

1958

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

Utah Supreme Court

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IN THE SUPREME COURT of the STATE OF UTAH

REX HOLLAND

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

—vs.—

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

RESPONDENTS' BRIEF

Plaintiffs' (appellants) brief and the so-called "The Verbatim Testimony," a separate document, so distort the record and take so much out of context that we are impelled to restate the factual premise.

Counsel would attempt to make it appear the issues herein have already been decided against the defendants by *Holland v. Columbia Iron Mining Co.*, 4 Utah 2d 303, 293 P.2d 700. The language of Judge Jones, concurred in by the majority of the Court, is to the effect that nothing therein contained should in any respect be construed as a

determination of any of the issues as between Holland and Moreton. Plaintiffs, however, point with some apparent comfort to language of Justice Crockett found in the latter's supplement to the main opinion and premise the quote on pages 2 and 3 of their brief with the statement that the evidence in the instant case is "substantially" the same as when the corporate defendants were removed from the action by summary judgment. The premise is erroneous and is an obvious attempt to persuade the Court that the task is an easy one and that the previous reference to Moreton requires no squaring of judicial opinion with the facts in the instant case. Arthur E. Moreton, the target in this controversy, was not before the Court in *Holland v. Columbia Iron Mining Co.*, supra. The issues involved here have not been predetermined and plaintiffs' reference to expressions in the prior opinion as affecting Mr. Moreton are entirely redundant.

STATEMENT OF THE FACTS

On December 20, 1948, Rex Holland, John G. Holland, Clara S. Holland and Wm. C. Murie delivered their warranty deed to Columbia Iron Mining Company covering an undivided three-fourths interest in the M & H, M & H No. 1 and M & H No. 2 patented lode mining claims and received \$100,000.00. On the same day Arthur E. Moreton and members of his family delivered their warranty deed covering an undivided one-fourth interest in the same property and received from the same source part payment on an overall commitment to pay \$287,500.00 for the same. These facts are admitted.

This action was commenced by the filing of a complaint on December 19, 1952, the last day of the fourth year following the receipt of the money and the delivery of the deeds to Columbia and four years and approximately seven months after plaintiffs' deed to Mr. Moreton of an undivided one-fourth interest on July 23, 1947. John G. Holland died on October 9, 1949. On July 28, 1953, Rex Holland was appointed as administrator of the estate of John G. Holland, deceased, with Will Annexed. The statute of limitations, subsections (2) and (3) of Section 78-12-26, Section 78-12-37 and subsection (1) of Section 78-12-25, *U.C.A.* 1953, are pleaded and relied upon (R. 155-168). At the close of the evidence defendants made their motion for a directed verdict (R. 237-242; 950-962).

The verdict of the jury (R. 287-288) was set aside in accordance with defendant Arthur E. Moreton's motion (R. 293). The court dismissed the action of Rex Holland and Rex Holland as administrator as against defendants Ethel T. Moreton, John R. Moreton, Rose Ann P. Moreton and Susan Moreton Tevis and dismissed the action of Rex Holland as administrator against the defendant Arthur E. Moreton (R. 236, 292-294, 298-299, 960). As the case was submitted to the jury it was the action of Rex Holland in his individual capacity against the defendant Arthur E. Moreton (R. 261, 960), upon the first cause of action of plaintiffs' amended complaint (R. 1-12, 960-961). The defendant Wm. C. Murie was dismissed out of the case by the pretrial order of October 22, 1956 (R. 148-150).

The first cause of action is to deprive Arthur E. Moreton of the value of the undivided one-fourth interest in the mining claims, which interest he received by deed on July 23, 1947 (XVIII, R. 9) for patenting the claims. It is alleged that in either the Spring or Fall of 1946 or the Spring of 1947 Moreton agreed to act as plaintiffs' attorney in obtaining a United States patent to the mining claims and to act as their attorney and agent in negotiating for and the sale and disposition of said mining claims, and that said Moreton for said services was to receive an undivided one-fourth interest in and to the mining claims (XVI, R. 8-9); that the co-owners were completely unaware of and had no knowledge regarding the value of said mining claims, except that there was some iron ore therein, and were completely unaware of the value thereof and *mistakenly believed* that such mining claims were worth much less than they actually were, which lack of knowledge continued until on or about December 18, 1951 (XIV, R. 8); that *prior* to the time the co-owners signed the various documents Moreton learned and became aware of the true facts concerning the mining claims and property and its value and knew that the co-owners were unaware of the same (XV, R. 8); that in reliance on the "fraudulent" conduct of Moreton the co-owners affixed their signatures to a series of documents, including options, ownership agreements and other documents, and that said co-owners purportedly agreed to and purportedly did convey on July 23, 1947, to Moreton a one-fourth interest in said mining claims, which interest the Moretons sold and conveyed on December

20, 1948, to the corporate defendants (XVIII, R. 9); *that at the various times between the spring of 1946 and July 1947* "that the co-owners signed the various documents hereinabove referred to," Moreton "fraudulently" misrepresented to the co-owners that the said mining claims were worth "much less" than they actually were worth and "fraudulently" concealed from them all that he knew about the actual value of said mining claims and property "and thereby obtained their signatures to said documents" (XIX, R. 9-10).

It is then alleged that by reason of the misrepresentations Moreton is not entitled to any compensation for any services rendered in connection with the mining claims and property (XXI, R. 10); that the co-owners, had it not have been for the conduct of Moreton, would never have agreed to convey nor would they have conveyed the one-fourth interest but would have paid Moreton a reasonable fee for his services, which they allege to be not in excess of \$5000.00 (R. 10-11). In paragraph XXV (R. 11-12) it is alleged that the co-owners did not discover *or have any means or reason that they knew of to discover* the alleged fraud until on or about December 18, 1951. The allegation of damage (XXVI, R. 12) as to Rex Holland and John G. Holland is two-thirds of \$287,500.00, the alleged value of the one-fourth interest conveyed to Moreton.

By the pretrial order of October 22, 1956 (5, R. 149), the trial court granted a summary judgment as to the first cause of action in favor of the individual defendants, giving the plaintiffs leave to move for a reconsideration.

By the pretrial order (R. 149) the court found “that the plaintiffs’ claim under count one was that they are entitled to all of the proceeds from the sale to Columbia Iron Mining Company, a corporation, *on the theory that part of those proceeds amounted to a commission for the sale*” (Emphasis ours), and by paragraph 7 stated that the pretrial order “supersedes the pleadings wherein they are in conflict with said order.” By a pretrial order of February 19, 1957 (R. 153-154) plaintiffs’ first cause of action was reinstated. The trial was conducted on the pretrial orders mentioned (R. 317).

Before outlining the factual premise we call attention to the testimony of Rex Holland:

“Q (R. 331) When did you first become acquainted with Mr. Moreton?

A That was in the spring of 1946.
* * *

A (R. 333-334) We told him that we would like to have the claims patented.
* * *

A Then he made the statement of, ‘Would you be willing to give me a one-fourth interest in those claims if I obtain a patent to those claims?’
* * *

A Well, we told him that if he would get us a patent to those properties that he would get a one-fourth interest in them.

Q And was anything else said?

A Well, he says, 'That is fine. That is a deal. I will get a surveyor, a mineral surveyor, down on those as soon as I can.'

* * *

A (R. 336-337) Mr. Moreton told us that in obtaining these patents that it takes different lengths of time to get a patent, that sometimes it took six months or a year, different times, different lengths of time to get the patent. And we then agreed that we would let him have a period of six months in which to get ready to start getting a patent to that property.

Q Was anything further said at that time?

A Yes, there was a question asked Mr. Moreton what he thought the value of that property would be at that time, and Mr. Moreton replied that he did not know what the value of the property was at that time.

Q And was there any further discussion or conversation?

A Then Mr. Moreton told us that if he was going to get this patent he wanted an assurance from us that we would not sell our three-quarters interest to any other parties, and at that table Mr. Moreton did not have his stenographer or his typewriter with him, and I think it was on a letterhead of the hotel, in which it was written out in longhand, that he would get a one-fourth interest in the mining claims for obtaining the patent. ***"

The plaintiff also testified (R. 318-319):

" 'Q Well, let's put it this way. Maybe it will clear it all up. I want you to listen to it and not be

mislead. All the contracts that you made and agreements where you had any conversations and were trying to negotiate some kind of relationship between you for the buying and selling of these properties, wasn't it always finally reduced to writing and signed by the parties?

A Yes, as far as I know it was.

Q There wasn't any agreement outside of these written agreements was there that you know about?

A Not that I know of.

Q Mr. Holland, if I understood your testimony correctly you make no claim of Mr. Moreton being your attorney other than activities he had in relation to the patenting and selling of the M & H claims?

