

1958

# Rex Holland v. Arthur E. Moreton et al : Brief of Appellants

Utah Supreme Court

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**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

UNIVERSITY UTAH

DEC 19 1958

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1958-1958

Clerk, Supreme Court, Utah

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

*Plaintiffs and Appellants,*

—VS.—

ARTHUR E. MORETON, ETHEL  
T. MORETON, also known as E. T.  
MORETON, JOHN R. MORETON,  
also known as J. R. MORETON,  
ROSE ANN P. MORETON, SUSAN  
MORETON TEVIS,

*Defendants and Respondents.*

**BRIEF OF APPELLANTS**

RAWLINGS, WALLACE, ROBERTS & BLACK  
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# IN THE SUPREME COURT of the STATE OF UTAH

---

REX HOLLAND,  
REX HOLLAND, Administrator with  
the Will Annexed of the Estate of  
JOHN G. HOLLAND, Deceased,  
*Plaintiffs and Appellants,*

—vs.—

ARTHUR E. MORETON, ETHEL  
T. MORETON, also known as E. T.  
MORETON, JOHN R. MORETON,  
also known as J. R. MORETON,  
ROSE ANN P. MORETON, SUSAN  
MORETON TEVIS,  
*Defendants and Respondents.*

Case No. 8740

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## BRIEF OF APPELLANTS

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(Numbers in parentheses refer to pages of the record. The parties will be referred to here as they appeared in the trial court.)

### HISTORY OF THE LITIGATION

This action was brought by Rex Holland individually and as Administrator with the Will Annexed of the Estate of his father, John G. Holland, deceased, against Arthur Moreton, a lawyer, and members of Moreton's immediate family and against five corporations. Before the case came to trial the lower court denied a motion

to dismiss and a motion for summary judgment filed by the Moreton's (146), but granted a motion for summary judgment filed by the corporate defendants (63, 64). While that judgment was affirmed, *Holland v. Columbia Iron Mining Co.*, 4 Utah 2d 303, 293 P. 2d 700, this Court specifically cautioned:

“But nothing herein contained should in any respect be construed as a determination of any of the issues as between the appellants and the individual defendants.”

The evidence introduced in this case was substantially the same as the evidence considered by this Court in the appeal of the corporate defendants on the basis of which evidence the following statement of facts was made in the opinion of Justice Crockett (4 Utah 2d at 308):

“It appears that after conversations with Mathesius, Moreton contacted the Hollands at Cedar City with respect to the patenting of the mining claims in question which plaintiffs had previously located with a view to eventually arranging a sale; that he acted as their attorney in doing so; that he advanced the necessary costs involved in the patenting and became a one-fourth owner; that he acted for his co-owners in negotiating a sale of the claims to Columbia; that Moreton bore a fiduciary relationship to the Hollands and, therefore, owed them a duty to make a full disclosure of facts; that he seems to have followed a carefully studied plan to conceal from the Hollands that he was getting \$287,000 for his one-fourth interest, whereas, he was getting for them only \$33,333.33 for each of their one-fourth interests; that meanwhile he warned the



Hollands not to talk to anyone else about the matter.

“The above facts appear from the Hollands’ testimony and are supported by other circumstances shown: that the letters (later referred to herein) which Mathesius requested and which Moreton presented to the Hollands for them to sign, carefully avoided any recitation of the price per ton or the actual purchase price being realized from the claims; the fact that when Columbia furnished papers handling it as one transaction, Moreton returned them and requested two separate conveyances which would have the effect of concealing from the Hollands the full consideration being paid; the fact that the two separate conveyances were used and the transaction at the closing was so managed that the plaintiffs first received their check for \$100,000 about which they quite naturally would be somewhat elated and preoccupied while the Moreton phase of the transaction was handled.”

This case went to trial against the individual defendants before the Honorable Stewart M. Hanson and a jury. At the close of all the evidence the court directed a verdict against both plaintiffs, in favor of all the individual defendants except Arthur E. Moreton and against the administrator and in favor of defendant Moreton (288, 289). The trial court then submitted the cause of action of Rex Holland in his individual capacity against Moreton to the jury. The jury found in favor of Rex and awarded him general damages in the sum of \$95,833 and punitive damages in the sum of \$25,000 (277). Thereafter the court set aside the verdict and granted defendants’ motion for a directed verdict with

respect to the cause of action of Rex Holland in his individual capacity and entered a judgment for defendant Moreton notwithstanding the verdict (292-294).

## NATURE OF THE APPEAL

This is an appeal from the judgment entered in favor of the defendant Moreton and against the plaintiff Rex Holland in his individual capacity, after the jury had rendered judgment in Rex's favor in the sum of \$95,833 general damages and \$25,000 punitive damages, from the judgment on the directed verdict entered in favor of the defendant Moreton and against the plaintiff Rex Holland as Administrator with the Will Annexed of the Estate of John G. Holland, deceased and from the judgment on the directed verdict in favor of the other defendants and against both plaintiffs (304, 305).

The plaintiff, Rex Holland, in his individual capacity, asks the Court to set aside the judgment entered against him notwithstanding the verdict, and to reinstate the judgment in his favor against Moreton in the sum of \$120,833.00 and to add thereto interest on \$95,833 at the rate of 6% per annum from the 20th day of December 1948. He further asks the court to set aside the judgment on the directed verdict entered against him and in favor of the defendants other than Moreton and to enter judgment in his favor against the such defendants in a like amount or, in the alternative, to grant a new trial against such defendants.

The plaintiff Rex Holland as Administrator with

the Will Annexed of the Estate of John G. Holland, Deceased, asks this Court to reverse the judgment entered on the directed verdict in favor of all defendants and to enter judgment in his favor and against the defendants in the amount rendered against Moreton or in the alternative to grant the administrator a new trial.

### PRELIMINARY STATEMENT

Rex Holland and John Holland, his father, and one Murie owned three mining claims. The defendant Moreton, an attorney at law, duly licensed to practice law in the State of Utah, fraudulently obtained a one-fourth interest in said mining claims. Thereafter, acting as their attorney, he negotiated a sale of the property. He fraudulently concealed from the co-owners that the total sale price of the property was \$387,500.00 and he fraudulently concealed from the co-owners the fact that he himself received \$287,500.00 for the one-fourth interest that he had fraudulently obtained from the co-owners while each of his clients received but \$33,333.33 for an undivided one-fourth interest.

This is an action for damages against the Moretons resulting from attorney Moreton's breach of his confidential relationship with his clients, the Hollands and Murie, by fraudulently misrepresenting the value of the property, by concealing from them the total price received for the entire property and the amount he received for his purported one fourth interest in the property and for otherwise overreaching and taking advantage of his clients from the very beginning.

## STATEMENT OF THE CASE

The three prospectors, Rex Holland, his father, John Holland (now deceased), and William C. Murie, jointly located the three mining claims known as the M & H Claims in 1941 and 1943 (Ex. P-1, P-2 and P-3). These men were of trusting disposition and entirely lacking in business experience. The transaction involved herein was the only sale of mining property with which they had ever been connected (526). They not only had no idea of what the value of their property was but, additionally they had no way of determining its value (669).

(a)

Attorney Moreton in the spring of 1946 went to Cedar City and made arrangements to see the co-owners at the Escalante Hotel (331, 332). The inference is that he knew a great deal about the potential value of the claims which the co-owners did not know and he sent for them.

At this first meeting he proposed an arrangement which was accepted by them, whereby he was to be their attorney in the proceedings to get a patent on their property and in the sale of their property, and whereby he was to have an option to patent the property in which event he was to receive a quarter interest in their property and also an option to purchase the remaining three-fourths interest of the property (333). The agreement was reduced to writing by attorney Moreton and signed by the co-owners (333, 334). They were never given a copy of it and Moreton has never produced a copy of

it. His claim is that the document has been lost (335, 612, 615).

Plaintiff Rex Holland testified as to this first option that no time was fixed for its exercise and that no price was fixed but that both were left blank in the writing prepared by Moreton and signed by Rex, his father and Murie (333, 336). While the defendant Moreton's testimony attempts to contradict this (623, 627), the matter that is uncontradicted is this: attorney Moreton gave no adequate consideration for the option he secured on the property ultimately sold for \$387,500.00. Moreton testified that the writing, of which he had the only copy and which he did not produce (615), recited a consideration of \$1.00, but his attorney objected to a question as to whether or not even that \$1.00 was paid (626).

At this first meeting Moreton instructed the co-owners, as he did on every other occasion, not to discuss the sale of the property with anyone (445).

On July 5, 1946, Moreton wrote the co-owners again instructing them not to discuss the sale of the property with anyone (644). His reason, as announced at the trial, for giving this instruction, was that it was necessary to protect him (645).

(b)

On September 1, 1946, Moreton who had done absolutely nothing at all towards getting the claims patented (627, 628), came to Cedar City and on his plea that he needed more time (629, 651), had the option extended to April 1, 1947 (Ex. P-4). Again, he gave them

no consideration for this extension and gave them no copies of the paper he prepared and had them sign (339, 340, 657).

Moreton next went to Cedar City on or about March 10, 1947, and he still had done nothing at all in connection with patenting the claims except to talk to a surveyor (343, 663) but this time he had his clients sign a letter he had previously prepared (341, 345) (Ex. P-8) under the terms of which he was to receive a deed to a one-fourth interest in the property *immediately upon his merely filing an application for a patent survey*. This, again, was presented by him without any consideration and represented a drastic change from the original agreement that provided he was to get the one-fourth interest only when he actually patented the property.

It was at this March meeting that Moreton told the co-owners that there were 1,500,000 tons of ore on the property (343) but that because of the overburden "we could not expect to get more than 10 cents a ton" (344). Moreton said, furthermore, that they could probably get \$133,000.00 as an over-all price and of this amount the co-owners would get \$100,000.00, leaving \$33,000.00 for their lawyer, defendant Moreton (344).

Additionally, it appears, that Moreton was careful on this and frequent other occasions to point out that it might be possible to get something more than \$133,000, perhaps as much as \$155,000. While his clients agreed that he could keep whatever there might be over \$133,000, it is crystal clear on the record that this was on their belief induced by his representations that the price could



never in any event be more than \$155,000.00 and the overage never more than \$22,000 (445, 527, 529, 530, 542, 543).

(c)

On or about June, 1947, Moreton who still had not secured a patent on the property and whose options to purchase a three-fourths interest for \$100,000.00 had expired all unexercised, next prepared another document for his clients (Ex. P-5). This one gave him an option to purchase the three-fourths interest for \$100,000.00, payable either in cash or in ten annual payments, without anything for interest. Moreton testified as to this option which was for a twelve month period that he "overlooked" putting a date on it when he prepared it at his office (677, 678) and further, that this new undated option represented "quite a little difference in the original proposal" between him and his clients for which he was prepared to pay more money than \$100,000.00. He, of course, never advised his clients of this (679) when he procured their signatures to the option which he admitted he never exercised (352, 682).

