

1955

Rex L. Cole and Helga S. Cole v. Frank J. Parker et al : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED
SEP 16 1935

REX L. COLE and HELGA S. COLE,

Plaintiffs and Appellants,

— vs. —

**FRANK J. PARKER, LIZZIE PARKER,
HAROLD V. PARKER and JUANITA
PARKER,**

Defendants and Respondents.

Clerk, Supreme Court, Utah.

BRIEF OF APPELLANTS

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— vs. —

FRANK J. PARKER, LIZZIE PARKER,
HAROLD V. PARKER and JUANITA
PARKER,

Defendants and Respondents.

} Case No.
8340

BRIEF OF APPELLANTS

STATEMENT OF FACTS

A. PRELIMINARY STATEMENT

The parties will be referred to as in the Court below.

All italics are ours.

B. THE FACTS

1. General

This action arose from a real estate contract entered into by the parties on August 21, 1952. This contract

(Exhibit 2) provided for the sale of real estate situated in Millard County, Utah, near the town of Garrison and near to the Utah-Nevada line. The property involved is commonly known as the Robinson Ranch and the Meecham Ranch consisting of a total of approximately 760 acres and two shacks (Exhibits 21, 23, 26 and 28). Harold V. Parker purchased the Robinson place on April 1, 1937, and had owned it since (R. 216). Frank Parker moved on to the Meecham place in 1942 (R. 185).

Besides the real property, included in the sale were the following items of personal property: three horses, three cows, ten brood sows, one mowing machine, one rake, one harness, one harrow, one ditcher and one derrick (Exhibit 1). Prior to the action the defendants had back in their possession all of the above items except the ten brood sows (R. 77). Also, under the contract the sellers reserved one-half of the mineral, oil and gas rights, five tons of barley from the current crop and a grazing lease on the Meecham Ranch terminating on December 31, 1952. The buyers received the balance of the growing crops. Plaintiffs received a total amount of money for the sale of crops harvested in 1952 of \$1,498.22 for barley (R. 78) and \$343.12 for the sows (R. 83).

The total purchase price was \$40,000.00 which was to be paid \$2,800.00 down, \$8,800.00 on or before December 31, 1952, and \$5,680.00 each year thereafter. Plaintiffs made the down payment and the \$8,800.00 payment totalling \$11,600.00. Defendants admitted in their answer that these payments were made by plaintiffs (R. 10).

Plaintiffs moved on to the ranch in the latter part of September, 1952, and stayed for about two and one-half to three months (R. 69). Plaintiffs moved back to Murray at that time because the water had dried up and there was no drinking water (R. 70). The next spring, (1953), Mr. Cole made preparations to lease the place to a man by the name of Goff on a share basis. Mr. Goff went out to the place with his machinery but came back (R. 73). Mr. Cole went out and found that there was no water coming out of Hendrie's Creek and that the place could not be farmed (R. 74). Mr. Cole found out after he moved on to the place and the following spring that almost all of the water that would come out of Hendrie's Creek would be lost before reaching the ranch (R. 75). The ranch was not farmed in the summer of 1953 and this action was commenced in December 1953. By order of the Third District Court, A. Kyle Bettilyon was appointed receiver of the property in dispute on March 3, 1954 (R. 21, 22). The receiver allowed the Parkers to farm the property in 1954 (R. 211). No accounting has been made on said receivership. The trial in this case was commenced on November 8, 1954.

Plaintiffs instituted the lawsuit asking for rescission of the contract and return of their \$11,600.00 less a reasonable rental (R. 1). Prior to commencing the lawsuit plaintiffs tendered the property back to defendants and demanded their money less a reasonable rental (R. 10). As grounds for rescission plaintiffs alleged that the de-

fendant, Harold Parker, well knowing there was an insufficient supply of water for successful agriculture induced plaintiffs to enter into said contract by falsely and fraudulently representing to the plaintiff, Rex L. Cole, that the water supply for the property was and always had been adequate and sufficient for agriculture and pasture (R. 2). Defendants refused the tender, declared the contract forfeited after the time for the next payment was up and asked the court to forfeit the money paid on the contract by plaintiffs and cancel the contract. The trial court ruled in favor of defendants and forfeited the \$11,600.00 paid on the contract by plaintiffs (R. 40).

2. Facts Surrounding the Execution of the Contract.

Mr. Cole went down to see the Parker Ranch on August 12, 1952, with Mr. Mark Crystal who was employed by Bettilyons, Inc., a real estate company in Salt Lake City, Utah (R. 53, 54). They arrived at the Parker Ranch just before dark on the evening of August 12, 1954. Prior to this time Mr. Cole had never been in the area around Garrison, Utah (R. 52). Mr. Cole did not have an opportunity to observe the ranch until the next morning (R. 54). The next morning Mr. Harold Parker drove Mr. Cole and Mr. Crystal around the place (R. 55). The ranch was located on fairly level ground east of some low mountains on the Nevada side of the state boundary (R. 56). Mr. Cole took some pictures on that day (Exhibits 5, 6 and 7). Exhibit 7 shows a general view looking toward the ranch and including most of the

ranch which starts less than half way up the picture (R. 58). Mr. Cole observed that the crops were fairly good (R. 59); that there was about ten acres of oats, fifteen acres of corn, sixty acres of alfalfa, ten acres of wheat and about forty acres of barley or about a total of one hundred and thirty-five acres under irrigation (R. 59). Also, Mr. Cole observed a little orchard on the Meecham place, a little orchard of young trees on the Meecham place and on the other place a young orchard of possibly fifty or sixty trees (R. 61). The source of water for irrigation was Hendrie's Creek which emerged from the mountains about three and one-fourth miles from the ranch (R. 63). Mr. Cole testified as to being taken to see the source of the water (R. 63):

"Q. Were you taken out to see the source?