A That is correct.' ”

On July 23, 1947, John G. Holland, Wm. C. Murie and Rex Holland executed their warranty deed (Exhibit P-7) in favor of Arthur E. Moreton to an undivided one-fourth interest covering the then unpatented mining claims in question. The deed was executed and delivered pursuant to an Agreement of Ownership of the same day, P6, which is set forth in the appendix attached hereto. The recited consideration in the Agreement of Ownership is the patenting of the claims by Mr. Moreton at his sole cost and expense, “and other good and valuable considerations.” It is undisputed in the record that the mining claims were so patented, the patent, Exhibit P20, being duly executed by the Bureau of Land Management on October 22, 1948.

Exhibit P18 is a power of attorney acknowledged by the Hollands and Murie under date of March 11, 1947, making Arthur E. Moreton their attorney in fact to appear and act for them in all matters in connection with the application and issuance of patent. In explanation of the power of attorney a letter was signed by the Hollands and Murie under date of March 10, 1947, addressed to Mr. Moreton, Exhibit P8, a copy of which is found in the appendix to this brief, which letter reiterates the basic understanding that for obtaining the patent and for securing the survey, and paying the costs, etc., Mr. Moreton was to obtain a one-fourth interest by deed to the mining properties. Nothing is said in this letter or elsewhere in any of the writings that Mr. Moreton was to receive a commission for the sale of any interest or that such was contemplated.

It was provided by the Agreement of Ownership that if the properties were sold, leased or otherwise disposed of on a tonnage basis for \$133,333.33, Mr. Moreton was to receive one-fourth thereof, and if the properties were sold, leased or otherwise disposed of *for more than said sum, Moreton was to receive the amount in excess of the stated sum together with the one-fourth thereof, which "shall be paid by the purchaser to the said Arthur E. Moreton and received by him as his sole property, for his said interest."* The Agreement of Ownership, which in effect fixes a price of \$100,000.00 for the three-fourths interest in the claims, is consistent with two preceding documents, one of which is Exhibit P4 dated September 1, 1946, on the stationery of the Escalante Hotel at Cedar

City, signed by Rex K. Holland, Will C. Murie and John G. Holland in favor of Arthur E. Moreton. The text of the agreement reads:

“For and in consideration of One dollar and other good and valuable consideration, the receipt of which is hereby acknowledged the undersigned hereby give and grant to you and your assigns the exclusive right to patent the three M & H claims situate near Desert Mound, Iron County, Utah, which are the property of the undersigned subject to an option to you to purchase same. In return for securing such patent, you and your assigns shall receive an undivided one fourth interest in said claims. A survey will first be made of said claims and application for patent shall be filed on or before April 1-1947—so that it will be unnecessary to do the work for the pending year. In consideration hereof, your option to purchase is extended to April 1-1947.”

The other document is the renewal undated option, Exhibit P5, but which, by its text, was after April 21, 1947, and which granted to Moreton, described as the “optionee,” his heirs, executors, administrators and assigns, the exclusive right, privilege and option for a period of twelve months “from date hereof, (*and so long thereafter as the said Arthur E. Moreton shall have negotiations for the sale of said claims to others, actively pending*) to purchase from” the two Hollands and Murie their undivided three-fourths interest in the mining claims for the sum of \$100,000.00 either in cash or ten equal annual payments without interest thereon. A copy of the option is to be found in the appendix to this brief. It is to be noted that the handwriting in the body of the

original instrument is admittedly that of Rex Holland. It was Rex Holland who inserted the time element of "twelve" months and the consideration of \$100,000.00 and the terms of payment.

The property was core drilled in 1945-1946 by the Bureau of Mines under the supervision of W. E. (Bill) Young (R. 726) assisted by John G. Holland (R. 721-726). The result of the core drilling was made the subject of a printed report dated May 1947, Exhibit D37, which was given public circulation on June 26, 1947, Exhibit D48, which exhibit shows that a copy was sent to Mr. Moreton, to Rex Holland, to Wm. C. Murie and John G. Holland. Rex Holland forwarded a copy of the report to H. L. Waldthausen of Kaiser Engineers, Oakland, California, on July 9, 1947, with a letter of transmittal, Exhibit D36, in which letter he specifically called attention to pages 77-79 and to drill holes Nos. 24, 29, 30, 32, 34 and 36, and otherwise disclosed an intimate knowledge of the report itself which contains an ore analysis, the approximate size of the ore body, the thickness of the overburden and other pertinent facts. Rex Holland, in his deposition, denied having sent the report to the Kaiser people even when he was confronted with Exhibit D35, a letter to Moreton dated July 9, 1947, in which he so stated. At the time of trial when confronted with the Waldthausen letter, Exhibit D36, Rex leaned on the crutch of a faulty memory (R. 544). Copies of Exhibits D35 and D36 are set forth in the appendix.

The letter to Waldthausen (D36) as written by Rex

contains, in addition to the detailed information with respect to the M & H claims, the following:

“While in Salt Lake City last week Mr. Moreton stated that Dr. Mathesius of the Geneva Steel Co. had been in the office concerning this property so it may be well if it is needed by you to contact Mr. Moreton at an early date.”

The reference by Rex Holland to Dr. Mathesius in the Waldthausen letter is significant. It not only shows that Rex was aware of the interest of Dr. Mathesius in the property, but it shows that Rex had recently conferred with Mr. Moreton. It confirms Mr. Moreton's testimony that he advised the Hollands and Murie of his negotiations with Columbia Iron. Mr. Moreton in answer to Exhibit D35, Rex's letter to Moreton of July 9, 1947, wrote to John G. Holland and Murie on July 17, 1947, Exhibit P46, concerning Dr. Mathesius. Mr. Moreton stated in the letter, after reviewing the work of the surveyor Gorlinski, the foundation that he was laying for an application for patent; that he thought the time was approaching “very shortly when we can expect to make a deal” on the M & H claims which he would tell them about when he met the group in Cedar City; that he had a further talk with Dr. Mathesius “and I told him about the M & H claims.” A postscript is attached to the letter requesting that price and terms “of this option with me” be not discussed as “it may interfere with what I have in mind.” The letter is set forth at length in the attached appendix.

Following the Waldthausen letter a previous and outstanding option given by the co-locators in favor of Walter G. Lund for \$5000.00 was cancelled and released

(Exhibit P52, September 8, 1947), and Mr. Moreton filed the application for patent. The surveyed description was incorporated in the ownership agreement, and the deed in favor of Moreton on the 23rd day of July, 1947, was executed. No one knew what Columbia would pay for the claims at the time of the Moreton deed of July 23, 1947, and in fact not until October 9, 1948, the following year. As a matter of fact Rex, John Holland and Wm. Murie, practical miners living in the vicinity of the claims and knowing of the work of W. E. Young for the Bureau of Mines, with John G. Holland actually participating therein, had a better opportunity than Moreton to determine values, the extent of the overburden and to know the going price, if there was a going price, for iron ore. Rex's knowledge was probably superior to that of all of the others as evidence by his suggestion that the Kaiser Steel could use the high grade iron ore known by him to be in place on the M & H claims for the purpose of upgrading the ore found elsewhere on Kaiser properties. In the letter to Mr. Moreton under date of July 9, 1947, Exhibit D35, a copy of which is set forth in the appendix to this brief, Rex said in explanation of his letter to Waldthausen that "If it will hasten a sale of our claims I have done the right thing in mailing the report and not to wish them any bad luck but I hope the California deposit is good enough to mine low grade ore, but they must acquire the ore from the M & Hs to mix with it." Rex Holland impeached and contradicted himself with regard to the letter to Waldthausen, written on July 9, 1947, which

impeaching testimony is set forth in the appendix to this brief.

By the ownership agreement and the prior option the co-locators had committed themselves to sell their three-fourths interest for \$100,000.00 at a time when a possible sale was uncertain and when the knowledge of the locators was superior to that of Moreton's, or at least on an equal footing. Furthermore, patent had not issued and there were still title difficulties, particularly involving Robert A. Arthur, concerning whom we will have more to say. The price of \$100,000.00 was thereafter confirmed by several instruments but more particularly Exhibit D32, a letter dated July 14, 1948, written in the hand of Rex Holland and addressed to Mr. Moreton. By this letter, which is set forth in full in the appendix attached hereto, Rex offered to sell 3% of his one-third dollar interest in \$100,000.00, which he correctly appraised at \$999.99, for \$600.00—a practical construction placed upon the transaction by Rex himself and at a time far enough in advance of the closing of the transaction on December 20, 1948, to permit him to back away, particularly in light of his letter of Dr. Mathesius of September 14, 1948, Exhibit P14. Rex was aware of the firm commitment evidenced by the option agreement and the ownership agreement, otherwise he would not have asked Dr. Mathesius to delay closing the transaction so as to permit the option to expire in order to renegotiate with Mr. Moreton. We will refer again to the letter to Dr. Mathesius, but while on the subject of the September 14, 1948, letter to Dr. Mathesius, a copy of which is set forth in the appendix to

this brief, it is to be noted that Rex Holland two days later, and on September 16, 1947, in his own handwriting, wrote the following letter, D42, to Mr. Moreton:

“Cedar City, Utah
Sept. 16, 1948

Mr. Arthur E. Moreton
Salt Lake City, Utah
Dear Sir:

I have been requested to write and have you mail me three duplicate copies of the Option obtained from us on the M & H mining property. These copies are for myself, my father and Bill Murie.

