 124, line 23 through p. 125, line 8; p. 125, line 30 through p. 126, line 18; p. 126, lines 22-25; p. 126, line 30; p. 127, lines 1-2; line 23 through p. 128, line 2).

It is obvious from a reading of the cleverly contrived language of the so-called "Agreement of Ownership" that Moreton had told them that the ore in the body was worth only ten cents per ton and that therefore the prop-

⁶ It is impossible to figure out even from Moreton's own records or his testimony just what interest, or the basis thereof, if any, he had in the M & H property or what documents he was relying upon. For example, Moreton admitted that up until the time he received a deed dated August 23, 1947, he had no interest in the property. Admittedly he has neither paid for nor ever exercised any of the options (Moreton's dep., p. 210, lines 1-26). Admittedly, he did not thereafter acquire any interest in the property nor did he ever exercise any of the purported options. Again, on the 25th day of August, 1947, he prepared the Application for Patent, which was filed with the U. S. government, for the signatures of the co-owners, which application recited that they, the co-owners, each still owned a one-third interest in the property (Moreton's dep., p. 210, lines 1-6). This document was prepared by Moreton after the purported "Agreement of Ownership." If the co-owners each owned one-third of the property at that time, Moreton never had any interest at all in the property.

erty would bring close to \$133,000.00. Otherwise he would not have recited that figure of \$133,000.00 at all.

Because of these concealments and false representations the co-owners assumed that the buyer would not pay much more than \$133,000.00, that Moreton, therefore, would not receive much more than one-fourth of the total amount paid by the buyer and thus were persuaded to agree that Moreton should so receive all over the \$100,000.00 and *to that extent* consented to his receiving all over \$100,000.00 for his one-fourth interest in the property.⁷

At a later date Moreton told the co-owners their property contained between 1,400,000 and 1,550,000 tons. While there is evidence in the record that the figure of 1,550,000 tons is correct, there is also evidence in the record that varying estimates up to approximately 6,000,000 tons are correct (Plaintiffs' amended complaint, R. 8, 14, 16, 17, 22); Rex Holland's deposition, Defendants answer to Interrogatories, R. 48). If these latter estimates of the tonnage contained in the M & H claims are correct, Moreton concealed the true tonnage of ore contained in the property.

Moreton concealed the fact that Columbia might purchase the Milner property and that if they did, the ore in

⁷ No reason whatsoever has been advanced by Moreton or anyone else why the agreement provided that Moreton was to get all over \$133,000.00, in addition to his one-fourth of that amount (Moreton's dep., p. 218, lines 26, 29-30; p. 219, lines 1-2).

the M & H properties would be and was worth 25 cents or more per ton. Moreton also concealed the fact that Columbia acquired the Milner property. He represented that the ore in the M & H properties was worth only 10 cents per ton (Rex Holland's dep., p. 121, lines 5-19). Moreton represented that he was going to get the same amount or perhaps a LITTLE more for his one-fourth as each of the co-owners was getting for each of their one-fourth (Rex Holland's dep., p. 125, line 30, through p. 126, line 18; p. 127, line 23 through p. 128, line 2). Moreton concealed the amount of money that he was getting for his one-fourth.

In September or October, 1948, Columbia prepared a *single* contract of sale between the co-owners and Moreton as the sellers and Columbia as the buyer. This contract (admittedly later destroyed by Columbia — Heald's dep., p. 17, lines 16-22—) covered the *entire* M & H property and recited the *total* price Columbia was paying for it (Heald's dep., p. 14, lines 17-18). Columbia forwarded the contract to Moreton, apparently hoping that the co-owners would sign the contract without reading it, as they had signed other documents submitted to them by Moreton.

About September 12, 1948, before (according to both Moreton and Mathesius) either Moreton or Columbia had ascertained the tonnage contained in the M & H property and before they had discussed any price per ton and before any contract was submitted to the prospectors for

their signatures, one of the prospectors, Rex Holland, heard from a Parley Canfield that the M & H property contained an estimated 3,500,000 tons of ore "and that it was being *offered* for sale for 25 cents per ton" (Rex Holland's letter of September 14, 1948; Rex Holland's dep., Defendants' Exhibit #5, page 2, lines 11-12). (This estimate was high by 2,000,000 tons according to the testimony of Mathesius—Mathesius' dep., p. 12, lines 4-5; p. 71, lines 11-12 p. 145, lines 9-16). Rex thereupon (September 14, 1948) wrote a letter to Mathesius (Defendants' Exhibit #5, Rex Holland's dep., Appendix A of this brief) for the purpose of finding out how much the steel company was paying for ore at that time (Rex Holland's dep., p. 52, lines 16-19), since the co-owners knew of no sales or prices paid and had no other way to determine the value of the property (bottom line, page 1, lines 1-7, page 2 of second affidavit of Rex Holland, R. 90, 91; Moreton's dep., p. 72, lines 6-11; plaintiffs' amended complaint, R. 14, 15) or of getting an equal division of the money (Rex Holland's dep., p. 76, lines 28-29; p. 77, lines 10-11). The letter advised Mathesius that he, Rex, had heard that the property contained 3,500,000 tons of ore and that it was being offered at 25 cents per ton. The letter requested a one-fourth, three-fourths division of the money and notified the president that the Agreement of Ownership with the lawyer was based upon the supposition that the lawyer was to get one-fourth of the money Columbia was paying for the entire

property. The letter also suggested that the deal should be postponed until such time as it was understood that Moreton was to receive one-fourth and the co-owners three-fourths.

The other two co-owners did not know the contents of this letter to Mathesius (Rex Holland's dep., p. 78, lines 17-18; Moreton's dep., p. 168, lines 11-17, 25-27).

After Mathesius received the letter from Rex Holland he had a telephone conversation with Moreton. It was in this telephone conversation that the pretended "negotiations" in their entirety for the sale of the M & H property took place. According to Moreton and Mathesius both, the entire "negotiations" consisted of 38 words. Mathesius told Moreton that Columbia would pay 25 cents a ton based upon *Columbia's* estimate of the tonnage and Moreton answered that that was agreeable with him.

"A. He (Mathesius) said that they would be willing to pay twenty-five cents per ton upon the estimate that Mr. Sargis might come up with after he had completed his making his survey and his notes.

Q. What did you say?

A. I said that would be agreeable." (Moreton's dep., p. 137, line 30 through p. 138, line 4; See also, Moreton's dep., p. 270, lines 10-11; p. 273, lines 15-18; p. 269, lines 14-16; p. 281, lines 13-16)

It is nowhere even claimed by anyone that there were ever any separate negotiations covering either the three-fourths interest of the co-owners or the one-fourth interest of Moreton.

Mathesius then had a meeting with the lawyer in regard to Rex's letter. This meeting was held in the lawyer's office about October 1, 1948 (Moreton's dep., p. 134, lines 12-30, p. 135). Mathesius read the letter to the lawyer (Moreton's dep., p. 139, lines 17-18) and furnished the lawyer with a copy thereof (Moreton's dep., p. 134, lines 21-22).

From this letter it appears that Rex was misinformed about the transaction and that he claimed the co-owners should get a three-fourths share of any price paid. Yet Dr. Mathesius decided he would not contact him (Mathesius dep., p. 83). He could thereby have learned of Rex's contention and could have advised him directly of the negotiations. He determined not to answer Rex's letter. By this conduct he eliminated Rex from any source of information except Moreton. The letter of October 16, 1948 was obtained by Moreton. He noticed that there was nothing in it indicating that the co-owners knew what Moreton was getting (Mathesius' dep., p. 92). He did not inquire whether the co-owners

had been told the price per ton which would be paid or the total price and he did not know whether they knew this important fact (Mathesius' dep., p. 97, 98; Moreton's dep., p. 139, lines 29, 30; p. 140, lines 1, 2, 13-16, 18-21; p. 160, lines 8-13, 27-30; p. 161, lines 1-24).

After writing the letter to Mathesius (sometime between September 14, 1948 and October 1, 1948), Rex Holland was told by Parley Canfield that the figure of 3,500,000 tons previously given him by Canfield included the tonnage contained in the adjoining, much larger (Short Line Claims, Milner) property⁸ (First affidavit of Rex Holland R. 81). Rex then concluded that on that basis Moreton's estimate of the tonnage of the M & H property alone was about correct. Rex then realized that either he or Canfield had been mistaken as to what Canfield had said regarding the matter of tonnage and the price at which it was being offered. He then reconsidered the positive statements made by Moreton that the tonnage of the M & H claims was 1,550,000; that it was worth much less than the 25 cents per ton he had heard was the asking price for the entire ore body because of its (the M & H property's) overburden (R. 81, 82; Moreton's dep., p. 71, lines 18-21); that regardless of the price that Moreton may have offered it for, Columbia would not pay more than 10 cents per ton (Rex Holland's dep., p. 121, lines 5-9; p. 122, lines 3-8) and concluded

⁸ Even Mathesius realized that Rex's information was based upon the total tonnage of both the Milner and M & H properties (Mathesius' dep., p. 85, lines 6-18)

that Canfield had been in error and that he had been in error in entertaining the idea that there was substantially more ore in the property than what Moreton had represented there was; that the 25 cents per ton was an error and that Columbia was paying 10 cents per ton and that Columbia was paying \$133,000.00 or a little more for the property, and, therefore, the information upon which he had based his letter to Mathesius was erroneous (First Affidavit of Rex Holland, R. 81, 82). Rex was influenced additionally not to press the matter because he now felt that if there had been any truth in his letter, Mathesius would have contacted him (R. 82). Thus Rex was reassured that Columbia was not paying Moreton much more than one-fourth of the entire sale price. He again believed that Columbia or whoever it was (he thought Geneva Steel Co.) that was buying the property was paying approximately \$133,000.00 for it and that they were paying Moreton not much more than one-fourth of \$133,000.00.

Rex was then convinced that Moreton had told him the truth and had given him the correct advice regarding the tonnage and how much Columbia was paying per ton for the property and its value and that he had been mistaken in ever doubting the representations of Moreton, his attorney; that his momentary distrust of Moreton had been unjustified and unwarranted; and that Moreton was not imposing upon him (R. 82).

Rex definitely concluded to rely on Moreton and that Moreton had acted and was acting honestly towards him and trusted, believed and relied implicitly upon the statements of Moreton and Moreton alone regarding the tonnage, the value thereof per ton and the amount per ton that Columbia was paying for it and that the value thereof was approximately \$133,000.00. By reason thereof and because Moreton was his attorney, Rex's former complete confidence in Moreton was restored (R. 82).

In the meantime, Mathesius, in the furtherance of the conspiracy, destroyed the single contract (Heald's dep., p. 16, lines 29; p. 17, lines 1-10, 16-24; p. 37, lines 8-10) providing for the sale and purchase of the entire property and which recited the total amount of money Columbia was paying for the entire property. He then departed from his usual practice, (Heald's dep., p. 15, lines 3-6) and instructed Moreton to submit two separate offers to sell, one by the lawyer and one by the three co-owners. The offer to sell covering the sale of the purported one-fourth interest of Moreton recited the amount of money Columbia was to pay him. The offer to sell covering the three-fourths interest of the co-owners recited only the sum of \$100,000.00 (Heald's dep., pp. 21, 22; Moreton's dep., p. 281, lines 26-27).

Mathesius, again in furtherance of the conspiracy, then instructed Moreton to prepare and obtain the signa-

tures of the prospectors to a letter dated October 16, 1948 (Defendants' Exhibit #8, Rex Holland's deposition, Appendix B of this brief.)⁹ The letter states that the co-owners understood that Columbia estimates the tonnage to be 1,550,000 but omits the price per ton that Columbia is paying for the property, and recites further that

“ . . . Mr. Moreton may offer and sell his interest in said claims for whatever price you (Columbia) and he may agree upon, if he so desires, and the entire proceeds therefrom will of course be his sole property, it being his right to determine and to receive whatever amount you may agree upon with him.” (Moreton's dep., p. 312, lines 5-7; Defendants' Exhibit #8, Rex Holland's deposition, Appendix B of this brief.)

But the amount Moreton was to receive was not stated therein.

The patent from the U. S. Government to the M & H property came through on October 22, 1948.

Mathesius, apparently still concerned about the matter and again in furtherance of the conspiracy, then further instructed Moreton to prepare and obtain the signatures of the co-owners to a second letter, dated November 20, 1948, (Defendants' Exhibit #9, Rex Holland's deposition, Appendix C of this brief),¹⁰ and again to omit in

⁹ See analysis of this letter under No. 27 of the specific respects in which the corporate defendants participated in the accomplishment of the fraud, etc.

¹⁰ See analysis of this letter under Point No. 28 of the specific respects, etc.

said letter any mention of the amount of money they had agreed to pay Moreton for his purported one-fourth interest and to reaffirm therein that

“An interest in these claims is also held by Arthur E. Moreton, and it is no concern of ours as to when and to whom he may sell his interest or at what price or upon what terms.” (Defendants’ Exhibit #9, Rex Holland’s dep., Appendix C of this brief.)