In July of 1947 Moreton prepared and procured the signatures of the co-owners to a so-called Agreement of Ownership (360-361, 688) to take the place of the prior undated option (360, Exhibit D-33). This agreement of ownership recited that Moreton was to have a one-fourth interest in the property and all over \$100,000 if "said property shall be sold, leased or otherwise disposed of on a tonnage basis for a sum in excess of \$133,333.33." Additionally and as also provided in the

agreement of ownership, he had his clients give him on July 23, 1947, a warranty deed for a one-fourth interest (691, 692, Exhibit P-6). Moreton confessed at the trial that in view of the fact that he had not secured a patent on the property he had not earned that one-fourth interest (701, 702) and that the agreement of ownership represented a considerable deviation from the option in that under the agreement of ownership he was not required to put up \$100,000 or get anyone else to put up \$100,000, and that further, there was no time limit in the agreement of ownership as to when anything had to be done (698).

From his own testimony it is clear he never advised his clients of the significance of any of the documents they signed and (except for purported tax considerations which clearly appear to have been an afterthought) the only reason he gave at the trial for having them sign the documents of July 23, 1947, was that *he “preferred to have it that way to evidence my ownership as a matter of record”* (695). In any event, the property was neither sold, leased or otherwise disposed of *on a tonnage basis* so as to fall within the terms of the agreement of ownership.

Moreton next prepared and filed the application for patent August 25, 1947 (Ex. P-12). He also prepared the other papers necessary to be signed by the co-owners (Ex. P-13).

(d)

On September 14, 1948, Rex Holland had a chance meeting with one Parley Canfield on the street (381).



Canfield, who had been a total stranger to Rex (368), mentioned that there were 3,500,000 tons of ore in the M & H claims and iron ore had been bringing 25 cents a ton (381, 382). Since Moreton had told them there were only 1,500,000 tons of ore in the M & H and the price was only 10 cents a ton, Rex didn't know what to think (446), so that night he wrote this letter (Ex. P-14) to Dr. Walther Mathesius, President of Columbia, hoping that Mathesius would advise him.

Mathesius took the letter to Attorney Moreton and discussed it with him (717, 786), but neither of them answered it or ever at any time mentioned it to Rex or the other co-owners (438-439, 526-527).

In the meantime Canfield admitted to Rex that he had been mistaken as to the tonnage contained in the M & H claims (383) and that he had been talking about somebody else's claims (382, 383). Rex had been told by Moreton that while some iron ore would bring 25 cents a ton, the iron ore in the M & H claims could only bring about 10 cents a ton because of the size of the overburden (344). Rex concluded that since Canfield had been entirely wrong as to the amount of tonnage, that therefore Canfield's price information was not applicable to the M & H claims and that Moreton had advised the co-owners correctly on the tonnage and the price (385). Rex's confidence in Moreton was now restored (527). His belief in everything that Moreton had said in the past was confirmed and he believed everything that Moreton said thereafter (540). For that reason Rex never asked Moreton how much he (Moreton) was get-

ting for his (Moreton's) one-fourth interest or how much was being obtained for the entire property (527, 528).

(e)

The record establishes that Moreton was dealing with Mathesius before April of 1946 (831, 857, Letter of July 5, 1946, set out at 982). However, Moreton freely admitted that his first discussion with Mathesius concerning the price which Columbia would pay for the M & H claims occurred at a meeting between Moreton and Mathesius in Moreton's office on October 8, 1948 (784).

At this meeting, Mathesius stated that since Columbia had acquired the Milner claims it would be interested in leasing the M & H properties. Mathesius asked Moreton what the ore was worth and he replied that it was worth 25 cents a ton. Mathesius readily agreed to this price (784, 785).

A few days after October 8, Mathesius and Moreton had a telephone conversation in which they agreed that the tonnage basis would be 1.55 million tons (794). According to Moreton, the entire "negotiations" consisted of 38 words (789). Mathesius told Moreton that Columbia would pay 25 cents a ton based upon *Columbia's* estimate of the tonnage and Moreton answered that that was agreeable with him (789).

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

(f)

After Mathesius and Moreton had agreed upon a

total price of \$387,500 Columbia sent to Moreton a *single document* containing the offer of sale for the entire property by all four co-owners for a total sum of \$387,500 (551, 769). This use of a single document was in accordance with the standard practice of Columbia when they were dealing for property owned by more than one person (549).

Moreton, however, advised Columbia that he wanted the transaction embodied, not in a single document, but in two sets of documents: one to cover the sale of the three-fourths interest of his clients at a price of \$100,000 and the other to cover the sale of his one-fourth interest for \$287,500.00 (551, 771).

Additionally, Moreton, in compliance with the prior request of Mathesius, procured the signature of his clients to Exhibit P-19 dated October 13, 1948 (388). In this document the tonnage is referred to as 1.5 million tons but there is nothing in it with respect to the total price or the price per ton which is to be paid (771).

Columbia agreed to Moreton's request that they abandon their standard practice of using a single document embodying the offers of all four owners and instead employed two sets of documents, one covering the offer of Moreton's clients and the other covering the sale of Moreton's one-fourth interest alone (551). Thereupon Moreton proceeded to procure the signature of his clients to another document dated October 16, 1948, prepared by him and stating that the co-owners were satisfied with the sum of \$100,000 and that Moreton could sell his interest

for whatever price Columbia and he could agree upon (780, Exhibit P-16).

On November 20th, still another letter was prepared by Moreton (Exhibit P-17) and presented to his clients for their signatures (794, 795). It stated that it was no concern of theirs as to when, to whom, at what price or upon what terms Moreton may sell his interest. Again, as in the letters of October 13th and 16th, notwithstanding that all matters of price covering both Moreton's interest and his clients' interest had been clearly and completely resolved, the document which Moreton induced his clients to sign was so misleadingly worded as to make it appear that the matter of price was still for future determination.

It further appears that originally Moreton and Mathesius had agreed that the purchase by Columbia would be handled under an escrow agreement and that this arrangement was abandoned (791, 792). Of course, had the transaction been handled by escrow all parties would have been fully informed as to all matters, including the total price paid and the amount received by defendant Moreton.

(g)

On December 19, 1948, the co-owners received a telegram from Moreton requesting that they come to Salt Lake. On December 20, 1948, they presented themselves at Moreton's office (392). Dr. Mathesius and Mr. Heald of Columbia arrived. Heald turned over some papers to Moreton who then read the deed conveying the interest of the co-owners to Columbia. The co-owners then affixed their signatures to a receipt (393).

There was nothing said at this meeting about the amount of money that Moreton was to received for his interest. There was no mention of a figure of \$387,500 nor of a figure of \$287,500. No revenue stamps were put on the deeds at that time (395).

We realize that there is a conflict of evidence in this matter, but the evidence must be viewed in its light most favorable to plaintiffs and both Rex Holland (393-399) and Clara Holland (933-939) testified concerning this matter as above outlined. Rex and his mother both testified that at the final meeting of December 20, 1948, neither Moreton, Mathesius, nor anyone else informed them of the contract between Columbia and Moreton covering the sale of Moreton's purported one-fourth interest and the amount Columbia was paying Moreton for his purported one-fourth interest and also the amount Columbia was paying for the entire property; and that Moreton also concealed the revenue stamps which were to be attached to the separate deeds covering the interest of Moreton and the interests of the co-owners.

This testimony is of particular significance in view of the fact that Moreton testified that he and Mathesius had agreed in October of 1948 that the co-owners were to be fully informed as to the total price being paid and as to the price paid for Moreton's interest, at the closing of the transaction on Dec. 20, 1948 (777-780, 812). It would appear obvious, of course, that neither Moreton nor Mathesius would have felt the need for any such arrangements except for the fact that they were both fully aware of the ignorance of the co-owners as to the true situation. Thus



it is both express and implicit on the record in this case that all parties were aware that the co-owners did not know the true situation prior to December 20, 1948, and of course, the testimony of the co-owners which the jury had a right to believe and did believe and which is to be treated for the purposes of this appeal as conclusive, was that they were not informed on December 20, 1948.

Although because of the confidential relationship which existed between the parties, it is not necessary to show reliance by Rex and his father, John Holland, on Moreton's representations the testimony and evidence at the trial (395-399), was that had Rex known Moreton was receiving \$287,500 for his interest or that the ore was being sold at twenty-five cents per ton or that the entire property was worth \$387,500, he would not have signed the offers to sell the  $\frac{3}{4}$  interest for \$100,000 (Exhibit P-15), the letter of October 16 (Exhibit P-16), the letter of October 13 (Exhibit P-21), the letter of November 20 (Exhibit P-17), or the warranty deed (Exhibit P-22); that he would not have accepted the check and that he would not have signed the receipt for the check from Columbia (P-21) or signed the statutory deed to Columbia (Exhibit P-22) or the warranty deed to Moreton (Exhibit P-7).

It was, of course, Moreton's duty to tell Rex and the co-owners these things. Moreton at the trial, after days of evasion, finally broke down under examination and admitted that he never told the co-owners how much he was getting for the property (514, lines 24-30):

“Q. (By Mr. Pollack) Will you now tell me when

it was that you told the Hollands and Murie, for the very first time, that Columbia was paying 25 cents a ton for the M&H claims?

A. I never told them that at any time.

Q. You never told them?

A. No.”

(h)

Three years later it was discovered and it is now admitted that Moreton sold the entire property for \$387,500 and that he received for the one-fourth interest which he had fraudulently procured, \$287,500.00 (400, 401).

It is manifest on the record that the confidential relationship existing between Moreton and the Hollands continued at least up until the time of the actual discovery of his fraud and that appears from the fact that when John Holland died on October 9, 1949, Moreton was employed by the Hollands to act as attorney for them and the estate of John Holland and that he accepted that employment and continued in it until finally after the actual discovery of the fraud by Rex Holland, he was discharged (940).

Rex first learned that the property had been sold for \$387,500 in October of 1951 (400). He was at the home of Bishop Parson U. Webster of Cedar City. Canfield stated that the M & H Claims had brought \$387,000. Rex was shocked to learn of this total price and after he considered for some time he wrote Mr. Moreton (401). The letter he wrote was introduced as Exhibit P-21. In this letter he reminds Moreton that Moreton had lead them to believe that there was 1.6 million tons of good

grade iron ore for which the steel company would pay the owners 10 cents per ton. This was the first time that the plaintiff, Rex, had learned of the fraud which had been perpetrated upon him by his lawyer Moreton.

Moreton answered Rex by a letter of December 18, 1951 (Ex. P-25) in which Moreton threatened to put Rex in jail if Rex pursued the matter any further. Copy of this letter was attached to plaintiff's amended complaint (43) and was, of course, introduced in evidence at the trial. There is no clearer indicia of Moreton's fraud in this case than his answer to Rex's letter. It not only gives a clear indication of Moreton's guilt and his knowledge of his guilt, but it also indicates Moreton knew he was dealing with simple naive people.