Hoping you the best of luck I am
Yours truly
Rex Holland.”

Mr. Moreton's answer, D33, is dated September 25, 1948, a copy of which is set out in the appendix.

The Bureau of Mines report made available for distribution on June 26, 1947, sent by Rex on July 9, 1947, to Waldthausen for Kaiser Engineers, is a veritable manual for the practical miner as well as the geologist and mining engineer. In addition to pages 77-79 specifically referred to by Rex in his letter to Mr. Waldthausen, the report contains a surface map (Fig. 26) showing the relative location of the Short Line claim, the M & H No. 1, the M & H No. 2 and the surface location of the drill holes mentioned. A geological section of drill hole 24 is shown in the upper left-hand corner of Fig. 28 of the exhibit; Fig. 27 shows drill hole 29 about the center of the lower half of the page, drill hole 30 is shown in the

lower right-hand portion, drill hole 32 is just to the left of drill hole 29, drill hole 34 is just to the right of drill hole 29, and drill hole 36 is to the right of drill hole 32; all intersecting the ore body with a showing as to elevations, nature of the deposit etc. Pages 77-79 of the exhibit show the detail of the various logs and core analysis.

In contrast with the Bureau of Mines report, and over objection that the testimony was hearsay and self-serving (R. 376), Rex Holland testified, in explanation of his letter to Dr. Mathesius of September 14, 1948, that he met a Mr. Canfield on the street in Cedar City on the morning of September 14, 1948, at which time Rex asked Canfield if he knew approximately how many tons of iron ore there were in the M & H claims, to which inquiry Canfield said that there were 3,500,000 tons. At the same time Rex asked Canfield concerning price and was informed by Canfield that iron ore that had been sold at that time was bringing 25¢ a ton (R. 380-382). Rex testified that he wrote the letter to Dr. Mathesius that evening (R. 382).

The fore part of October "approximately two weeks after our first conversation" Rex had a second conversation with Canfield at Desert Mound near the M & H claims (R. 382-383). At this time, and over the same objections, Canfield is alleged to have said that he did not mean that there were 3,500,000 tons "in the M & H properties, but he had meant to include the M & H properties and the Short line properties adjoining the M & H. That was estimated tonnage of the complete ore body, and not just the separate M & H claims".

The Bureau of Mines report, Exhibit D37, as presently in the record, shows evidence of mutilation. For some unexplained reason pages have been cut out of the exhibit between pages numbered 4 and 5 and which are referred to in the text of the exhibit, page 5, under the heading "PROPERTY AND OWNERSHIP" as "Figures 2a, b and c show claims and ownership for most of the area." At the time to be set for the argument before this Court, or sooner if found convenient, defendants will ask the Court for leave to supplement the record by a further copy of Exhibit D37 which has not been mutilated by the removal of Figures 2a, b and c. It will then be disclosed by Fig. 2b in the un mutilated report that the Short Line and Short Line Wedge cannot be confused with the M & H claims when considering the report itself. Fig. 2b will disclose the M & H claims, which were formerly known as the Pedros (Exhibit D50), as embracing a portion of Section 35, Township 35 South, Range 13 West, S. L. M. in the Iron Springs Mining District, Iron County, Utah, as more particularly described in the patent, Exhibit P20. The patent also describes the claims as embracing a portion of Section 2, Township 36 South, Range 13 West, of the same Meridian—the result of the Gorlinski survey.

The relative location between the Pedro claims, now the M & Hs, the Short Line and the Short Line Wedge claims, becomes important in light of the conversations Rex claims to have had with Canfield. Holland's familiarity with the Bureau of Mines report, his activity in the mining district, his work as a practical miner in the vicinity of Cedar City, the widespread interest in the develop-

ment and exploitation of the iron deposits in Iron County, Utah, as shown by the report, all combine to make the story of lost confidence in Mr. Moreton and restoration of the same bizarre to say the least.

Within a month from the second alleged conversation with Canfield Rex wrote to Mr. Moreton in a tone of extreme urgency. This letter, Exhibit D28, in the handwriting of Rex, is dated November 4, 1948. The letter is copied in full in the appendix to this brief.

The letter says that Robert A. Arthur had informed Murie that he, Arthur, "was going to attempt to throw the deal *we are all in on* into litigation if he was not paid for his old intrest (sic) in the claims." Rex was disturbed to the point of saying:

"Father is going to town now for a few minutes each day and I am afraid that he will soon learn that Mr. Arthur is going to attempt to block the sale which would mean that father would go directly to Arthur and have it settled the old way they used to settle disputes over mining property. This we don't want because I had an argument with this man once before and since being in the Army I am not so sure I can hold my temper as I did at that time."

Mr. Moreton's answer, Exhibit P60, to Rex's letter of November 6, 1948, is likewise set forth in full in the appendix. Also the formal demand, Exhibit D27, made upon Mr. Moreton by Robert A. Arthur under date of November 17, 1948, in which Robert A. Arthur asserted a one-half interest in the M & H, M & H 1, 2, 3, 4 and 5 "which said mining claims were formally (sic) known and designated Pedro, Pedro No. 1, 2, 3, 4 and 5." The Robert A.

Arthur claim was disposed of by Mr. Moreton for the sum of \$1500.00 as indicated by Exhibit D50 and the several instruments attached thereto.

The September 14, 1948, letter to Dr. Mathesius, Exhibit P14, is commented on in detail in the concurring opinion of Justice Crockett in *Holland v. Columbia Iron Mining Co.*, supra.

“The simplest mathematical calculation would have shown that 25 cents per ton x 1.55 million tons totals \$387,500, which calculation Rex Holland could easily have made, as is apparent from the contents of the September 14th letter itself.”

In the letter Holland states unequivocally that the property “is being offered for sale for .25¢ per ton” and that Moreton has misrepresented the tonnage. “Mr. Moreton has made us believe that there was only One Million, Four Hundred Thousand (1,400,000) tons of iron ore contained in this deposit. We agreed to accept \$100,000.00 for this property based upon that tonnage and have signed Articles of Agreement that will expire at the end of September, 1948.” Holland then complains that “Since we signed the Agreement we have been advised that instead of One Million, Four Hundred Thousand tons of iron upon the property there are Three Million Five Hundred Thousand tons of iron ore.” The letter requests Dr. Mathesius to consider “postponing the purchase of the property until after November 1st, 1948 and notify Mr. Moreton that the sale has been canceled. This will then give time for the Agreement between us to expire. We will then demand that the sale be made on an equal basis whereby we the owners of the property will receive

three fourths of the total and Mr. Moreton will receive his $\frac{1}{4}$ interest for patenting the property.”

Following the letter to Dr. Mathesius, which was never answered, Rex Holland made two requests of Moreton for money. Exhibit D29 is a telegram dated November 13, 1948. “Need \$300 now, will you please send check.” Exhibit D30 is a handwritten letter from Rex to Mr. Moreton dated November 30, 1948, set out in full in the appendix. Rex tells of a contemplated operation and states that he needs “another \$200.00 check which together with the \$300.00 sent me last month will be deducted from the monies received from the sale of the M & H’s.” Exhibit D31 is Mr. Moreton’s letter dated December 2, 1948, transmitting \$200.00 to Rex. This letter is set out in full in the appendix.

The Agreement of Ownership states that Mr. Moreton was to receive all over \$100,000.00 on the sale of the property. The undated option is to the same effect. Furthermore, there were several express references to that precise situation following the letter of September 14, 1948, to Dr. Mathesius. These letters are set out in full in the appendix but they can be summarized as follows:

October 13, 1948, Exhibit P19. This is an originally executed document by John G. Holland, Clara S. Holland, Rex Holland and Wm. C. Murie addressed to Columbia Iron Mining Company. Rex acknowledged the execution of this document. The letter states that the signers had been informed by Moreton on several occasions during the “last five or six months” that he had been negotiating with a mining company for the purchase of the M & H

claims. The letter states that the estimated tonnage is 1.55M. The letter recites the agreement with Moreton for the patenting of the claims and that he, Moreton, was to receive for his interest all of the purchase price in excess of \$100,000.00. Furthermore, that the interest of the signers consists of an undivided three-fourths.

October 16, 1948, Exhibit P16. This is a letter addressed to Columbia Iron Mining Company. The letter differs from Exhibit P19 in that it states that Moreton received an interest for patenting the claims and that Moreton may offer and sell his interest for whatever price the company and he may agree upon, "it being his right to determine and to receive whatever amount you may agree upon with him." The former letter states that he, Moreton, "shall receive for his interest in said claims, all of the purchase price which may be received for said claims in excess of \$100,000.00." Another difference is that while Exhibit P19 states that the interest of the Hollands and Murie is a three-fourths interest, Exhibit P16 does not delineate the interest, but places the sum of \$100,000.00 as the sale price "for our interest".