Said letters were presented to the co-owners by their attorney, Moreton, for their signatures on their respective dates. None of the co-owners knew or suspected that the corporate defendants had conspired with the Moretons to defraud them in connection with the sale of said property (R. 91). Moreton had represented and the co-owners believed that the entire M & H property was worth approximately \$133,000.00 and was being sold for approximately that amount (R. 91); that his, Moreton’s, share of the total consideration to be paid by Columbia for the M & H property was the same as the co-owners, with perhaps a small additional amount for his services (R. 91). Had the co-owners known that Columbia was paying approximately 25 cents per ton for the ore or the actual value of the property, or the total consideration paid therefor, or that Moreton was to be paid a grossly disproportionate share of the total consideration, they would not have signed the said letters of October 16, 1948, and November 20, 1948 (R. 91, 92).

The co-owners, two of whom had never heard that their claims contained much more in excess of 1,550,000 tons of ore or that Columbia was paying anything in excess of ten cents per ton, and who had never heard that the M & H claims were worth much more than \$133,000.00 and who, therefore, had never been suspicious of Moreton, all now believing that the total tonnage contained in their property was 1,550,000, that Columbia was paying only ten cents per ton, that the total price Columbia was paying for the property was not much more than \$133,000.00 and that Columbia was not paying Moreton much more than one-fourth of that amount or about \$33,000.00 for his one-fourth interest in the property, and having complete confidence in Moreton, their attorney, and relying upon him and no one else and assuming to be true what he had told them regarding the price per ton that the ore was worth and that that was the price Columbia was paying for the property and satisfied that Columbia was paying Moreton only a LITTLE more for his one-fourth, signed the two letters and the offer to sell their three-fourths interest.

Columbia, after receiving the separate offer of sale covering the three-fourths interest of the co-owners and the two letters all signed by the co-owners, departed from their usual practice and prepared two separate contracts of sale. One contract recited the amount of money Columbia was paying Moreton for his one-fourth interest and the second recited the amount of money Columbia was paying the co-owners for their three-fourths interest.

Mathesius and Moreton then agreed that the co-owners should be instructed to come to Salt Lake City and for the deal to be closed on December 20, 1948, in Moreton's office (Mathesius' dep., p. 15, lines 20-23).

The co-owners, in response to a telegram, went to Salt Lake City and to Moreton's office on December 20, 1948 (Rex Holland's dep., p. 32).

The deal was closed in the office of attorney Moreton. The testimony is in conflict on the question of who presided over this meeting. According to Rex Holland, Moreton did. He sat at his desk and read the document relating to the co-owners interest, and Mathesius sat at the back of the room with little or nothing to say (Rex Holland's dep., p. 33-36). Moreton's testimony indicates that he sat at his desk and was apparently in charge (Moreton's dep., p. 154). Mathesius claimed to have been in charge, sitting at the desk and doing all the talking (Mathesius' dep., p. 15-19). This discrepancy is of significance in establishing the existence of an issue of fact. If Dr. Mathesius was not in fact in charge of the meeting, then there is less likelihood that he read from the documents relating to Moreton's quarter.

Also, Rex and his mother testified that only the co-owners papers and transaction was mentioned and nothing was said about the Moreton share (Rex Holland dep., p. 34, 35; Clara Holland dep., p. 5-7).

At the time of this meeting the co-owners did not know the price per ton being paid nor did they know the amount Moreton was receiving for his share nor how the amounts were arrived at. The record is clear that the corporate defendants, through Mathesius and Heald, knew they should have disclosed to the co-owners the true facts relating to the above matters. (Heald dep., p. 23, lines 17-20; Mathesius dep., p. 93). They also recognized that the discrepancy in the amount paid Moreton as compared with the co-owners put them on notice to "ascertain the reason why" (Heald dep., p. 27, lines 4-9).

Rex Holland and his mother have both testified that at the final meeting of December 20, 1948, Mathesius concealed from the co-owners the contract between Columbia and Moreton pretendedly covering the sale of Moreton's purported one-fourth interest and the amount that Columbia was paying Moreton for his purported one-fourth interest, the amount that Columbia was paying for the entire property and that Mathesius also concealed the revenue stamps which were to be attached to the separate deeds (Answers to Interrogatories #50, 51, Clara Holland's dep., p. 7) covering the interest of Moreton and the interest of the co-owners.

While Heald and Moreton have both testified that Mathesius did so advise the co-owners, it is interesting to note that Mathesius himself admits that he NEVER told the co-owners how much Moreton was getting for his one-fourth interest.

“Q. And then Mr. Pollack asked you this question: ‘But you never told them how much Moreton was getting?’ And you answered: ‘No.’ Do you recall that question and answer?

A. I do.” (Mathesius’ dep., p. 131, lines 1-5).

Mathesius likewise would not deny that he had admitted to two different persons on two different occasions that he did conceal that information from the co-owners (Mathesius’ dep., p. 127, lines 14-25; p. 128, lines 1-10; p. 130, lines 1-25; p. 131, lines 1-5).

Moreton, of course, admits that he never told the co-owners how much he was getting for the entire property (Moreton’s dep., p. 336, line 30; p. 337, lines 1, 3, 4).

“Q . . . Did you (Moreton) ever tell them (the co-owners) in dollars how much you were getting for the entire property?

A. . . .

Q. The question is simple.

A. No.” (Moreton’s dep., p. 336, line 30; p. 337, lines 1, 3, 4)

“Q. Did you ever tell them (the co-owners) in dollars how much you were getting?

A. I have already answered that.

Q. Yes or no?

A. No.” (Moreton’s dep., p. 161, line 30; p. 162, lines 1-4)

Thus Columbia acquired the property. Each of the prospectors received \$33,000.00 for his one-fourth interest in the property.

Three years later it was discovered and it is now admitted that Columbia had paid the lawyer pretendedly¹¹ for his purported one-fourth interest \$287,500.00!

John Holland died on October 9, 1949. Moreton continued to act as attorney for the Hollands and the Holland estate at least until January, 1952 (Clara Holland's dep., Interrogatories and Answers #55, 56, 57, 58). It was not until the following year that Moreton formally resigned as their attorney.

On December 16, 1951, Rex wrote to Moreton.¹² Moreton answered by letter dated December 18, 1951. From this reply, although the exact contents of Rex's letter is not apparent, it is clear that Rex had apparently just heard rumors regarding the amount of money Moreton had received and that the co-owners had been deceived with regard to the tonnage and the value per ton and that he wanted an adjustment. Moreton ends his

¹¹ Mathesius admits he did not rely on either the purported option or ownership agreement (Mathesius' dep., p. 69, lines 17-25; p. 70, lines 1-3; p. 79, lines 8-12).

¹² The letter states that he, Rex, had heard rumors that Columbia had paid Moreton \$287,500.00; that they, the co-owners had agreed to take \$100,000.00 for their three-fourths interest based upon the representations made by Moreton to them before the sale was made that there was 1,550,000 tons of ore and that the steel company would pay 10 cents per ton for it (Reference to the letter is made on page 209, lines 7-20 of Moreton's deposition).

answering letter by threatening to put Rex in jail if he pursues the matter any further. A copy of this letter is attached to plaintiffs' amended complaint, (R. 43, 44).¹³

The M & H property may be worth in excess of \$1,-000,000.00 (Rex Holland's Affidavit, R. 94; Rex Holland's dep., p. 122, lines 28-30; p. 123, lines 1-2). On the basis of what Columbia paid Moreton for his purported one-fourth interest, it was worth \$1,150,000.00.

Later it was learned that Columbia, in the meantime, had apparently initiated and consummated two other deals with Moreton. In one deal in which Columbia paid \$50,000.00 for a mine, they paid Moreton \$22,000.00 (Moreton's dep., p. 217, lines 21-28; p. 318, lines 7-9). In the second deal in which Columbia paid \$250,000.00 for an ore property, they paid Moreton the entire \$250,000.00 (Moreton's dep., p. 318, lines 1-4).

THE AMENDED COMPLAINT

The amended complaint is part of the record herein by reason of its incorporation by reference into and being made a part of Rex Holland's second affidavit.

¹³ Rex then went to the U. S. Attorney in Salt Lake City to determine whether he had violated the law in asking Moreton for an adjustment. The U. S. Attorney advised him of his rights and he then employed counsel. Plaintiffs' counsel wrote to both Columbia and the lawyer requesting information regarding the details of the transaction. However, both Columbia and the lawyer refused to furnish the information to plaintiffs' counsel (Rex Holland's dep., p. 2, lines 14-19; p. 3, lines 1-16).

John Holland died on October 9, 1949, and his son, Rex Holland, as the administrator of his estate, is one of the plaintiffs. Rex Holland in his individual capacity is also a plaintiff. After the investigation of this case was begun by plaintiffs' attorneys Moreton began to *loan* Murie (one of the co-owners) \$250.00 every single month up to the present time. (Moreton's dep., p. 199, lines 5-13, 24-30; p. 200, lines 1-5). William C. Murie now not wishing to be a plaintiff, is named as a defendant.

The amended complaint pleads six causes of action.

The first is against the Moretons alone for damages for fraud in connection with the fraudulent procurement of Moreton's purported one-fourth interest.

The second is against the Moretons alone for damages for fraud in connection with plaintiffs' and Murie receiving only \$100,000.00 for their property which was worth upwards of \$1,150,000.00 and Moreton in a confidential relationship with them received \$287,500 for a one-fourth interest.

The third cause of action is for damages for fraud against the corporate defendants and the Moretons, which fraud was accomplished by means of a conspiracy between the corporate defendants and the Moretons.

The fourth cause of action is to declare a constructive or resulting trust on behalf of plaintiffs in said property.

The fifth cause of action is to set aside and cancel the deeds to Columbia.

The sixth cause of action is to quiet title to said property in plaintiffs.

GENERAL QUESTION INVOLVED

The sole question involved herein is whether on the record herein there *EXISTS* a single triable issue of fact.

The crux of this case presents an issue on which there is a direct conflict in the testimony.

Were the co-owners ever informed of the amount Moreton was to receive for his one-fourth interest and was it concealed from them?

Rex Holland and Clara Holland in their depositions testified they were never told. Moreton, Mathesius and Heald testified they were informed. Although a number of documents were signed by the co-owners at the behest of the defendants, in none of them is there so much as a statement of the amount to be received by Moreton for his share. This tends to support the contention of the plaintiffs, because with all the signing going on, if Moreton and the corporate defendants were in good faith seeking to inform the co-owners of the price, it could easily have been inserted in one of these many signed documents.

WHAT THE FRAUD CONSISTED OF

1. Concealing from and refusing to advise the co-owners the correct price per ton that Columbia was paying for the property and representing that Columbia was paying ten cents per ton when in truth and in fact Columbia was paying between 25 cents and 75 cents per ton. If the property was in fact worth only \$387,500.00 and if in fact there were only 1,550,000 tons, then Columbia was paying 25 cents per ton. If in fact the property was worth \$1,150,000.00 and if in fact there were only 1,550,000 tons, then Columbia was paying a minimum of 75 cents per ton.

2. Concealing from and refusing to advise the co-owners of the correct tonnage and representing to the co-owners that the M & H property contained 1,550,000 tons of ore when in truth and in fact it contained as much as 6,000,000 tons of ore. While there is evidence that the M & H property contained only 1,550,000 tons of ore, there is also evidence that the property contained up to 6,000,000 tons of ore. If the fact of the matter turns out to be that the correct tonnage is 1,550,000 there would be no fraud in this one respect. However, should it develop that the property contained substantially in excess of 1,550,000 tons and perhaps 6,000,000 tons, then there would be fraud in this particular respect. At the present state of the record inferences may be drawn either way.

3. In paying Moreton almost nine times as much pretendedly for his purported one-fourth interest as they were paying each of the co-owners for their one-fourth

interest, even though they knew that Moreton was to receive one-fourth of the entire sale price for his purported one-fourth interest and even though the only negotiations allegedly carried on provided for the sale of the entire property figured on the basis of 25 cents per ton for 1,550,000 tons or \$387,500.00, and even though there were no separate negotiations, pretended or actual, for the sale of his purported one-fourth interest.

4. The corporate defendants through Mathesius and Heald recognized that they should advise the co-owners of the amount received by Moreton for his one-fourth interest, yet they did not disclose to them such amount and they were never advised thereof and by such failure they enabled Moreton to perpetrate the fraud and by preparing two sets of papers and working only through Moreton they actively participated in Moreton's defrauding of the co-owners.

THE SPECIFIC RESPECTS IN WHICH THE CORPORATE DEFENDANTS PARTICIPATED IN THE ACCOMPLISHMENT OF THE FRAUD AND OTHER EVIDENCE OF SUCH PARTICIPATION.

The corporate defendants:

1. Instigated the conspiracy and the scheme to defraud the co-owners by:

(a) advising Moreton that Columbia was contemplating the purchase of the Milner property (Mathesius' dep., p. 7, lines 16-20).

(b) advising Moreton that if Columbia purchased the Milner property, it, Columbia, would be interested in acquiring the M & H property (Mathesius' dep., p. 7, lines 14-25; p. 8, lines 1-3).

(c) instructing Moreton to contact the co-owners and to suggest to the co-owners that they, the co-owners, employ Moreton as their attorney for the purpose of getting the claims patented (Mathesius' dep., p. 8, lines 5-6; p. 50, lines 8-17).