A. Yes, by a roundabout way.

Q. What do you mean by 'a roundabout way'?

A. Usually, I found out afterwards, when they wanted to go to the mouth of Hendrie's Creek, they would drive directly up there. The road was good enough to drive up, especially at that time, with a truck. But we made a roundabout way, back over on the bench, and come in from the south, up over the bench, on a road that goes in from up there.

Q. Is this called Henry Creek?

A. Hendrie's Creek.

Q. Where is the source that you examined, with respect to the ranch?

A. Three and one-fourth miles.

Q. Is that at the foot of the mountain?

A. That is the foot of the mountain. Hendrie's Canyon, I guess — I don't know whether they call it Hendrie's Canyon, but it is Hendrie's Creek.

Q. Where does the water come from that comes through this creek, the mouth of it?

A. I have never yet been able to go up and examine exactly where it come from, but there is some comes from springs up there. And there is a little spring at the north of Hendrie's Creek, that was producing, at that time."

Mr. Cole further testified that he was taken back from the source by the same route and not down the creek (R. 231).

Mr. Cole testified that he, Harold Parker and Mark Crystal engaged in a conversation concerning the water at a point where the creek emerges from the mountains and that he observed at that time a stream of from four to five second feet at that point. Mr. Cole testified concerning the conversation as follows (R. 65, 66) :

"Q. Was there a conversation between you and Mr. Parker at that point?

A. Harold Parker made the remark, at that point, that the creek was like that all the time, and never varied, and that there has been as high as 62 second feet come out of that canyon in the run-off.

Q. Was anything else said in that conversation, that you remember?

- A. Yes; we walked on over to the spring, and he made the same remark on the spring, that it hadn't varied at all.
- Q. Did he say anything with respect to whether or not the spring was always—
- A. The spring was always that way, it never varied.
- Q. Was there anything else that was said at either of those two places, that you remember?
- A. In respect to the water?
- Q. Yes.
- A. That was about what was said on the water."

Mr. Cole stated that after this conversation, they returned to the ranch and he signed an earnest money receipt. The contract was entered into between the parties on August 21, 1955. At the time the contract was signed there was no specific discussion concerning the forfeiture provision of the contract (R. 68, 69).

Mr. Crystal had been engaged in the ranching part of real estate for about one month and this was his first sale of a ranch (R. 158, 159). Mr. Crystal testified as to the conversation concerning the water situation as follows (R. 155, 156):

- "A. When we walked over to the creek where the water was flowing, I observed a clear stream of water that I estimated to be approximately five or six second feet of water. Obviously, at that particular time we were

discussing percolation loss on the water, where it was running over the alluvial fill at the mouth of the canyon. I had mentioned at that time that there was a similar situation that I was intimately familiar with, down in Central Utah, where they had occasion to lead the water over a flat of about two and a half to three miles, from the mouth of a canyon down to a reservoir.

At that time I stated that this particular company, this irrigation company, had contracted having a ditch lined, a concrete and beveled ditch, and that they had been able to solve their loss, that is, prevent the loss of water through percolation, by constructing a ditch and concrete lining it.

Q. What did Mr. Parker say, if anything?

A. I can't recall what Mr. Parker's remarks were.

Q. Do you recall any remarks he made, at all, about the water in previous years?

A. Mr. Parker's?

Q. Yes.

A. Yes sir. He stated that there had been a great deal of water in the past, especially during the spring run-off, and as the summer progressed, and the snows melted in the high range, the water subsided.

Q. Did you hear him make any specific statement to Mr. Cole, guaranteeing any specific amount of water?

MR. BLACK: I object to that—

THE COURT: The word 'guaranteeing' wasn't used in any way. You can ask him whether he made the statement Mr. Cole said he did.

Q. Mr. Crystal, do you remember Mr. Parker, in substance, and effect, making any statement to the effect that the creek was always like that, the way it was when you saw it, and had never varied, and went as high as 60 second feet?

MR. BLACK: Object to that as leading.

THE COURT: Objection overruled.

A. I recall Mr. Parker had mentioned that there was a high of so many second feet of water, a great deal of water in the spring of the year, then it eventually subsided down. And that was August 13th, that we observed this water, which was well into the middle part of the summer.

Q. Did you ever hear him say, as Mr. Cole testified, that the creek was always like that, and never varied?

A. No sir, I cannot recall that statement."

Mr. William Hancock, a witness for defendants, testified that he was also looking at the Parker place on August 13, 1952, and was present at the conversation at Hendrie's Creek. He testified as follows about this conversation (R. 145):

"A. That in the spring there is as much as 52 second feet; that it declines through the year; that the water was being lost by—a good share of it was being lost by running into the ground before it got to the ranch; if cement

was taken the first mile, that it would help a lot. That there was a natural reservoir there, where you could store some of that early water, or a dam up above it could be put in, to store the early water."

The defendant, Harold Parker, testified as to the conversation concerning the water as follows (R. 200):

"A. We had a discussion, Mr. Cole, Mr. Crystal and Mr. Hancock. I explained to them how the water varied, that it was very high in the spring of the year, and receded as the snow melted; and it got very low in the fall of the year. And it was necessary there to have a rock-lined ditch, concrete ditch, or pipe line, to deliver that water to the ranch.

And Mr. Crystal discussed the thing, about his projects—he had been down in southern Utah—and derived at some figure.

And Mr. Cole decided that that was very necessary and so did Mr. Hancock, that that water had to be piped down there."