Rex went to the U.S. Attorney in Salt Lake City to determine whether he had violated the law in asking Moreton for an adjustment (Ex. P-26, P-68). The U. S. Attorney advised him of his rights and he then employed counsel. Rex's counsel then wrote to Moreton requesting information regarding the details of the transaction. However, Moreton refused to furnish the information (531). After the investigation of this case was begun by plaintiff's attorney, Moreton began to "loan" Murie (one of the co-owners) \$250.00 every single month up to at least the time of the trial.

(i)

Rex Holland is suing as the administrator of the Estate of his father John Holland, and Rex Holland is also a plaintiff in his individual capacity.



This is a brief resume of the testimony in this case and our intention is by it to give the Court a general background of this case. As we deal with the specific points involved we will go more into detail. Additionally, for the convenience of the Court, we are collecting in a separate pamphlet the testimony at the trial pertaining to each of several points as to which we feel the Court will want to be fully informed.

## STATEMENT OF POINTS RELIED UPON

### POINT I.

THE EXISTENCE OF A CONFIDENTIAL RELATIONSHIP BETWEEN MORETON AND THE HOLLANDS WAS ESTABLISHED AS A MATTER OF LAW.

### POINT II.

THE BURDEN OF PROOF WAS UPON MORETON TO ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT THE CO-OWNERS WERE FULLY INFORMED OF ALL MATTERS RELATIVE TO THE TRANSACTION, THAT THE TRANSACTION BETWEEN HIM AND THE CO-OWNERS WAS FAIR AND EQUITABLE AND THAT NO ADVANTAGE OF THE CO-OWNERS WAS TAKEN BY HIM.

### POINT III.

THE EVIDENCE IS CONCLUSIVE THAT MORETON DID NOT MAKE THE NECESSARY DISCLOSURE, THAT HE MISREPRESENTED THE PRICE, THAT HE CONCEALED THE PRICE AND THAT THE TRANSACTION WAS UNFAIR AND THAT HE TOOK ADVANTAGE OF THE CO-OWNERS.

### POINT IV.

THE EVIDENCE IS CONCLUSIVE THAT MORETON'S FAILURE TO MAKE THE DISCLOSURE CONCERNING PURCHASE PRICE WAS WILFUL AND DELIBERATE.

## POINT V.

AS A MATTER OF LAW THE STATUTE OF LIMITATIONS HAD NOT RUN AT THE TIME THIS ACTION WAS COMMENCED.

## POINT VI.

REX HOLLAND AS ADMINISTRATOR OF THE ESTATE OF JOHN HOLLAND HAD STATUTORY AUTHORITY TO BRING THIS ACTION AND DID NOT NEED SPECIFIC COURT AUTHORITY.

## POINT VII.

IN REINSTATING THE JUDGMENT THIS COURT SHOULD ORDER THAT INTEREST BE ADDED THEREON FROM THE 20TH DAY OF DECEMBER, 1948, TO DATE OF FINAL ENTRY OF JUDGMENT.

## POINT VIII.

JUDGMENT SHOULD BE ENTERED IN FAVOR OF THE ESTATE IN THE SUM OF \$120,833.00.

## ARGUMENT

## POINT I.

THE EXISTENCE OF A CONFIDENTIAL RELATIONSHIP BETWEEN MORETON AND THE HOLLANDS WAS ESTABLISHED AS A MATTER OF LAW.

There can be no question about the fact that the defendant Moreton was acting as the attorney and agent for the other co-owners. He agreed to act as their attorney in obtaining a patent upon the M&H Claims and in selling the claims. We submit that under the evidence in this case this confidential relationship appears as a matter of law.

Rex Holland testified as follows (337):

“Q. Was there anything else said in the conversation about what he was going to do, or what you shouldn’t do, or anything of that kind?

A. He told us at that time, that he, when we started on this patent, that he would be our attorney, that he would be our attorney in getting the patent, and that he would also be our attorney in the sale of these properties.”

Moreton never denied that he had so told the co-owners.

Every document used in the transaction between Moreton and the co-owners was prepared by Moreton and presented to the co-owners. Never, at any time, did they refuse to sign any document which Moreton placed before them. The documents so signed present an impressive list:

1. The original agreement signed in the spring of 1946. (This document was never produced by Moreton and the co-owners did not have a copy thereof.)
2. The extension of the option and agreement to give an undivided one-fourth interest for patenting (Ex. P-4).
3. The undated option (Ex. P-5).
4. The agreement of ownership (Ex. P-6).
5. Warranty deed conveying one-fourth interest to Moreton (Exhibit P-7).

6. Letter of understanding (Exhibit P-8).
7. Power of attorney and authority to act (Exhibit P-18).
8. Re-amended location certificate (Exhibit P-9).
9. Amended location certificate (Exhibit P-10).
10. Application for Patent (Exhibit P-12).
11. Three affidavits of citizenship (Exhibit P-13).
12. Letter of October 13, 1948 (Exhibit P-19).
13. Letter of October 16, 1948 (Exhibit P-16).
14. Letter of November 20, 1948 (Exhibit P-17).
15. Offer of October 16, 1948 (Exhibit P-15).

All of these documents affected the legal relations existing between the co-owners, the government and Columbia. They are the type of documents about which a person would seek legal advice and in preparing these and presenting them to the co-owners for signature there can be no question but what Moreton was acting as their attorney. He is an attorney of long standing in the State of Utah. The co-owners looked to him as their attorney and he should not be permitted to now say that he was not acting in his professional capacity. The co-owners had no other attorney from whom they obtained advice.

The closing of the transaction occurred in the office of Moreton, the attorney (392). He there read to them the documents relating to the transfer of the interest of the co-owners to Columbia. He presented the documents to them for their signature. Implicit in his conduct was

his advice that these documents were proper for them to sign and would properly effectuate the intention and desires of the parties. Here again, he was acting as the attorney for these people in effecting an eventual transfer of their interest in the mining claims to Columbia.

He, in addition, acted as the agent of the co-owners in negotiating the sale of the M & H mining claims. Mathesius dealt with no one but Moreton. As a matter of fact, when Rex wrote the letter of September 14, 1948, to Mathesius, Mathesius refused to "go around" Moreton and took up the contents of the letter with him. Mr. Moreton on every occasion that he talked with Rex and his father cautioned them not to talk with anybody about the terms of this deal (445). He not only cautioned them orally, but in a letter (Ex. D-33) he advised John Holland "however, let me caution you again to leave the entire bargaining and selling of these properties to me as agreed upon."

Further proof of the continued existence of the confidential relationship is found in the evidence that after John Holland died on October 9, 1949, the Holland family employed Moreton to handle John's estate. He continued as attorney of record until the summer of 1953 (940).

The foregoing facts are admitted by all parties concerned and we submit that this confidential relationship between the Hollands and Moreton was established as a matter of law. In any event, the jury, under Instruction No. 6, found that this relationship existed. Certainly there can be no dispute that at least a question of fact was presented on this matter and the court could not con-

clude as a matter of law that there was no confidential relationship existing between these parties.

## POINT II.

THE BURDEN OF PROOF WAS UPON MORETON TO ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT THE CO-OWNERS WERE FULLY INFORMED OF ALL MATTERS RELATIVE TO THE TRANSACTION, THAT THE TRANSACTION BETWEEN HIM AND THE CO-OWNERS WAS FAIR AND EQUITABLE AND THAT NO ADVANTAGE OF THE CO-OWNERS WAS TAKEN BY HIM.

Utah cases clearly require that where the existence of a confidential relationship is established that any transaction between the parties, in order to be upheld when questioned by the confidant, must be shown to have been fair and equitable, that no advantage has been taken of him and that he was fully informed of all matters relative to the transaction. The burden of establishing these propositions is placed upon the advisor. This is particularly true where the relationship of attorney and client is shown to exist. The attorney is under a duty to make all of these disclosures and showings and if his conduct is ever called into question he has the burden of establishing these propositions by a preponderance of the evidence.

In *Omega Investment Co. v. Woolley*, 72 Utah 474, 271 Pac. 797, the relationship of attorney and client was involved. In addition the defendant attorney acted in some ways as an agent of plaintiff. In that case shares of stock had been transferred to the defendant attorney. The trial court ordered him to re-convey the stock to

plaintiff. This Court affirmed. The Court concluded, as it must be concluded in the case at bar :

“There can be no question but that the trial court was justified in drawing the conclusion that a fiduciary relation existed between Baldwin and Woolley at the time the stock in question in this case was transferred. In fact, no other conclusion can reasonably be drawn.”

The Court, in discussing the law, then stated :

“The confidential relation being shown to exist, the burden devolved upon Woolley to show that, in the making of the transaction, the fullest and fairest explanation and communication was made to Baldwin of every particular in Woolley’s breast; that the transaction itself was fair, and the consideration paid therefor adequate, before a court is justified in permitting the transaction to stand.”

The Court again stated :

“Whether Woolley had information at that time, that Baldwin did not have, of facts that tended to enhance the value of the property, cannot be told. The burden under the authorities was upon Woolley to show that he made a full and fair disclosure of all facts within his knowledge to Baldwin and that Baldwin entered into the agreement freely and fully advised.”

\* \* \* \* \*

“Not only was the burden placed upon Woolley to show a full and fair disclosure of all facts within his knowledge, but it was also his duty to show that the transaction was fair and equitable, and that the consideration paid was adequate.”



“All of the instruments relied on by the defendant as the consideration for the transfer of the stock were executed while the relation of confidence existed between the parties, and are burdened with the presumption that they were executed as a result of undue influence and fraud without full disclosure of all facts known by Woolley, and without an adequate consideration. The same thing is true with reference to the infringement contract and all other transactions between these parties during the year 1924. No attempt was made to overcome the presumption.”

In the recent case of *In Re Swan's Estate*, 4 Utah 2d 277, 293 P. 2d 682, wherein an attorney was involved, the Court reaffirmed the rule of the Omega case. In discussing the effect of the presumption arising from the existence of a confidential relationship, the Court stated:

“Since this presumption has the effect of shifting the burden of persuasion that these legacies were not induced by fraud or undue influence, then in determining whether the findings of the trial court are sustained by the evidence, we must assume that there was fraud or undue influence unless the trial court is convinced that no fraud or undue influence was exercised, or unless the evidence to that effect is so strong and convincing that a finding to the contrary would be unreasonable. This is the rule that we apply in this case and the rule required by Rule 14(a) of the Uniform Rules, and under it, the findings of the trial court must be affirmed.”

The Court concluded as follows:

“After careful study and consideration we



conclude that this presumption shifts the burden onto the confidential adviser of persuading or convincing the fact finder by a preponderance of the evidence that no fraud or undue influence was exerted, or in other words, he has the burden of convincing the fact finder from the evidence that it is more probable that he acted perfectly fair with his confidant; that he made complete disclosure of all material information available and took no unfair advantage of his superior position than that he exerted fraud or undue influence to obtain the benefits in question."