2. Advised Moreton that they had acquired the Milner property (Mathesius' dep., p. 7, lines 23-24).

3. Instructed Moreton to contact the co-owners and to get the co-owners to appoint Moreton as the co-owners' agent in the sale of the property (Mathesius' dep., p. 50, lines 8-17).

4. Concealed from the co-owners the fact that Columbia was intending to purchase or had purchased the Milner property and the effect thereof on the value of the M & H property.

5. Concealed the fact that they had given Moreton information regarding the price they were willing to pay for it.

6. Concealed from the co-owners the fact that they had directed Moreton to contact them and offer his services to them and to suggest to them that he, Moreton, patent their claims.

7. Concealed from and refused to advise the co-owners of the correct price per ton that Columbia was paying for the property and represented that Columbia was paying ten cents per ton and that the value of the ore was ten or twelve and a half cents per ton (Moreton's dep., p. 70), when in truth and in fact Columbia was paying between 25 cents and 75 cents per ton. If the property was in fact worth only \$387,500.00 and if in fact there were only 1,555,000 tons, then Columbia was paying 25 cents per ton. If the property was in fact worth \$1,150,000.00 and if in fact there were only 1,550,000 tons, then Columbia was paying a minimum of 75 cents per ton (Moreton's dep., p. 139, lines 29-30; p. 140, lines 1-2, 13-16; p. 160, lines 8-13, 27-30; p. 161, lines 1-24; p. 152, lines 9-25; Mathesius' dep., p. 127, lines 14-25; p. 128, lines 1-10; p. 130, lines 1-25; p. 131, lines 1-5).

8. Concealed from and refused to advise the co-owners of the correct tonnage and represented to the co-owners that the M & H property contained 1, 550,000 tons of ore, when in truth and in fact it contained as much as 6,000,000 tons of ore. While there is evidence that the M & H property contained only 1,550,000 tons of ore, there is also evidence that the property contained up to 6,000,000 tons of ore. If the fact of the matter turns out to be that the correct tonnage is 1,550,000, there would be no fraud in this one respect. However, should it develop that the property contained substantially in excess of 1,500,000 tons and perhaps 6,000,000 tons, then there would be fraud in this respect. At the present state of

the record inferences may be drawn either way (Moreton's dep., p. 139, lines 29-30; p. 140, lines 1-2, 13-16; p. 160, lines 8-13; 27-30; p. 161, lines 1-24; p. 152, lines 9-25; Mathesius' dep., p. 127, lines 1-25; p. 128, lines 1-10; p. 130, lines 1-25; p. 131, lines 1-5).

9. Pretended that the alleged negotiations for the purchase and sale of the M & H properties allegedly consisting of only 25-35 words exchanged by Mathesius and Moreton in one telephone conversation were bona fide, when as a matter of fact said alleged negotiations were not bona fide but merely pretended.¹⁴

¹⁴ According to Moreton, he, Moreton, had a total of only two or three talks, including telephone conversations, with Mathesius regarding the M & H property before the meeting of December 20, 1948 (Moreton's dep., p. 254, lines 13-17; 29-31; p. 255, lines 1-2). At the first meeting, according to Mathesius, Mathesius told Moreton to contact the co-owners and suggest to them about patenting their claims (Mathesius' dep., p. 8, lines 5-6; p. 50, lines 8-17). In the second talk, Mathesius told Moreton that Columbia had purchased the Milner claim and that when the patents came through from the U. S. government, he would discuss the purchase of the M & H property. So that leaves only one meeting which Moreton says took place over the telephone (Moreton's dep., p. 268, lines 29-30; p. 269, line 11) around October 1, 1948, where the sale of the property was discussed and that entire conversation consisted of Mathesius' offering to buy the M & H properties for 25 cents per ton based upon Columbia's estimate of the tonnage, and Moreton's answering "Yes" to that suggestion (Moreton's dep., p. 267, lines 29-30; p. 268, line 3; p. 137, line 30 through p. 38, line 4). In other words, the entire transaction consisted of a maximum of 25-35 words! This we feel is strong evidence of a conspiracy and a working together and collusion or prearrangement between Moreton and Mathesius. It is inconceivable that there would not be more negotiating; that Moreton would not realize that even though Columbia had paid 25 cents per ton for the Milner property, that that price might be low; that Columbia might conceivably be willing to pay more for an adjoining piece. At least was it not worth a try on Moreton's part to get more money and isn't that how business is usually conducted?

Actually there were no negotiations at all. Moreton testified that Mathesius, around October 1, 1948, on the telephone stated that Columbia would pay 25 cents a ton, based upon Columbia's estimate of the tonnage, to which Moreton replied that that would be agreeable with him:

“A He (Mathesius) said that they would be willing to pay twenty-five cents per ton upon the estimate that Mr. Sargis might come up with after he had completed his making his survey and his notes.

Q What did you say?

A. I said that would be agreeable.” (Moreton's dep., p. 137, line 30, through p. 138, line 4; See also, Moreton's dep., p. 269, lines 14-16; p. 270, lines 10-11; p. 273, lines 5-18).

10. Did not carry on bona fide negotiations for the purchase of the M & H property.

11. Even though Mathesius did not know who was lying and who was telling the truth at that time after receiving Rex's letter (Mathesius' dep., p. 10, lines 1-2), refused to discuss the matter with the co-owners or even contact them.

12. Refused to deal directly with Rex even though Mathesius considered Moreton merely a co-owner (Mathesius' dep., p. 147, lines 4-7).

13. Asked only Moreton for a conference after receipt of Rex's letter of September 14, 1948, for the purpose of discussing it (Mathesius' dep., p. 58, lines 17-19).

14. Held a meeting with Moreton in Moreton's office regarding the contents of Rex's letter (Mathesius' dep., p. 60, lines 4-5; p. 66, lines 4-5; Moreton's dep., p. 134, lines 23-30).

15. Gave Moreton a carbon copy of Rex's letter (Moreton's dep., p. 134, lines 21-22).

16. Did not discuss with Moreton the statement in Rex's letter that Moreton was to receive only one-fourth of the total amount of money that Columbia was paying for the property (Mathesius' dep., p. 86, lines 8-15).

17. Did not inquire of Moreton at all as to the circumstances under which the co-owners signed the agreement of ownership or the option (Mathesius' dep., p. 68, lines 18-23; p. 70, lines 6-10) nor of any other phase of the relationship between Moreton and the co-owners (Mathesius' dep., p. 70, lines 6-10).

18. Agreed with Moreton not to answer and did not answer at all Rex's letter, knowing that such failure would leave Rex without any other place to inquire regarding the amount of money Columbia was paying for the entire property or the basis of computing the price thereof (Mathesius' dep., p. 65, lines 16-18; p. 66, lines 4-5, 8-9).

19. Agreed with Moreton not to answer and did not answer Rex's letter, knowing that such failure and refusal would leave Rex without any other place to inquire regarding the division of the proceeds of the sale of the property, would cause Rex to believe that the

information he had obtained was erroneous and without basis and would, therefore, give the effect of restoring Rex Holland's confidence in his attorney, Moreton (Mathesius' dep., p. 65, lines 16-18; p. 66, lines 4-5, 8-9).

20. Agreed with Moreton not to advise the co-owners and did not advise and concealed from the co-owners the price per ton that Columbia was paying for the ore, even though they knew Rex did not know how much that was.

21. Agreed with Moreton not to advise the co-owners and did not advise and concealed from the co-owners how much they were paying for the entire property, even though they knew that the co-owners did not know the correct sale price of the entire property and even though Rex had told them in his letter that Moreton was to receive only one-fourth of the total amount that Columbia was paying for the property and that it was, therefore, necessary for Rex to know the total amount Columbia was paying.

22. Agreed with Moreton to conceal and concealed from the co-owners the amount of money Columbia was paying Moreton pretendedly for his purported one-fourth interest, even though Rex had told them in his letter that Moreton was to receive one-fourth of the total amount that Columbia was paying for the property and that it was, therefore, necessary for Rex to know the

total amount Columbia was paying and even though Mathesius knew that Rex was claiming that he was not getting a fair share out of the property.

23. Destroyed the original single contract that covered the purchase and sale of the entire property and which recited the total price that Columbia was paying for the property (Heald's dep., p. 16, line 29; p. 17, lines 1-10, 16-24; p. 37, lines 8-10).

24. Departed from their customary practice of accepting just one offer to sell for each property they wished to acquire and accepted two separate offers of sale (Mathesius' dep., p. 92, lines 8-11), one to the co-owners and one to Moreton. The former recited only the amount of money the co-owners were offering to take for their three-fourths interest.

25. Never raised the question as to why they were using two such separate offers of sale for the one piece of property (Mathesius' dep., p. 92, lines 8-11).

26. Departed from their usual customary practice of having one contract and one deed and substituted therefor two separate contracts and two separate deeds, one contract and one deed for the co-owners and one contract and one deed for the Moretons. The first contract recited the amount of money Columbia was paying the co-owners; the second recited the amount of money Columbia was paying the Moretons. Because they would not see Moreton's separate contract, the co-owners would

not know and would be unable to ascertain how much Columbia was paying for the entire property or how much Columbia was paying Moreton pretendedly for his purported one-fourth interest (Heald's dep. p. 14, lines 17-18; p. 15, lines 3-6; Moreton's dep., p. 281, lines 26-27).

27. Directed Moreton to secure the signatures of the co-owners to the letter of October 16, 1948¹⁵ (Moreton's dep., p. 139, lines 29-30; p. 140, lines 1-2, 13-16, 18-21; p. 160, lines 8-13, 27-30; p. 161, lines 1-2 p. 281, lines 27-30; p. 282, lines 1-12; Mathesius' dep., p. 70, lines 20-25; p. 71 lines 1-5; p. 76, lines 5-8 p. 79, lines 18-20; p. 93, lines 11-18; p. 11, lines 9-12; Defendants' Exhibit #8, Rex Holland's deposition, Appendix B; see footnote 15, this brief).

This letter:

a. fraudulently implies that Moreton has not yet decided to sell or has not yet sold his one-fourth interest in the property.

¹⁵ The letters of October 16, 1948, and November 20, 1948, were part of the scheme to defraud the co-owners. It was probably thought that those letters would preclude the co-owners from maintaining an action for fraud such as this against the corporate defendants and at the same time read in such a way that the co-owners would not be told or suspect the real facts. The signatures of the co-owners, two of whom had never heard anything other than that the property was worth \$133,000.00, or perhaps a little more, were obtained by Moreton at the behest of Mathesius, with full knowledge that all three of the co-owners were uninformed and misinformed regarding the value of the property, the total amount that Columbia was paying for the entire property, the amount of money Columbia was paying Moreton presumably for his purported one-fourth interest and in the belief that Moreton was going to receive one-fourth or a little more of the total amount Columbia was paying for the property.

“ ... Mr. Moreton may offer and sell his interest ... if he so desires ... ”

b. fraudulently implies that Moreton and Mathesius are still negotiating for the separate sale and purchase of Moreton's one-fourth interest.

c. fraudulently implies that they had not as yet agreed upon the price Columbia would pay Moreton presumably for that purported one-fourth interest.

d. fraudulently conceals the fact that they had already agreed upon a price that Columbia would pay for the entire property.

e. fraudulently conceals the price that Columbia had agreed to pay for the entire property.

f. fraudulently conceals the price per ton that they had already agreed to pay for the entire tonnage.

g. fraudulently conceals the amount of money they had already agreed to pay Moreton pretendedly for his purported one-fourth interest.

28. Directed Moreton to secure the signatures of the co-owners to the letter of November 20, 1948 (Moreton's dep., p. 139, lines 29-30; p. 140, lines 1-2, lines 13-16, 18-21; p. 160, lines 8-13, 27-30; p. 161, lines 1-24; p. 281, lines 27-30; p. 282, lines 1-12; (Mathesius' dep. p. 70, lines 20-25; p. 71, lines 1-5; p. 76, lines 5-8; p. 79, lines 18-20; p. 93, lines 11-18; p. 11, lines 9-12; Defendants' Exhibit #9, Rex Holland's deposition, Appendix C, see footnote 11, this brief).

This letter :

a. implies that Mathesius and Moreton had negotiated for the sale and purchase of only the three-fourths interest of the co-owners when as a matter of fact the negotiations allegedly covered only the price Columbia would pay for the entire property.

b. implies that Mathesius and Moreton had agreed on the price of \$100,000.00 for the three-fourths interest of the co-owners as a result of a separate agreement.

c. conceals the fact that there was presumably only one deal ever discussed or agreed upon, which deal covered the entire property.

d. implies that Moreton has not yet decided to sell or has not yet sold his one-fourth interest in the property.

“ ... it is no concern of ours as to when ... he may sell his interest ... ”

e. implies that Moreton may decide to sell his purported one-fourth interest to someone other than Columbia.

“ ... it is no concern of ours as ... to whom he may sell his interest . . . ”

f. implies that Moreton is still negotiating for the separate sale of his purported one-fourth interest.

g. implies that he an Mathesius had not yet agreed upon the price that Columbia would pay Moreton presumably for his purported one-fourth interest.

h. conceals the fact that they had already agreed upon a price that Columbia would pay for the entire property.

i. conceals the price per ton that they had already agreed to pay for the property.

j. conceals the total price that Columbia had agreed to pay for the entire property.

k. conceals the amount of money they had already agreed to pay Moreton presumably for his purported one-fourth interest.

