

1956

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

Utah Supreme Court

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Raymond R. Brady; Dean E. Flanders; Counsel for Respondents;

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In the  
**Supreme Court of the State of Utah**

REX L. COLE and HELGA S. COLE,  
*Plaintiffs and Appellants,*

vs.

FRANK J. PARKER, LIZZIE PARK-  
ER, HAROLD V. PARKER, and  
JUANITA PARKER,  
*Defendants and Respondents.*

**FILED**

FEB 27 1956

Clerk, Supreme Court, Utah

Case No.  
8340

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**BRIEF OF RESPONDENTS**

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**BRIEF OF RESPONDENTS**

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**PRELIMINARY STATEMENT**

The parties will be referred to as in the Court below.  
All italics are ours.

**STATEMENT OF POINTS RELIED UPON  
BY RESPONDENTS**

**POINT I.**

**THE TRIAL COURT WAS JUSTIFIED IN  
FINDING THAT THERE WAS NO FRAUD ON  
THE PART OF THE DEFENDANTS.**

## POINT II.

THAT THE PLAINTIFFS HAVE WAIVED ANY RIGHTS TO RESCIND THE CONTRACT THEY MIGHT HAVE HAD BY THEIR ACTS AND CONDUCT.

## POINT III.

THE TRIAL COURT DID NOT ERR AND WAS JUSTIFIED IN FORFEITING THE SUM OF \$11,600.00 PAID ON THE CONTRACT BY THE PLAINTIFFS.

## ARGUMENT

## POINT I.

THE TRIAL COURT WAS JUSTIFIED IN FINDING THAT THERE WAS NO FRAUD ON THE PART OF THE DEFENDANTS.

Plaintiff's first point as set forth in their appeal is that the evidence establishes fraud on the part of the defendants, and in support of this point they claim that Harok V. Parker avoided taking Mr. Cole along the route of the creek. This, of course, Mr. Parker denies. Mr. Parker testified (R. 203) "that there were two routes from the ranch to Hendries Creek. We took him up one and down the other." But even though Mr. Parker did not return from the spring to the ranch by another route but came back by the same route, this does not constitute fraud or misrepresentation. The undisputed evidence is that Mr. Cole visited the ranch and went over the whole ranch and

saw for himself exactly how much water was reaching the ranch (R. 55). The evidence is also undisputed that Mr. Cole, after looking at the ranch and specifically the amount of water reaching the ranch, was taken by Mr. Parker to the source of the stream; that is, the spring at the head of Hendries Creek. At this point Mr. Cole saw exactly how much water was originating at the source of Hendries Creek. Mr. Cole also saw for himself that the major portion of the water originating in Hendries Creek was lost by percolation before it reached the ranch. When Mr. Parker, Mr. Crystal, Mr. Hancock and Mr. Cole were present at the source of the water supply there was a conversation concerning the necessity of ways and means of conserving the water which was being lost by percolation on its course to the ranch. Mr. Hancock, who is a disinterested witness, being also a prospective purchaser and who was being shown the ranch at the same time it was being shown to Mr. Cole, testified as follows (R. 144, 145) :

“Q. What do you recall Mr. Parker said specifically about the water?

“A. That in the spring there is as much as 52 second feet, that it declines during the year, that the water was being lost—a good share of it was being lost by running into the ground before it got to the ranch—if cement were taken about the first mile or so that it would help a lot.”

Mr. Mark Crystal, called as a witness for the defendants, testified as follows (R. 155) :

“Q. Did you have—by you I mean Mr. Cole and you and Mr. Parker and Mr. Hancock—did you have any discussion about the water situation?

“A. Yes sir.

“Q. Will you state to His Honor and counsel the conversation as you remember it that Mr. Parker and these gentlemen and you had.

“A. When we walked over to the creek where the water was flowing I observed a clear stream of water of 5 or 6 second feet of water. Obviously at that particular time we were discussing percolation loss of 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 familiar with down in central Utah where I had occasion to lead the water over a plot about two and a half to three miles from the mouth of a canyon down to a reservoir. At that time I stated this particular company—this irrigation company—had contracted having a ditch lined; a concrete and beveled ditch, and that had been able to solve their loss; that is, prevent the loss of water through percolation by the construction of a ditch and cement lining it.”

The evidence is conclusive that Mr. Cole did understand the true condition of the water supply, and that the water varied at different seasons of the year and from year to year, and that the major part of the water originating at the source was lost by percolation en route to the ranch, and that extensive development work was necessary; namely, the cementing of a ditch from the source of Hendries Creek to the ranch.

Now appellants claim that they were misled because Mr. Cole was taken from the ranch to the source of the water supply and back by the same route, and therefore he was prevented from observing that the water was being lost by percolation in a hidden fault somewhere en route.



Mr. Parker testified that there are two routes from the ranch to the source of the water supply and that they went up one and down the other (R. 203). If this is not the true fact, then it is significant that Mr. Black only attempted to prove the contrary by the testimony of Mr. Cole, and did not ask either of the disinterested witnesses, Mr. Hancock or Mr. Crystal, who were also in the truck and who also knew the facts. There is only one fair conclusion to be drawn from the record, and that is that Mr. Cole was taken from the ranch to the water supply by one route and back by the other; and that Mr. Cole saw precisely how much water was originating at the source and how much was reaching the ranch; that the water was being lost by percolation into the ground and that in order to preserve the water certain development work was necessary; namely, the cementing of the ditch to preserve the water; and that the cementing would be about \$1.00 per foot.