3. Facts concering the property.

Mr. W. Don Peterson, who was employed by the Federal Government in Soil Conservation Service from 1935 to 1953 was called as a witness for the plaintiffs. Mr. Peterson was in charge of engineering in Millard County from approximately 1942 to 1953 (R. 116). As part of his duties he was engaged in irrigation water measurement, construction of reservoirs, spring development, pipe lines and drainage. Mr. Peterson was acquainted with the property in question from 1942 or

1943 to 1953 (R. 117). Also since that time he had made water measurements over the years on Hendrie's Creek. As to the water situation Mr. Peterson testified as follows (R. 117, 118, 119, 120 and 121):

“Q. Now, is there any condition up there, that you know of, that creates any kind of water problem in regards to the Robinson and Meecham ranches, regardless of the amount of water coming out of the source of Hendrie's Creek?

A. Well, you have got a problem there along that whole range of mountains, as you have got a fault just as the mountains meet the valley, and there your waters are lost.

The water supply up the canyon itself, oh, you might say it is fairly stable. You could probably count on pretty close to two second feet any time, if you go a mile or more above the junction of the canyon with the valley. But when it hits that fault zone it loses the water quite rapidly.

I remember I recommended to Mr. Parker a method of saving the water, which I had seen used on Lost River, and Birch Creek, up in Idaho. That is, changing the channels so it is carrying a silt load, and it plugs up the interstices in the ditch, and you get a fairly good level of water.

If you go up the canyon, I think you will find where the channel has been changed in different places to deliver water in that manner.

Q. When did you make that recommendation?

A. I think that was about one of our first contacts with Parkers. We recommended it could be lined, but, of course, your cost is quite heavy on that.

Q. What would be the cost of lining the ditch down to the place?

A. A dollar a foot would be very conservative estimate.

Q. Had you had any other occasions than that, to discuss with the Parkers their water problems?

A. We have discussed it numerous times. I have stopped there in the spring. There is usually a fair flow of water in the average year. Of course in the summer months, and towards fall, usually the water—when I say ‘seldom reaches the road’—during the night, when it cools off, you get probably one-quarter of a second foot down through there.

Q. Do you know about how many second feet it would take up at the mouth, before you would get any water at the ranch itself?

A. That is a question. It would depend on how the water was, whether it was muddy, whether it was cloudy, evaporation, cool, and hot weather. That is a question I couldn't answer.

Q. Have you had occasion to notice the farming operation on that place from 1942 until you left the service?

A. Well, when we first went out there and completely mapped the place, oh, it was marginal farm, it is similar to the farms along there.

The process of making a living, because of the water supply—generally you have got pretty good water in the spring, so it was possible to give alfalfa at least one or two irrigations.

And if the water supply was good, it meant probably a crop of hay, and if it wasn't possibly a crop of seed.

You find most alfalfa up there a light stand. That is pretty good for growing seed, but not very heavy for yielding hay. Quite often you would have ample water for maturing a crop of grain.

MR. BRADY: What do you mean by 'marginal farm'?

- A. You haven't got a stable water supply. You are limited in the kind of crops you can grow. Some crops will take water throughout the irrigation season. Some of them you can grow a crop with one or two irrigations in the spring.

And alfalfa seed is a crop that works out quite satisfactorily along that line. If you can give it one or two shots of water, maybe you will make a crop. If you have more than that you will make a crop of hay, and possibly another irrigation may make you a crop of seed.

- Q. Would you say, based on your observation and experience, that a person could expect a good crop every year at that place?
- A. Definitely not. There isn't any of those ranches along there under those canyons—it has been just a marginal thing. They show it.

Q. In your work have you had occasion to note the amount of rainfall water supply for various years, in that area?

A. Yes. Of course, their water shed is quite high. I am not too familiar with that. I am quite familiar with the spring of 1952, because I was called in for doing a lot of work on flood damage, and I think the weather records will bear me out that the snow report was about 140 per cent of normal for that year.

Q. Do you know whether or not that is the wettest year you observed in that area?

A. That is the wettest I know of, because many of the roads could not be used for two or three months because of water crossing them.

Q. I wonder if you could give me any figures, what the amount of water needed at a place say to get one second foot down to a place—could you give me a figure of about how many acres that would serve, with good management?

A. Well, the State of Utah, its own recommendation you ought to irrigate at least fifty acres with a second foot.

Under good management, if the land is level, you ought to cover seventy acres with a second foot of water. That is, if you have got a continuous flow with a second foot you ought to be able to cover a farm of at least seventy acres. That has to be good management. You can't have rough land. It has got to be level, and a good irrigation system.

Q. Do you know whether this particular farm could expect that much water in a given summer or not?

MR. FLANDERS: Object to that, your Honor.

The Court: Objection overruled.

- A. *That farm, in the time I have known it, could never count on that much water throughout the irrigation season.* That is, I would say from the first of April to around the first of October. You could count on that much in the spring. Several times, I am sure that there has been a stream maybe from six to ten second feet there in the spring, a good stream to irrigate; and say five second feet is a nice stream to irrigate with. But, along toward July it would be more or less a trickle. So it limited the kind of crops you were going to grow."

Mr. Walter Griffith, a real estate agent employed by American Housing, was called as a witness by plaintiffs. Mr. Griffith had specialized in ranches and farms for twenty odd years operating in Utah, Idaho, Montana and Wyoming. In his business, Mr. Griffith is in constant touch with selling prices of ranch and farm real estate (R. 126). Mr. Griffith recently attended a class conducted by the Master Appraising Institute at Colorado University (R. 127). Also, Mr. Griffith, for a good many years has been acquainted with the vicinity around Garison, Utah (R. 127). Mr. Griffith made a special trip out to the ranch in question two days prior to trial and examined the ranch and the water supply. As to the market value of the ranch in question, Mr. Griffith testified as follows (R. 129, 130, 131 and 132):

“Q. Mr. Griffith, assume, with me, that there are about 135 acres of land out there that is under irrigation and producing, approximately; that will raise oats, corn, alfalfa, wheat and barley, and that there is a State Land Lease for grazing for 3400 acres of grazing land out to the north of this place, and that there is a Taylor Grazing permit for 30 head.