October 16, 1948, Exhibit P15. This letter is signed by the Hollands and by Murie and receipt is acknowledged on November 2, 1948, by Columbia Iron Mining Company. The letter is addressed to Mathesius as President of the company. This letter is the one referred to in P16 and in P19 as the offer "this day prepared and submitted to you". The offer specifically states an undivided three-fourths interest and the sale price as \$100,000.00.

Exhibit P19 contains a reference to the estimated tonnage.

November 20, 1948, is the date of a letter from the Hollands and Murie to Columbia Iron Mining Company, Exhibit P17. This letter, also in the appendix, reaffirms the offer of October 16, 1948, for the sale of "our interest" for the sum of \$100,000.00 cash. It states that the patent, Exhibit P20, on these claims has "now been issued and we hope for an early acceptance of our offer." The letter concludes with a statement that an interest in the claims is also held by Arthur E. Moreton and "it is no concern of ours as to when and to whom he may sell his interest or at what price or upon what terms."

On October 8, 1948 (R. 238, 505) Moreton wired the Hollands and Murie:

"Have talked on phone to president of company twice today bargaining with him for sale of your interest for your fixed amount in cash and for as much more as I can get for mine as agreed and as set forth in our written agreements I will keep you advised."

Rex's handwritten letter to Mr. Moreton of November 30, 1948, Exhibit D30, anticipates the closing of the transaction. He states:

"This will put me in Salt Lake so that when the final papers are completed on the M & H's I will be there to work with you until the final papers are signed."

There is also an admonition to Mr. Moreton, Rex being fearful that he might have to pay for the operation out of his personal funds:

“* * * so I ask that you please be careful when you come to visit me that you do not reveal the sale of mining property.”

When Rex went into the meeting of December 20, 1948, with Dr. Mathesius, Mr. Heald and Mr. Moreton he was armed with the knowledge that the tonnage was approximated to be 1.55M tons; that ore had been sold for 25¢ per ton; that he, his father and Murie between them were to receive \$100,000.00 and Mr. Moreton was to receive all over that. While Rex disputes the testimony of Mr. Heald, the attorney for Columbia Iron Mining Company, that each phase of the transaction, including the amount of money Mr. Moreton was to receive, was carefully and methodically spelled out and explained, nevertheless it is contended that from the documentary evidence alone reasonable minds could not differ on the proposition that Rex actually knew or should have known in the exercise of reasonable prudence the purport of the transaction, a sufficient ground in and of itself to support the judgment notwithstanding the verdict.

The cleverness of Rex, once having received what he bargained for, is reflected in the writings following the closing of the transaction on December 20, 1948. These writings, Exhibits D62, D41, D63A, D38, D40, D67A, P24, P26, D65, P70, D38 and D66, in the main, propose fantastic deals to Moreton and make many references to Canfield as a co-adventurer with Rex. The letters are climaxed by the letter of December 16, 1951, Exhibit P24, to which letter Mr. Moreton on December 18, 1951, Exhibit P25, referred to as attempted extortion. To the charge of extortion Rex turned to the United States At-

torney, the letters being among the exhibits mentioned and, although invited to make full disclosure of the civil claims against Mr. Moreton to the United States Attorney, Rex replied by Exhibit P69, a letter dated January 23, 1952, "I am going to try again to get this man (Moreton) to make a more equal division of the money received from this sale. This I believe he will do. So I choose that nothing more is done until after I have met with him." Exhibit D65, a letter dated February 23, 1952, and Exhibit D39, a letter written June 11, 1952, proposes an investment in an alleged titanium deposit in Canada. The correspondence was finally closed by Mr. Moreton's letter to Rex on June 18, 1952, Exhibit D66, in which Moreton stated that he would not invest in the Canadian enterprise, then the employment of out of State counsel and this lawsuit followed.

In *Holland v. Columbia Iron Mining Co.*, supra, two fundamental concepts are reiterated by the majority of the Court (1):

"Inferences are made for the purpose of aiding reason, not to override it."

and (2):

"Common sense and reason dictate that evil inferences should not be permitted to be drawn from routine business transactions where there are no other circumstances. To hold otherwise would throw the door open for an attack on each and every transaction that one might enter into. Every vendor who might feel aggrieved because he wasn't paid enough money for his property should not be permitted to come into court and have his case submitted to the trier of the facts merely because it is subsequently ascertained that

he made a bad bargain. And those who are willing to sign most anything in order to obtain money should not be permitted to lightly cast aside these solemn documents and vitiate transactions which have long since been consummated.”

With the factual setting as outlined above, taken in the main from the documentary evidence in the case, the following become self-evident:

STATEMENT OF POINTS

POINT I.

THE RELATIONSHIP WAS NEITHER THAT OF ATTORNEY AND CLIENT NOR PRINCIPAL AND AGENT.

POINT II.

THERE WAS NO OBLIGATION ON THE PART OF MORETON TO DISCLOSE THE PURCHASE PRICE.

POINT III.

THE HOLLANDS KNEW AND UNDERSTOOD THE CONTRACTUAL COMMITMENTS.

POINT IV.

MEANS OF KNOWLEDGE IS EQUIVALENT TO “KNOWLEDGE.”

POINT V.

THE HOLLANDS HAD ACTUAL KNOWLEDGE OR THE MEANS OF KNOWLEDGE WITHIN THE CONNOTATION OF THE STATUTES OF LIMITATION.

POINT VI.

THE TRUST RELATIONSHIP, IF ANY, WAS REPUDIATED LONG PRIOR TO DECEMBER 20, 1948.

POINT VII.

THE STATUTES OF LIMITATION HAVE RUN AGAINST THE ACTION BY REX HOLLAND.

POINT VIII.

THE STATUTES OF LIMITATION HAVE RUN AGAINST
REX HOLLAND AS ADMINISTRATOR.

POINT IX.

PLAINTIFFS DEVIATE FROM THE PRETRIAL PRO-
CEEDINGS AND THEIR THEORY OF THE CASE.

POINT X.

TO REINSTATE THE JURY VERDICT WOULD BE TO
DEPRIVE DEFENDANT OF HIS PROPERTY WITHOUT
DUE PROCESS OF LAW.

ARGUMENT

POINT I.

THE RELATIONSHIP WAS NEITHER THAT OF AT-
TORNEY AND CLIENT NOR PRINCIPAL AND AGENT.

For no reason pointed out, other than that the “defendant Moreton is an attorney at law, duly licensed to practice law in the State of Utah”, plaintiffs jump to the conclusion, without evidence or law to support such contention, that the relationship between the parties was that of attorney and client. Reference is repeatedly made to the co-owners as “clients” rather than “optionors”. This alleged relationship of attorney and client is so often repeated in plaintiffs’ brief that it would seem that they have labored hard and long to convince themselves, and finally to convince this Court that repeated assertions of this relationship will make it a fact. Rex Holland and his mother both admitted that Mr. Moreton had never, prior to the time the co-owners gave to him an option, been their attorney or performed any services for them.

Under "Statement of Points to be Relied Upon", in plaintiffs' brief it is said under Point I, page 20, "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. * * * We submit that under the evidence in this case this confidential relationship appears as a matter of law." Plaintiffs went so far in their complaint as to charge that Mr. Moreton had been their attorney for twenty years, but were obliged to recede from that position by their testimony above related.

Upon the foregoing conclusion of law with respect to such alleged relationship, the plaintiffs have built their brief, ignoring the testimony in the case, how the transaction originated as a business proposition, as an offer to sell pursuant to an option admittedly given to Moreton and recognized and affirmed in the communications of the co-owners to Columbia.

Each and every one of the documents and communications from the co-owners to Columbia negative the existence of any such alleged relationship, but on the contrary recognize and affirm the option. Mr. Moreton's rights under such option were never questioned, and in fact Rex in his letter to Dr Mathesius of September 14, 1948, recognized the option and mistakenly thought that the option was about to expire and asked the company to wait until it did expire.

If any such relationship of attorney and client was created, it would necessarily have had to arise from the

interpretation and construction of the option, which we submit is impossible.

We agree with plaintiffs' Point I to the effect that the relationship between the parties was a matter of law for the Court to determine, and this can be accomplished only by construction of the option and not by presumption, inferences or innuendoes.