29. Mathesius never asked Moreton to furnish him with a statement from the co-owners stating they understood how much Moreton was getting (Mathesius' dep., p. 94, lines 12-19; p. 139, lines 7-10).

30. Mathesius never asked Moreton whether he (Moreton) was acting as attorney for or agent of the co-owners (Moreton's dep., p. 271, lines 2-6).

31. Mathesius never asked Moreton whether Moreton had advised the co-owners of the correct price per ton that Columbia was paying for the ore (Mathesius' dep., p. 97, lines 9-14; p. 137, lines 8-19).

32. Columbia never asked the co-owners whether they knew how much Moreton was getting for his interest (Mathesius' dep., p. 137, lines 20-23) or whether they knew how much per ton Columbia was paying for the ore (Mathesius' dep., p. 138, lines 17-20).

33. Mathesius never told Moreton to tell the co-owners the price per ton that Columbia was paying for the ore (Moreton's dep., p. 287, lines 4-7).

34. Mathesius instructed Moreton to direct the co-owners to be at Moreton's office for the closing of the deal on December 20, 1948. Mathesius presided over this meeting (Mathesius' dep., p. 15, lines 20-23).

35. Columbia never ascertained why Moreton was entitled to more than one-fourth (Moreton's dep., p. 282, lines 21-23).

36. Columbia paid Moreton \$287,500.00 even though they had been told in or could tell from the contents of Rex's letter of September 14, 1948, that the agreement of ownership and the option had both been signed by the co-owners on Moreton's representations that he was to get one-fourth of the amount of money Columbia was paying for the entire property.

37. Concealed the fact that Columbia was paying Moreton \$287,500.00 pretendedly for Moreton's purported one-fourth interest (Clara Holland's dep., Interrogatories and Answers #37, 38, p. 5; #39, 40, 46, 47; p. 6, #48, 49, p. 7).¹⁶

¹⁶ It is conceded by both Mathesius and Moreton that they agreed between them not to advise and to conceal from the co-owners the total amount of money that Columbia was paying for the entire property, the amount of money Columbia was paying Moreton pretendedly for his purported one-fourth interest in the property. Moreton takes the position that the co-owners were not entitled to have the information, while Mathesius admits that the co-owners were entitled to have that information (Mathesius dep. p. 93; Heald's dep., p. 23, lines 17-20) and that he intended to give them that information at the time the deal was closed in Moreton's office on December 20, 1948 (Moreton's dep., p. 152, lines 11-14; p. 154; p. 155). Rex Holland and his mother, Clara Holland, have both testified that he did not give the co-owners any such information.

38. At the closing of the deal, Mathesius waited for the co-owners to leave before affixing revenue stamps to the separate deeds (Clara Holland's deposition, Interrogatories and Answers thereto #50, 51). He put three times as much revenue stamps on one deed as on the other.¹⁷

39. Mathesius would not deny that in his own office in Chicago, Illinois, on November 3, 1952, he told Nick Spanos, one of the lawyers for the plaintiffs, that he never told the co-owners how much money Moreton was getting for his one-fourth interest in the property because it was none of their business (Mathesius' dep., p. 101, lines 22-25; p. 102, lines 5-6; p. 104, lines 3-6, lines 15-17).

40. In a telephone conversation with Mr. Pollack, one of the attorneys for plaintiffs, Mathesius admitted that he never advised the co-owners of the total amount of money Columbia was paying for the property or the amount they were paying Moreton presumably for his purported one-fourth interest (p. 127, lines 14-25; p. 131, lines 12-17, page 128, lines 1-10; p. 130, lines 1-25).

41. Mathesius at the direction of Columbia attempted to suppress the telephone conversation with Mr. Pollack (Mathesius' dep., Exhibits #6 and 7; p. 119, lines 1-25; p. 122 lines 23-25; p. 123, lines 1-10; p. 128; p. 118,

¹⁷ If Mathesius had placed the revenue stamps on both deeds while the co-owners were in the office, they may have noticed it and if they knew that revenue stamps reflect consideration they may have found out they were being imposed upon.

lines 23-25; p. 120, lines 15-25; p. 121, lines 1-6), even though the answers he gave Mr. Pollack's question were correct (Mathesius' dep., p. 123, lines 22-24).

42. Mathesius finally admitted that he never told the co-owners how much Moreton was getting for his one-fourth interest (Mathesius' dep., p. 131, lines 1-5).

43. Mathesius, while afraid to deny that he had admitted several times to the lawyers for the plaintiffs that he had concealed that information from the co-owners (Mathesius' dep., p. 104, lines 3-6; 15-17; p. 127, lines 14-25; p. 131, lines 1-5, 12-17; p. 128, lines 1-10; p. 130, lines 1-25; p. 131, lines 12-17) testifying from prepared notes (Mathesius' dep., p. 26, lines 3-11), now untruthfully claims that he did give the co-owners that information.

44. Columbia collaborated with the U. S. Steel Corporation, exchanging opinions, advice, information, and recommendations to complete the deal (Mathesius' dep., p. 34, 35, 36, 37, 38, 41).

STATEMENT OF POINTS RELIED UPON

POINT I.

SUMMARY JUDGMENT IS NOT APPROPRIATE IN AN ACTION BASED ON A COMPLEX SCHEME OF FRAUD, INVOLVING LENGTHY AFFIDAVITS, DOCUMENTS AND VOLUMINOUS DEPOSITIONS.

POINT II.

SUMMARY JUDGMENT IS A DRASTIC REMEDY AND SHOULD BE DENIED IF THERE IS THE SLIGHTEST DOUBT AS TO THE FACTS.

POINT III.

THE COURT IN RULING ON MOTION FOR SUMMARY JUDGMENT SHOULD HAVE MADE AN ORDER INDICATING WHICH FACTS WERE AND WHICH WERE NOT CONTROVERTED.

POINT IV.

SUMMARY JUDGMENT MUST BE DENIED IF THERE IS A SINGLE TRIABLE ISSUE.

POINT V.

IN DETERMINING WHETHER A TRIABLE ISSUE EXISTS, THE COURT MUST ACCEPT AS TRUE ALL FACTS ALLEGED IN AFFIDAVIT IN OPPOSITION TO SUMMARY JUDGMENT.

POINT VI.

FACTS ALLEGED IN AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT NEED NOT NECESSARILY BE COMPOSED OF STRICTLY EVIDENTIARY FACTS.

POINT VII.

THE AFFIDAVIT OF THE PARTY MOVING FOR SUMMARY JUDGMENT SHOULD BE STRICTLY CONSTRUED.

POINT VIII.

THE AFFIDAVITS IN OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT SHOULD BE LIBERALLY CONSTRUED.

POINT IX.

NATURE AND ELEMENTS OF A CONSPIRACY.

POINT X.

THE GRAVAMEN OF THE ACTION FOR DAMAGES FOR CONSPIRACY TO DEFRAUD IS THE CIVIL WRONG WHICH RESULTS IN DAMAGE.

POINT XI.

WHERE, AS IN THE CASE OF ATTORNEY-CLIENT, A RELATIONSHIP OF TRUST AND CONFIDENCE EXISTS, THERE IS A DUTY ON THE PART OF THE ATTORNEY TO DISCLOSE ALL MATERIAL FACTS AND FAILURE TO DO SO CONSTITUTES FRAUD.

POINT XII.

A PERSON WHO NEGOTIATES A PURCHASE OF LAND FOR THE BENEFIT OF HIMSELF AND OTHERS, BEING THE AGENT OF HIS ASSOCIATES, IS BOUND AS SUCH TO THE UTMOST GOOD FAITH WITH THEM, REGARDLESS OF WHETHER THE DEALINGS CONSTITUTED A TENANCY IN COMMON OR A PARTNERSHIP.

POINT XIII.

CONCEALMENT OF A MATERIAL FACT CONVEYING A FALSE IMPRESSION ON THE MIND OF THE OTHER PARTY WILL SUPPORT AN ACTION IN FRAUD.

POINT XIV.

AN ACTION WILL LIE AGAINST PARTIES WHO CONSPIRE WITH AN AGENT TO DEFRAUD THE LATTER'S PRINCIPAL, EVEN THOUGH THEY THEMSELVES ARE NOT FIDUCIARIES.

POINT XV.

CONSPIRATORS ARE JOINTLY AND SEVERALLY LIABLE FOR ALL DAMAGES RESULTING FROM THE CONSPIRACY, EACH BEING RESPONSIBLE FOR THE ACTS OF THE OTHER IN FURTHERANCE OF THE COMMON DESIGN.

POINT XVI.

A CO-CONSPIRATOR IS LIABLE FOR ALL OVERT ACTS COMMITTED IN PURSUANCE OF THE CONSPIRACY, WHETHER HE JOINED WILLINGLY OR UNWILLINGLY OR WHETHER HE WAS AN ACTIVE PARTICIPANT OR NOT.

POINT XVII.

PERSONS COMING IN AFTER FORMATION OF CONSPIRACY ARE LIABLE FOR ALL ACTS PREVIOUSLY OR SUBSEQUENTLY DONE IN PURSUANCE THEREOF.

POINT XVIII.

A CONSPIRATOR IS LIABLE EVEN THOUGH HE EXPECTED TO RECEIVE NO BENEFIT AND IN FACT RECEIVED NO BENEFIT.

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POINT XX.

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POINT XXI.

WHERE A CONFIDENTIAL RELATION EXISTS, NOTHING SHORT OF ACTUAL KNOWLEDGE WILL PREVENT RECOVERY FOR MISREPRESENTATION.

POINT XXII.

THE MERE FACT THAT SUSPICIONS ARE AROUSED BY STATEMENTS OF THIRD PERSONS DOES NOT PRECLUDE RECOVERY FOR A MISREPRESENTATION ACTUALLY RELIED UPON.

POINT XXIII.

THE RULE REQUIRING INVESTIGATION CANNOT BE INVOKED BY A THIRD PERSON IN COLLUSION WITH ONE HAVING A CONFIDENTIAL RELATION WITH THE PLAINTIFF.

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EVEN THOUGH MEANS OF KNOWLEDGE OR INVESTIGATION ARE OPEN TO ONE, NO DUTY RESTS UPON ONE TO SO EMPLOY SUCH MEANS OR KNOWLEDGE WHERE HE IS JUSTIFIED IN RELYING UPON THE REPRESENTATIONS MADE TO HIM.

POINT XXV.

A PERSON MAY RELY UPON ONE WHO ACTUALLY DEFRAUDED HIM WHERE HIS CONDUCT IN LIGHT OF HIS OWN INTELLIGENCE AND INFORMATION WAS NOT UNREASONABLE AND MAY RECOVER FOR THE FRAUD.

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POINT XXVII.

ESTOPPELS ARE NOT FAVORED BY THE LAW.

POINT XXVIII.

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POINT XXIX.

A PARTY IS NOT ESTOPPED BY A WRITTEN INSTRUMENT WHICH HE IS INDUCED BY THE FRAUD OF THE OTHER PARTY TO EXECUTE.

POINT XXX.

THE DOCTRINE OF ESTOPPEL MAY NOT BE INVOKED BY ANY PARTY GUILTY OF FRAUD.

POINT XXXI.

ESTOPPEL CANNOT BE RELIED UPON SO AS TO CREATE LIABILITY WHERE AGENT ACTING SOLELY FOR THE BENEFIT OF HIS PRINCIPAL ACTIVELY PARTICIPATED IN THE DECEIT AND FRAUD AND SOLICITED THE ACT FROM THE PERSON SOUGHT TO BE ESTOPPED BY THE PRINCIPAL.

POINT XXXII.

ESTOPPEL MAY NOT BE USED AS A SHIELD AGAINST THE RESULTS OF FRAUD, WRONGFUL OR ANY INEQUITABLE CONDUCT IN THE TRANSACTIONS.

POINT XXXIII.

ESTOPPEL MAY NOT BE RELIED UPON AS A DEFENSE AGAINST A FRAUDULENT PLAN OR AN ATTEMPT TO DEFRAUD IN WHICH PARTY CLAIMING ESTOPPEL WAS ACTIVE PARTICIPANT.

POINT XXXIV.

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POINT XXXV.

ESTOPPEL IS NOT APPLIED TO PENALIZE AN INNOCENT PARTY WHO HAS BEEN MISLED TO HIS MATERIAL PREJUDICE.

POINT XXXVI.

FULL KNOWLEDGE OF THE REAL FACTS AT THE TIME OF THE CONCEALMENT, REPRESENTATION OR OTHER CONDUCT OF THE PARTY CLAIMING THE ESTOPPEL IS AN INDISPENSABLE ELEMENT OF ESTOPPEL.

ARGUMENT

POINT I.

SUMMARY JUDGMENT IS NOT APPROPRIATE IN AN ACTION BASED ON A COMPLEX SCHEME OF FRAUD, INVOLVING LENGTHY AFFIDAVITS, DOCUMENTS AND VOLUMINOUS DEPOSITIONS.

Schultz v. Manufacturers Traders Trust Co., 3 F. R. Serv. 56c 41, 1 F.R.D. 451 (1940)

In the *Shultz* case, the Court said:

“In my opinion, the procedure for summary judgment provided by the Federal Rules of Civil Procedure was not intended to function in such a complicated case. The transactions which

form the basis of the complaints and decedent's knowledge of them are entirely too involved to be disposed of in a summary manner. This is not a case where documentary evidence alone is made the basis of the relief asked. The granting of a summary judgment is a drastic remedy."