The Court considered a situation where there is no evidence contrary to that produced tending to show that the confidential adviser had made the necessary disclosures. The Court stated:

"Such a finding is made against the party who fails to satisfy his burden even though there is no evidence to the contrary. In other words, the court must find the facts against a party who fails to satisfy his burden and such finding does not have to be supported by positive evidence."

We submit that the burden of persuasion was upon defendant Moreton to convince the finder of fact by a preponderance of the evidence that the transaction between himself and the co-owners and the ultimate sharing of the proceeds of the sale of the M & H Claims to Columbia was fair and equitable, that he took no advantage of them and that he at all times kept them fully informed as to all matters relative to the transaction.

### POINT III.

THE EVIDENCE IS CONCLUSIVE THAT MORETON DID NOT MAKE THE NECESSARY DISCLOSURE, THAT HE

MISREPRESENTED THE PRICE, THAT HE CONCEALED THE PRICE AND THAT THE TRANSACTION WAS UNFAIR AND THAT HE TOOK ADVANTAGE OF THE CO-OWNERS.

Under the authorities set forth in Point II even if the testimony of Moreton disclosed that he had made the necessary disclosures, the case should have been submitted to a jury for its determination of whether or not that testimony had convinced the jury by a preponderance of the evidence that Moreton had made full disclosures of the price and terms of the sale which he negotiated. Such is the direct language of this Court in the last quotation under Point II. However, in this case there is positive testimony that Moreton at no time made the disclosures required by the rule and the evidence establishes that the contract was not fair and equitable and the evidence further discloses that Moreton did take advantage of the Hollands.

As early as March, 1947, Moreton told the Hollands that because of the overburden they could not expect to get more than 10 cents a ton for the ore. He told them at that time that he thought he could get an overall price of \$133,000.00 (344). He reiterated this statement in June of 1947 (358). The agreement of ownership (Exhibit P-6) substantiates this misrepresentation. It mentions therein that the contemplated selling price of the mining claims was \$133,333.33. The approximate tonnage which had been spoken of was 1,500,000 (343, 358). The Hollands were never told anything different so far as price is concerned. Moreton himself admitted that he did not tell Hollands the price when he testified (832):

“Q. Will you now tell me when it was that you told the Hollands and Murie, for the very first time, that Columbia was paying 25 cents a ton for the M & H claims?

A. I never told them that at any time.

Q. You never told them?

A. No.”

The evidence is clear that in consummating this sale the Hollands relied upon Moreton's statement that they could not expect to get more than 10 cents for the ore because of the depth of the overburden (528). The Hollands never did know that Moreton was getting \$287,500, or that the total price was \$387,500. Both Rex and his mother testified that at the meeting where the transaction was consummated there was no disclosure of the total amount of the purchase price or the amount which Moreton was to receive (395, 933-939). Hence, we have testimony which definitely would support a finding that disclosure was not made of the price which was to be received. As originally prepared, the final papers were drafted so that there would be but one group of papers to cover the entire transaction (549, 550, 551). Subsequently, at Moretons behest, this method of closing the transaction was abandoned and it was arranged for two separate sets of papers to be drawn, one covering the one-fourth undivided interest of Moreton and the other set covering the undivided three-fourth interest of the co-owners. It was never disclosed to the co-owners why the transaction was handled in this manner. Nothing was ever said to them about the original documents wherein

the entire transaction was placed in one set of documents. The obvious reason for this division was to enable Moreton to sell his interest without disclosure of what he received or what the total purchase price was.

Moreton concealed the fact that he knew of Rex's letter of September 14, 1948 to Mathesius (526, 527). However, this letter had been shown to Moreton by Mathesius as early as October 8, 1948 (784-788). By virtue of this letter, Mathesius required the statements contained in the letters of October 16 and November 20 wherein the co-owners replied that they were satisfied with the \$100,000 for the three-fourths interest and that it was of no concern of theirs how much Moreton received for his interest (764, 765). No disclosure was ever made of the reason for these documents and the co-owners signed them without question when prepared and presented to them by Moreton.

Moreton never did reveal to the co-owners the content of the conversations which he had with Mathesius in order that they would be fully informed upon all phases of the transaction wherein Moreton was acting as their attorney. The evidence, without dispute, clearly establishes that the transaction between Moreton and the Hollands was not fair and equitable and the evidence discloses without question that Moreton took advantage of the co-owners. The result of this transaction points indubitably to the fact that Moreton over-reached the co-owners and took advantage of his confidential relationship with them to accomplish this result. He so arranged and finagled this transaction that he received

\$287,500 for his undivided one-fourth interest and each of the other co-owners received \$33,333.33 for his undivided one-fourth interest.

We submit that not only did Moreton fail to sustain the burden of proof which rested upon him, but the evidence clearly would require a finding that he had breached his confidential relationship with them and thereby became liable to respond in damages for that breach of confidential relationship. Under the authorities the presumption alone would justify and support a finding against Moreton in favor of both Rex and John *In re Swan's Estate, supra*.

#### POINT IV.

THE EVIDENCE IS CONCLUSIVE THAT MORETON'S FAILURE TO MAKE THE DISCLOSURE CONCERNING PURCHASE PRICE WAS WILFUL AND DELIBERATE.

This case was submitted to the jury upon the principles set forth in 2 *Restatement of the Law of Agency*, Section 469, wherein it is stated:

“An agent is entitled to no compensation for conduct which is disobedient or is a breach of his duty of loyalty; such conduct, if constituting a wilful and deliberate breach of his contract of service, disentitles him to compensation for even properly performed services for which no compensation is apportioned.”

The comment to this section, so far as material here, is as follows:

“An agent is entitled to no compensation for a service which constitutes a violation of the agent's

duties of obedience, stated in § 385. This is true although the disobedience results in no substantial harm to the principal's interests, and although the agent believes that he is justified in so acting. Language expressing insubordination as well as disobedience acts may be sufficient to prevent the agent from being entitled to recover compensation for conduct of which the words are a part.

“b. A serious violation of a duty of loyalty or seriously disobedient conduct is a wilful and deliberate breach of the contract of service by the agent, and in accordance with the rule stated in § 456, the agent thereby loses his right to obtain compensation for prior services, compensation for which has not been apportioned.”

\* \* \* \* \*

“If the principal, in ignorance of the agent's faulty conduct, pays to the agent compensation or indemnity to which he is not entitled, the principal can maintain an action to recover the amount.”

In speaking of a similar situation, this Court in *Reich v. Christopoulos*, 123 Utah 137, 266 P2d 238, stated:

“In undertaking the sale of the property for the Reiches, Hill had a duty to represent their interest in good faith, to discharge it with reasonable skill and diligence and to disclose to them all pertinent facts which would materially affect their interest. As is noted in American Jurisprudence, (4 Am. Jur. 1067, Brokers Sec. 142):

“‘The faithful discharge of his duties is a condition precedent to any recovery upon the part of a broker for the services he has rendered his principal. Thus, he is not entitled to compensation if he fails to disclose to his principal any personal knowledge which he possesses relative to matters

which are or may be material to his employer's interests \* \*.' ”

See also *Baird v. Madsen*, 57 Cal. App. 2d 465, 134 P. 2d 885.

The evidence in this case establishes that Moreton's breach of his confidential relationship was wilful and deliberate in misrepresenting the price to be paid and in concealing the price paid by Columbia for all three mining claims and the amount which he received for his share. Moreton started out by representing that because of the overburden the most that could be received was 10 cents per ton. He never did tell them any differently from this even though he knew that its value was greatly in excess of this figure. The first time that any mention of price is made is after the Bureau of Mines report dated May, 1947 (Exhibit D-37). This was in June of 1947 when the undated written option (Exhibit P-5) was prepared and presented to the co-owners for signature by Moreton. They readily signed the document. Later he figured the best way to handle the matter was to enter into an agreement of ownership. This agreement showed that the contemplated price would be approximately \$133,333.33, but with the understanding that there might be some excess but it was the understanding of the co-owners that this excess would not be more than in the neighborhood of \$22,000 putting the tonnage and price at 1,500,000 and 10 cents (542).

The patent application was not prepared until August 25, 1957. On September 14, 1948, Rex wrote a letter to Mathesius concerning the sale of the M&H claims



and requested a reply from Mathesius (Exhibit P-14). Mathesius did not contact Rex, but on or about October 8, took the matter up with Moreton (784). Moreton never did contact the Hollands concerning this letter. He absolutely disregarded the fact that Rex at least was contending he was entitled to a full one-fourth share. Moreton proceeded to arrange things so that he could obtain the \$287,500 for his undivided one-quarter interest without disclosing this to the co-owners. He refused to permit the transaction to be closed with only one document disclosing the total purchase price (771). He arranged to have the documents in two sets, one for his interest; the other for the co-owners interest. At the time of the closing of the transaction on December 20 it was arranged so that there would be no disclosure to the co-owners of either the amount paid to him or the documents relating to the sale of his interest. He had the co-owners sign the two letters of October 16, 1948 (Exhibit P-16) and of November 20, 1948 (Exhibit P-17). These letters denote a studied avoidance of disclosing the amount he was to receive for his interest. These documents only disclose the amount to be received by the co-owners. The amount to Moreton is not disclosed. It also would appear from these documents that the amount which Moreton was to receive for his share had not yet been agreed upon. As a matter of fact the record discloses that this matter had been determined as early as October 8, 1948. A letter dated October 15, 1948 (Exhibit P-43) discloses that the original proposal for sale for \$387,500 was transmitted to Moreton. It



states that this proposal is pursuant to an earlier conversation of October 9, 1948. All of this conduct on the part of Moreton shows without question that he was intentionally and deliberately concealing and failing to disclose the price and terms of the sale of the M & H claims.

We submit that a court could rule that his conduct was intentional and deliberate as a matter of law, but certainly the foregoing conduct would support a finding on the part of a jury that his conduct in this connection was intentional and deliberate within the rule announced by the authorities cited under this point.

#### POINT V.

AS A MATTER OF LAW THE STATUTE OF LIMITATIONS HAD NOT RUN AT THE TIME THIS ACTION WAS COMMENCED.

#### (a)

It should be noted initially that in this case there was never at any time any duty upon any of the co-owners to make any inquiry as to the facts and circumstances surrounding the transaction; throughout the transaction a confidential relationship existed which warranted and justified them in relying completely on their attorney, the defendant Moreton, and further, there never was at any time available to them any means of which they knew of discovering the correct purchase price from any persons other than the defendant Moreton and Columbia, both of whom, when Rex made inquiry, failed to divulge the information.

At least up to October 8, 1948, no price had been agreed upon between Moreton and Columbia for the sale of the property. Therefore, it must be concluded that up to that time at least, no inquiry of any kind could have ever revealed the amount of the purchase price. The remarks of Parley Canfield, a total stranger to the transaction, to Rex on September 14, therefore, bore no relation to the transaction itself and while they momentarily disturbed Rex, it must be borne in mind that when shortly thereafter Rex discovered that Parley Canfield was mistaken, his confidence in his attorney Moreton was justifiably, fully and completely restored.