Rex Holland, John G. Holland and Murie met with Mr. Moreton at Cedar City in the Spring of 1946 to promote or initiate the sale of their mining claims. They wanted to sell the claims and they did sell them (R. 412). According to Rex, Mr. Moreton stated that the claims would have to be patented and the co-locators told Mr. Moreton that if he would patent the properties he would get a one-fourth interest for so doing (R. 332-333). Holland testified that Mr. Moreton wanted assurance that the co-locators would not sell their three-fourths interest to third parties, and therefore an option was given for the three-fourths interest, leaving a blank space, according to Holland, in a handwritten instrument for the price and the period of the option, with the explanation that the value of the property was then unknown to Mr. Moreton (R. 336-337). Mr. Moreton fixed the date of the first conversation as being April 6, 1946 (R. 622), testifying that at the time of the conversation the bargaining between them was whether Moreton was to receive a half interest for patenting the claims or a quarter interest (R. 624-625).

The option, as above expressed, was written on a piece of stationery of the Escalante Hotel (R. 621) and

would have expired on September first of the same year "or thereabouts" (R. 627). The document was not found. Mr. Moreton was unable to find the April 6, 1946, document in his file (R. 614-615), nor was he able to find the document at the time of his deposition taken on February 16, 1953 (R. 622-623). The option was extended by the September 1, 1946, document, Exhibit P4, which acknowledges receipt of the recited consideration and gives and grants to Moreton and his assigns the exclusive right to patent the three M & H claims "subject to an option to purchase the same". The instrument states that in return for securing the patent Mr. Moreton is to receive an undivided one-fourth interest in the claims and that the patent application shall be filed on or before April 1, 1947, the extended date of the option. The agreement evidences a simple business transaction. Rex Holland testified that he had no further or different relationship with Mr. Moreton (R. 318-319).

On March 10, 1947, a letter was written to Mr. Moreton, Exhibit P8, stating that a power of attorney, Exhibit P18 (acknowledged March 11, 1947), had been signed, likewise the application to the District Cadastral Engineer for a survey. The letter confirms the understanding that Moreton had employed Robert Gorlinski, Deputy United States Mineral Surveyor, to survey the claims and that he, Moreton, would pay for such services together with all other expenses of securing the patent for an undivided one-fourth interest to be deeded by John G. Holland, Wm. C. Murie and Rex K. Holland "provided application for patent survey was made on or before

April 1, 1947, and said patents carried through to a conclusion." Amended locations of the M & H No. 1 and M & H No. 2, Exhibits P9 and P10, were dated April 21, 1947, and forwarded by mail to Mr. Moreton with Rex's letter of transmittal dated April 23, 1947, Exhibit P11. This letter indicates that all three of the locators had again been on the property and were fully informed concerning the patent proceedings. Rex spent three days with Mr. Gorlinski assisting him on the survey (R. 346).

Mr. Moreton's letter of July 17, 1947, Exhibit P46, states that he is planning on being in Cedar City around July 21st and would have additional papers to be signed in connection with the application for patent. The letter refers to the plat and field notes as prepared by Mr. Gorlinski and that the Cadastral Engineer was expected to approve the plat within a few days. Reference in this letter is also made to Rex's letter of July 9th pertaining to the Waldthausen letter. The letter of July 17th is the only evidence in the record, other than the uncertain testimony of Rex Holland, that Mr. Moreton was in Cedar City between April 23rd and July 21st. From Rex's letter of April 23, Exhibit P11, it would appear that Mr. Moreton was not in Cedar City at that time nor had he been for sometime prior to April 21st, the date of the amended locations. It is to be assumed, therefore, that it was sometime between the 23rd day of April and the 21st day of July, 1947, that the undated option, Exhibit P5, was signed. Rex at one place in his testimony (R. 353-358) stated that the document was presented the first or sec-

ond week in June, 1947. The blanks are filled in in Rex's handwriting (R. 356).

The undated option refers in its text to the re-amended location certificate of both the M & H No. 1 and M & H No. 2 prepared by the U. S. Mineral surveyor dated and filed for record on April 21, 1947. The option price and the terms of payment are the voluntary writings of Rex Holland. He does not claim that at the time the blanks were filled in Mr. Moreton told him what to write or made any calculations for him. Mr. Moreton testified that he intended to give the Hollands and Murie an opportunity to determine for themselves the terms of payment and an opportunity to raise their price if they were not satisfied with spreading the payment out over a period of ten years. Therefore, the undated option was left in blank for the period of the same and for the price (R. 679-681). The understanding, however, was clear. From the time the option was first given Rex's understanding was that he, his father and Murie were to get \$100,000.00 for their part of the claims (R. 415-416). He stated that they were willing to sell their interests for that amount of money, which amount they ultimately received (R. 520).

There is no testimony on the part of the plaintiff indicating any representation on the part of Mr. Moreton at the time of the submission of the ownership agreement. The implication is that the agreement was mailed or at least handed to the co-locators at Cedar City (R. 359-365).

This agreement (Exhibit P6) provided for the conveyance to the defendant of the agreed one-fourth in-

terest and made provision that in the event the mining claims were sold on an installment purchase plan, or leased, rather than sold for cash, that the proceeds to the co-owners remained at the sum of \$100,000. However, neither of these possible contingencies occurred, and the claims were sold pursuant to the option for the agreed purchase price of \$100,000.00 in cash.

The transactions related above and in the matters that followed through to the delivery by the Hollands and Murie of their deed to Columbia Iron Mining Company, and the receipt by them of \$100,000.00 is no different than the normal relationship of those dealing in the market place. The defendant Moreton bargained for an interest and an assignable option to purchase in return for the payment of the costs of patenting of the mining claims, a matter that did not require per se the services of a lawyer. There was nothing in the transaction that any businessman or layman could not have done and carried out. It is clear that the defendant was not employed in his professional capacity. The owners or any other layman could have applied for a patent. The technical part of obtaining a patent is that performed by the deputy United States mineral surveyor in making the official survey, and his submission of it for approval to the United States Cadastral Engineer. Thereafter, if the survey is approved, the Bureau of Land Management causes publication of the application for patent to be made on payment of the costs thereof and of the fees of the Land Office plus the payment of the purchase price for the land. There is nothing in connection with filing an

application for patent that requires the services of an attorney.

Where there is more than one applicant for a patent, it is required by the Land Office that one of them or some agent be selected for all applicants in order that notice may be given to one. For this a special power of attorney is required and upon the form furnished by the Land Office. *Lindley on Mines*, Vol. 3, page 1703. The plaintiff testified that the defendant said to him "When we started on the patent proceedings that he would be our attorney". This alleged conversation (R. 337), plaintiff testified, occurred in March, 1947, when the patent was applied for and not at the beginning of the transaction in April, 1946, as incorrectly stated in plaintiffs' brief. The option of April 6, 1946, was the initiation of the transaction and this belated alleged conversation with reference to such relationship of attorney and client was purely an afterthought by an accommodating witness. However, the saying comes too late in point of time and is in contradiction to the option of April 6, 1946, and the renewal thereof on Sept. 1, 1946.

"Where the language of the written contract is plainly inconsistent with or contradictory of the alleged misrepresentations, the party to whom they are made cannot ordinarily continue his reliance upon such representations." 66 C. J. 610.

In *Goodson v. Smith* (Wyo.) 243 P.2d 163, the Court said:

"When parties have deliberately put their engagements in writing, and such writing is complete on its face, and is certain and definite as to the

objects of their engagement, it is conclusively presumed that the whole contract of the parties and the extent and manner of their undertaking was reduced to writing, and cannot be contradicted, altered, added to, or varied, by parol or extrinsic evidence.' ”

The limited authority given by such power of attorney in connection with the patent proceedings and arising out of performance of the option to purchase, cannot be held to establish the relationship of attorney and client.

At the time of the initiation of the transaction on April 6, 1946, whether the relationship created be that of an optionor and optionee, vendor and vendee, principal and agent, attorney and client, the parties were dealing at arm's length and the defendant, under any view of the relationship so created, had the right to fix the amount of his compensation and the co-owners were likewise free to accept or reject.

The authorities are abundant without dissent that it is the duty of the court to determine as a legal matter the question of the interpretation of the instruments before it. This the trial judge did when he set aside the verdict.

The general rule that an attorney, before he undertakes the business of a client, assuming only for the purpose of argument that such relationship might have existed, bargains at arm's length with his client with respect to the fixing of compensation, is well stated in 5 *Am. Jur., Attorneys at Law*, page 356, Section 159, as follows:

“Before an attorney undertakes the business of a client, he may contract with reference to compensation for his services; no confidential relationship then exists and the parties deal with each other at arm’s length. Such contracts are not within the rule of presumption against the attorney which obtains in contracts between the attorney and client after the relation has been established. A contract made under such circumstances is as valid and unobjectionable as if made between other persons not occupying fiduciary relations, and who are, in all respects, competent to contract with each other, and it will be upheld and enforced if it is fair and reasonable, is not champertous, or does not for other reasons contravene public policy.”

See also *Hansel v. Norblad* (Ore. 1915), 151 P. 962.