Even though there was what counsel terms a hidden fault; as testified to by Don Peterson (R. 118), Mr. Cole was not misled, because he was advised by Mr. Parker and Mr. Crystal that the water was being lost by percolation and exactly what must be done to prevent it. That Mr. Cole was not in fact misled by reason of an alleged hidden fault is shown by the testimony of Mr. Cole himself (R. 75):

“Q. Did you know of your own knowledge what the reason is, now?

“A. Yes. The knowledge that I found out is that the water between the ranch and above there goes into the gravel.”

So there is insufficient evidence in the record to establish that the water is lost by reason of a hidden fault, because Mr. Cole found out by experience that as an actual fact the water was being lost in the gravel en route to the ranch

There is no evidence in the record to substantiate counsel's claim that Harold Parker misrepresented to Mr. Cole the extent of productivity of the ranches. Mr. Harold Parker took Mr. Cole over both of the entire ranches and he saw for himself just exactly how much land was under cultivation and what crops it had produced, as it was then about harvest time (R. 55).

That the ranches were and had been for many years productive is established by the uncontradicted testimony of Mr. Parker. Mr. Parker testified that he was married and had eight children, and that the family was supported from the ranch for the years, 1951, 1949, 1948, 1947, 1946, 1945 and 1944. Mr. Parker testified that his income tax for the year 1951, the year previous to the sale to Mr. Cole, showed a net taxable income derived from the Robinson ranch of \$1,200.00 Mr. Parker had ten exemptions of \$600.00 each, making the total profit derived from the Robinson ranch alone of \$7,200.00 after the interest payments, taxes, depreciation, and the usual farm deductions had been made. Mr. Parker also testified that his income tax return for the year 1950 showed a taxable income of a little better than \$1,200.00, and that it was about the same for the year 1949 (R. 220 and 230).

No evidence was introduced as to the income of the Meecham ranch, but the uncontradicted evidence is that

the income of the Robinson ranch was in excess of \$7,200.00 and with some variation it had been substantially the same. The evidence does not sustain counsel's contention that the ranches were marginal ground and unproductive. Mr. Parker moved onto the Robinson ranch in the year 1937 (R. 193) and lived on the ranch from then until it was sold to Mr. Cole in 1952, with the exception of three years when he leased the ranch, and at all times made payments on the mortgage and supported his family from the ranch (R. 194-195).

Counsel, in support of Point I, argues that various courts have agreed that there are subtle ways of being deceitful; that the courts have ruled time and time again that half-truths are just as dishonest as bold lies, and cites the case of *Melnoe et al. vs. Dixon et al.*, 225 P. 2d 273.

Even if we concede, which we do not, that the case cited by counsel stated a true rule of law applicable to this case, it is clearly distinguishable. In the case cited by counsel, the owner-builder had intentionally and knowingly failed to comply with the building requirements and had obtained no permits for the building, and they could not be obtained because the building was not constructed according to the legal requirements. All of these facts were positively known to the seller-builder, and knowing of his own knowledge that the building requirements had not been complied with and that building permits had not been taken and could not be obtained, and knowing that the house would eventually have to be torn down. The court disposed of this case by adopting the language used in the case of

*Mary Pickford Company vs. Bagley Bros., Inc.*, 86 P. 2d 102:

“If the seller of a security impliedly represents that the law had been complied with and that a permit for such sale had been issued, it is to naturally follow that if the builder-owner of a house sells such house he impliedly represents that the law has been complied with.”

Counsel also cites the case of *Dyke vs. Zaiser*, 182 P. 2d 353:

“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 it says:

“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.”

In all of the cases cited by counsel there was a concealment of a material fact. Now, the only concealment of fact alleged by counsel is what counsel calls the fatal defect of a hidden fault. There is no evidence in the record to prove that this so-called hidden fault was in any manner prejudicial to the defendant. Before going to the source of the water supply Mr. Cole saw for himself just how much water was reaching the ranch (R. 55). They then went to the source of Hendries

Creek and he saw exactly how much water there was at the source, and he saw for himself that the major portion of the water was being lost by percolation. There was then a discussion as to how the water could be conserved (R. 144, 145), and everyone understood that the major portion of the water was being lost by percolation and that in order to conserve the water it was necessary to cement a ditch from the source of the supply to the ranch. Whether the loss was by percolation into the gravel or was due to a hidden fault or an alluvial fill, this fact was well understood; that the water was being lost and the development program that was necessary to conserve the water. The plaintiff knew at the time the contract was signed that the major portion of the water was being lost by percolation, either by passing over an alluvial fill, as it was designated by the defendant, or by a hidden fault, as it was described by Mr. Peterson. So that even though there was a hidden fault and the defendant failed to reveal it to the plaintiff, the plaintiff was not misled in any manner, for he knew that in fact the water was being lost by percolation en route to the ranch.

## POINT II.

THAT THE PLAINTIFFS HAVE WAIVED  
ANY RIGHTS TO RESCIND THE CONTRACT  
THEY MIGHT HAVE HAD BY THEIR ACTS  
AND CONDUCT.

Even assuming that Mr. Parker concealed and failed to mention to Mr. Cole the alleged hidden fault and did in fact mislead him about the water supply, the plaintiffs

under the facts as they appear in this record are not entitled to have the contract rescinded. The rule is stated in 17 C. J. S. 914:

"In accordance with the general rule stated in Section 431 above, a party desiring to rescind for fraud or false representation *must do so promptly and within a reasonable time*, and the right is lost by the failure to act in such a time on discovery or after it might have been discovered by the use of due diligence."