Here we have a complicated and complex scheme of fraud. There is hopeless conflict and confusion as to many dates. Involved are an option alleged by defendant to be lost but which plaintiffs claim never existed; a second option which does not recite the amount of money to be paid by the purchaser; a third option which is undated; an agreement of ownership obtained by the fraud of a fiduciary, which recites in one place that Moreton has a one-fourth interest in the property and in another place that he is to get all over \$133,000.00 but no reason for his getting more than one-fourth of the proceeds; another instrument prepared by Moreton, dated after the agreement of ownership, which indicates that Moreton has no interest at all in the property; an offer of sale which does not recite the total purchase price, which recites a certain amount of tonnage but which omits the price per ton being paid; Rex Holland's letter of September 14, 1948, inquiring as to the tonnage and the price per ton that Columbia was intending to pay and notifying Columbia that Moreton is to get one-fourth and the co-owners three-fourths of the purchase price; the letters of October 16, 1948, and November, 20, 1948 which were secured by reason of the fraudulent implications, representations and concealments.

There are many other documents, all of which require explanation. There are about 1000 pages of transcript and about 55 pages of affidavit, including the 41 page amended complaint which has been incorporated by reference and made a part of Rex Holland's second affidavit.

The language and holding of the above cited case obviously is particularly applicable to the instant case.

POINT II.

SUMMARY JUDGMENT IS A DRASTIC REMEDY AND SHOULD BE DENIED IF THERE IS THE SLIGHTEST DOUBT AS TO THE FACTS.

Peckham v. Ronrico Corp., 171 Fed. (2d) 653 (1948)

Doehler Metal Furniture v. United States, 149 Fed. (2d) 130, 8 F.R. Serv. 56c Case 6 (1945)

Travelers Indemnity Co. v. McIntosh, 112 Cal. App. (2d) 177, 245 P. (2d) 1065 (1952)

Walsh v. Walsh, 18 Cal. (2d) 439; 116 P. (2d) 62 (1941)

Schultz v. Manufacturers Traders Trust Co., 3 F.R. Serv. 56c 41, 1 F.R.D. 451 (1940)

6 *Moore's Federal Practice*, section 56.15.

In the *Shultz* case, the Court said:

"... The granting of a summary judgment is a drastic remedy."

In the *Walsh* case, the Court, at page 444, stated:

“The summary judgment statute is drastic and its purpose is not to provide a substitute for existing methods in the trial of issues of fact.”

In the *Doehler* case, *supra*, Justice Frank of the Second Circuit:

“We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the slightest doubt as to the facts, and a denial of that right is reviewable; but refusal to grant a summary judgment is not reviewable. Such a judgment, widely used, is a praiseworthy time saving device. But, although prompt dispatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. Denial of a trial on disputed facts is worse than delay The District Courts would do well to note that time has often been lost by reversals of summary judgments improperly entered.”

POINT III.

THE COURT IN RULING ON MOTION FOR SUMMARY JUDGMENT SHOULD HAVE MADE AN ORDER INDICATING WHICH FACTS WERE AND WHICH WERE NOT CONTROVERTED.

Rule 56 (d) - “*Duty To Make Order As To Issues*”. The court at the hearing on the motion is under a duty, so far as performance is practicable, to make an order stating what issues are and are not in good faith controverted.

This the court did not do. We are and always have been at a complete loss to know the basis of the court's ruling.

POINT IV.

SUMMARY JUDGMENT MUST BE DENIED IF THERE IS A SINGLE TRIABLE ISSUE.

The primary duty of a trial judge is to determine whether there is an issue of fact to be tried. If he finds one, he is then powerless to proceed further. Issue *finding* rather than issue *determination* is pivot upon which summary judgment law turns.

Walsh v. Walsh, 18 Cal. (2d) 439, 116 P. (2d) 62 (1941);

Eagle Oil & Refining Co. v. Prentice, 19 Cal. (2d) 553 (1942), 122 P. (2d) 264;

Sanford Co. v. Cory Glass Coffee Brewer Co., 85 Cal. App. (2d) 724, 194 P. (2d) 127 (1948);

Gibson v. De La Salle Institute, 66 Cal. App. (2d) 609, 152 P. (2d) 774 (1944).

In the *Walsh* case, *supra*, the court below granted the motion for summary judgment.

On appeal, this was reversed, the court, at page 441, holding:

“Thus, in passing upon a motion for summary judgment, the primary duty of the trial court is to decide whether there is an issue of fact to be tried. If it finds one, it is then powerless to proceed further, but must allow such issue to be tried

by a jury unless a jury trial is waived. By an unbroken line of decision in this state since the date of the original enactment of section 437c, the principle has become well established that issue finding rather than issue determination is the pivot upon which summary judgment law turns (*Security First National Bank v. Cryer*, 39 C.A. 2nd 757, 104 P. 2nd 66); (*McComsey v. Leaf*, 36 Cal. App. 2nd 132, 97 P. 2nd 242; *Kelly v. Liddicoat*, 35 Cal. App. 2nd 599, 96 P. 2nd 186; *Shea v. Leonis*, 29 Cal. App. 2nd 984, 84 P. 2nd 277; *Bank of America v. Casady*, 15 Cal. App. 2nd 163, 59 P. 2nd 444). As was said in *Shea v. Leonis*, supra, at p. 187: 'A motion for summary judgment is not a trial upon the merits. It is merely to determine whether there is an issue to be tried.' The same thought was expressed in *Bank of America v. Casady*, supra, at p. 168: 'If an issue of fact is raised, then a summary judgment is improper, and the case must proceed to trial. (citing cases)' In *McComsey v. Leaf*, supra, the court by an extensive review of leading authorities from other states wherein provision had been made for the award of summary relief, gives striking demonstration of the universal practice to permit this expedited procedure only where it is perfectly plain that there is no substantial issue to be tried. Illustrative of this view is the following quotation from *Dwan v. Massarene*, 199 App. Div. 872, (192 N. Y. S. 577, 582), a well-considered and widely cited New York case which limits itself strictly to a discussion of the summary judgment rules: 'The court is not authorized to try the issue but is to determine whether there is an issue to be tried. If there is, it must be tried by a jury.' "

POINT V.

IN DETERMINING WHETHER A TRIABLE ISSUE EXISTS, THE COURT MUST ACCEPT AS TRUE ALL FACTS ALLEGED IN AFFIDAVIT IN OPPOSITION TO SUMMARY JUDGMENT.

In passing upon the motion, the court must find that the facts alleged in the affidavits in opposition thereto are accepted as true.

Eagle Oil & Refining Co. v. Prentice, 19 Cal. (2d) 553, 122 P. (2d) 264 (1942);

Sanford Co. v. Cory Glass etc. Co., 85 Cal. App. (2d) 724, 194 P. (2d) 127 (1940);

Strauss v. Strauss, 90 Cal. App. (2d) 757, 203 P. (2d) 857 (1949);

The Travelers Indemnity Co. v. McIntosh, 112 Cal. App. (2d) 177, 245 P. (2d) 1065 (1952).

In the *Sanford* case, the court, at page 731, said:

“ . . . for the purpose of the motion the better rule is that the facts alleged in the affidavit of the party against whom the motion is made must be accepted as true . . . ”

In the *Strauss* case, *supra*, the plaintiff brought an action on a judgment of a sister state. The defendant denied that he had ever been served. The plaintiff made a motion for summary judgment and the court granted it. On appeal the court reversed the lower tribunal, stating that the defendant had a right to show that he had never been served and that the judgment as to him is a nullity. At page 759, the Court said:

“In passing upon the motion, the facts alleged in the affidavit of the parties against whom it is made, must be accepted as true . . .”

POINT VI.

FACTS ALLEGED IN AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT NEED NOT NECESSARILY BE COMPOSED OF STRICTLY EVIDENTIARY FACTS.

The Travelers Indemnity Co. v. McIntosh, 112 Cal. App. (2d) 177, 245 P. (2d) 1065 (1952);

Sanford Co. v. Cory Glass etc. Co., 85 Cal. App. (2d) 724, 194 P. (2d) 127 (1948);

Eagle Oil & Refining Co. v. Prentice, 19 Cal. (2d) 553, 122 P. (2d) 264 (1942);

Strauss v. Strauss, 90 Cal. App. (2d) 757, 203 P. (2d) 857 (1949);

Wyatt v. Madden, 32 Fed. (2d) 838, 59 App. D.C. 38 (1929).

In the *Eagle* case, *supra*, the plaintiff claimed that the defendant's affidavit contained nothing but conclusions of fact and law and was thus insufficient. In answering this contention, the Court, at page 561, held:

“As we have seen, it is not necessary that the averments be rigidly restricted to evidentiary matter. It may be that some of the allegations or statements are somewhat in the nature of conclusions, but we are satisfied that facts within the knowledge of the affiants and to which they are competent to testify are set forth with sufficient particularity, and from which it appears that a

bona fide defense to the action exists. This is especially true, when we are mindful of the rule of liberal construction applicable to cover cases of this character."

In the *Strauss* case, *supra*, the court stated, at page 769:

"... and the affidavit to be sufficient need not necessarily be composed wholly of evidentiary facts."

POINT VII.

THE AFFIDAVIT OF THE PARTY MOVING FOR SUMMARY JUDGMENT SHOULD BE STRICTLY CONSTRUED.

Sanford Co. v. Cory Glass etc. Co., 85 Cal. App. (2d) 724, 194 P. (2d) 127 (1948);

Wyatt v. Madden, 32 Fed. (2d) 838, 59 App. D.C. 38 (1929).

In the *Sanford* case, *supra*, at page 731, the Court said:

"... the affidavit of the moving party should be strictly construed."

POINT VIII.

THE AFFIDAVITS IN OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT SHOULD BE LIBERALLY CONSTRUED.

Sanford Co. v. Cory Glass etc. Co., 85 Cal. App. (2d) 724, 194 P. (2d) 127 (1948);

Eagle Oil & Refining Co. v. Prentice, 19 Cal. (2d) 553, 122 P. (2d) 264 (1952);

Wyatt v. Madden, 32 Fed. (2d) 838, 59 App. D.C. 38 (1929).

In the *Sanford* case, *supra*, at page 731, the court stated:

“ . . . and those (affidavits) of his opponent (the one opposing the motion for summary judgment) (should be) liberally construed . . . ”

In the *Eagle* case, *supra*, the court said, at page 561 :

“ . . . we are mindful of the rule of liberal construction applicable to cases of this character.”

In the *Wyatt v. Madden* case, *supra*, the plaintiff brought an action upon notes for default in payments thereon. The notes were secured by a deed of trust. Defendant in her affidavit alleged that she was induced to execute these notes through material misrepresentations, known to be false and made for the purpose of inducing her to sign these notes. The court below granted the motion. In reversing the case, the upper court held: 1. that a summary judgment deprived defendant of a trial on the merits; 2. that the plaintiff's (party making the motion) affidavit had to be strictly construed; 3. that the defendant's affidavit had to be liberally construed; 4. and that if its terms reasonably warrant the inference that defendant has a substantial defense, summary judgment ought not to be entered.

POINT IX.

NATURE AND ELEMENTS OF A CONSPIRACY.

“A civil conspiracy is a combination of two or more persons by concerted action to accom-

plish an unlawful purpose, or to accomplish some purpose not in itself unlawful by unlawful mean. 'Collusion' is the equivalent of conspiracy, being an agreement between two or more persons to defraud another of his rights . . ." 15 C.J.S. Conspiracy, Section 1, page 996-997.

"No formal agreement between the parties to do the act charged is necessary; it is sufficient that the minds of the parties meet understandingly so as to bring about an intelligent and deliberate agreement to do the acts and to commit the offense charged although such agreement is not manifested by any formal words, or by a written instrument. If two persons pursue by their acts the same object often by the same means, one performing one part of the act and the other another part of the act, so as to complete it with a view to attaining of the object which they are pursuing, this will be sufficient to constitute a conspiracy. It is not essential that each conspirator have knowledge of the details of the conspiracy or of the exact part to be performed by the other conspirators in execution thereof; nor is it necessary that the details be completely worked out in advance to bring a given act within the scope of the general plan." 15 C.J.S. Conspiracy, Section 2, page 998.

"One who has conspired with others to cheat and defraud will in a proper case be held liable therefor. It is essential to a conspiracy to defraud that there be some designed and positively fraudulent artifice employed, or that a fraudulent intent should exist on the part of the party sought to be held and that such fraud or artifice should be practiced on the party defrauded to his damage." 15 C.J.S. Conspiracy, Section 9, page 1004.

“It has, however, been held that no affirmative fraudulent representations need be shown, a concealment of the true nature of the transaction being sufficient.” 15 C.J.S., Section 9, page 1005.

POINT X.

THE GRAVAMEN OF THE ACTION FOR DAMAGES FOR CONSPIRACY TO DEFRAUD IS THE CIVIL WRONG WHICH RESULTS IN DAMAGE.

Anderson v. Thacher, 76 Cal. App. (2d) 50, 172 P. (2d) 533 (1946).