Section 78-51-41, *U. C. A.* 1953, provides that the compensation of an attorney is governed by agreement, express or implied, which is not restrained by law. It is submitted that there is nothing in the record which would inhibit Mr. Moreton from taking the quarter interest in the claims in his own right as his compensation for patenting the same and there is nothing which would prevent him from protecting his minority interest by the option under the circumstances indicated. There is nothing but speculation and the innuendo of counsel to say that Mr. Moreton overreached a fiduciary or any relationship of trust and confidence when the price was fixed for the three-fourths interest, whether it be at the first meeting on April 6, 1946, or at the time of the undated option and the writing in of the amount by Rex Holland himself.

It was held in *Holland v. Columbia Iron Mining Co.*, supra, that evil inferences should not be permitted to be drawn from routine business transactions, and that to hold otherwise would throw the door open for an attack on each and every transaction that one might enter into. The statement that this Court made to the effect that every vendor who might feel aggrieved because he wasn't paid enough for his property should not be permitted to come into court and have his case submitted to the trier of the fact merely because it is subsequently ascertained that he made a bad bargain is particularly applicable when the vendor attempts to impeach the transaction merely because the other party happens to be a lawyer. Counsel in their brief and in the trial of the case, as the record will disclose, dwell upon the characterization of "attorney" as being proof *per se* of their client's cause.

The recent Colorado case of *Lindsay v. Marcus*, 325 P. 2d 267 (Pacific Reporter Advance Sheets June 13, 1958), holds that, while the relationship of attorney and client is a confidential one which creates a fiduciary relation between the parties with respect to the matter in which the attorney is acting for the client, the relationship does not, however, forbid the parties from dealing with each other. The Colorado Court stated:

"There is no express evidence here that Lindsay had employed Holland as his attorney to represent him in this transaction or that he ever paid or agreed to pay him anything for his work in connection therewith. Defendant had the burden of showing that the relationship of attorney and client existed, this he failed to do. *Moore v. Hoar*, 1938, 27 Cal. App. 2d 269, 81 P. 2d 226, 236. In the

absence of fraud no person is excused from reading an agreement, nor can he say that he failed to understand it by showing that the other party was a lawyer who in the past had performed services as such for him. We cite with approval from *Masters v. Elder*, 1950, 407 Ill. 512, 95 N. E. 2d 360, 364 where the court said:

‘The relation of attorney and client is a confidential one which creates a fiduciary relation between the parties with respect to the matter in which the attorney is acting for the client. However, the relation of attorney and client does not forbid the parties from dealing with each other, * * *. (Here) The relation of attorney and client had not been of a continuous nature previously, but consisted of occasional and isolated transaction(s) of the type narrated above, and not of a continuing character, such as an annual or other retainer. * * *’

“To the same effect are many other authorities relating to fiduciaries, including: *Isaacs v. Okin*, 331 Ill. App. 268, 73 N. E. 2d 11; *Sanford v. Flint*, 108 Minn. 399, 122 N. W. 315; *Harrison v. Murphey*, 39 Okl. 548, 135 P. 1137.”

One facet of the California case of *Moore v. Hoar*, 81 P. 2d 226 (1938), cited above, is of more than a passing interest on its facts. Hoar, an attorney, testified that the sole consideration for an assignment from Colberg to himself to the mining claims in question was an unpaid balance of between \$200.00 and \$300.00 due him for professional services rendered in Colberg’s behalf prior to the date of the assignment. The attorney witness testified that he suggested the assignment of interest, that he pre-

pared the instrument of assignment, that Colberg consulted with no other person with reference to making the same and that it was not suggested to Colberg by the witness that independent advice should be sought in executing the assignment. Prior to the institution of the action the five mining claims were sold for an amount of approximately \$200,000.00. After stating the California rule to the effect that transactions between attorney and client are presumptively invalid and that the burden rests upon the attorney to show that the transaction between him and his client was fair and equitable and no advantage was taken by the attorney, and that the client was fully informed as to all matters relating to the transaction and was placed in a position to act understandingly and to deal with the attorney at arm's length, the Court said:

“However, it must be conceded that upon appellants rested the burden of showing that *at the time the assignment was made the relation of attorney and client existed* between Hoar and Colberg. The assignment was valid on its face and imported the existence of sufficient consideration to support it.” (Emphasis added).

In the instant case it was plaintiffs burden to show the relationship of attorney and client at the time of the execution of the documents alleged to have been executed “between the Spring of 1946 and July 1947” as charged in the complaint, and which plaintiffs have failed to do.

John Holland had assisted in the drilling program of the Bureau of Mines; Rex Holland, a practical miner, had assisted in the survey, and they both lived in the immediate vicinity of the claims. They bargained with Mr.

Moreton on at least an even footing. To make more out of the transaction would be to inhibit an attorney in any business transaction and to make him suspect merely because of his profession. Just as was said before, those who are willing to sign most anything in order to obtain money should not be permitted to lightly cast aside their solemn documents and vitiate transactions which have long since been consummated. Mr. Moreton gave no legal advice. He acquired no knowledge by reason of the pretended relationship. He violated no duty.

This Court *In re Blodgett's Estate*, 93 Utah 1, 70 P.2d 742, has held that an administrator has a duty to make a full disclosure of his acts and the state of the business and render a correct accounting, but this obligation does not carry any further, the Court stating:

“But being the superior party in such case does not mean that he is under obligation to advise his partner in matters affecting a conflict of interests between themselves. As to external affairs of the estate, yes, but there is no obligation on the part of one heir who is an administrator to either give advice or wisdom to a coheir in matters where there is a conflict or a controversy as to the extent or nature of their respective rights. His duty as administrator went to the obligation to take into possession and disclose all estate property and all information to those interested in the estate as to estate matters, thus putting them on the same plane as he was as to such information regarding all the assets and transactions, but, when that is done, he has performed his duty to a party in regard to whom he is in controversy as to their respective interests. In that relationship, after they are on an even

plane as to all estate matters, she must exercise the decisions as to whether she will stand firm or recede in the controversy between them as to differences of opinion regarding their rights. Counsel for appellant blithely state that there was no room for differences—the will was perfectly plain as to what should be charged against her and against his interests. Plain in words, but like the law at times not so clear when the words were to be applied.”

We cite the *Blodgett* case for the proposition that once the business transaction between the parties has been consummated a subsequently fiduciary relationship does not require one to foresake the business interest, but permits the dealing with the adverse interest not acquired by reason of the fiduciary relation just as if such relation never existed. The *Blodgett* case spells out the rule that once performed the duty as trustee does not extend into a field where the trusteeship stops and the adverse interest begins. Once the bargain was made in the instant case, although we do not concede the fiduciary relationship, we do say that if such relationship came into existence after the bargain that Mr. Moreton could nevertheless and independently of the relationship deal adversely with his interest and sell his undivided interest in the mining claims for whatever price he cared without disclosing the transaction to the other co-owners. See also *Swanson v. Hempstead* (Cal. 1944), 149 P.2d 404.

Of significance, it seems to us, is that the pretrial order of October 22, 1956 (R. 148-150), does not proceed on the premise of the alleged attorney-client relationship,

but on the theory of a commission for a sale. Paragraph 4 of the pretrial order reads :

“The Court found that the plaintiffs’ claim under Count 1, was that they are entitled to all of the proceeds from the sale to Columbia Iron Mining Company, a corporation, on the theory that part of those proceeds amounted to a commission for the sale.”

Counsel, in their zeal to capitalize on Mr. Moreton’s vocation, overlooked the theory of the case. They did not complain of the pretrial order and they do not attempt to rationalize the record with the theory of a commission and, of course, the record cannot be so rationalized. Mr. Moreton could sell his quarter interest for any amount he chose, he was not required to confer with his co-owners or to disclose to them his selling price. The co-owners made their separate offer to Columbia Iron, they gave their separate deed and they had the opportunity to refuse the sale. If anything can be said for the transaction, Rex Holland is the one who acted in bad faith. He was alerted to the price of 25c per ton, but notwithstanding he remained mute when Columbia Iron delivered its check for \$100,000.00, just as if he were cleverly, cunningly and designedly trapping Mr. Moreton into a position where he, Holland, had at the same time the benefit of his bargain and the potential of a greater recovery through the medium of a lawsuit. There is much to be said for the expression of Mr. Moreton in the correspondence that followed to the effect that there was extortion and blackmail on the part of Rex.

There is nothing in the record that discloses the relationship of principal and agent, which of necessity would have to be predicated upon something directly opposed to the connotation of an option. Mr. Moreton was dealing on his own account to reduce to a specific, definite form the bargain that had been agreed upon by the option. There is nothing that can be said to be that of an agency. In the transaction outlined Moreton was not dealing as an attorney. Neither of the two Hollands nor Murie had sought Mr. Moreton out to advise them as a lawyer with regard to the sale of their claims. They sought Mr. Moreton out as a prospective purchaser for the claims, with perhaps the added factor that they knew that he was acquiring the option for the purpose of interesting someone else in the property with the hope that he could secure a greater sum than the price fixed for the three-fourths interest by the co-locators. This we submit does not spell out either the relationship of attorney and client or principal and agent. Upon this ground alone the trial court would have been justified in granting the judgment notwithstanding the verdict.