In *Fletcher vs. Wireman*, 152 Ky. 565, the court says:

"The party who claims to have been defrauded in the execution of a contract *must assert this defense within a reasonable time* after a suit has been brought against him to enforce the contract, or within a reasonable time after the fraud was discovered, or else he shall be deemed to have waived his right to rely on the alleged fraud."

The same rule is expressed in *Century Life Insurance Company vs. Taylor*, 176 Southwestern 373, wherein the court says:

"Where one sues in equity to obtain rescission of a contract because his claim to the relief sought upon the grounds of fraud induced the execution of the contract, *he must act promptly in making his election of remedies*, for if he fails to act promptly upon discovery of the fraud he loses his right to rescission in equity."

The rule has been settled in this jurisdiction that the buyer, if he is to rescind the contract, must do so within a reasonable time after the discovery of the alleged fraud. In the

case of *Fraily vs. McGarry*, 211 P. 2d 840 (Utah 1949), this court says:

“After reviewing the record of events as they transpired, we find it unnecessary to determine whether the defendant, by fraud, induced the plaintiff to enter into the contract. The facts present in the instant case preclude plaintiff from rescinding the contract because of misrepresentation or fraud. It is well settled by decisions from this court that all persons claiming the right to rescind must, after the discovery of the fraud, announce his purpose and adhere to it (*Taylor vs. Moore*, 87 Utah 493, 51 P. 2d 222). We have also held that the purchaser must evidence his intention to rescind by some unequivocal act, either by notice or by some act amounting to a notice of intention to rescind (*McKellar Real Estate and Investment Co. vs. Paxton*, 61 Utah 97, 218 P. 128).

*“Moreover, a defrauded party after learning the truth will not be permitted to go on deriving the benefits from the transaction and later elect to rescind (LeVine vs. Whitehouse, 37 Utah 160, 109 P. 2).*

“The fraud alleged by plaintiff as grounds for rescission consist of alleged statement made by the defendant that there was ample water available to irrigate the 960 acres of farm land, and that it was a mere formality to secure the right to drill wells in order to obtain the water. The falsity of such statements, if made, was made known to the defendant many months before he decided to rescind the contract. He became aware of the fact that there was a supposed shortage of water and that it would not be a mere formality to receive permission to drill wells when he received his first letter from the state engineer on March 2, 1946. Yet he did not notify

defendant of his intention to rescind until some ten months later. Black in his work in rescission and cancellation, Section 536, states the rule as follows:

“ \* \* \* It must be remembered that a contract induced by fraud, false representation, mistake, etc., is not void, but merely voidable, and it is entirely within the right of the injured party to affirm it or treat it as valid and subsisting. In this respect he has a choice or election, and he should not be required to make his decision instantly. The true doctrine is that if discovering the facts justified rescission the party is entitled to a reasonable time in which to decide upon the course he will take, but this does not mean that he will be indulged in a vacillating or hesitating course of conduct, *but that he must act with such a measure of promptness as fairly can be called reasonable with reference to all the circumstances of the particular case.* Particularly he must, if possible, avoid such delay as will make the ensuing rescission injurious to the other party. He must use reasonable diligence in ascertaining the facts which may entitle him to a rescission *and must act as soon thereafter the discovery of them so that the opposite party will not be unnecessarily prejudiced.* The rule is that he who would rescind the contract must offer to do so promptly upon discovery of the facts that will justify a rescission and while he is able of himself or by the judgment of the court to place the opposing parties substantially in status quo.’ ”

Mr. Cole bought the Robinson and Meecham ranches on the 13th of August, 1952, and took possession of the property and harvested and sold the crops which were then on the place; and, as testified to by Mr. Cole, he had determined within two months after the contract was signed that he was going to rescind the contract (R. 95).



"Q. You didn't make up your mind to rescind until December 31?

"A. No, my mind was made up two months after I moved onto the property."

Two months after the contract was executed Mr. Cole had determined to rescind the contract, but did nothing to notify the Parkers until December 1, 1953. Mr. Cole harvested the crops then on the place and then abandoned the property and permitted the trees to die, and made no effort to prevent the premises from deterioration. Immediately after purchasing the properties he listed them for sale at a price in excess of \$40,000 (R. 95), the purchase price for the properties, and continued to hold possession until December 31, 1953, thirty days before the next payment was due, depriving the Parkers of the use of the properties and allowing them to deteriorate, knowing full well that he intended to rescind the contract. By such action and conduct by the plaintiffs, they waived all right to rescind the contract, if there had ever been such a right. It is also the well settled law that if the buyers desire to rescind the contract they must also do equity and return the consideration. The uniform real estate contract under which the plaintiffs purchased the property provides for the sale of 760 acres of land and the grazing permits for 30 head of cattle on 3400 acres of public lands under leases from the Bureau of Land Management (R. 4 & 5). The grazing rights were a substantial part of the contract, and during the time the plaintiff held possession of the property he defaulted in the payment of the grazing fees that were required to be paid under the terms of said contract, and

allowed the leases to become in default, and then secured the grazing permits in his own name, and offered to return the property to the defendants, keeping the grazing permits, a very substantial part of the value of the property sold; so that if the court should rescind the contract it could not put the parties in status quo, because of the willful fraud on the part of the plaintiff in permitting the permits to lapse and then taking them in his own name (R. 79).

"Q. Did you ever receive the stated land leases in your own name?

"A. No sir.

"Q. Have they lapsed since, do you know?

"A. They have.

"Q. Where are they now?

"A. The state land leases?

"Q. Yes.

"A. I have them.

"Q. You picked them up in your own name, have you?

"A. Yes sir.

"Q. Why did you do that, Mr. Cole?