Now, let us assume, first, that there is all the water on that place, that the place needs. Let us assume that there is just all the water that a person, a farmer, would need to irrigate that place during the spring, summer and fall. Do you have an opinion as to what the reasonable market value of that place would be?

A. I do, but I don't see any evidence of any water on that place.

Q. Let us make this assumption first, that there is. Do you have an opinion on that assumption?

A. I have.

Q. About what would it sell for on the market?

A. Sixty dollars an acre for irrigated land.

* * * *

Q. About fifty or sixty dollars an acre, of irrigated land?

A. That would be high on it, with plenty of water.

Q. Let us assume that the water supply is such that there can be an early watering of the alfalfa, but it is very doubtful in any given year, whether there is any water in the sum-

mer time to irrigate, and that in dry years there isn't any water to irrigate, in the summer time.

Assuming those facts, on the same other general information that I asked you to assume, and from your own examination and experience, do you have an opinion on what this place would be worth?

A. In my opinion, it is worth nothing only for range land, with the available supply of water that appears to me.

Q. Can you tell from your examination, Mr. Griffith, whether it looked like there had been any water on the place this year?

A. It don't look like it this year. I can say there has been times that it appears there has been water on it. Probably sometimes there may be ample water, but there certainly hasn't been this year.

Q. I will ask you, further, Mr. Griffith, whether or not you just heard the testimony of Mr. Peterson, who was on the witness stand in regard to the water situation—

A. I did.

Q. . . . customarily out at that place?

A. I did.

Q. I will ask you, considering that, plus these other things I have asked you to assume, plus your own personal examination and your experience and training, if you have an opinion on what the rental value would be on that place for a year?

A. Well, leased to a good operator—you couldn't get him on there for nothing. He would be willing to take the range for nothing, but it is my opinion a good operator would turn you down, if you offered it to him free. It is definitely marginal.

Q. What does 'marginal' mean?

A. That means something maybe will and maybe won't.

Q. Mr. Griffith, can you state whether or not the general real estate market and ranching and farming throughout this area, Utah, Idaho and Montana, has changed appreciably since August of 1952?

* * * *

Q. Do you think, generally, the market would have changed considerably from August, 1952, to the present time?

MR. FLANDERS: Object to that as leading.

Q. Or do you think it would be relatively level?

THE COURT: Objection overruled.

Q. Just sort of a general question.

A. You mean for crops, or for the farm?

Q. For the farm sale?

A. I will tell you, there has never been a time when I would touch anything like that.

Q. And that would have gone, in 1952, as well as today?

A. Yes sir, or 1942, either."

Exhibits 21 through 28 are pictures taken of various parts of the ranch two days before trial and Exhibits 3 and 4 about six weeks prior to trial.

In regard to the question of any possible depreciation in the shacks on the place, Mr. Peterson testified (R. 122):

“Q. During your years being acquainted with this Parker ranch out there, have you had many occasions to notice the buildings and structures around the place there?

A. I would say from the time I have known that ranch, the buildings, the yard, the fences, around there, were in a stage where it appeared the place was about to be abandoned, or something on that order. They were never well kept.

I remember the first time I came there boards were out of the porch, and we were warned about where to step in going into the house. And I can't say I saw much difference in it at any time.”

And as to the land (R. 121, 122):

“Q. Based on your knowledge and experience and education, can you tell me, in a general way, whether or not land will depreciate if not plowed and planted every year?

A. Well, it would depend on the area. Just because land grows a crop of weeds, that is not any indication of depreciation. That may be a rest for that land, and actually may be, in the long run you might gain by plowing that under, especially if it is legumes, or

something of that sort. If that legumes are allowed to grow, then plowed under, the soil will definitely be enriched.

On the other hand, if you would leave it and let willows or noxious weeds come in, it would lose some value, no question about it."

4. Reliance.

Mr. Cole testified as to his reliance on Parker's representations, as follows (R. 231):

"Q. Mr. Cole, I believe you testified you had experience in farming in dry countries. Were you aware, at that time, of the importance of water in that type of country?

A. Yes sir; that was the main object of that place, was the water. The only life of the place would be the water.

Q. Did you rely on the representations that Mr. Parker made?

A. Yes sir."

and further that Mr. Crystal "highly recommended the place; that if the water was like it was then, it could be made an extra good place" (R. 234).

5. Credibility.

Mr. Lawrence Bunker from Delta, Utah, testified that he is acquainted with the people in the Garrison area; that he knew the reputation in the area of Harold Parker for telling the truth and that it is bad (R. 236, 237).

STATEMENT OF POINTS RELIED UPON

POINT I.

THE EVIDENCE CONCLUSIVELY PROVED FRAUD
ON THE PART OF DEFENDANTS.

POINT II.

THE FORFEITURE OF \$11,600.00 WAS AGAINST LAW
AND GROSSLY UNCONSCIONABLE.

ARGUMENT

POINT I.

THE EVIDENCE CONCLUSIVELY PROVED FRAUD
ON THE PART OF DEFENDANTS.

The ranch in question was advertised at \$40,000.00 (R. 160). After a conference with Mr. Crystal, Mr. Cole went out to see this ranch. Mr. Crystal was new in the ranch field, this being his first sale. Mr. Cole went out to the ranch, was conducted around by Harold Parker and Mark Crystal; had a discussion with Harold Parker concerning the water supply, and signed an earnest money receipt the same day agreeing to pay the sum of \$40,000.00 for said ranch. Mr. Cole stated that Harold Parker avoided taking him along the route of the creek although Parker denies this. It should be kept in mind in considering this case that water was the all important consideration in determining the value of a ranch in this

territory. As Mr. Peterson stated (R. 125), "Without the water, it is just a desert." Mr. Crystal testified in his direct examination (R. 158) :

"Q. Did you think it was unreasonable?