It is not unusual in the business world for one having an option to openly seek a purchaser for the property and thus in effect exercise the option. There is nothing strange or unusual about so doing. Rex knew that Mr. Moreton had an option because he said so in his letter to Dr. Mathesius of September 14th. The ownership agreement, the several letters and the option itself all have the clear connotation that Mr. Moreton was to receive as his

own all that he could get above the option price. There is nothing but a cotenancy disclosed by the record.

POINT II.

THERE WAS NO OBLIGATION ON THE PART OF MORETON TO DISCLOSE THE PURCHASE PRICE.

There is no principal and agent relationship. The cotenancy cannot be twisted into a relationship of trust and confidence. There was no obligation on Moreton's part to disclose the purchase price. It is so held in *Lindley on Mines*, Volume 3, Section 800:

“In the absence of a special contract between tenants in common of mining property, who are partners only for the purpose of exploitation, there is no relation of trust which prevents one from receiving a higher sum for his interest than is paid to his co-owners; nor is the selling cotenant under any obligation to disclose to the others the fact that upon the sale of the entire property he is to receive a higher sum for his interest than the others.”

The Montana case of *Harris v. Lloyd* (1891), 28 P. 736, deals with co-owners and tenants in common in mining properties. The Court commented that there was not a word in the testimony which tends to prove that the relations of the parties were of a fiduciary or any higher character than that of tenants in common, and held that fiduciary relations are not created or enlarged if the parties become mining partners, citing and quoting the case of *Bissell v. Foss*, 114 U.S. 252, 5 Sup. Ct. Rep. 851, 29 L.Ed. 126. In this case Bissell was not informed of the negotiations for the sale and purchase of the mining

property while they were going on and Foss requested the prospective purchaser not to tell Bissell of the sale. The Court summarized the situation as follows:

“This case settles two propositions: First, that the members of a mining association have no right to object to the admission of a stranger into the association who buys the share of one of the associates; and second, that the sale and assignment by one of the associates, of his interest, does not dissolve the mining partnership. It follows from these propositions, that one member of a mining partnership has the right, without consulting his associates, to sell his interest in the partnership to a stranger, and that such a sale injures no right or property of the other associates. Much less does a purchase by one associate, of the share of another, inflict any wrong upon the other members of the partnership. There is no relation of trust or confidence between mining partners which is violated by the sale and assignment by one partner, to a stranger or to one of the associates, of his share in the property and business of the association.”

The Montana Court in the *Harris* case pays its respect to the Supreme Court of United States in the following language:

“We have quoted extensively from the foregoing cases by reason of the eminence of the jurists who delivered the opinions, and the clearness with which the law has been expounded. Their applicability to the case before us can be seen without difficulty. They establish the proposition that, in the absence of a special contract, there is no relation of trust or confidence between tenants in common who had been partners in the develop-

ment of lode mining claims which prevents one of them from demanding and receiving a higher sum for his interest in the property than is paid therefor to his co-owners.”

In the instant case the plaintiffs have the burden to show the fiduciary relationship, the breach of duty arising out of the same and the concealment as alleged. The amended complaint by paragraph XIX thereof (R. 9) alleges that the concealment occurred between the Spring of 1946 and July 1947. The record is silent as to any knowledge on the part of Mr. Moreton covering the period charged, and this Court has held that Columbia Iron did not conspire in the premises. Mr. Moreton did not undertake to sell the claims for the Hollands and Murie. The relationship of principal and agent would be inconsistent with the written commitments of the parties. The emotional aspect of the case cannot justify ignoring the integrity of the contract. If Mr. Moreton even came close to acting as an attorney in the premises, it was in connection with the procedures relating to the patent. There is nothing in the record and there is no claim made that Mr. Moreton violated any duty or took advantage of any confidence in the patent proceeding.

The importance of the option in relation to the practical business of mining is noted in 3 *Lindley on Mines*, Section 859, as follows:

“There is no class of contracts connected with the mining industry more familiar to the profession than that of options to purchase, working bonds, or executory contracts of sale. Unlike other classes of real estate, the value of a mine cannot be determined by mere superficial observation. Ex-

pensive investigations, involving measurements, examination of underground geological conditions, and sampling invariably precede the consummation of a purchase or sale of mining property. In order to justify an intending purchaser in making the requisite investigations and incurring the attendant expense, he invariably exacts some contract from the owner by which he secures the first privilege of purchasing the property in the event the examination proves satisfactory. ***."

A recent article found in the *Rocky Mountain Law Review* (April 1958), pages 317-331, quotes from *Lindley* as above and states, among other things, the following:

"A mining option is an agreement by which the owner of a mineral estate gives another person the privilege of buying the mineral interest upon specified terms within a specified time. Such a contract imposes no obligation to purchase upon the optionee; if an obligation to purchase is imposed, it becomes a contract of purchase and sale. *** If consideration is given for the option, there is a completed contract and the optionor may not revoke the offer within the specified time. The option may, of course, be supported by consideration other than money, and, where a lease and option are given for a sum of money and there is no apportionment or division, this consideration will support both the lease and the option."

By way of summary the mere fact that Mr. Moreton is an attorney does not in and of itself create the relationship of attorney and client and certainly not in the instant case. The fact that he was a co-owner does not create the relationship of principal and agent or make him a fiduciary. The trial court had ample reason on

these grounds alone to enter the judgment in favor of the defendants notwithstanding the verdict and upon the still further ground that the plaintiffs have wholly failed to prove the alleged fraud and concealment between the Spring of 1946 and July of 1947. Furthermore, the plaintiffs make no pretense of having followed the pretrial order, which states the issue to be tried, namely: the relationship whereby Moreton obtained the quarter interest as a commission for the sale of the mining properties to Columbia Iron, an issue that the record makes entirely illusory.

POINT III.

THE HOLLANDS KNEW AND UNDERSTOOD THE CONTRACTUAL COMMITMENTS.

The complaint charges that Moreton acted as plaintiffs' attorney and agent in negotiating for and the sale and disposition of the mining claims and the property "and the said Moreton for said services was to receive an undivided one-fourth interest in and to the mining claims." There is no issue that we need meet as to the patent, but as to the sale there is not even a scintilla of evidence to support the allegation. There was no contract, express or implied, to such effect, and the writings and understandings of the parties were expressly to the contrary. It would do violence to the record and to the express understandings of the parties to say that Moreton was acting either as their attorney or their agent in the sale and disposition of the claims to Columbia and that the one-fourth interest given to him for obtaining the patent was a commission in the premises.

The complaint alleges (IV, R. 2) that the Hollands and Murie “were all men of very limited education, training and experience in the business world. They were of trusting dispositions.” Counsel labored hard to support the allegations, but the facts belie the same. Murie would not even join as a plaintiff in the action. Whether that is a reflection on his intelligence remains to be seen, but the fact remains, with the intervening death of John G. Holland, that Rex spearheaded this proceeding with the same degree of intelligence that is reflected in his letters to Mr. Moreton, which started approximately a year after the closing of the transaction and when he, Rex, had run out of money. (Exhibit D 67A)

John G. Holland was 74 years of age when he died (R. 407). He worked with the Bureau of Mines drilling the M & H claims (R. 408). At one time he was engaged in the mining of the Silver Reef mines in Washington County. He worked in Delmar, Nevada, as a miner, and in Cedar Canyon for Ward and Taylor for more than twenty years (R. 410-411). He was described by W. E. Young as a man who “saw length, breadth and thickness, and that is unusual in lots of people.” He spoke a miner’s language and could see the three dimensions. He had sunk two shafts on the M & H claims which were sunk into limestone. These shafts were utilized in the diamond drilling to save footage (R. 725).

Rex Holland was 49 years old at the time of the trial and had been interested in the M & H properties since 1941. He had lived all of his life in Cedar City within twenty miles of the M & H claims, and had attended the

Agricultural College at that place. He had taken a class in geology and was acquainted with the fact that Iron County was well known for its deposits of iron, coal and other minerals (R. 405-408). Both Rex and his father were prospectors and engaged in the mining business (R. 326-327).

Iron County is sparsely populated. The exploitation of its iron deposits has been a matter of common knowledge for years. It was the business of Rex, John Holland and Murie to know of the mining activities in the vicinity. The investigations conducted by the Bureau of Mines in 1945 and 1946 were calculated, as the record discloses, to make available to the public the detail of the underlying ore bodies. Rex Holland was familiar with the report and the detail of the same as evidenced by his letter to Waldthausen on July 9, 1947. He was also familiar with the richness of the ore. He suggested that Kaiser engineers could use it for upgrading their lower grade properties. John G. Holland contributed his talents to the Bureau of Mines investigation and assisted in determining the size, values and depth of the particular ore body in question. Rex assisted Mr. Gorlinski in the survey.