In the cited case, the court held at page 72:

“It is not the conspiracy but the civil wrong which gives rise to the cause of action. If plaintiff is successful in proving an injury of the nature claimed, she may recover in her action against all those who have united or cooperated in inflicting that injury (*Revert v. Hesse*, 184 Cal. 295, 193 P. 943).”

POINT XI.

WHERE, AS IN THE CASE OF ATTORNEY-CLIENT, A RELATIONSHIP OF TRUST AND CONFIDENCE EXISTS, THERE IS A DUTY ON THE PART OF THE ATTORNEY TO DISCLOSE ALL MATERIAL FACTS AND FAILURE TO DO SO CONSTITUTES FRAUD.

A confidential relationship exists between attorney and client.

Gidney v. Chappelle, 26 Okla. 737, 110 P. 1099.

This confidential, or fiduciary, relationship binds the attorney to a duty of utmost fidelity.

Matter of Danford, 157 Cal. 425, 108 P. 322 (1910);

Cox v. Delmas, 99 Cal. 104, 33 P. 836 (1893).

Where such a relationship of trust and confidence exists, there is a duty on the part of the attorney to disclose all the material facts and failure to do so constitutes fraud.

37 C.J.S., Sec. 16 (d), p. 247;

Daily v. Superior Court, 4 Cal. App. (2d) 127, 40 P. (2d) 935 (1935).

In *Matter of Danford*, *supra*, the court states as follows, at page 429:

“The relation between attorney and client is ‘a fiduciary relation of the very highest character and binds the attorney to most conscientious fidelity — *uberrima fides*.’ . . . It is one which precludes the attorney from obtaining any personal advantage by abusing the confidence reposed in him by his client.”

In *Cox v. Delmas*, *supra*, the court, at page 124, holds that:

“the attorney must show affirmatively that he gave full and proper advice in the premises, acted with entire fairness throughout the transaction, and took no advantage of his client.”

In *Daily v. Superior Court*, *supra*, at pages 131-132, the court declares:

“Where there exists a relation of trust and confidence, it is the duty of the one in whom the confidence is reposed to make full disclosure of all material facts within his knowledge relating to the transaction in question, and any concealment of material facts is a fraud.”

POINT XII.

A PERSON WHO NEGOTIATES A PURCHASE OF LAND FOR THE BENEFIT OF HIMSELF AND OTHERS, BEING THE AGENT OF HIS ASSOCIATES, IS BOUND AS SUCH TO THE UTMOST GOOD FAITH WITH THEM, REGARDLESS OF WHETHER THE DEALINGS CONSTITUTED A TENANCY IN COMMON OR A PARTNERSHIP.

Shaw v. Shaw, 160 Cal. 733, 117 P. 148 (1911).

POINT XIII.

CONCEALMENT OF A MATERIAL FACT CONVEYING A FALSE IMPRESSION ON THE MIND OF THE OTHER PARTY WILL SUPPORT AN ACTION IN FRAUD.

The gist of an action for fraud is fraudulently producing a false impression on the mind of the party, and if such result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendants or concealment and suppression of material facts not equally within the knowledge or the reach of the plaintiff.

Sime v. Malouf, 95 Cal. App. (2d) 82, 212 P. (2d) 946 (1949).

The word “conceal” pertains to affirmative action likely to prevent or intended to prevent knowledge of a

fact and refers to some advantage to some interested party or some disadvantage to some interested party from whom the fact is withheld.

Mitchell v. Locurto, 79 Cal. App. (2d) 507, 179 P. (2d) 848 (1947).

POINT XIV.

AN ACTION WILL LIE AGAINST PARTIES WHO CONSPIRE WITH AN AGENT TO DEFRAUD THE LATTER'S PRINCIPAL, EVEN THOUGH THEY THEMSELVES ARE NOT FIDUCIARIES.

Anderson v. Thacher, 76 Cal. App. (2d) 500, 172 P. (2d) 533 (1946);

15 C.J.S., Conspiracy, section 9, p. 1005;

Woefersberger v. Miller, 39 S.W. (2d) 758, 327 Mo. 1150.

POINT XV.

CONSPIRATORS ARE JOINTLY AND SEVERALLY LIABLE FOR ALL DAMAGES RESULTING FROM THE CONSPIRACY, EACH BEING RESPONSIBLE FOR THE ACTS OF THE OTHER IN FURTHERING THE COMMON DESIGN.

Frost v. Hanscome, 198 Cal. 550, 246 P. 53 (1926);

McPhetridge v. Smith, 101 Cal. App. 122, 281 P. 419 (1929);

Ellis v. Navarro, 61 Cal. App. (2d) 755, 143 P. (2d) 735 (1943);

Peebler v. Olds, 71 Cal. App. (2d) 382, 162 P. (2d) 953 (1945);

Anderson v. Thacher, 76 Cal. App. (2d) 50, 172 P. (2d) 533 (1946);

Biggs v. Tourtas, 92 Cal. App. (2d) 316, 206 P. (2d) 871 (1949).

In the *Anderson* case, plaintiff owned an apartment house which she valued at \$55,000.00 and which she desired to exchange for other property. She made known her desires to defendant Brown, a broker, who in turn contacted defendant Thacher in Los Angeles. Eventually plaintiff came to Los Angeles to see various properties and met defendant Thacher. He found a building which the owners were willing to sell for \$120,000.00 cash. The defendant Thacher then told the plaintiff that he could get this building for her for \$125,000.00 cash plus her property in San Diego. After making numerous representations to the plaintiff, he succeeded in getting plaintiff to agree to buy this Los Angeles property under those terms. The check for \$125,000.00 was made to one Margaret Johnstone, a mother-in-law of another defendant broker, one Sackett, who worked with Thacher on this deal, and the conveyance of the San Diego property was made to the said defendant, Margaret Johnstone. Thacher had told the plaintiff that said defendant Margaret Johnstone was a sister and co-owner of the Hollywood property and that she represented the co-owners of the Hollywood property for the purpose of this sale, all of which statements he knew to be lies. The fact was that defendant Margaret Johnstone was merely being used as a dummy in the two escrows. Actually, the owners of

the Hollywood property sold it for \$124,000.00 cash paid to them by Margaret Johnstone who had received the check for \$125,000.00 plus the conveyance of the San Diego property from the plaintiff. This all happened around September, 1937. Not until September, 1940, did the plaintiff discover the true situation, to wit, that her Hollywood property had been sold for \$124,000.00 and that she had given up the property in San Diego as a secret profit. All of the defendants were sued on the theory of recovering a secret profit obtained by one who owed a fiduciary duty to the principal, plaintiff herein. A judgment for \$40,000.00, the value of the San Diego property, was recovered against all the defendants, not only the broker who had a fiduciary duty to his principal, but also against Margaret Johnstone, the mother-in-law who acted as the dummy in the escrows, and the defendant broker Sackett, her son-in-law. Each of the defendants appealed separately.

The court in ruling on the above point held at page 72:

“And where, after the violation of a fiduciary obligation, an amount is found to be due from the agent, judgment for the same amount may also be rendered against those proven to have fraudulently aided in the attempt of the fiduciary to obtain secret profits, although they themselves are not fiduciaries, and even though they receive no share of the profits (*Lomita Land & Water Co. v. Robinson*, 154 Cal. 36 [97 P. 10, 18 L.R.A.N.S. 1106]).”

At page 72, the court further held:

“Because of the inherent difficulty in proving a conspiracy, it has been held that a conspiracy may sometimes be inferred from the nature of the acts done, the relations of the parties, the interests of the alleged conspirators, and other circumstances (*Revert v. Hesse*, supra). That both defendants Thacher and Sackett knew that plaintiff’s San Diego property was not to be included as a consideration for the Hollywood Boulevard property is attested by the fact that both defendants agreed that Thacher was to wait for his \$5,000.00 commission until plaintiff’s property was acquired by defendant Johnstone and a loan could be negotiated thereon. The question might also be appropriately asked as to why defendant Sackett selected defendant Johnstone, his mother-in-law, to act as a ‘dummy’ in the escrow opened in connection with the Chase property? Was it to keep secret the fact that plaintiff was not, as defendant Thacher represented to her, transferring title to her San Diego property in exchange for the Hollywood Boulevard property? *Why was a double escrow resorted to when if there was nothing to conceal from plaintiff a single escrow would have sufficed?*”

We believe that the facts in our case closely parallel the facts in this case as far as perpetrating fraud on the plaintiffs is concerned. We may take that which is underlined above and paraphrase it to read as follows: Why were two bills of sale and two deeds resorted to when, if there was nothing to conceal from plaintiffs, a single bill of sale and deed would have sufficed? The answer is that

had there been a single deed and a single bill of sale the plaintiffs would have been informed by that single bill of sale that Moreton was to have received \$287,500.00 and each of the co-owners was to receive only \$33,333.00. The two bills of sale and the two deeds just like the two escrows in the Anderson case were used so as to fraudulently conceal from the plaintiffs the secret profit which in the Anderson was only \$40,000.00 and in our case was over \$254,000.00, a sum to shock the conscience of the most hardened.

4 Restatement of Law of Torts, §876.

“For harm resulting to a third person from tortious conduct of another, a person is liable if he:

(a) Orders or induces such conduct, knowing the conditions under which the act is done or intending the consequences which ensue, or

(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct separately considered constitutes a breach of duty to the third person.”

Applying this section of the restatement to our facts, Mathesius knew of the other's (Moreton's) conduct, knew, or as a reasonable man should have known, that Moreton's conduct was a breach of duty towards the plaintiffs,

and yet gave substantial assistance and encouragement to Moreton so as to conduct himself (by having the transaction for the sale of the M & H claims divided into two transactions for one purpose only) to continue the deceit that had been perpetrated upon the plaintiffs.

This is the comment on clause (b) in the Restatement:

Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortious, it has the same effect upon the liability of the advisor as participation or physical assistance.

If the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the consequences of the other's act.

POINT XVI.

A CO-CONSPIRATOR IS LIABLE FOR ALL OVERT ACTS COMMITTED IN PURSUANCE OF THE CONSPIRACY, WHETHER HE JOINED WILLINGLY OR UNWILLINGLY OR WHETHER HE WAS AN ACTIVE PARTICIPANT OR NOT.

This is true even though the results were not specifically intended or the means specifically agreed upon, and it is true whether the alleged tort amounts to a crime or not.

Langston v. Craddock, 156 S.E. 632, 42 Ga. App. 484 (1931);

- Hill v. Reynolds*, 91 S.E. 434, 19 Ga. App. 334 (1917);
- Burgess Bros. Co. v. Stewart*, 184 N. Y. S. 199, 112 Misc. Rep. 347 (aff.) (1920);
- Wells v. Lloyd*, 6 Cal. (2d) 70, 56 P. (2d) 517 (1936);
- Mox, Inc. v. Woods*, 202 Cal. 675, 262 P. 302 (1927);
- Revert v. Hesse*, 184 Cal. 295, 193 P. 943 (1920);
- McPhetridge v. Smith*, 101 Cal. App. 122, 281 P. 419 (1929);
- Neblett v. Elliott*, 46 Cal. App. (2d) 294, 115 P. (2d) 872 (1941);
- Tuman v. Brown*, 59 Cal. App. (2d) 16, 138 P. (2d) 363 (1943);
- State v. Day*, 76 Cal. App. (2d) 536, 173 P. (2d) 399 (1946);
- Biggs v. Tourtas*, 92 Cal. App. (2d) 316, 206 P. (2d) 871 (1949);
- Globe Dairy Lunch Co. v. Joint Executive Bd. of Culinary Workers*, 117 Cal. App. (2d) 190, 255 P. (2d) 94 (1953).

POINT XVII.

PERSONS COMING IN AFTER FORMATION OF CONSPIRACY ARE LIABLE FOR ALL ACTS PREVIOUSLY OR SUBSEQUENTLY DONE IN PURSUANCE THEREOF.

- Franck v. Moran*, 36 Cal. App. 32, 171 P. 841;
- Calcutt v. Gerig*, C.C.A., Tenn., 271 F. 220 (1921);

Rosco Trading Co. v. Goldenberg, 182 N. Y. S. 711 (1920) ;

Eyak River Packing Co. v. Huglen, 143 Wash. 299, 255 P. 123, (aff.) (1927) ;

Marcus v. Hess, U.S. ex rel., D.C. Pa., 41 F. Supp. 197 (revd. on oth. grds.) (1941) ;

Lesnik v. Public Industrials Corporation, C.C.A. N.Y., 144 F. (2d) 968 (1944) ;

Sears v. International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Local No. 524, 8 Wash. (2d) 883, 112 P. (2d) 850, (1946).

Under the authority of the above cited cases the corporate defendants would be liable for all of the acts of the Moretons even though they, the corporate defendants, did not instigate the conspiracy but came into it at the time they received Rex's letter.

POINT XVIII.

A CONSPIRATOR IS LIABLE EVEN THOUGH HE EXPECTED TO RECEIVE NO BENEFIT AND IN FACT RECEIVED NO BENEFIT.

Anderson v. Thacher, 76 Cal. App. (2d) 50, 172 P. (2d) 533 (1946).