A. Generally speaking, providing that water could be had and put down there, and the potential productiveness, I don't think it was unreasonable."

And on cross examination (R. 159) :

"Q. And it looked like a pretty good potential, on the price, to you, from what you saw?

A. Providing water were obtained, and put down on the ranch.

Q. Yes. If you could get water it looked like a good potential?

A. Yes.

Q. So the business of water meant everything on this deal?

A. That is right, sir."

Mr. Cole's testimony as to the importance of water in his mind at the time he looked at the ranch is certainly credible (R. 231).

Added into the situation which Mr. Cole faced when he went to see the ranch was the fact that the spring and summer of 1952 was one of the best years the ranch had ever had due to the fact that the water supply was unusually high.

Mr. Peterson, whose business it was to know of such things, testified (R. 120) :

“Q. In your work have you had occasion to note the amount of rainfall water supply for various years, in that area?

A. Yes. Of course, their water shed is quite high. I am not too familiar with that. I am quite familiar with the spring of 1952, because I was called in for doing a lot of work on flood damage, and I think the weather records will bear me out that the snow report was about 140 per cent of normal for that year.

Q. Do you know whether or not that is the wettest year you observed in that area?

A. That is the wettest I know of, because many of the roads could not be used for two or three months because of water crossing them.”

In the midst of this situation, a high price asked, an unusually good crop for this particular place, an inexperienced real estate man, and a casual, short conversation about the water, it is the contention of plaintiffs' that Harold Parker not only specifically represented that the ranch was always that productive and could very easily be made better but that by his statements and his skillful avoidance of going any further in regard to the water situation when the subject was opened up, that he fraudulently concealed a hidden and drastically fatal defect in his water supply; *the fact that there was a hidden fault along the base of the mountains which*

stole most of the water coming out of the creek. Harold parker knew very well that this hidden fault existed. Mr. Peterson testified (R. 117, 118):

“A. Well, you have got a problem there along that whole range of mountains, as you have got a fault just as the mountains meet the valley, and there your waters are lost.

“The water supply up the canyon itself, oh, you might say it is fairly stable. You could probably count on pretty close to two second feet any time, if you go a mile or more above the junction of the canyon with the valley. But when it hits that fault zone it loses the water quite rapidly.

I remember I recommended to Mr. Parker a method of saving the water, which I had seen used on Lost River, and Birch Creek, up in Idaho. That is, changing the channels so it is carrying a silt load, and it plugs up the interstices in the ditch, and you get a fairly good level of water.

If you go up the canyon, I think you will find where the channel has been changed in different places to deliver water in that manner.

Q. When did you make that recommendation?

A. I think that was about one of our first contacts with Parkers. We recommended it could be lined, but, of course, your cost is quite heavy on that.

Q. What would be the cost of lining the ditch down to the place?

A. A dollar a foot would be a very conservative estimate.

Q. Had you had any other occasions than that, to discuss with the Parkers their water problems?

A. We have discussed it numerous times."

Harold Parker could not help but know that this fault zone was something a prospective buyer would be vitally interested in, and yet he allowed the impression to be conveyed that there was only a normal type percolation loss. Because of an unusually good year there happened to be water at the ranch at that time of year. This fact, plus the way in which the water was discussed, that sometimes there would even be sixty or seventy second feet at the source and that the ranch could be made even better by conservation methods, shows an artful and deceitful fraud practiced on Mr. Cole by painting an untrue picture of the ranch to him and skillfully hiding and concealing the fatal defect of the hidden fault zone which robbed the ranch of its water year in and year out. Even Mr. Parker did not claim to have stated that there was any unusual percolation loss. Harold Parker knew of the fault, knew that Mr. Cole would certainly be interested in knowing of such fault and studiously avoided any mention of it when the subject of water and water loss was brought up. Mr. Cole relied on this picture with only the highlights and not the undertones which was painted by Harold Parker.

The various courts of this country and England have recognized that there are subtle ways of being deceitful. They have ruled time and again that half truths are just as dishonest as bold lies. A recent California decision exemplifies the Judicial thinking on this subject. In the case of *Milnoe et al v. Dixon et al*, (1950), 225 P. 2d 273 involved a case where plaintiffs purchased a five and one half acre tract of realty improved by a main house and a guest house, both erected by defendants. Mr. Dixon told Mr. Milnoe that he had erected the house himself and that it was strong and well built. After moving in and starting to make alterations, plaintiffs discovered that defendants had only acquired a building permit on the main house for 18 x 21 feet consisting of a dining room, bedroom and bath having since added many rooms. Also, defendants discovered that the guest house was at first constructed as a chicken coop, without a permit and later improved by the addition of other rooms. Plaintiffs discovered many hidden defects and in order to satisfy code requirements had to demolish the main house and build a new one.

It was held that the buyer making an inspection does not forfeit his right to rely on representations or concealment of the seller as to matters of a technical nature or as to facts not ascertainable by the exercise of reasonable diligence in the inspection. The court cited the case of *Dyke v. Zaiser*, 182 P. 2d 353 as stating that:

“the present tendency * * * is to class concealment as actual fraud in those cases where the seller knows of facts which materially affect the desirability of the property which he knows are unknown to the buyers.”

and on page 275 the court stated:

“It is a general rule that a vendor not in a confidential relation to the buyer is not under a duty to make full disclosure concerning the object which he would sell. However, it is a universally recognized exception that if he undertakes to do so he is bound not only to tell the truth but he is equally obligated not to suppress or conceal facts within his knowledge which materially qualify those stated. If he speaks at all he must make a complete and fair disclosure.”