"A. *For my own protection.*"

At the time of the execution of the contract, Mr. Cole paid the sum of \$2,800 as the down payment, and the next payment in the amount of \$8,800 was payable December 31, 1952. Prior to the date of this payment Mr. Cole had discovered the alleged fraud (R. 106).

"Q. Mr. Cole, it is stated here in the earnest money receipt that \$2,800 was paid down on the contract and the next payment was due December

31, 1952 of \$8,800. I will ask you if you made that payment of \$8,800 in addition to this.

"A. I made that payment under protest, yes sir.

"Q. I will ask you whether or not you made an application in the fall of 1952 to the Soil Conservation Service.

"A. I did. I wrote the Soil Conservation Service for assistance on what to do there after I found out my troubles that were confronting me there and getting that water down, when I did find out.

"Q. Did anyone come in response to your application?

"A. Yes sir.

"Q. Who was that?

"A. Mr. Don Peterson and his fellow worker, I think Mr. Walker.

"Q. What kind of assistance was contemplated?

"A. They were—of course, it wasn't a new problem to Mr. Peterson. At that time he told me so. He says—

"Q. Don't tell me about that conversation, just what kind of assistance was contemplated.

"A. They were going to help me conserve the water as near as they could. Work out the problems what would help on the water and also leveling and the ditching and that of the property that would be for the best interests of the ranch.

"Q. Was there any feasible solution that was worked out for the water problems?

"A. The only feasible solution that was worked out, if a person could have gone approximately five miles up the canyon from the ranch and put a cement ditch in all the way.

"Q. Were you quoted a price on that project?

"A. Yes, the price would run anywhere from \$20,000 to \$27,000.

"Q. Was anything done as a result of this application?

"A. Well, I tried at various places to get some assistance on that, but I just couldn't get to first base because they didn't seem to think that the ranch was worth the money that had to be spent on it to develop the water. It wasn't sure enough."

By his own testimony Mr. Cole admitted that Mr. Peterson had made a survey of the work necessary to solve the water problem which had been discussed by the parties at the time the contract was signed, and had full information as to all of the facts concerning the water supply, and particularly the alleged hidden fault as testified to by Don Peterson, and the cost of the project and that the cost was prohibitive and financial assistance could not be obtained. All of this information was known to Mr. Cole before the payment of \$8,800 was due on the 31st day of December, 1952; and he had at that time made up his mind to rescind the contract. If Mr. Cole was going to rescind the contract, this was the time to have done so, at the time he had discovered the alleged fraud and when he was in possession of all of the information concerning the ranch and the water supply. If Mr. Cole had elected to rescind the contract in the fall of 1952 after he had been advised by Don Peterson of all of the facts concerning the water supply and the cost of the necessary development work and at the time, by his own testimony, that he had determined to rescind the contract, then there would have been little damage to either

of the parties, and the parties could have been put in status quo without a hardship on either of the parties. At that time, Mr. Cole had paid only the sum of \$2,800, and under the testimony of Mr. Cole himself, practically all of that sum was derived from the sale of the crops on the place, (R. 78, 83), which were grown and ready for harvest at the time he entered into the contract. If a rescission had been made at that time, Mr. Parker could have either resold the ranches or rented them or farmed them himself and secured a crop for the year 1953. But instead of notifying Mr. Parker of his intention to rescind the contract when he had all of the information concerning the alleged fraud and the water supply of the property, he elected to make the payment of \$8,800 on December 31, 1952, "under protest," as he termed it in his testimony, and continued to hold and occupy the property for another full year without making any effort to plant the ground into crops and permitting the trees and premises to go to rack and ruin and deteriorate in value, thereby allowing the property to depreciate in value and depriving the Parkers of the opportunity of either selling the property or planting it to crops; while Cole speculated during the entire year trying to resell the property at a profit and in the meantime acquire in his own name the grazing rights for 30 head of cattle on the public lands, which constituted a substantial part of the value of the property sold; and then just before the payment was due on December 31, 1953 he cried fraud and elected to rescind the contract, but kept the grazing rights which he had secured in his own name, and demanded back all of the money paid, with interest.

The facts of this record clearly show that if the Parkers did misrepresent the water supply to the ranches, Mr. Cole, by his acts and conduct, had clearly waived the right to ask for rescission of the contract, and it would be grossly inequitable to permit the plaintiffs to keep the property for a whole year after the discovery of the alleged fraud, for the purpose of speculating on reselling the property without making an honest effort to cultivate and manage the property and to reduce the damages depriving the defendants of the opportunity of either planting the property to crops or reselling it, and then keep the grazing rights for 30 head of cattle on 3400 acres of public lands which they fraudulently acquired after they had discovered the alleged fraud, but before they elected to rescind the contract.

That the plaintiffs did completely abandon the property in the fall of 1952 after Don Peterson had made his survey of the property and the water supply for Mr. Cole was shown from the testimony of Mr. Cole himself (R. 69).

“Q. What did you do in the way of work on the place after you moved on?

“A. We finished harvesting the crops, the barley, finished the barley and put up the crop of hay and that was the end of it, and that was about all we did on the place.

“Q. About how long was it you stayed at that time living on the place?

“A. Well, we came on—I was probably on the place three months, two and a half.

“Q. Where did you go after you moved off?

“A. I moved back in the home I was building out here on 110th South.

"Q. What was your reason for moving back?

"A. The biggest reason we moved back, the creek dried up entirely. I couldn't get any water for drinking and I was scared of the well water that was there. One big reason."