In discussing the necessity as to whether any particular conspirator must have profited in order to be liable, the court, at page 74, said :

“In the state of the evidence here presented we would not be justified in disturbing the conclu-

sion arrived at by the trier of facts that defendant Johnstone joined in the plan and scheme initiated by defendants Thacher and Sackett to obtain plaintiff's San Diego property as a secret profit; that her conduct in acting as a 'dummy' in the dual escrows and in the subsequent negotiations through which plaintiff's property was disposed of, were illegal and in furtherance of the common scheme or design to achieve the unlawful purpose of the conspiracy. As heretofore pointed out, the liability of a conspirator is not dependent on whether such conspirator receives any of the benefits of the conspiracy. By reason of the surreptitious and deceptive means resorted to by her co-defendants and in which defendant Johnstone willingly used her name, it cannot be said that the trial court's inference that she had knowledge of the conspiracy and its unlawful purpose was unreasonable. . . ."

POINT XIX.

EVIDENCE OF OTHER SIMILAR FRAUDS MAY BE SHOWN TO PROVE A CONSPIRACY TO COMMIT A PARTICULAR FRAUD.

To prove a conspiracy to commit a particular fraud, it may be shown that the same conspirator perpetrated similar frauds on third persons about the same time or in execution of the same plan.

Davis v. Maislen, 116 Conn. 375, 165 A. 451, (1933);

Montgomery v. Crum, 199 Ind. 660, 161 N.E. 251, (1928);

Mason v. Gantz, Tex. Civ. App. 226 S.W. 435 (1920);

Davis v. Columbia Gas & Elec. Co., 68 N.E. (2d) 571, Affd. 68 N.E. (2d) 231 (1938).

POINT XX.

ONE CONSPIRATOR, ALTHOUGH UNCORROBORATED, IS A COMPETENT WITNESS AGAINST A CO-CONSPIRATOR.

Bean v. Bean, 12 Mass. 20 (1815);

New York Guaranty, Etc., Co. v. Gleason, 78 N.Y. 503, 7 Abb. N. Cas. 334 (1879);

Moore v. Tracy, 7 Wend. 229 N.Y. (1860);

Reichert v. Shuscavage, 72 Pa. Dist. & Co. 279, 41 Luz. Leg. Reg. 251 (1950).

The law permits great latitude in the admission of circumstantial evidence tending to establish a conspiracy and those advising and encouraging, aiding, abetting and ratifying the overt acts committed for the purpose of carrying into effect the objects of the conspiracy.

United Mine Workers of America v. Coronado Coal Co., Ark., 169 C.C.A. 549, 258 F. 829, (reversed) (1919);

Good v. Hartford Accident & Indemnity Co., D.C. S.C., 39 F. Supp. 475, 480 (1941).

POINT XXI.

WHERE A CONFIDENTIAL RELATION EXISTS, NOTHING SHORT OF ACTUAL KNOWLEDGE WILL PREVENT RECOVERY FOR MISREPRESENTATION.

If a confidential relation exists between the parties, nothing short of actual knowledge will prevent recovery for misrepresentation by the one in whom the confidence is reposed.

37 C.J.S. sec. 27 (b) p. 269;
Butcher v. Newburger, 318 Pa. 547, 179 A. 249.

In *Butcher v. Newburger*, supra, at page 241, the court states:

“Where, as here, the parties dealt on a basis of trust and confidence, the rule is to hold the party making a representation bound by it . . . If fiduciary relations obtain, nothing short of actual knowledge will prevent recovery for misrepresentations.”

POINT XXII.

THE MERE FACT THAT SUSPICIONS ARE AROUSED BY STATEMENTS OF THIRD PERSONS DOES NOT PRECLUDE RECOVERY FOR A MISREPRESENTATION ACTUALLY RELIED UPON.

The mere fact that one's suspicions are aroused by statements of third persons does not necessarily preclude recovery for a misrepresentation actually relied on.

37 C.J.S., sec. 31 pp. 275-6;
Williams v. Bedenbaugh, 215 Ala. 200, 110 So. 286, (1935);
Perkins v. Orfield, 145 Minn. 68, 176 N.W. 157 (1920);
Emery v. Third Nat'l. Bank, 308 Pa. 504, 162 A. 281 (1932);

Benjamin v. Starkweather, 32 Mich. 305 (1875).

In *Williams v. Bedenbaugh*, supra, where an attorney told a representative of the plaintiff that plaintiff was making a bad investment, the court, at p. 289, stated:

“If she (plaintiff), nevertheless, chose to trust and did trust the defendants as her friends and as having better knowledge of the condition of their company, it is not for them to say: ‘You should not have believed our report.’”

In *Perkins v. Orfield*, supra, it was held as follows, at page 157:

“While Mrs. Perkins (plaintiff) testified when she could get no verbal statement from Linn (one of the defendants) at the time she was pressing for information, other than the statement made when he handed her the Hurd letter, she was suspicious that something was wrong, she did not know what, that is far from sufficient to take from her the right to rely upon the representations, which clearly were made to induce her to enter into the trade.”

In *Emery v. Third Nat'l. Bank*, supra, at page 284, the court states:

“... a bare suspicion or an opportunity to learn the truth through the exercise of reasonable diligence does not constitute knowledge of fraud sufficient to prevent recovery.”

In *Benjamin v. Starkweather*, supra, at page 307, the court holds:

"It would be absurd to allow street talk about the size of a farm to rebut the conclusions of fraud arising out of positive untruths. It is certainly not presumable that others will know better than the parties interested; and even if such rumors had been multiplied and brought home to Benjamin (plaintiff), he would be justified in believing Starkweather's (defendant) statements based on better knowledge."

POINT XXIII.

THE RULE REQUIRING INVESTIGATION CANNOT BE INVOKED BY A THIRD PERSON IN COLLUSION WITH ONE HAVING A CONFIDENTIAL RELATION WITH THE PLAINTIFF.

Where a third person is in collusion with one having a confidential relationship with the plaintiff, the rule requiring investigation cannot be invoked by said third person.

Wustrack v. Hall, 95 Neb. 384, 145 N.W. 835 (1914);

Shoup v. Dowson, 134 N.J. Eq. 440, 36 A. (2d) 65 (1944);

Zimmer v. Gudmundson, 142 Neb. 260, 5 N.W. (2d) 707 (1942).

POINT XXIV.

EVEN THOUGH MEANS OF KNOWLEDGE OR INVESTIGATION ARE OPEN TO ONE, NO DUTY RESTS UPON ONE TO SO EMPLOY SUCH MEANS OR KNOWLEDGE WHERE HE IS JUSTIFIED IN RELYING UPON THE REPRESENTATIONS MADE TO HIM.

Where a person is justified in relying, and does in fact rely, upon false representations, his right of action is not destroyed because means of knowledge are open to him and no duty is devolved upon him in such case to employ such means of knowledge.

Blackman v. Howes, 82 Cal. App. (2d) 275, 185 P. (2d) 1019 (1947).

In our case, Moreton told Rex Holland that the steel companies would pay ten cents a ton for the ore. This was an affirmative misrepresentation, as in truth and in fact Moreton knew that the steel companies were paying twenty-five cents a ton. Therefore, under the authorities cited there was no duty on the part of the plaintiff to attempt to ascertain the true price, although in fact the plaintiff did attempt to ascertain the true facts by the only means he knew of, by writing a letter dated September 14, 1948 to Columbia, which letter was never answered. Had Columbia answered Rex's letter advising him of the simple fact that they were paying twenty-five cents a ton for the ore, the co-owners would of course not have gone through with the deal.

POINT XXV.

A PERSON MAY RELY UPON ONE WHO ACTUALLY DEFRAUDED HIM WHERE HIS CONDUCT IN LIGHT OF HIS OWN INTELLIGENCE AND INFORMATION WAS NOT UNREASONABLE AND MAY RECOVER FOR THE FRAUD.

A plaintiff seeking relief from fraud will not be denied relief because he reposed too much confidence in the

person who actually defrauded him where it cannot be said that his conduct in light of his own knowledge and information was manifestly unreasonable.

Anderson v. Thacher, 76 Cal. App. (2d) 50, 172 P. (2d) 533 (1946).

POINT XXVI.

A PERSON TO WHOM A FALSE REPRESENTATION IS MADE IS NOT HELD TO CONSTRUCTIVE NOTICE OF A PUBLIC RECORD WHICH WOULD REVEAL THE TRUE FACTS.

The purpose of the recording acts is to afford protection not to those who make fraudulent representations but to bona fide purchasers for value, and the person to whom a false representation is made is not held to constructive notice of a public record which would reveal the true facts.

Seeger v. Odell, 18 Cal. (2d) 409, 115 P. (2d) 977, 136 A.L.R. 1291 (1941);

Rogers v. Warden, 20 Cal. (2d) 286, 125 P. (2d) 7 (1942);

Hefferan v. Freebairn, 34 Cal. (2d) 715, 214 P. (2d) 386 (1950);

Anderson v. Thacher, 76 Cal. App. (2d) 50, 172 P. (2d) 533 (1946);

Stoll v. Selander, 81 Cal. App. (2d) 286, 183 P. (2d) 935 (1947).

In the *Seeger* case above, on the question of duty to consult records, the court held:

“ . . . and it is well established that he is not held to constructive notice of a public record which would reveal the true facts. (Rest. Torts, sec. (b) ; see cases cited in 12 Cal. Jur. 759 ; Prosser, Torts, 750, 751.) The purpose of the recording acts is to afford protection not to those who make fraudulent misrepresentations but to bona fide purchasers for value.”

The court had this further to say in the *Seeger* case :

“No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool . . .”

The antiquated authority that one must assume that everyone with whom he has a business transaction is a rogue and act accordingly will not receive judicial approval.

POINT XXVII.

ESTOPPELS ARE NOT FAVORED BY THE LAW.

Weinberg v. Vaughn Corp., 137 Cal. App. 55, 29 Pac. (2d) 862 (1944).

POINT XXVIII.

A MOTION FOR SUMMARY JUDGMENT BASED UPON ESTOPPEL SHOULD BE DENIED WHEN THE VERY QUESTION OF ESTOPPEL PRESENTS A FACTUAL ISSUE.

Begnard v. White, 170 F. (2d) 323, 12 F. R. Serv. 56 (c) 57, Case 1 (1948).

Estoppel, like any other issue, may be summarily adjudicated when it does not involve any genuine issue

of material fact, but when the question of estoppel involves a factual issue, then a summary judgment should be refused.

POINT XXIX.

A PARTY IS NOT ESTOPPED BY A WRITTEN INSTRUMENT WHICH HE IS INDUCED BY THE FRAUD OF THE OTHER PARTY TO EXECUTE.

“A party is not estopped by a contract or instrument which he is induced by the fraud of the other party to execute.” 31 C.J.S., Estoppel, sec. 75, p. 281-282.

Corcoran v. Waugh, 368 Ill. 318, 13 N.E. (2d) 961 (1938);

Capital Amusement Co. v. Bd. of Common Council of City of Frankfort, 210 Ky. 622, 276 S.W. 528, (1925);

See also,

Rochelle v. Anderson, 113 Okla. 137, 243 Pac. 528 (1925);

Sawtelle v. Astor, 23 Tenn. App. 33, 126 S.W. (2d) 367 (1938);

Roberts v. Roberts, 81 Cal. App. (2d) 871, 185 Pac. (2d) 381 (1947).

POINT XXX.

THE DOCTRINE OF ESTOPPEL MAY NOT BE INVOKED BY ANY PARTY GUILTY OF FRAUD.

John Hancock Etc., Ins. Co. v. Markowitz, 62 Cal. App. (2d) 388, 144 Pac. (2d) 899 (1944);

Pacific Finance Corp. v. Hendley, 119 Cal. App. 697, 7 P. (2d) 391 (1932).

In the *John Hancock* case, *supra*, the court stated as follows, at page 408:

“ . . . the company was led into the position of making payments to its prejudice by the fraudulent action of the defendant . . . The equitable doctrine of estoppel can never operate to protect one from the consequences of his fraud.”

POINT XXXI.

ESTOPPEL CANNOT BE RELIED UPON SO AS TO CREATE LIABILITY WHERE AGENT ACTING SOLELY FOR THE BENEFIT OF HIS PRINCIPAL ACTIVELY PARTICIPATED IN THE DECEIT AND FRAUD AND SOLICITED THE ACT FROM THE PERSON SOUGHT TO BE ESTOPPED BY THE PRINCIPAL.

First National Bank v. Reed, 198 Cal. 252, 244 P. 368 (1926).

POINT XXXII.

ESTOPPEL MAY NOT BE USED AS A SHIELD AGAINST THE RESULTS OF FRAUD, WRONGFUL OR ANY INEQUITABLE CONDUCT IN THE TRANSACTIONS.

New York Life Ins. Co. v. Odom, C.C.A. Ga., 93 F. (2d) 641 (certiorari denied, 304 U.S. 566, 58 S. Ct. 948, 82 L. Ed. 1532 and 304 U.S. 566, 58 S. Ct. 949, 82 L. Ed. 1532 (1938) ;

Bridger v. Goldsmith, 143 New York 424, 38 N.E. 458 (1894) ;

Cawthon v. Cochell, Tex. Civ. App. 121 S.W. (2d) 414 (1938) ;

Cohen v. Lewis, Tex. Civ. App. 44 S.W. (2d) 468 (1931);

Sueskind v. Michael Hardware Co., 228 Ky. 780, 15 S.W. (2d) 528 (1929);

New Jersey National Bank & Trust Co. v. Berkshire, Inc. 9 N.J. Misc. 933, 156 A. 40 (1931);

John Hancock Mutual Life Ins. Co. v. Markowitz, 62 Cal. App. (2d) 388, 144 P. (2d) 899 (1944).