The courts, while recognizing within limits that people are entitled to make good bargains for themselves, draw the line when honesty is tampered with. It is a step forward in the law to recognize the insidious nature of half-truths, for otherwise the most dangerous deceiver, the clever and artful person, could roam free profiting from unconscionable bargains. The clever deceiver is the one who technically tells the truth as far as he goes but by leaving out parts here and there creates a false picture.

It is stated as a general rule in Restatement of Torts, Vol. III, par. 529:

“A statement in a business transaction which while stating the truth so far as it goes, the maker

knows or believes to be materially misleading because of his failure to state qualifying matter is a fraudulent misrepresentation.”

The courts have recognized this dishonesty. The case of *Benner et al v. Hooper*, (Calif., 1931), 296 Pac. 660, was a case where defendant built a home for his wife over a filled-in creek bed which appeared to be on high ground. The house was put up for sale and plaintiffs came to see it. In the course of discussion plaintiffs commented that this place was on high ground and that he did not want a home over a creek bed. Defendant had already stated that he had built many homes in the community and in answer to plaintiff's comment stated that he would not want a home over a creek bed. The court cut through defendant's artifice and held that this statement by defendant and his further silence constituted fraud.

For the proposition that such fraudulent concealment can be found from all of the surrounding circumstances the case of *Crompton v. Beedle et al*, (Vt. 1910), 75 A. 331 has the following to say at page 334 :

“Unfairness and fraud may be collected from a variety of circumstances and it is ordinarily enough to establish fraud that a vendee has actively attempted to ensnare, and has in fact ensnared, the vendor into the making of an unconscionable contract. Where concealment of an essential thing is effected by an industrious course of misleading and deceptive talk or conduct, there is fraud against which equity will relieve.”

For further authorities on the subject of fraudulent concealment, see the following:

23 *Am. Jur.* 851, 860, 861; *Restatement of Torts*, Vol. 3, par. 529, comments a. and b.; *Smith on The Law of Fraud*, par. 171, p. 428; *Warvelle on Vendors*, Vol. 1, p. 874, 995; *Trout v. Harrell et al.*, 233 S.W. 2d 233; *Eisenschmidt v. Conway et al.*, (Okla., 1944), 155 P. 2d 241; *Kimball v. General Electric Co.*, (Calif., 1933), 23 P. 2d 295, 30 P. 2d 39; *Van Hauten v. Morse*, (Mass., 1894), 38 N.E. 705; *Newall v. Randall*, (Minn., 1884), 19 N.W. 972; *American Bonding Co. of Baltimore v. Fourth Nat. Bank of Montgomery*, (Ala. 1921), 91 So. 480; *Hill v. Associated Almond Growers of Paso Robles*, (Calif., 1928), 265 Pac. 873; *Sullivan et al v. Helbing, et al.*, (Calif., 1924), 226 Pac. 803; *Stackpole et al. v. Hancock et al.*, (Fla., 1898), 24 So. 914; *White Tower Management Corp. v. Taghino et al.*, (Mass., 1939), 19 N.E. 2d 700; *Hutsell v. Citizen's Nat. Bank et al.*, (Tenn., 1933), 64 S.W. 2d 191; *Hays v. Meyers*, (Ky., 1908), 107 S.W. 287; *Feist et al v. Roesler*, (Tex., 1935), 86 S.W. 2d 787; *Baker v. Seahorn*, (Tenn., 1851), 55 Am. Dec. 724; *Howard v. Gould*, (Vt., 1856), 67 Am. Dec. 728; *Croyle v. Moses*, (Pa., 1879), 35 Am. Rep. 654; *Equitable Life Ins. Co. of Iowa v. Halsey Stuart & Co.*, 312 U.S. 410, 85 L. Ed. 920; *Anno*. 33 L. Ed. 384; 43 *Words & Phrases* 79.

Unconscionable Bargains

“Where the inadequacy of the price is so great that the mind revolts at it the court will

lay hold on the slightest circumstances of oppression or advantage to rescind the contract." Elliot on Contracts, Vol. I, par. 159, p. 280.

And again in par. 210 at p. 344:

"The consideration may be so grossly inadequate as to raise a presumption of fraud or mistake."

The evidence conclusively established the fact that at the time the contract was entered into the value of the ranch was less than one-fourth of the price agreed on. Mr. Griffith testified that, based on his experience and knowledge and his examination of the ranch plus the evidence Mr. Peterson gave concerning the year in and year out water supply, the property was useful only for range land and that a good operator would not pay anything for rental (R. 130, 131). Mr. Griffith further stated that the ranch would not have been worth any more in 1952 than it would the day of trial (R. 132). Even assuming that there was ample water at all times and using the peak cultivated acreage ever mentioned in the record, the ranch would not have been worth over \$15,000.00 (R. 130, 198). Mr. Griffith even hesitated to assume a situation with all of the water necessary. Mr. Peterson and Mr. Griffith both stated that this farm was definitely "marginal" (R. 119, 131).

Defendants attempted to claim depreciation on the shacks on the two places. It appears ridiculous that such a contention should be made. Mr. Peterson stated that

from the time he knew the ranch "the buildings, the yard, the fences, around there, were in a stage where it appeared the place was about to be abandoned" (R. 122). An utterly frank statement considering the testimony and viewing the pictures (Exhibits 21, 23, 26 & 28) would be that these so-called homes have been for a great many years the rough equivalent of the less prosperous end of Tobacco Road.