The letter of September 14, 1948, from Rex to Mathesius based on this first conversation with Canfield was written three months before the transaction was closed. It, of course, had absolutely nothing whatever to do with the running of the statute of limitations. By the time the sale was concluded the letter had dissipated itself. The co-owners continued to follow Moreton's advice and accept his statements and sign whatever he presented to them. The confidence of the co-owners was continuing. They proceeded with the sale. They were then defrauded on December 20, 1948, when they received \$33,333.33 for one-fourth and Moreton received \$287,500.00.

Nothing happened thereafter to create the slightest suspicion on the part of the co-owners that their attorney Moreton was deliberately and intentionally defrauding them until October, 1951. They were, as a matter of law, therefore, not required to make any inquiry of any kind before that time. Moreover, the law is that although

they may have begun an inquiry which they abandoned before the fraud was fully revealed, it in no way affects their rights or precludes them from maintaining the action they would otherwise be entitled to maintain.

(b)

It is sometimes generally stated that the statute of limitations shall begin to run against a defrauded person from the time when he should have discovered the fraud. However, that rule is subject to an overwhelmingly recognized exception in situations where confidential relationship exists (as it did in this case) between the parties. The rule where confidential relationship exists is that nothing short of actual discovery of the full details of the fraud will set the statute in motion.

Some pertinent authorities announcing both the general rule and the law applicable to the case at bar are as follow (emphasis supplied throughout):

*Briece v. Bosso*, 158 S.W. 2d 463, 467 (Mo. 1942, St. Louis Court of Appeals):

“There must be reasonable diligence and the means of knowledge are the same thing in effect as knowledge itself. This rule, however, is subject to qualification where a relation of trust and confidence exists between the parties. *When a plaintiff is lulled into a sense of security by reason of such relationship, rendering it the duty of the defendant to disclose the truth, he is under no duty to make inquiry and the statute does not begin to run until actual discovery of the fraud.*”

*Rutherford v. Rideout Bank*, 11 Cal. 2d 479, 80 P. 2d 978, 981-983:

“\* \* \* It is, however, the contention of the appellant that the fraud was open and patent, that, since the slightest inquiry would have disclosed the truth, nothing but the plaintiff’s inexcusable negligence kept her so long in ignorance of the fact that she had not received a fair price for her property, and finally, the additional fact, which came to light in September, 1927, was not one of the facts constituting the fraud but merely Taylor’s motive for committing it.

\* \* \*

“\* \* \* The finding of a confidential relationship is amply sustained by the evidence (*Bank of America v. Sanchez*, 3 Cal. App. 2d 238, 38 P. 2d 787, and, in view of its existence, *Mrs. Rutherford* cannot be charged with lack of diligence in making independent investigation either at the time or afterward. *Barron Estate Co. v. Woodruff Co.*, 163 Cal. 561, 575-577, 126 P. 351, 42 L.R.A., N.S., 125; *Marston v. Simpson*, 54 Cal. 189, 190.”

*Spencer v. Nelson*, (Cal. App.) 238 P. 2d 169, 179:

“In *Rutherford v. Rideout Bank*, 11 Cal. 2d 479, 80 P. 2d 978, 117 A.L.R. 383, in order to gain an advantage for a friend, the manager of the bank in which plaintiff was a depositor and whom she constantly consulted on business affairs, made misrepresentations which caused her to sell her ranch to the banker’s friend for less than its true value. It was not until approximately seven years later than plaintiff discovered the fraud. In the meantime plaintiff had made no effort to ascertain the truth of the representations. In holding that this fact did not bar her action for damages the court said that in view of the confidential relationship between plaintiff and the bank manager she could not be charged with lack of diligence

in not making independent investigation either at the time or afterward.”

*Butcher v. Newberger*, 318 Pa. 547, 179 Atl. 240, 241-2:

“In 26 Corpus Juris, page 1137, it is said that if fiduciary ‘relation is obtained, nothing short of actual knowledge will prevent recovery for misrepresentations.’ The jury has decided they would obtain here and that plaintiff did not have such actual knowledge. Indeed, they could not well have concluded otherwise. In the instant case plaintiff testified and no one contradicted him, that he did not know anything about the stock, would not have known the difference between Class A and Common Stock if he had read the certificate, and because of his ‘implicit reliance on Mr. Morles,’ defendant’s manager, he took the certificate which the latter handed him. This the jury believed \* \* \*. Under such circumstances plaintiff had the right to rely on the manager’s statement without inspecting that which was delivered to him, and this would be so even if plaintiff by inspection would have known he was not getting what he had bought which was not the case here. 615 Flatbush Ave. Corp. v. Hatoff, 126 Misc. 573, 214 N.Y.S. 138.”

37 *C.J.S.*, page 268, Fraud, Section 27 b:

“If confidential relations obtained, nothing short of actual knowledge will prevent recovery from misrepresentations.”

54 *C.J.S.*, page 198, Section 194:

“The failure of the defrauded person to use diligence in discovering the fraud may be excused

where there exists a relation of trust and confidence between the parties.”

(c)

Where confidential relationships are shown to exist, courts often reach the same result by imposing an estoppel against the adviser to plead the statute of limitations:

*Anderson v. Thacher*, 76 Cal. App. 2d 50, 172 P. 2d 533, 544-545:

“\* \* \* Defendant Thacher cannot be heard to complain that plaintiff reposed too much confidence in him. *‘No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.’* Seeger v. Odell, supra, 18 Cal. 2d at page 415, 115 P. 2d at page 981, 136 A.L.R. 1291. The law does not applaud fraud and condemn the victim thereof for his credulity. \*\*\*

“\* \* \* *The possible but antiquated authority that one must assume that everyone with whom he has a business transaction is a rogue and acts accordingly will not receive judicial approval.* Courts rather will hold that one can act upon the presumption that there exists no intention to defraud him. *Tidewater Southern R. Co. v. Harney*, 32 Cal. App. 253, 260, 162 P. 664. \* \* \* We therefore hold that the evidence in this case is reasonably susceptible to the conclusion that there existed a continuing confidential and fiduciary relationship between plaintiff and defendant Thacher. The evidence satisfies us as it did the trial court that the delay upon plaintiff’s part about which appellant Thacher complains was induced by his own representations to her, and by reason thereof, *even if it be conceded that the statute*

*of limitations commenced to run as contended for by him he is estopped from taking advantage of the statute.* Calistoga National Bank v. Calistoga Vineyard Co., 7 Cal. App. 2d 65, 72, 46 P. 2d 246.”

In *McKee v. Industrial Commission*, 115 Utah 550, 206 P. 2d 715, 717, 718, 719, this Court, while finding that the plaintiff in that case failed to prove facts sufficient to establish an estoppel, clearly announced its recognition of the estoppel rule, which, as appears from its opinion in that case, is plainly applicable to the case at bar:

“Inasmuch as there is a period greater than three years between the date of the accident and the time plaintiff filed his application for compensation, the decision of the Industrial Commission must be affirmed unless, as plaintiff contends, the statute has either been waived or the Pipe Company is estopped from setting it up in bar of plaintiff’s claim. In this regard, plaintiff does not claim he could not have discovered the true nature of his injury immediately after the accident. In fact, he must concede his own medical advisor could have discovered the truth at any time by taking X-ray pictures or by examining those taken by the Pipe Company’s doctor. *Plaintiff seeks to avoid his own failure to find out the real cause of his trouble by contending that the company doctor either mistakenly or intentionally informed him that there had been no injury to his back; that he had a right to rely and did, in fact, rely upon the company doctor’s diagnosis of the condition of his back and in so doing he has been misled to his prejudice.*



*"It is well established that a statute of limitations will not run in favor of one who fraudulently conceals another's right of action against him.*

\* \* \*

"Under these circumstances, *the narrow question to be decided is whether the Pipe Company is estopped to set up the statute in bar assuming an error was made by its doctor.* Inasmuch as the Industrial Commission held that Sec. 42-1-92, U.S.C. 1943 was a bar to plaintiff's right to compensation, it necessarily rejected plaintiff's theory of estoppel. \* \* \* if we are to reverse its decision, we must be able to say that, as a matter of law, the facts establish that all elements of estoppel are present. Before plaintiff can prevail upon a theory of estoppel, it is incumbent upon him to establish his reliance upon the company doctor's statement which we shall assume was erroneous.

\* \* \*

"We think it is clear in this case that no fiduciary relationship existed between the Pipe Company's doctor and the plaintiff inasmuch as he did not report to the doctor for a diagnosis of his ailment or for medical assistance. \* \* \* Under these circumstances, we believe that the commission could reasonably conclude that plaintiff had relied upon physicians of his own choosing rather than upon the statement of the company doctor, and therefore had failed to establish his plea of estoppel."

(d)

The rule requiring diligence on the part of a plaintiff in order to avoid the bar of the statute of limitations is not applicable to the case before this Court for another reason. That rule applies only where the means of dis-

covering the fraud are shown to have been available to the defrauded party. It is manifest on the record in the case at bar and conclusively established that neither Rex Holland nor John Holland nor the Administrator of John Holland ever had sufficient reason to suspect or the means to discover the fraud.

Moreton, by his testimony, established that prior to at least October 8th no one knew what price Columbia was to pay for the mining claims and it is also clear on the record that after October 8th the only two parties that did know what price Columbia was to pay were Moreton and Columbia.

No one aside from these two parties had facts in their possession to give to either Rex Holland or John Holland had either Rex or John Holland made any inquiry. The record further establishes that not only would inquiry of anyone else have been futile but that any inquiry directed to Columbia or to Moreton would have been equally futile.

Rex Holland did write to Columbia in the person of its President, Dr. Mathesius, on September 14, 1948, hoping to be advised as to the true situation. Mathesius never answered Rex but he did take Rex's letter straight over to Moreton, who proceeded to mislead Columbia by reference to some of the cunningly drawn documents which he had previously fraudulently induced his clients to sign and by procuring the signature of his clients to three further completely misleading letters (Exhibits P-16, P-17 and P-19) which he prepared and so phrased as to make it appear to his clients that the price Columbia

was to pay had not yet been established even though Moreton and Mathesius had known the price since at least October 8th.

In a situation such as this, the courts have in unmistakable language announced that the wrongdoer shall not be permitted to keep the profits of his fraud by asserting that his victim should not have trusted him but should have questioned him sooner. The courts have made it clear that the statute will not be set in motion where the only means for discovering the fraud lay with the party perpetrating the fraud and where any other means were shown to have been foreclosed.