This is the strongest evidence in the record to sustain the plaintiff's contention that he did not abandon the property in the fall of 1952, after he had listed it for resale. Even if there was no water in the creek, as Mr. Cole testified, there was water in the well, which was admitted by Mr. Cole, but he was scared of it, without offering evidence that the water was not good. It was the same water as had been used by the defendants for many years. Mr. Cole admitted that he did not plow a furrow or plant a seed in the fall of 1952 (R. 69). Mr. Cole further testified that he attempted to lease the property in the spring of 1953 to Bert Goff (R. 72 & 73), but that he didn't commence to work.

Mr. George Sims, a nearby farmer, testified that he lives 17 miles from the Robinson and Meecham ranches, and that he goes by them frequently (R. 171); that there was no attempt made on the part of the plaintiffs to do any work on the Robinson or Meecham ranches whatsoever in the spring of 1953 (R. 171, 172). Mr. Sims also testified that there was water on the ranches from Hendries Creek in 1953, but not quite as much as 1952 (R. 173). Mr. Sims also testified that there were crops raised on the neighboring farms for the year 1953, but they were not quite normal. The preponderance of the evidence clearly shows that after Mr. Cole had removed the crops from the place and had had the place examined by Mr. Don Peterson that he then de-



terminated to rescind the contract and thereafter made no effort to plant the ranches to crops and moved from and abandoned the property and was content to gamble during the entire following year on selling the property at a profit without making any effort to raise a crop and reduce the damages or rescind the contract and return the property to the defendants in order that they might reduce the damages by planting it to crops or reselling it.

Counsel argues that the contract price for the ranches was the sum of \$40,000 and that they were in fact only marginal ranches and not worth more than \$20,000. Even if we should concede this, which we do not, the plaintiffs would not be entitled to rescind the contract under the facts of this case because all of the losses that the plaintiffs suffered were occasioned by their own desire and election to hold the property for a year in an effort to resell the same at a profit and to secure the grazing rights to 3400 acres of public lands for 30 head of cattle in their own names. Under all the facts of this case the return of the \$11,600 paid on the contract by the plaintiffs is not unconscionable, while on the other hand it would be unconscionable on the part of this court to rescind the contract and return the consideration of \$11,600 to the plaintiffs and permit them to keep the money paid on the contract from the sale of the crops which were ready for harvest at the time the sale was made, and also the grazing rights which the plaintiffs fraudulently acquired in their own names and after they had determined to rescind the contract, and which they did not at any time offer to return to the defendants.



The case at bar comes squarely and clearly within the rule laid down by this court in the case of *Fraily vs. McGarry*, 211 P. 2d 840, except that the case at bar is a much stronger case against rescission. In the *Fraily vs. McGarry* case the buyer vacillated for nine months after he had discovered that he could not obtain drilling permits from the Secretary of State's office in order to secure water for the place, thus deriving benefits under the contract for the period of nine months, before electing to rescind the contract. In the case at bar the plaintiffs not only vacillated for a period of ten months after they had learned of and discovered the alleged fraud, but a substantial part of the consideration paid by the plaintiffs was derived from the sale of crops already grown and on the place at the time of execution of the contract; and in the case at bar the failure on the part of the plaintiffs to rescind the contract at the time of the discovery of the alleged fraud was the sole and only cause for all the loss that one of the parties must now suffer.

### POINT III.

THE TRIAL COURT DID NOT ERR AND WAS JUSTIFIED IN FORFEITING THE SUM OF \$11,600.00 PAID ON THE CONTRACT BY THE PLAINTIFFS.

Counsel argues that the contract was unconscionable.

These were and had been producing ranches for many years, on which the Parkers had lived and raised their families (R. 195). Mr. Parker, after the usual farm deductions of interest, taxes, depreciation, labor and tak-

ing his ten exemptions of \$600 each, made an income of \$1,200, which would make the gross income of \$7,200 from the Robinson ranch for the year 1951, the year previous to the sale to Mr. Cole (R. 220).

Counsel argues that it is unconscionable to permit Mr. Parker to keep the sum of \$11,600 paid on the contract when the Coles were in possession of the property for only a year and five months. But at the time of the purchase of the ranches by the Coles the ranches were planted into crops that were grown and ready for harvest, and were in fact harvested by the plaintiffs (R. 59). There is a dispute as to the value of the crops harvested by the plaintiffs, but from the obviously biased testimony of Mr. Cole he harvested barley in the sum of \$1,498.22 (R. 78) and sold hogs for the sum of \$343.12 (R. 83). Mr. Cole testified that there were about 60 acres of alfalfa which he harvested (R. 59). Mr. Parker testified that there was about 40 or 50 tons of alfalfa baled hay in addition to the first crop, and that the value was about \$20 per ton (R. 207), making the total value of the hay at least \$800, not considering the value of the first crop on which there are no figures as to value or amount; so that at the very least \$2,641 of the \$11,600 paid by the plaintiffs was paid out of the crops that were on the place at the time of the sale to the Coles, and the plaintiffs have the grazing rights to 3400 acres of public lands, on which there is no evidence as to value.

Counsel states that the Perkins case (*Perkins vs. Spencer*, 243 P. 2d 446) sets forth the elements of damages which the defendants are entitled to keep:

- “1. Loss of an advantageous bargain;

"2. Any damage 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."