The concept of an "unconscionable contract" has been recognized in the law for a great many years as a basis for a court of equity to rescind or reform a contract. Page on the Law of Contracts, Vol. 1, Sec. 641, at page 1114 defines such a contract as follows:

"An unconscionable contract is said to be one 'such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other.'"

Certainly the contract in the case at bar fits this definition.

An early Utah case has recognized the concept of "unconscionable contract", *Howells et ux v. Pacific States Savings Loan and Bldg. Co.*, (1900), 21 Utah 49, 60 Pac. 1025. In this case, plaintiff borrowed \$1,500.00 from defendant entering into a contract to pay \$18.00 per month as premiums on thirty shares of the capital stock of the company, nominally subscribed for by the borrower, until \$100.00 per share on said stock was paid. In addition, plaintiff was required to pay

on the \$1,500.00 loaned, interest at the rate of six per cent per annum monthly until said stock was paid. In addition, plaintiff was to pay all fines which might become due on the stock. On full payment for the thirty shares of stock, they were to be surrendered to the company, and the obligation would be satisfied. The court figured that plaintiff would pay \$4,250.00 to pay back the \$1,500.00 borrowed or interest at the rate of twenty-six per cent per annum. The court held that the contract was unconscionable and refused to enforce it. Instead the court treated it as a simple loan. The court cited Lord Hardwicke in *Chesterfield v. Janssen*, 2 Ves. Sr. 155, as stating, "that fraud which is *dolus malus* may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses and not under delusion would make on the one hand and as no honest and fair man would accept on the other which are inequitable and unconscientious bargains."

A great deal of the cases on this subject rule that such a transaction creates a presumption of fraud while others merely grant relief on the ground of an "unconscionable contract."

In the case of *Ditto v. Slaughter*, (Ky., 1906), 92 S.W. 2, where a married woman purchased worthless stock which plaintiff knew to be so, the court held the circumstances sufficient to put plaintiff on notice that the husband or someone must have misrepresented the

value of the stock or she was incompetent to protect herself. Also, the court stated in such a case fraud will be presumed.

Statesbury v. Huber et al, (Dist. Ct. E. D. N.Y. 1916), 237 Fed 413, held an "unconscionable contract" where an heir assigned \$50,000.00 of his share in an estate with the life tenant having a life expectancy of nine years, for the sum of \$23,500.00 cash.

Butler v. Duncan, (Mich., 1881), 10 N.W. 123, involved a dissolute spendthrift borrowing money, the contract calling for him to purchase some property of the lender at about three times value even though the lender had insisted that the borrower inspect the land and the borrower represented he had inspected it when he had not.

There are many other examples of "unconscionable contracts" which courts have refused to enforce. *Domus Realty Corp. v. 3440 Realty Co., Inc., et al*, (N.Y., 1943), 40 N.Y. S. 269; *Osage Nation of Indians v. United States*, (1951, U.S. Ct. of Claims), 97 F. Supp. 38; *Stiefler v. McCullough*, (Ind., 1931), 174 N.E. 823; *Wenninger v. Mitchell et al*, (Mo., 1909), 122 S.W. 1130; *Hough's Administrator v. Hunt*, (Ohio), 15 Am. Dec. 569; *McKinney v. Pinckard*, (Va., 21 Am. Dec. 601. Also see Annotation, 15 Am. Dec. 572, for a discussion of "unconscionable contracts" in relation to constructive fraud.

The rule of law developed in granting relief to persons entering into unconscionable contracts results from a public policy which cannot in an enlightened civilization allow persons to ruthlessly impose on and take advantage of other persons. As it is stated at 15 Am. Dec. 573, quoting from the case of *Jurzain v. Toulman*, 9 Ala. 662:

“And gross inadequacy of price, when connected with suspicious circumstances or peculiar relations between parties, affords a vehement presumption of fraud.”

SUMMARY

The facts clearly show that a deceptive fraud was practiced on Rex Cole. Cole was interested in purchasing a producing farm. The farm shown Mr. Cole was represented to him in every way as a producing farm, and not a marginal farm. The evidence conclusively shows that this always has been a marginal farm. With the absolute necessity of water for production in that area, Parker's conversation about the water supply should be very closely scrutinized along with the surrounding picture painted to Mr. Cole. The fact that Mr. Cole entered into an “unconscionable contract” agreeing to pay at least double the price that the place would be worth even if it were a producing farm and many times the actual value of the place should be considered along with the surrounding facts and given effect according to the well established law. It is earnestly urged upon the

court not to place its stamp of approval upon such an outrageous "steal" but by its opinion to publish to the people of this state that honesty will be rewarded and dishonesty in any form shall not be sanctioned.

POINT II.

THE FORFEITURE OF \$11,600.00 WAS AGAINST LAW AND GROSSLY UNCONSCIONABLE.

By its decree the trial court forfeited \$11,600.00 from plaintiffs when plaintiffs had possession of the ranch for approximately one year and five months. By its decree the trial court forfeited an amount in excess of the total value of the ranch even stretching the value as much as possible. The trial court found that the value of the ranch was less than \$20,000.00 (R. 37).

The receiver has tried to sell the ranch and has not even been able to obtain an earnest money offer. The only figures even talked of by the receiver with prospective purchasers were from \$10,000.00 to \$18,000.00 (R. 82). The true value of this place which is definitely marginal and good only for range land and which could not even be leased free to a good operator could not even approach the \$18,000.00 figure. Even if the ranch had all the water it could use, according to Mr. Cole's estimate of irrigated acreage in August of 1952 of one hundred and thirty-five acres, the ranch would only be worth \$8,100.00 (R. 59, 130). Mr. Peterson stated that this ranch could never expect a constant supply of one second foot of water which could only irrigate from fifty or

seventy acres of land (R. 120, 121). Obviously, Mr. Griffith's reason for stating a good operator would not lease this land for anything is that a person could not earn as much as his labor is worth.