POINT XXXIII.

ESTOPPEL MAY NOT BE RELIED UPON AS A DEFENSE AGAINST A FRAUDULENT PLAN OR AN ATTEMPT TO DEFRAUD IN WHICH PARTY CLAIMING ESTOPPEL WAS ACTIVE PARTICIPANT.

Rushville National Bank of Rushville v. State Life Ins. Co., 210 Ind. 492, 1 N.E. (2d) 445 (1936);

Stephon v. Topic, 147 Minn. 263, 180 N.W. 221 (1920).

POINT XXXIV.

DOCTRINE OF ESTOPPEL BASED ON CONDUCT OR REPRESENTATIONS INDUCED BY FRAUDULENT CONCEALMENT OF PARTY CLAIMING IT MAY NOT BE INVOKED.

Milwaukee - American Ass'n v. Landis, D.C., Ill., 49 F. (2d) 298 (1931);

Capital Amusement Co. v. Board of Common Council of City of Frankfort, 210 Ky. 622, 276 S.W. 528, 531 (1925);

Kellogg - Mackay Co. v. O'Neal, 39 Ohio App. 372, 177 N.E. 778 (1931);

Parmenter v. Mueller, 17 Ohio Cir. Ct. N.S. 104 (1910);

Reclamation Co. v. Western Brokerage & Supply Co., Tex. Civ. App. 57 S.W. (2d) 274, affirmed *Western Brokerage & Supply Co. v. Reclamation Co.*, 127 Tex. 386, 93 S.W. (2d) 393 (1936);

Carter v. Hall, 191 Ky. 75, 229 S.W. 132 (1921);

Forman v. Grant Lunch Corporation, 113 N.J. Eq. 175, 166 A. 219 (1933);

Otte v. Pierce, 111 Colo. 386, 142 P. (2d) 280, 282 (1943);

Swaim v. Martin, 302 Ky. 381, 194 S.W. (2d) 855 (1946);

Scottsbluff Nat. Bank v. Blue J. Feeds, Inc., 156 Neb. 65, 54 N.W. (2d) 392 (1952).

POINT XXXV.

ESTOPPEL IS NOT APPLIED TO PENALIZE AN INNOCENT PARTY WHO HAS BEEN MISLED TO HIS MATERIAL PREJUDICE.

The doctrine of estoppel will not be applied to penalize an innocent party who has been misled to his material prejudice by express representations of another.

Blackstone Valley Gas & Electric Co. v. Rhode Island Power Co., (R. 2.) 12 A. (2d) 739, (1940).

POINT XXXVI.

FULL KNOWLEDGE OF THE REAL FACTS AT THE TIME OF THE CONCEALMENT, REPRESENTATION OR OTHER CONDUCT OF THE PARTY CLAIMING THE ESTOPPEL IS AN INDISPENSABLE ELEMENT OF ESTOPPEL.

It is indispensable to the application of the doctrine of equitable estoppel that the person claimed to be estopped shall have had full knowledge of the real facts at the time of his representation, concealment or other conduct relating thereto and alleged to constitute the basis of the estoppel.

Battle v. Niece, 43 Cal. App. (2d) 655, 111 P. (2d) 455 (1941);

Mercer Casualty Co. v. Lewis, 41 Cal. App. (2d) 918, 108 P. (2d) 65 (1940);

Hacker Pipe & Supply Co. v. Chapman Valve Mfg. Co., 17 Cal. App. (2d) 265; 61 P. (2d) 944 (1936);

Weinberg v. John A. Vaughn Corporation, 137 Cal. App. 55, 29 P. (2d) 862 (1934);

Weintraub v. Weingart, 98 Cal. App. 690, 277 P. 752 (1929);

Rice v. McCarthy, 73 Cal. App. 655, 239 P. 56 (1925);

Bisconer v. Billing, 71 Cal. App. 779, 236 P. 329 (1925);

Norton v. Overholtzer, 63 Cal. App. 388, 218 P. 639 (1923);

Marlenee v. Brown, App. 128 P. (2d) 137, subs.
op. 21 Cal. (2d) 668, 134 P. (2d) 770, (1943);

Mirich v. Underwriters At Lloyd's London, 64
Cal. App. (2d) 522, 149 P. (2d) 19 (1944);

People v. Ocean Shore R.R., 32 Cal. (2d) 406,
196 P. (2d) 570, 6 ALR (2d) 1179 (former
opinion 181 P. (2d) 705)

CONCLUSION

From the fact that Mathesius instructed Moreton to contact the co-owners with regard to patenting and selling their property, can it not be inferred that Moreton had not yet arranged to act as their attorney in patenting the claims and in selling the property for them.

Had Moreton already contacted the co-owners and were he already representing them, surely he would have so advised Mathesius and it, therefore, would not have been necessary for Mathesius to have directed Moreton so to do.

It can, therefore, be reasonably inferred that Columbia instigated the conspiracy and was in it from the very beginning to the present time.

According to both Mathesius and Moreton the price per ton had not yet been agreed upon and the tonnage had not yet even been estimated when Rex Holland wrote his letter of September 14, 1948 to Mathesius.

If Columbia was not in the conspiracy from the very beginning, it got into it after Mathesius received Rex's letter.

Rex's letter was sufficient even according to Mathesius' own interpretation of it to put him on notice that the co-owners had been misinformed regarding the value of, and uniformed regarding the price that Columbia was paying for the entire property. The letter likewise advised Mathesius that the agreement with Moreton was that he was to get only one-fourth of the total price paid.

Mathesius assisted Moreton and participated in the conspiracy when he refused to answer Rex's letter and when he destroyed the single contract of sale, departed from his usual and customary practice and substituted two separate offers to sell and two separate contracts of sale and two separate deeds and two separate checks and when he instructed Moreton to secure the two letters from the co-owners which contained fraudulent implications and which omitted the price per ton that Columbia was paying for the ore and for the entire property and perhaps even the correct tonnage.

The pretended negotiations, consisting of between 25 and 38 words, were indeed meager and their meagerness alone renders the entire transaction suspect.

According to the testimony of both Mathesius and Moreton there were never any separate negotiations whatsoever with regard to the sale of either Moreton's one-fourth interest or the co-owners three-fourths interest. The pretended negotiations covered merely the sale of the entire property.

No one even claims that any of the co-owners were told that Columbia had agreed to pay 25 cents per ton after Mathesius received Rex's letter and after the agreement to pay that amount had been reached and before the time of the closing of the deal on December 20, 1948.

Heald, Moreton and Mathesius concealed from the co-owners the total price Columbia was paying when the deal was closed and did not affix the revenue stamps to any deeds in the presence of the co-owners. This is testified to by Rex Holland and his mother, Clara Holland and Mathesius himself in several places admits that he did not advise the co-owners thereof.

The corporate defendants obviously knew that the co-owners did not know the price per ton or the total price that Columbia was paying for the entire property. This is clearly evidenced by the studied effort in those two letters to conceal those facts from the co-owners.

If the defendants had not conspired to defraud the co-owners, would they not have simply included in either one of those two letters of October 16, 1948, and November 20, 1948, the simple statement that Columbia was paying 25 cents per ton for the ore or that the total price was \$387,500.00.

Looking at the record with simple realism, does it not unequivocally and for a certainty appear that Columbia and Moreton assisted each other in the perpetration of the fraud; that John Holland always trusted Moreton from the beginning of the transaction until his

death; that except for a very brief interval which was before Columbia had agreed upon the price per ton and before the tonnage had been estimated, Rex Holland always trusted Moreton; that after that brief interval, Rex concluded not to rely on Canfield, whose information was indefinite and who had proved himself unreliable, but rather to rely on what his lawyer, Moreton, had told him regarding the tonnage and the value per ton; that Rex's confidence in Moreton was completely restored and that at the time the deal was closed, all of the co-owners believed that Columbia was paying a total price of approximately \$133,000.00 for the property and that Columbia was paying Moreton only one-fourth of the total amount paid; that had the co-owners known the true facts they never would have gone through with the deal.

Finally, is it not true that in any event there surely EXIST triable issues and that, therefore, the plaintiffs are at the very least entitled to a trial of those issues.

Respectfully submitted,

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530 Judge Building
Salt Lake City, Utah

Counsel for Appellants

APPENDIX A

Cedar City, Utah
Sept. 14, 1948

Dr. Walter Mathesius
Geneva Steel Corporation
Provo, Utah

Dear Sir:

I sincerely hope that you will give this letter a lot of consideration as it means so much to us as the original owners of the M & H Iron Mining property located at Desert Mount, Utah that has been placed in the hands of Mr. Arthur E. Moreton, Attorney at Law, Judge Bldg., Salt Lake City, Utah, who has advised us that the United States Steel Co. has expressed to him their intentions to purchase this property and the reasons I am writing you to postpone the purchase of this property until a more satisfactory agreement can be reached between we, the original & present owners, and Mr. Moreton.

Ever since the property has been diamond drilled Mr. Moreton has made us believe that there was only One Million, Four Hundred Thousand (1,400,000) tons of iron ore contained in this deposit.

We agreed to accept \$100,000.00 for this property based upon that tonnage and have signed Articles of Agreement that will expire at the end of September, 1948. Since we signed the Agreement we have been advised that instead of One Million, Four Hundred Thousand tons of iron upon the property there are three million five hundred thousand tons of iron ore and that it is being offered for sale for .25 cents per ton or a total sales price of \$875,000.00

Therefore Mr. Moreton, has through misleading us about the total tonnage, had us sign an agreement that will net him \$775,000.00 for a \$700.00 investment.

Will you consider postponing the purchase of the property until after November 1st, 1948 and notify Mr. Moreton that the sale has been canceled. This will then give time for the Agreement between us to expire. We will then demand that the sale be made on an equal basis whereby we the owners of the property will receive three fourths of the total and Mr. Moreton will receive his 1/4 interest for patenting the property. This will be a fair return of \$218,750.00 for his \$700.00 investment and we who have been doing yearly assessment work for many years, to keep the property with a clear title, will enter into the sale of our property on a 3/4 equal basis.

Will you also please send me a duplicate copy of the letter advising Mr. Moreton of the refusal to purchase the property until after Nov. 1st, 1948 so that he can not in a future agreement between us insert the clause that the sale under old agreement is "still pending".

I write you this letter as a good citizen and a Veteran of World War II, who has given three years of my life for the protection of this country and feel that you will not refuse my request to postpone a sale that will now be unjust to us.

Hoping that an immediate answer will be made before it is too late, I remain

Yours truly,

/s/ Rex Holland

125 So. 3rd East St.
Cedar City, Utah

APPENDIX B

Cedar City, Utah
October 16, 1948

Columbia Iron Mining Company
Provo, Utah

Attention Dr. Walther Mathesius, President.

Re: M & H, M & H No. 1 & M & H #2 Lode *Mining Claims at Desert Mound*

Gentlemen:

We understand that proposed purchase of our interest in the three M & H Claims at Desert Mound, Iron County, Utah, known as M & H, M & H No. 1 and M & H #2 Lode Mining Claims, is awaiting your determination of estimated tonnage (which we understand you estimate at 1.55 million tons) and issuance of patent to us by the United States Government.

We, the undersigned, have this day prepared and submitted to you an offer for the sale of our interest in and to said M & H Mining Claims for the sum of \$100,000.00 cash. This purchase price to be paid us is entirely satisfactory to us, and in full for our interest.

We realize that in order to interest a purchaser in these claims, it would be necessary that they be patented. However, we were without such funds or means to secure such patent and costs incident thereto and we therefore asked Mr. Arthur E. Moreton to secure such patent, at his sole cost and expense in return for an interest. Needless to say, Mr. Moreton may offer and sell his in-

terest in said claims for whatever price you and he may agree upon, if he so desires, and the entire proceeds therefrom will of course be his sole property, it being his right to determine and to receive whatever amount you may agree upon with him.

Sincerely yours,

/s/ John G. Holland

/s/ C. S. Holland

/s/ Rex Holland

/s/ William C. Murie

APPENDIX C

Cedar City, Utah
November 20, 1948

Columbia Iron Mining Company
Provo, Utah
Attention Dr. Walther Mathesius, President:

Re: M & H, M&H No. 1 & M & H #2 Lode *Mining Claims at Desert Mound*

Gentlemen:

We reaffirm our letter to you of October 16, 1948 with respect to the offer made by us to your company for the sale of our interest in and to the M & H Claims at Desert Mound for the sum of \$100,000.00 cash.

We make this offer to sell our interest for this sum, free and clear of all encumbrances and lawful claims whatsoever. Patent on these claims has now been issued and we hope for an early acceptance of our offer.

An interest in these claims is also held by Arthur E. Moreton, and it is no concern of ours as to when and to whom he may sell his interest or at what price or upon what terms.

Sincerely yours,

/s/ John G. Holland

/s/ C. S. Holland

/s/ Rex Holland

/s/ William C. Murie