*Adams v. Harrison*, 34 Cal. App. 2d 288, 93 P. 2d 237, 243-244:

*“Moreover, it does not appear that means of knowledge were then open to the respondent or that any reasonable inquiry on his part would have developed the true facts with respect to the real fraud, which is here in issue. It appears that after he had received an intimation of this fraud, in 1936, the respondent went to Judson, from whom the land had been purchased, to Judson’s attorney and to the real estate agent who had represented Judson, all of whom refused to give him any information on that subject. It does not appear that an earlier inquiry would have been more successful, and it is not to be anticipated that the appellant would have been any more helpful had an inquiry been made of him.*

*Sime v. Malouf*, 95 Cal. App. 2d 82, 212 P.2d 946, 960-961:

*“Defendants cannot prevail on the point of discovery unless the record shows, as a matter of law, that avenues of inquiry were open to Sime, which, if explored, would have resulted in discovery of the fraud. In order that one who claims to have been defrauded be charged with constructive knowledge of the facts constituting the fraud, it must appear not only that he had notice of facts sufficient to put a prudent person upon inquiry, but also that means for the discovery of the facts were available to him. Hobart v. Hobart Estate Co., supra, 26 Cal. 2d at page 435, 159 P. 2d 958; West v. Great Western Power Co., supra, 36 Cal. App. 2d 403, 407, 97 P. 2d 1014; Adams v. Harrison, 34 Cal. App. 2d 288, 299, 93 P. 2d 237. It is argued by defendants that inquiry made of some of the defendants would have developed the facts constituting the conspiracy, and that if plaintiff had taken depositions in the action of Sunday against E. R. & W. he would thus have uncovered the facts. A sufficient answer is that the trial court did not believe the means of discovery were available to plaintiff in a practical sense. We have no hesitation in agreeing with this view. Plaintiff could not fairly have been charged with notice of facts which he could have learned only out of the mouths of the conspirators, who were successfully endeavoring to conceal them. Adams v. Harrison, supra, 34 Cal. App. 2d 288, 299, 93 P. 2d 237; see also Kimball v. Pacific Gas & Elec. Co., 220 Cal. 203, 30 P. 2d 39; Kane v. Cook, 8 Cal. 449; Marshall v. Buchanan, 35 Cal. 264, 95 Am. Dec. 95.”*

*Vanzandt v. Vanzandt*, 86 So. 2d 466, 470-471 (Sup. Ct., Miss. 1956):

“It is argued by the appellants, however, that the appellees cannot invoke the foregoing statute

because they fail to exercise reasonable diligence to discover the fraud. This argument by appellant must likewise be held to be untenable \* \* \* he has persisted in \* \* \* (his misrepresentation) \* \* \* throughout and even in the trial of this lawsuit, and *it is manifest that no inquiry made of him would have disclosed any other information.* He occupied a position of trust and confidence with appellees which was calculated to cause them to rely upon his statement even if inquiry as to the true facts had been made. We think, therefore, that the Chancellor was amply warranted under the evidence in finding that there had been no lack of diligence on the part of the appellees."

(e)

It is, moreover, clear that the circumstances in this case surrounding the letter of September 14th, written by Rex to Dr. Mathesuis, were not, as a matter of law, sufficient to put him on any inquiry in view of the existence of the confidential relationship between him and the defendant Moreton. (That he did actually commence an inquiry is, of course, no bar. See *Hobart v. Hobart*, supra). It must be remembered that Rex did not learn of any "facts" which caused him to write that letter. The incident which gave rise to the letter was a casual conversation with a total stranger named Parley Canfield who had nothing to do with the transaction. Even Canfield did not give Rex any "facts" as to the transaction. He gave only some misinformation as to the amount of tonnage which he (Canfield) believed to be in the M & H Claims and as to the price which he (Canfield) believed to have been paid for some ore.

The law is clear that such a casual statement of opinion, belief and misinformation from a stranger to the transaction is not the kind of "discovery" which will set the statute of limitations in motion so as to protect an attorney willfully and intentionally defrauding his clients.

54 *C.J.S.*, 197, Limitations of Actions, Section 191:

"\* \* \* a mere suspicion of fraud is not sufficient to constitute a discovery which will set the statute in motion."

*Hartford Empire Co. v. Glenshaw Glass Co.*, 47 F. Supp. 711, 716 (D.C. W.D. Pa. 1942):

"The Supreme Court of Pennsylvania, in *Emery v. Third National Bank of Pittsburgh*, 308 Pa. 504, on page 513, 162 A. 281, on page 284, where a charge of misrepresentation of the value of certain assets was made, said: 'But a bare suspicion or an opportunity to learn the truth through the exercise of reasonable diligence does not constitute knowledge of fraud sufficient to prevent recovery.' This statement of the law was reaffirmed in a second hearing of this case at 314 Pa. 544, 171 A. 881. We therefore conclude defendant is not barred from setting up the fraud alleged in the answer and counterclaim, either by the Pennsylvania statute of limitation or by laches."

*Starkweather v. Benjamin*, 32 Mich. 305, 306 (1875):

"It is alleged as error also that the court should not have ruled out the common rumor concerning the size of the land. \* \* \*

"It would be absurd to allow street talk about



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

*Williams v. Riddlesperger*, 217 Ala. 62, 114 So. 796, 798 (1927):

"There is no merit in defendant's contention that their rejoinder to plaintiff's replication to the plea of limitation was conclusively established by the evidence. *The mere opinion of an attorney to whom plaintiff casually mentioned her first purchase of stock that it was worthless \* \* \* did not amount to knowledge or notice of the falsity of the representations made to plaintiff by defendants. Certainly they cannot with propriety contend that plaintiff was bound, as a matter of law, to accept the attorney's unfavorable opinion, and to discredit the specific statements of fact made to her by these defendants whom she knew to be well informed and upon whose business character and judgment she strongly relied.*"

*Haight v. Hoyt*, 19 N.Y. 464, 64S:

"\* \* \* *A party making fraudulent representations upon the sale of property by him cannot defend himself, as a matter of law, upon the ground that a bystander stated the real facts. The purchaser may rely upon the statements of the vendor; and whether he does so rely and is thereby induced to purchase is a question for the jury. It does not appear that the plaintiffs had any other means of ascertaining the truth than the*



statements made by Hoyt and Delavan at the time of the purchase. They were not, therefore, guilty of any negligence in not ascertaining the facts.”

(f)

It should not and is not the policy of the law to permit the confidential relationship of attorney-client to be destroyed upon the statement of a mere bystander to a transaction between the attorney and his client. Yet that would be the effect of a decision that the unsupported statements of Canfield (which within two weeks Rex discovered were mistaken) were sufficient as a matter of law to destroy the attorney-client relationship between Rex and the defendant Moreton and to require Rex from that point on to question and investigate everything that his attorney, Moreton, said and did. There would be nothing left to the relationship of attorney-client if such a proposition were held to be the law and if a client were required at his peril to be on notice as against his own lawyer every time he heard something from someone in the street.

The courts have recognized the importance of upholding confidential relations and have refused to announce any rule which would permit them to be destroyed upon the statements of strangers or upon circumstances giving rise to suspicion.

*Larson v. McMillan*, 99 Wash. 626, 170 P. 324, 325-326:

“This is an action for deceit. The principal question is whether the action is barred by the statute of limitations.

“Whatever their relations to others may have been, the principles in this unfortunate affair were not dealing at arm’s length. They were conjugate; and *their relations inter sese were as fiduciary as if the marriage had been a valid one. The trust of a wife is not to be swept away as a thistledown by a breath of suspicion.* It is the policy of the law, for the good of society demands it, that trust and confidence between a husband and wife shall be sustained to the very limit.”

*Spencer v. Nelson*, (Dist. Court of App. Cal. 1st Dist.) 238 P. 169, 178, 179:

“The character of the hostility between the parties must be considered. \* \* \* ‘Differences might have existed without destroying confidence in each other’s honesty and integrity.’ *Shiels v. Nathan*, 12 Cal. App. 618, 108 P. 34, 40. There husband and wife had had ‘differences’ and separated on the very date the contract was entered into, relying upon the husband’s representations. In *Ramos v. Pacheco*, 64 Cal. App. 2d 304, 309, 148 P. 2d 704, it was contended that by reason of respondent’s fear of appellant induced by his threats against her the confidential relationship ceased to exist. The court held that this did not destroy the confidential relationship. The question of whether the situation should have put defendant on inquiry is one of fact for the trial court. We cannot say as a matter of law that during this period anything occurred which should have made defendant suspicious that he had been overreached. A reasonable interpretation of the hostility is that it indicated at most that plaintiff was standing strictly on his rights under the contract but gave no indication to defendant that the contract itself was not binding. *Nor was it such*

*that we can say as a matter of law that it overcame the confidential relationship which in spite of it still existed between plaintiff and defendants and therefore put defendants on inquiry as to the validity of the contract."*

*Hunt v. Smith*, 24 S.E. 2d 164, 167 (Sup. Ct. S.C. 1934):

"The question is: when did the appellant discover the facts constituting the fraud?

\* \* \*

"\* \* \* the grantee's failure to reconvey the property within the time agreed, and his failure subsequently to carry out his successive promises to make the reconveyance, did not constitute notice to the appellant of the fraudulent scheme. \* \* \* *Although his non action and his broken promises should have given rise to suspicion and would have warranted and indeed called for the institution of the action at a much earlier date, it would be putting a premium on dishonesty to hold in this case that because the appellant hung onto the hope (even a hope punctured by doubt and fear) that ultimately the grantee would carry out his assurances, she was under a legal obligation to determine that the grantee had undertaken to defraud her or her property."*

(g)

In the case at bar it is crystal clear that as a matter of fact the confidential relationship between the parties was never destroyed until long after the transaction was consummated. Moreton knew after September 14th and throughout the remainder of the transaction that the co-owners were continuing to rely on him as their attorney and he never told them to go to any other

attorney. The co-owners on their part never discharged Moreton after the conversation between Rex and Canfield or after the letter which Rex wrote to Mathesius on September 14th. Nothing is more conclusive of their implicit and continuing confidence in Moreton as their attorney than the fact that in 1949, after this transaction was consummated, the Hollands employed Moreton as the attorney for the Estate of John Holland. He himself accepted that employment and he continued in that capacity until he was discharged in 1953.

The California case of *Hobart v. Hobart Estate Co.*, 26 Cal. 2d 412, 159 P. 2d 958, 972, 972-974, involved both the existence of a confidential relationship and the issue of what kind of discovery on the part of the victim of the fraud is sufficient to set the statute of limitations in motion. In that case the plaintiff had actually participated in depositions which brought out some of the facts of the fraud of his fiduciary, an attorney named Greene. The depositions and the investigation in connection therewith were apparently abandoned before Greene's fraud was fully uncovered. The date of the depositions was such that if they constituted the type of discovery that would set the statute of limitations in motion, then plaintiff's cause of action against his fiduciary was barred.

Because the California Supreme Court in that case explored some of the problems involved here so completely, we quote at length from its opinion in which it held that the plaintiff's cause of action was not barred, notwithstanding that an investigation which, if pursued, would have led to a full discovery of the fraud was begun

and then abandoned, and that this was so because of the existence of a fiduciary relationship between the parties.