Under the facts in this case, the defendants are entitled to keep the total sum of \$11,600 paid by the plaintiffs. The contract contained the usual forfeiture clause in the Uniform Real Estate Contract (R. 4, 5), and this court is committed to the doctrine that the forfeiture clause of a contract is enforceable if it does not amount to a penalty and was a fair and honest effort to determine the damages, depending upon the facts of each case. In the case of *Christy vs. Guild et ux.*, 121 P. 2d 401, this court said:

"Assuming that such an issue may be properly raised in an action such as this, we must conclude that the forfeiture provision of the contract is just what it purports to be, and not a penalty. The contract provides for a down payment, the monthly installment to be made was \$20 per month for the first 6 months and \$30 per month from then on until the entire sum had been paid. While the appellant offered to prove that \$2,000 worth of improvements had been made on the premises, such proof would not add to their cause since it was admitted that the net monthly income from the premises, such proof would not add to their cause since it was admitted that the net monthly income from the premises was \$75.00. Such monthly income would more than compensate for the improvements to the premises plus the monthly installments."

In this case this court clearly upholds the principle that this court will enforce the forfeiture provision of a uniform real estate contract as liquidated damages stipulated to if they do not amount to a penalty. The correct rule as to whether a forfeiture provision in a uniform real estate contract amounts to a penalty or is in fact liquidated damages is stated by *Williston on Contracts, Revised Edition*, Section 7, P. 1921 as follows, and was cited with approval in the *Perkins vs. Spencer* case by this court:

“In spite of the language of the parties, there is little doubt that a sum named as liquidated damages in order to be given effect must be reasonable in amount. In the recent decisions of the most authoritative courts the primary question seems to be whether the parties honestly endeavored to fix a sum equivalent to the breach. This court says in other words, the reasonableness or unreasonableness of the stipulation is decisive.”

The same rule is also set forth in Section 339 of the *Restatement of Contracts*, dealing with the question of whether a forfeiture provision is liquidated damages or a penalty, and was also cited by this court with approval in the *Perkins vs. Spencer* case, and is as follows:

“(1) An agreement made in advance of breach fixing the damages therefore is not enforceable as a contract and does not affect the damages recoverable for the breach unless

“(a) The amount so fixed is a reasonable forecast of just compensation for the harm that is done by the breach and

“(b) The harm that is caused by the breach is one that is incapable or very difficult of accurate estimation.”

Applying this rule as stated in the *Restatement of the Law of Contracts*, quoted above and cited with approval by this court in the *Perkins vs. Spencer* case, to the facts of the case at bar, it becomes apparent that the forfeiture clause meets both the requirements (a) and (b) and is true liquidated damages. Mr. Cole purchased 720 acres of land, 135 acres of which was planted to crops, as testified to by Mr. Cole (R. 59) and 250 acres as stated by Mr. Parker (R. 198), which crops were ready for harvest; together with the grazing rights for 30 head of cattle on 3400 acres of public lands (R. 4, 5) for the sum of \$40,000.00. There were two homes on the property, and two orchards, both bearing fruit. The contract provided for the sum of \$2,800 down payment and the further sum of \$8,800 to be paid on or before the 31st day of December, 1952; making a total sum of \$11,600 to be paid on or before December 31, 1952 (R. 4, 5). No further payments were to be paid until the 31st day of December, 1953. The elements of damage that were reasonably foreseeable by the parties and which were attempted to be fixed by the parties as liquidated damages were as follows:

The amount and value of the crops then on the place were uncertain both as to the amount and the value. Mr. Parker testified that there were approximately 1,300 bags of grain of 90 pounds each, and that he took five tons, leaving 1,070 bags sold by Mr. Cole at \$2.50 per bag, for a total value of \$2,140 (R. 205). Mr. Cole testified that he had sold only \$1,492.22 worth of barley. Mr. Cole also testified (R. 98-99) that there were

“I don’t know how many bags of oats I took off, or barley, I should say. The wheat—there was a

pretty fair crop of wheat but by the time I got out there was no wheat for me. Mr. Parker informed me the wheat had been stolen and it apparently had because it wasn't around the place, and apparently the same thing happened to the biggest part of the oats."

There was also 45 to 50 tons of second crop of hay valued at \$20.00 per ton, and the first crop hay that was then in the stacks, the exact amount of which is unknown to the parties (R. 207). There was also 15 acres of corn to be harvested (R. 59). There were also two orchards of fruit. It is perfectly apparent that at the time this contract was entered into the damages in case of a breach would be very difficult if not entirely impossible to ascertain, and the facts of this case come squarely within the scope and purpose of liquidated damages as stated in requirement (b) as set forth in the *Restatement of the Law of Contracts*, Section 339. The damages were difficult, if not impossible, to ascertain.

Now were the damages which the parties forfeited in case of a breach in this case so disproportionate to the damages suffered by the defendants as to constitute a penalty? We think not. The defendants have suffered the following damages because of the breach of contract by the plaintiffs and the return of the property:

1. Payment of a real estate commission in the sum of \$2,800.00.
2. Interest from the 21st day of August to December 31, 1953, in the sum of \$3,255.00.