Yet, in spite of this evidence as to the true value of this ranch, the trial court forfeited an amount of money greatly in excess of the total value for only one year and five months occupancy. Even under the theory that the trial judge orally expressed that a man should be forced to perform his contracts no matter how inequitable, it seems cruel and unusual to forfeit a person's life savings for one year and five months occupancy of a marginal farm.

The law of forfeitures in Utah is well established. The case of *Perkins et al v. Spencer et al*, (1952, Utah), 243 P. 2d 446, set to rest any doubts that had theretofore existed. See also *Malmberg v. Bough*, 62 Utah 331, 218 Pac. 975; *Craft v. Jensen*, 86 Utah 13, 40 P. 2d 198; *Western Macaroni Mfg. Co. v. Fiore*, 47 Utah 108, 151 Pac. 984; *Young et ux v. Hanson et ux*, 218 P. 2d 666; *Jacobsen v. Swan*, 278 P. 2d 294; "Forfeitures Under Real Estate Installment Contracts in Utah" by Brigitte M. Bodenheimer, 3 Utah Law Review, p. 30; "The Right of a Defaulting Vendee To the Restitution of Installments Paid" by Arthur L. Corbin, 40 Yale Law Journal 1013; Restatement of Contracts, Sec. 339; Williston On Contracts, Revised Edition, Sec. 779.

The Spencer case specified the following elements of loss which may be credited to the vendor at pages 451 & 452:

- “1. Loss of an advantageous bargain;
2. Any damage to or depreciation of the property.
3. Any decline in value due to change in market value of the property not allowed in items Nos. 1 and 2;
4. For the fair rental value during the period of occupancy.”

There was no loss shown for items 2 and 3. There also was no rental value shown. It was obvious that the basis of the trial court's forfeiture was item No. 1, loss of an advantageous bargain. The question finally resolves itself to whether or not this court should enforce an “unconscionable contract” to this extent. An enforcement of such a contract by recognizing the loss of bargain would place a premium on sharp and deceitful practices and a stamp of approval on severely and heedlessly punishing the unwary trusting people of the community. What sort of heinous misconduct should a person be guilty of to merit such a drastic and cruel punishment as was inflicted upon plaintiffs in this case? Should a person be so punished merely because he is unwary and believes that other people will speak the truth to him? Certainly in accordance with all of the doctrines devel-

oped in equity this court should not approve of such a hard hearted and drastic decree as made by the trial judge.

The decree of the trial court allowed defendants approximately sixteen per cent per annum on the outrageous price of \$40,000.00. If the true value of the property is used as a base then defendants were earning at least over one hundred per cent per annum. Compare this with the case of *Howells et ux. v. Pacific States Savings, Loan and Bldg. Co.*, supra, where the court held an unconscionable contract where the defendant received twenty-six per cent per annum and *Perkins v. Spencer*, supra, where this court held that fifty per cent per annum and twenty-five per cent of value was an extreme penalty.

There is an indication in the authorities that courts will refuse to specifically enforce contracts on a smaller showing than it would take to set the contract aside. It is stated at 15 Am. Dec. 303:

“The court will not infrequently decline to enforce a contract specifically where it would also refuse to set it aside: (citing authorities). In other words, less evidence will be satisfactory in the one case than in the other. Where specific performance is asked, and there is great inadequacy, together with suspicious circumstances connected with the contract, the plaintiff must, by his proof, remove the taint.”

This court in the case of *Malmberg et al v. Bough et al*, (1923), 62 Utah 331, 218 Pac. 975, stated on rehearing at p. 981:

“Indeed, as stated in the opinion, ‘every contractual right of the vendor should be scrupulously preserved,’ provided, as in the case at bar, the contract is not unconscionable or one that a court of equity would not enforce.”

And in the main opinion at p. 980:

“It ought not to be enforced in a court of justice whenever the damages exceed an adequate and just compensation for the wrong complained of.”

If this court allowed defendants the loss of bargain for an “unconscionable contract” such as exists in the case at bar, it would be a holding that defendants could specifically enforce this contract.

This court in past decisions has dedicated itself to the principles of equity which have arisen to discourage sharp and deceitful practices and the ensnarement of unwary persons, into “unconscionable contracts.”

CONCLUSION

Plaintiffs respectfully submit to this court that the trial court’s decree was based on a hard hearted view of the law and a total disregard of equitable principles.

The evidence conclusively shows that defendants were guilty of fraudulently representing a marginal place to be a producing place by deceptively keeping away from plaintiffs the knowledge which they had of a hidden fault which made it so that the place in question could never be anything but marginal. The price asked for the place, the inference that the place was always as productive as it was when shown, the best season the ranch had ever had, the studious avoidance of mentioning the hidden fault and the whole tenor of the conversation that there was nothing unusual in the loss of water from source to ranch, all of which circumstances, show that a deceitful fraud was perpetrated upon plaintiffs. The gross and shocking inequity of the contract, providing for a price many times the actual value raises a "vehement presumption" that fraud was practiced on plaintiffs.

In accordance with authorities, the unconscionableness of the contract alone is sufficient to refuse defendants any relief.

The forfeiture of \$11,600.00 paid on the contract by plaintiffs is shocking and does violence to the law in Utah and all equitable principles. For the court to, in effect, enforce such an unconscionable contract by

granting defendants the loss of their bargain, places a premium on unfairness, dishonesty and sharp dealing while cruelly and inhumanly punishing the unwary, trusting, unlearned and ignorant persons imposed on.

Respectfully submitted,

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RECEIVED copies of the within Brief of
Appellants this..... day of September, 1955.

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Counsel for Appellants