*Hobart v. Hobart Estate Co.*, 26 Cal. 2d 412, 159 P. 2d 958, 971, 972-974:

“\* \* \* *A defrauded person, however is not barred from maintaining an action merely because he commenced an investigation if it was incomplete or abandoned before discovery of the falsity, particularly if the defendant has a superior knowledge of the facts, or if it is difficult for the plaintiff to ascertain all the facts or he is not competent to judge the facts without expert assistance.* See, for example, *Shearer v. Cooper*, 21 Cal. 2d 695, 702, 704, 134 P. 2d 764; *French v. Freeman*, 191 Cal. 579, 587, 588, 217 P. 515; *Payne v. Clow*, 114 Cal. App. 597, 600, 601, 300 P. 138; *Wilson v. Municipal Bond Co.*, 7 Cal. 2d 144, 151, 152, 59 P. 2d 974; 37 C.J.S., *Fraud*, Sections 37-39, pp. 286-288. \* \* \* Moreover, there was evidence that plaintiff did not make a complete investigation because of his reliance upon Greene’s representations. See *Shearer v. Cooper*, *supra*, 21 Cal. 2d 695, 704, 134 P. 2d 764; *Divani v. Donovan*, 214 Cal. 447, 453, 6 P. 2d 247.

“*Defendants contend that certain facts known to plaintiff should have aroused his suspicions and precluded his reliance upon the representations assertedly made by Greene.* It appears that the proponents in the will contest took the deposition of Howard G. Stevenson, secretary of the company, and that Lachmond was present as attorney for plaintiff and inquired of Stevenson concerning the value of the company’s assets and examined copies of the balance sheets of the com-



pany for the years 1932, 1933, and 1934, which listed all the assets and liabilities of the company. Defendants argue that having acquired this information through his attorney, plaintiff could not rely upon Greene's representations of value.

\* \* \* It is obvious that the balance sheets did not fairly represent the actual value of the corporate assets and that plaintiff had been so informed. *It cannot therefore be said, as a matter of law, that plaintiff was prevented from accepting the representations of Greene as true because of the difference in the value of the stock as shown by the books and as represented by Greene.*

\* \* \*

*"Defendants assert that in addition to these requirements plaintiff must show that he made a diligent inquiry to discover whether or not he had been defrauded, and they argue that plaintiff failed to prove that earlier inquiry would not have revealed the falsity of the alleged representations. It is not in every case, however, that a person is barred after three years by failure to pursue an available means of discovering possible fraud.*

\* \* \*

*" \* \* \* Accordingly, we must now determine whether plaintiff has brought himself within the exception to the statute of limitations. Plaintiff's evidence, if believed, disclosed certain factors that may have tended to discourage the making of an exhaustive independent investigation, and we cannot hold, as a matter of law, that any of the circumstances known to plaintiff should have put a reasonably prudent man upon inquiry. \* \* \**

*"Another pertinent factor is that there was a fiduciary relationship between the parties at the time of the fraudulent representations. Although the general rules relating to pleading and proof*

of facts excusing a late discovery of fraud remain applicable, it is recognized that in cases involving such a relationship facts which would ordinarily require investigation may not excite suspicion, and that the same degree of diligence is not required. \* \* \*"

\* \* \*

*"Defendants argue that the fiduciary relationship terminated when the sale was completed and that plaintiff was no longer entitled to the benefit of the rule. The relationship, nevertheless, did exist at the time of the asserted fraud, and plaintiff was under no duty to make a complete search and reexamination of the entire transaction immediately after it took place merely because the fiduciary relationship between the parties was terminated thereby."*

(h)

Another point to be noted in connection with the statute of limitations is that the defendant Moreton cannot urge that by recording the deeds he set the statute of limitations in motion. The rule is that where a confidential relation is shown to exist the recording of a deed does not give constructive notice of the fraud.

*Seeger v. Odell*, 18 Cal. 2d 409, 115 P. 2d 977, 980-981:

*"\*\*\* it is well established that he is not held to constructive notice of a public record which would reveal the true facts. Rest. Torts, sec. 540 (b); see cases cited in 12 Cal. Jur. 764, 759; Prosser, Torts, 750, 751. The purpose of the recording acts is to afford protection not to those who make fraudulent misrepresentations, but to bona fide purchasers for value."*



*Kauffman v. McLaughlin*, 189 Okla. 194, 114 P. 2d 929, 935:

“It is contended by the Kauffmans that the cause of action was barred by the several provisions of the statute of limitations. In *Clover, Adm’x. v. Neely*, 116 Okl. 155, 243 P. 758, we held: ‘When a relation of trust or confidence exists, making it the duty of defrauder in the trust capacity to disclose the true state of facts, the defrauded party is not charged with constructive discovery of the fraud on account of the facts being a matter of public record.’ ”

*Barder v. McClung*, 93 Cal. App. 2d 92, 209 P. 2d 808, 811:

“Neither can it be said that plaintiff was bound by constructive notice of the zoning ordinance, because as stated in *Seeger v. Odell*, 18 Cal. 2d 409, 415, 115 P. 2d 977, 980, 136 A.L.R. 1291: ‘The purpose of the recording acts is to afford protection not to those who make fraudulent misrepresentations, but to bona fide purchasers for value.’ ”

*Peterson v. Peterson*, 105 Utah 133 (1943), 141 P. 2d 882, 885:

“Lastly, Charles urges that the various claims set up by the plaintiffs are barred by the statute of limitations. With this we are unable to agree. Plaintiffs testified that they first got notice of this alleged fraud in 1941 when Charles for the first time asserted that plaintiffs had no interest in any of the property. Charles contends that plaintiffs had notice of the alleged fraud or breach of trust as early as 1935 when he recorded their quit claim deed. But what was there in the recording of that deed which would give plaintiffs notice

that he had breached his trust? Such recordation was entirely consistent with the intent of all concerned for they intended to put title into Charles so that he could, according to their theory, take the necessary steps to save the land.”

See also 54 C.J.S. 194, Limitations of Actions, Section 189(b); *Heap v. Heap*, 258 Mich. 250, 242 N.W. 252; *Faunt v. Hosford*, 119 Iowa 97, 93 N.W. 58; *Gerlach v. Schultz*, 72 Idaho 567, 244 P. 1095.

(i)

Under the facts and circumstances of this case and under the decisional and statutory law of this state the suit commenced by Rex Holland in his individual capacity is clearly not barred by the four year statute of limitations applying to the breach of a fiduciary relationship, 78-12-25, 2, *Utah Code Annotated* 1953. *Kamas Securities Co. v. Taylor*, 119 Utah 241, 226 P. 2d 111.

In that case a corporation brought suit against the secretary of the corporation for a breach of his fiduciary duty, he having delivered to a debtor securities held on the obligation and at a time when the obligation had become barred by the statute of limitations. In considering this problem the court stated:

“It is further contended that action against defendant is for fraud, and that the three year period of limitations provided by 104-2-24 (3) had run between the date of discovery by some of the directors in the summer of 1943 that defendant had surrendered the stock, and the date when suit was filed. It is true that the allegations of the amended complaint charge that defendant em-

ployed deceit, but viewing the charge in its entirety it is clearly one of breach of a fiduciary duty which would mean that the four year statute of limitations would be applicable, 104-2-30. The contention that action was barred by limitations was therefore properly overruled."

The defendant Moreton did not rely upon this section of the statute and under Rule 9 (h) it was necessary, if he relied thereon, to specifically designate this section and sub-section. In any event, the action of Rex Holland, individually, was filed one day before the expiration of the statute. The complaint was filed December 19, 1952.

As regards the cause of action of the Estate of John Holland:

Moreton again did not rely upon this section of the statute. As indicated under Rule 9 (h) it was necessary if he relied thereon to specifically designate this section and sub-section. Having failed to do so, he cannot claim the benefit of it.

(j)

The administrator of the estate of John Holland first entered this action by the amended complaint which was filed November 7, 1953. The order authorizing the appearance of the said administrator was dated December 4, 1953.

The record conclusively establishes that John Holland and his estate did not discover the fraud until October of 1951 and there was no duty on his part to make investigation and there were no facts which came to his attention which would require him to make inquiry before that time.

That being so, the statute of limitations as a matter of law did not start to run until October, 1951, and the filing of the complaint was within the three year period from that time and hence the court was in error in directing a verdict in favor of the defendants.

The trial court also mentioned a one year statute of limitations. The statute referred to was Section 78-12-37, which, in so far as material here, provides:

“If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representatives after the expiration of that time and within one year from his death.”

The purpose of this statute is not to limit the cause of action of the estate, but is rather to extend it. If the statute of limitations applicable to the particular action extends beyond the year, then this longer period is the one within which the administrator has to bring the action.

In *Gray Realty Co. v. Robinson*, 111 Utah 521, 184 P.2d 237, this Court held in an action against the estate that this section permits an action to be brought within one year from the death of the deceased, but if the applicable statute extends to a later date then the applicable statute prevails. This is the general holding of the courts on statutes of this kind. 2 *Bancroft's Probate Practice* (2 Ed.), Sections 495 and 496.

We submit that under the facts of this case this statute is not applicable because the fraud statute in this case extends beyond the year from the death.

## POINT VI.

REX HOLLAND AS ADMINISTRATOR OF THE ESTATE OF JOHN HOLLAND HAD STATUTORY AUTHORITY TO BRING THIS ACTION AND DID NOT NEED SPECIFIC COURT AUTHORITY TO DO SO.

One of the reasons given by the court for granting the motion of the defendants for a directed verdict against the estate of John Holland was that the administrator had not obtained authority of the court to bring the action and to enter into the contract on behalf of the estate (962). We assume this referred to the contract employing the attorneys.

A moment's reflection convinces that this ground is absolutely without merit of any kind. Action is brought to obtain assets of the estate and the person against whom the action is brought, although it is for the benefit of the estate, contends that the administrator should not be permitted to do so. The only time this matter may be properly presented is when the administrator seeks court approval of the costs, expenses and attorney fees which were expended, or incurred, in maintaining the suit.

But in any event, there is a statute in the State of Utah which gives the administrator authority to bring suits of this kind. Section 75-11-5, *Utah Code Annotated*, 1953, provides:

“Actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon, and all actions founded upon contracts, may be maintained by and against exe-

cutors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates.”

There is abundant authority for the proposition that this statute means what it says and permits the administrator to do just as the administrator did in this case. *Hatch v. Hatch*, 46 Utah 218, 148 Pac. 433; *In Re Burt's Estate*, 58 Utah 353, 198 Pac. 1108, 2 *Bancroft's Probate Practice* (2 Ed.), 543, Sections 447, 448:

#### POINT VII.

IN REINSTATING THE JUDGMENT THIS COURT SHOULD ORDER THAT INTEREST BE ADDED THEREON FROM THE 20TH DAY OF DECEMBER, 1948, TO DATE OF FINAL ENTRY OF JUDGMENT.