3. Taxes for the year 1953 in the sum of \$164.15 (R. 212).

4. Grazing fees in the sum of \$43.20 (R. 93).

The foregoing items make a total of \$6,262.35 which the parties could actually foresee and determine would be the actual damages to the defendants in case the contract was breached on the 31st day of December, 1953, the date it was actually breached. In addition to these items, the parties could reasonably foresee that the defendants would be damaged to the extent of the crops then on the place, which were harvested and sold by the Coles. Mr. Cole admitted that he sold barley for the sum of \$1,498.22 (R. 78) and pigs for \$343.12 (R. 83). When this sum is added to the foregoing items it makes a total of damages to the defendants of \$8,092.37, which does not take into consideration the wheat and oats which were on the property at the time the property was turned over to the plaintiffs but which were stolen after the execution of the contract and before the Coles got around to taking possession, nor the 40 to 50 tons of baled hay valued at \$20.00 per ton for a total sum of \$800.00 (R. 207). The total actual foreseeable damages suffered by the defendants is the sum of \$8,897.37, as established by the preponderance of the evidence, not including the wheat and oats that were stolen. When this sum is deducted from the sum of \$11,600 paid by the plaintiffs, this leaves the sum of \$2,702.63 with which to compensate the Parkers for the crop that they should have raised on the ranches for the year 1953 and for the depreciation on the two houses and the property and the two

orchards and the loss of grazing rights for 30 head of cattle on 3400 acres of public land. How can it be said that under all of the facts of this case that the forfeiture by the plaintiffs of \$11,600 was disproportionate to the actual damages suffered by the Parkers and amounts to a penalty? We think it cannot. It appears to be an honest and fair attempt to fix in advance and determine the damages in case of a breach in a situation where part of the damages were readily ascertainable and could be computed with certainty, but where a major part of the damages, that is, the value of the crops to be harvested and the crops to be grown the following year, the depreciation, and the loss of the grazing rights were not capable of accurate ascertainment by the parties stipulating to these elements of damages, and certainly under the facts of this case they were not disproportionate to the actual damages suffered and were certainly proper elements of damage for the parties to attempt to fix in advance as liquidated damages.

This court is committed to the doctrine that the forfeiture clause in such a contract will be enforced if it is a reasonable attempt to fix in advance the damages suffered and is not disproportionate to the value of the damages actually suffered. In *Bramwell Investment Co. vs. Uggle et ux.*, (Utah), 16 P. 2d 913 this court said:

“This court is committed to the doctrine that where the parties to a contract stipulate the amount of liquidated damages that shall be paid in case of a breach, such a stipulation is as a general rule enforceable if the amount stipulated is not disproportionate to the damage actually sustained.”



The case of *Perkins vs. Spencer* does not limit the damages recoverable to the items mentioned in this case, and this court does not in the *Perkins vs. Spencer* case depart from the long established rule in this jurisdiction that the court will enforce the provision for liquidated damages if the amount determined as liquidated damages in the case of breach is not disproportionate to the damage actually sustained. This court in the *Perkins vs. Spencer* case again reaffirms the long established doctrine in this court that the forfeiture provision as liquidated damage will be enforced if the amount stipulated to is not disproportionate to the damage actually suffered. In this case this court again uses the following language:

“This court is committed to the doctrine that where the parties to a contract have stipulated to the amount of liquidated damages that may be paid in case of breach, such stipulation is as a rule enforceable if the amount stipulated is not disproportionate to the damage actually suffered.”

That this court did not intend in the *Perkins vs. Spencer* case to depart from this doctrine is clearly shown from the following language of the court (P. 451).

“We hold that under the facts of this case the forfeiture provision amounted to a penalty, which is unenforceable. Defendant contends that to so rule nullifies their contract and leaves them no other recourse than they would have had if no such provision had been included. It is true that this should be done only with the greatest reluctance, and when the facts clearly demonstrate that it would have been unconscionable to decree enforcement of the terms of the contract. This is such a case.”

Under the facts of the *Perkins vs. Spencer* case the amount forfeited was in fact a penalty and bore no reasonable relationship to the damages actually suffered. But under the facts of the case at bar the amount of the forfeiture clearly bears a reasonable relationship to the actual damages suffered. In the *Perkins vs. Spencer* case there was a down payment of \$2,500 on a sale of property for \$10,500. In this respect the contract in this case was similar to the contract in the case at bar. The down payment was substantially 25% of the purchase price. In the case at bar the \$11,600 was substantially the same, 25% down. In the *Perkins vs. Spencer* case the contract provided for payments of \$75 per month, which the court found to be sufficient to compensate the seller for the interest, depreciation, etc., and the return of the \$2,500 paid as a down payment was clearly a penalty and bore no reasonable relationship to the actual damages suffered. But the facts of the case at bar are entirely different. The contract was executed on the 13th day of August, 1952 for the sum of \$40,000; payable \$2,800 down and \$8,800 on or before the 31st day of December, 1952. This was a sale of two ranches comprising 710 acres of ground, and grazing rights on 3400 acres of public land (R. 4, 5). At the time of the sale the ranches were planted to crops and they were about to be harvested, and were in fact harvested by the plaintiffs. The value of the crops was uncertain and difficult of ascertainment but was in fact a substantial part of the consideration paid to the defendant by the plaintiff. In other words, a substantial part of the money paid on the contract was derived from crops on the property at the time of the sale. There

were no monthly payments on the contract to provide for interest and rental value, as there were in the case of *Perkins v. Spencer*. In the Perkins case the contract contemplated termination in a few months, as soon as the Bountiful property was sold, and the \$75 per month payment was sufficient to pay the interest, taxes and rental. There was no evidence that the seller had sustained any loss in the way of payment of a real estate commission, so that the forfeiture of 25% down payment was clearly a penalty; but under the facts of the case at bar the 25% paid down does not amount to a penalty, but represents a reasonable and honest attempt to fix the damages and the amount of the forfeiture is not disproportionate to the actual damages suffered.

We do not believe that the court in the *Perkins vs. Spencer* case intended to limit the amount of the damages the vendor could recover to the specific items mentioned in the opinion, Nos. 1 to 4, P. 451-452, but under the facts of that case the seller was limited to these elements of damage. That the court did not in that case intend to limit the damage of the vendor in such cases to the specific items mentioned is clearly indicated by the language of the court in the cases cited by the court in its opinion. This court said in the *Perkins vs. Spencer* case:

“When the contract provision is unenforceable the only way the rights of the parties can be adjusted is in the case of damages ordinarily recoverable for such breach of contract, and citing *Malmberg vs. Baugh*, and in the case of *Malmberg vs. Baugh* this court said:

“‘Having elected to terminate the contract and resume possession of the property the vendor under

the rule we have invoked is entitled only to compensatory damages measurable by the difference between the contract price of the land with interest and its value at the time he terminates the contract and elects to resume possession of the property, less payments made thereon by the vendee. Upon the most casual analysis it will be found that this rule secures the vendor the full benefit of his contract and in the opinion of the court, this is all he is entitled to under the law. *If there are any damages in the case not covered by the above rule, they have not been made to appear.' "*

The language of the court clearly shows its intention not to deprive the vendor of such actual damages (not punitive) as the vendor shall actually sustain because of the breach. But in the case of *Malmberg vs. Baugh*, 218 P. 975 just referred to, that was the only element of damage shown, and in the case of *Perkins vs. Spencer* those elements of damage enumerated by the court were the only elements of damage shown. But in the case at bar the defendants have shown the following items of compensatory damages to which they are justly entitled, in the event that this court does not enforce the forfeiture provision of the contract as liquidated damages:

1. A real estate commission in the sum of \$2,800 which was entirely lost to the defendants when the plaintiffs defaulted in their contract.
2. The value of the crops on the ranch at the time of the execution of the contract, as admitted by Mr. Cole in the sum of \$1,840.30, and a much greater sum as testified to by Mr. Parker.

3. Interest in the sum of \$3,255.00.
4. Taxes for the year 1953 in the sum of \$164.15.
5. Grazing fees in the sum of \$43.27, making a total sum of \$8,102.65 in actual compensatory damages suffered by the defendants because of the failure of the plaintiff to comply with the terms of the contract as admitted by Mr. Cole himself and not including the hay as testified to by Mr. Cole and the grain that was stolen.

### SUMMARY

The facts clearly show that there was no fraud practiced by the defendants upon the plaintiffs; that Mr. Cole made an extended inspection of the property; that the contract was entered into before harvest time, when the crops were grown and ready for harvest; that Mr. Parker showed the entire properties to the plaintiffs and after viewing the ranches and seeing for himself the amount of land under cultivation, the amount planted to crops and the productivity of the ranches, and also the amount of water reaching the ranch at that time, they then were taken by Mr. Parker to the source of Hendries Creek, the source of the water supply for the ranches, and Mr. Cole saw for himself that the major part of the water was being lost by percolation before it reached the ranches. That there was at that time a discussion between Mr. Cole, Mr. Crystal, Mr. Hancock and Mr. Parker concerning the ways and means of preventing the loss of the water by percolation and Mr. Cole understood the true condition of the water supply and the necessary development work that would be

required in order to secure a stable water supply for the ranches.

That soon after the purchase of the property, Mr. Cole had Mr. Don Peterson make a survey of the ranches and the water supply, and Mr. Don Peterson advised Mr. Cole early in the fall of 1952 as to the nature of the water supply and the development program necessary to conserve the water. Mr. Cole attempted in the fall of 1952 to secure aid in the development of the water, but was unable to do so because of the prohibitive cost. Then, after securing all of the information concerning the ranches and the water supply he made up his mind in the fall of 1952 that he would rescind the contract, but instead of notifying the defendants of his intention to rescind the contract in the fall of 1952 when he knew all of the facts, he elected to make the payment due on the contract on the 31st day of December, 1952 in the sum of \$8,800 under protest, as he termed it, and did then abandon the property and failed to plant the property to crops and held possession in an effort to try to sell the property at a profit, until December 1, 1953, when he served notice of his intention to rescind the contract.

It is earnestly urged that under the facts of this case the court did not err in finding that the defendants had made no fraudulent representations and that under the facts of this case the plaintiffs were not entitled to rescind the contract, and that the defendants were entitled to keep the full sum of \$11,600 paid by the plaintiffs as liquidated damages for the breach of the contract.

## CONCLUSION

Defendants respectfully submit that the trial court's decree was not based upon a hard-hearted view of the law and a total disregard of equitable principles as stated by the plaintiffs in the conclusion of their brief, but that the decree of the court is based upon the soundest principles of law and equity. We submit that under the facts of this case all of the loss that the plaintiffs must now suffer was caused solely by the intentional misconduct of the plaintiffs in this case after they had discovered all of the facts concerning the alleged fraud of the defendants and while they were holding the property from December 31, 1952 to December 1, 1953, while they were attempting to resell the property at a profit rather than return the property to the defendants in order that they might resell the same or plant it to crops and thereby reduce the damages to be suffered. It is not a harsh ruling of the court nor a harsh rule of law that requires the plaintiffs to assume the damages that are occasioned solely by their own intentional misconduct. In this case the plaintiffs would have suffered no damages whatsoever if they had elected to rescind the contract in the fall of 1952 after they had discovered the alleged fraud, because at that time they had received from the sale of the crops all of the \$2,800 which they had made as the original down payment, and if a rescission had been made at that time there would have been no substantial losses to either of the parties. Under the facts of this case equity requires that this court find that the sum of \$11,600 forfeited by the plaintiffs was a fair and reasonable effort to fix the amount of liquidated damages where the damages were in truth and

in fact very uncertain, and that the damages suffered by the defendants were not disproportionate to the amount fixed by the parties as liquidated damages, and the forfeiture clause of this contract should be upheld by this court.

Respectfully submitted,

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