A judgment on the verdict was rendered July 10, 1957, in the sum of \$120,833 and the portion of the judgment for interest was left blank (281). Of that amount, \$25,000 was for punitive damages leaving general damages in the sum of \$95,833. This latter figure constituted one-third of the \$287,500 which Rex was entitled to as damages for a wilful breach of a confidential relationship. Under the evidence Rex was entitled to this money on December 20, 1948. Hence the judgment should award interest to Rex at the rate of 6% per annum since that date. This Court has held that in a case similar to this, interest should commence to run from the date the property was acquired by fraud. *Gillespie v. Blood*, 81 Utah 306, 17 P.2d 822.

#### POINT VIII.

JUDGMENT SHOULD BE ENTERED IN FAVOR OF THE ESTATE IN THE SUM OF \$120,833.00.



Individual defendants moved for a directed verdict against the administrator of the estate (237-242). As against the estate this motion was granted (960). As a necessary result, the case of the estate of John Holland was not submitted to the jury. However, the issues in the case were identical, involving as it did, the existence of a confidential relationship, whether or not there had been a complete disclosure by Moreton as well as a showing that the transaction was fair and equitable and that no advantage was taken of the Hollands. There was also the determination of whether or not the breach of the confidential relationship was wilful or deliberate. Also, there was the issue of the statute of limitations.

While we have found no authority directly in point on this subject, we submit that the finding of the jury would necessarily have been the same against the defendant on behalf of the estate and that therefore judgment should be entered for the estate in the same amount as it was entered for Rex Holland.

In any event, we submit that the evidence establishes as a matter of law the cause of action of the estate as indicated in the foregoing argument and authorities and upon this ground also a judgment should be entered in favor of the administrator of the estate and against the defendants in the sum of \$120,833.00.

### CONCLUSION

Everything necessary to establish plaintiffs' right to recover against Moreton and his family can be found in the documents themselves that Moreton himself drafted and his own testimony. Resort need not be had to any of plaintiffs' testimony.



A mere statement of the end result obtained by Moreton for himself is more than enough to convince anyone of the fact that he, attorney Moreton, was unfair, inequitable and overreaching in his dealings with the trusting co-owners and systematically concealed the selling price from them.

(1) Moreton had been an attorney, at the time of the trial of this case for over 40 years (583). He was experienced in mining law. He prepared almost every one of the legal documents mentioned in this law suit.

(2) The co-owners were aged, ailing, trusting, naive individuals. They had never before sold any mining property.

(3) Moreton never denied Rex's testimony that he, Moreton, had stated at his very first meeting with the co-owners that he would henceforth act as their attorney in the patenting and sale of the property.

(4) The confidential relationship existed by reason of the facts that Moreton at all times obviously acted as attorney for the co-owners, as agent for the co-owners besides being a co-tenant of the co-owners.

(5) Moreton, in his own letters directed the co-owners not to discuss the sale of the property with anyone else.

(6) Moreton must have known of the potential value of the property from the very beginning, otherwise he would not have sought the co-owners out and offered to take an option to buy the co-owners interest for \$100,000.00.

(7) Moreton told the co-owners on several occasions that they could not expect to get more than 10c per ton because the ore in their property was covered by a very substantial overburden. Rex remembered these statements and that was one of the reasons why he concluded that Canfield's remarks about ore being offered at 25c a ton would not apply to the co-owners' property.

(8) Nowhere, (except in the original contract of sale drafted by Columbia, which Moreton rejected and destroyed and which the co-owners never saw) in any document Moreton or anyone else ever drafted does the total sale price appear. Moreton does not claim that the co-owners' ever saw any document that disclosed the amount of money that he received from Columbia for his one-fourth interest.

(9) The letters of October 16, 1948 and November 20, 1948, that Moreton prepared and to which he secured the signatures of the co-owners, are concealing, misleading and deceiving, in that amongst other things, they imply that Moreton has not yet made a deal with anyone for his interest in the property; and that he might make a deal with someone else other than Columbia on his interest in the property. They do not state the total sale price or the amount that Moreton had already agreed to take.

(10) The entire negotiations and the entire effort exerted by Moreton in the sale of the property, according to Moreton himself, consisted of a thirty-five word conversation wherein Mathesius stated that there were about

1,550,000 tons of ore in the property and that he would pay for the property at the rate of twenty-five cents a ton, or a total sum of \$387,500 for the entire property. Moreton replied that that was satisfactory to him.

(11) Moreton cancelled the escrow that had been arranged for. An escrow would have revealed the total price being paid for the property.

(12) Moreton rejected Mathesius' documents which recited the *total* purchase price and insisted upon Mathesius submitting *separate* offers of sale and *separate* closing documents.

(13) Moreton himself, admits that he never told the co-owners what the total selling price was or what his family's share of the selling price was going to be.

Moreton has admitted repeatedly that he never, at any time, ever exercised any of the options he allegedly or purportedly had obtained from the co-owners.

(14) The property was not sold, leased or otherwise disposed of *on a tonnage basis*. Therefore, Moreton was not entitled to receive all over \$100,000. Even if the property had been disposed of on a tonnage basis the agreement of ownership being unfair and inequitable and having been secured as a result of Moreton's fraudulent concealment, Moreton was not entitled to receive anything under it and should now return that which he has unlawfully received.

(15) The deal was closed in Moreton's office Dec. 20, 1948. The co-owners had no lawyer other than Moreton representing them. Columbia was represented by Mr.

Heald. According to both Rex and his mother, Mrs. Clara Holland, nothing whatsoever was said or done at that meeting which would give them notice that Columbia was paying \$387,500.00 for the entire property. The co-owners assumed that Columbia was paying about \$133,333 for the entire property. No revenue stamps were even visible during the meeting.

(16) Canfield, a total stranger to Rex, told him that there were three and one-half million tons of ore in the property and ore was being offered for twenty-five cents per ton; Rex then wrote his letter of Sept. 14th to Mathesius. Shortly thereafter it developed that Canfield had been completely mistaken about the size of the ore body in the M&H Claims.

(17) Therefore, Rex concluded that since Canfield was obviously mistaken about the *amount* of ore in their property, he was also probably mistaken about its *price*.

(18) There was no reason for Rex, or anyone else for that matter, to believe that on September 14, 1948, Canfield knew or had any way of finding out whether Moreton and Mathesius had agreed upon a price or what that price was.

(19) Moreton admitted, first when his deposition was taken in 1953 and later at the trial, price was not agreed upon or even discussed until about October 15, 1948, or one month after Rex had spoken to Canfield.

(20) The conversation that caused Rex to write the letter of September 14, 1948, to Mathesius took place

about a month before Mathesius and Moreton had agreed upon or even discussed the price.

(21) There were actually only two people who would know what the price was when it was agreed upon, Moreton and Mathesius. Rex wrote to Mathesius who took the letter to Moreton. Neither Moreton nor Mathesius answered or ever referred to the letter.

(22) The letter of September 14, 1948, from Rex to Mathesius, was written three months before the transaction was closed. It, of course, has absolutely nothing whatever to do with the running of the statute of limitations. The effect of this letter had dissipated itself and the confidence of the co-owners in Moreton was restored. The co-owners continued to follow Moreton's advice and accept his statements and sign whatever he presented to them. The confidence of the co-owners was continuing. They proceeded with the sale. They were then defrauded on December 20, 1948, when they received \$33,333.33 for one-fourth and Moreton received \$287,500.00. Nothing occurred after that date which should have caused them to make further inquiry, or give them notice of any concealment, misrepresentation or overreaching until October, 1951. Therefore, the statute of limitation did not begin to run until the discovery of the fraud, to-wit: until October 1951.

(23) The Holland family employed Moreton to act as attorney for the John Holland Estate again in 1949 and Moreton was attorney of record for John Holland's Estate up until the summer of 1953.

(24) The co-owners did not discover the fraud that Moreton had perpetrated upon them for the following reasons: (a) they obviously had tremendous confidence in Moreton, witnesseth the fact that they apparently went along with everything that Moreton asked for, including the fact that they signed everything that he asked them to sign; (b) the nature of the property was such that there was absolutely no way of determining what its value was let alone determining what price Columbia would pay for it because apparently standing by itself it was too small to have any value at all. In other words, it would not pay for anyone to install a facility to work a mine of that size; (c) actually, that mine was valuable only to one person and that was Columbia. Had Columbia refused to buy the mine, it would have had no value whatsoever; (d) it was a total stranger at the time, Canfield, who apparently stated to Rex that the property of the co-owners contained three and one-half million tons of ore and ore was being offered for 25 cents a ton; (e) actually, Holland was not required to act at all upon the statement of a stranger in preference to the statements previously made to him by his trusted adviser, Moreton.

(25) Moreton overreached the co-owners. He was unfair to them. His agreements with them were inequitable. He never made a full disclosure to them of everything he knew regarding the property. He led them to believe the property was bringing only \$133,333.33 or a *little* more. He concealed the price that Columbia had, on or about Oct. 10, 1948, agreed to pay for the entire property.



(26) However, the co-owners suffered no actual loss until the deal was closed on Dec. 20, 1948. That is the date upon which their cause of action accrued. Nothing at all happened thereafter until October 1951 that would tell them that the total sale price had been \$387,500.00. In the meantime, Moreton was acting as attorney for the John Holland Estate and continued to act in such confidential relationship, at least until the time this action was filed.

(27) When Rex heard in October 1951 that Columbia had paid a total price of \$387,500.00 he wrote to Moreton asking for his proper share. Moreton answered (Ex. P-25, letter of Dec. 18, 1951). He refused to give the co-owners the amount they had coming from him. Moreton even threatened to put Rex in jail if Rex pushed the inquiry any further (Ex. P-25).

As quoted in *Omega Investment Co. v. Woolley*, 72 Utah 474, 271 Pac. 797 :

“Such people should not find encouragement in the thought that, by keeping their machinations within the letter of the law, they may find sanction for their practices and reap the reward of their craftiness. To the victim it is of little import whether his property is taken from him by a bold and forcible robbery or by an ingenious and unsuspected deception. The injury to him is the same; and the evil effect of court decisions which permit the wrongdoer to enjoy the fruits of his chicanery is of no small import when viewed ‘in the light of public policy.’ ”

It is respectfully submitted that this Court should therefore :

1. Enter final judgment in favor of the plaintiff Rex Holland and against Moreton and his family in the sum of \$95,833.00, plus interest at 6% from December 20, 1948 to the 10th day of July, 1957, plus interest on that entire amount at 8% per annum from July 10, 1957.

2. Enter final judgment in favor of Rex Holland as Administrator of the Estate of John Holland, deceased, against Moreton and his family in the identical amount, or, in the alternative, to order a new trial for Rex Holland as Administrator of the Estate of John Holland, deceased, based upon the trial court's erroneous direction of a verdict.

Earnestly and sincerely urging all of the foregoing this brief is

Respectfully submitted,

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