Regardless of what plaintiff claims Mr. Moreton may have told him concerning possible price, Rex Holland admits by his alleged conversation with Canfield that Canfield told him on September 14, 1948, that ore had been sold for 25c per ton. By Exhibit P19, a letter dated October 13, 1948, Rex knew the tonnage to have been estimated at 1.55 M tons.

The undisputed testimony is that Mr. Moreton did not even know where the claims were located when the owners approached him in April, 1946, much less what ore, if any, was in the mining claims, or the value thereof. Plaintiffs say: "*The inference* is that he (Moreton) knew a great deal about the potential value of the claims which the co-owners did not know and he sent for them." (Brief p. 6).

The undisputed evidence is that the owners told Moreton at their first meeting in April, 1946, that the claims had been drilled; that they were valuable and they desired to enlist his aid in selling them. As evidence of their knowledge of the value of the claims was the purchase price fixed by them in the sum of \$100,000.00. There is absolutely no evidence in the record that Moreton knew anything about the mining claims, other than what the co-owners told him as an inducement to him to enter into the arrangement with them. The Hollands knew all there was to know about their claims and the potential value as shown by the undisputed testimony.

After the letter to Dr. Mathesius on September 14, 1948, Rex did not ask either Moreton, Dr. Mathesius or Mr. Heald the price per ton at which the property was being sold. It is unbelievable that a meeting of the kind that was held on December 20, 1948, could be held without some inquiry being made, if only out of mere curiosity, if price was important. Rex's silence at a time when a person not motivated by some ulterior purpose would have spoken is evidence of his cleverness, unless his forgetfulness was prompted by his counsel. But in any event

the whole conduct of Rex Holland and his writings contradict the pleadings with regard to his alleged mental sluggishness and inferiorities. The price had been discussed and fixed on April 6, 1946, and there was a meeting of the minds on the option. Moreton made positive statements, repeated several times, to the Hollands and to Murie that he, Moreton, expected to make every effort to get more than \$100,000.00 for the three-fourths interest for his own account. Rex's testimony is to the effect that from the inception of the transaction he knew that the co-owners were to receive \$100,000.00 for their part of the claims. Mr. Moreton made a disclosure that he was in contact with Mr. Shelton, the General Attorney for Columbia.

On July 9, 1947, Rex wrote his letter to Mr. Waldthausen showing an intimate knowledge of the claims and his familiarity with the Bureau of Mines report. Mr. Moreton did not resent the intrusion of Rex as evidenced by the former's letter of July 17, 1947, Exhibit P46. Rex's letter to Waldthausen, however, shows his anxiety to get along with the transaction and his knowledge of the option. His letter of September 14, 1948, to Dr. Mathesius, shows knowledge of the primary term of twelve months for the option "and so long thereafter as the said Arthur E. Moreton shall have negotiations for the sale of said claims to others, actively pending." (Exhibit P5).

The fact that Rex would deliberately disavow the letter to Waldthausen at the time of his deposition, which testimony is set out in the appendix to this brief, is signi-

ficant. We say that it was because Rex did not want to be charged with the knowledge contained in the Bureau of Mines report, which is most comprehensive in its scope. Furthermore, the report shows that one could not be confused between the portion of the ore body on the M & H claims and the portion on the Short Line claim. The missing figures between pages 4 and 5 disclose that the M & H claims were previously known as the Pedros, all factual information that does not square up with much that Rex had said in the instant case and with what his counsel contend for him.

Rex is charged by his own letter to Waldthausen with knowledge of the overburden, the probable extent of the ore body, the scope of the core drilling and the richness of the deposit as shown by the core analysis. So far as Canfield is concerned, there is Rex's deposition which was before this Court in *Holland v. Columbia Iron Mining Co.*, supra, where at page 42 he states the conversation took place in September 1947, and that Canfield told him in answer to a question: "What are they paying for iron ore on the property?", that he thought it was 25c a ton. There is no reference in Rex's deposition to the alleged second conversation with Canfield, at which time Rex said his confidence in Mr. Moreton was restored, a decided afterthought after the disclosure of Rex's letter to Dr. Mathesius of September 14, 1948.

In the September 14, 1948, letter Rex discloses not only an intimate knowledge of the option and its terms, but of the price of 25c per ton. The letter does even more. By it Rex Holland places a construction upon his dealings

with Moreton. He acknowledges himself committed by the option, and yet he does not hesitate to suggest to Dr. Mathesius that action be stalled until the option is permitted to expire so that the whole matter can be renegotiated.

Rex was on the property for three days in the early part of the year 1947 as an assistant to Mr. Gorlinski, the surveyor. Rex was informed that in 1945 and 1946 the property was being core drilled by the Bureau of Mines and he executed a power of attorney in favor of John G. Holland to permit a trespass by the Government engineers.

There is Exhibit D32, the letter of July 14, 1948, where Rex Holland in his own handwriting appraised 3% of the money that he was to receive at \$999.99, which interest he offered to Moreton at a discount for \$600.00. In the letter of October 13, 1948, Exhibit P19, the estimated tonnage of 1.55 M is mentioned, as well as the fact that Moreton was to receive for his interest all of the purchase price in excess of \$100,000.00.

On December 10, 1949, Exhibit D62, Rex Holland wrote to Moreton proposing a venture with Canfield and mentions a million tons in the area "where the people from the East or the U.S. Steel Co. purchases the deposits already under consideration then they will also buy these other deposits which will return to a 15% interest (sic) an amount in access (sic) of \$35,000.00." \$37,500.00 would be 15% of a million tons at 25c per ton, a calculation that Rex undoubtedly made in attempting to interest Moreton in the proposition, and which accounts

for his expression “an amount in access (sic) of \$35,000.00.” On October 31, 1950, Exhibit D38, Rex wrote to Mr. Moreton showing an intimate knowledge of the M & H Nos. 3, 5 and 6. To this letter he attached a map showing a location of the Short Line, drill holes, discovery monuments and the location of M & H No. 1. The drawing is purportedly drawn to scale and shows the topography of the area. Rex did not acquire, overnight, the knowledge to draw the map and to state the details of the remaining holdings as indicated by the exhibit. On February 28, 1951, Exhibit D67A, Rex said in a letter to Moreton that he was now almost to the end of the money he had received for the M & H’s and asked for a loan of \$3000.00 for which Rex would give Moreton a 1% interest in a new discovery. This letter is copied in the appendix. Exhibit D39, a letter to Moreton dated June 11, 1952, proposing a fantastic investment in an alleged titanium property in Canada, was admitted by Rex to have been a hoax and his way of dealing with Moreton in order to equalize the M & H transaction without going to court (R. 924-927). Failing at every turn to borrow, beg or cheat Mr. Moreton, Rex sent the letter, (Exhibit P24) postmarked December 16, 1951, which is likewise set out in the appendix. The mistake that Rex made in this letter was the paragraph we now quote:

“I know, and you know, that you sent us a letter before the sale was made stating that there was 1.6 million tons of good grade iron ore on those claims, proven by diamond drilling and that the Geneva Steel Co. would pay 10 cents per ton for the deposit, and it was because of this letter,

which is still at home, that we decided that for your services we were willing to take the \$100,000.00 and you would get the \$60,000.00."

The purported letter that Rex refers to was never produced although its production was timely demanded (R. 174). There is no reference to the conversation with Canfield.

Inasmuch as the plaintiff had no such purported letter, he resorted to an alleged oral statement by the defendant with reference to 10c per ton. This alleged oral statement was an ingenious afterthought designed to relate the estimated tonnage made by Columbia, more than one year later in October, 1948, of 1.55 million tons, to a price of 10c per ton, to make a total "believed" purchase price of \$155,000.00.

Contrary to the record, it is stated in plaintiffs' brief (P. 29) "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," and that in closing the transaction (P. 33) "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."

The alleged statement with reference to 10c per ton can avail the plaintiff of nothing because according to his own testimony, it occurred more than a year after the option had been entered into on April 6, 1946. Holland gave various times as to this alleged conversation, which he finally stated occurred but "one time." However, plaintiff's attorneys say falsely and contrary to the record that the conversation occurred "on several occa-

sions” and in their brief (P. 33) say “Moreton started out by representing that because of the overburden, that the most that could be received was 10 cents per ton.” There is nothing in the record to sustain any such statement.

The time when this one alleged conversation took place was finally definitely fixed for all time in his cross-examination, wherein plaintiff testified it “was just before we signed the agreement of ownership,” which is dated July 23, 1947 (R. 456). Further, he testified on cross-examination that this alleged statement was made after he signed the renewal option in June, 1947 (R. 458).

Therefore, it definitely appears that such statement, if ever made, could not have been an inducement or representation by this defendant to the co-owners at the time of the original option made on April 6, 1946, nor at the time of the renewal thereof in June, 1947. Plaintiff’s own testimony is conclusive in that respect.

The fact remains that in spite of this belated alleged statement with respect to 10c per ton, and in spite of the plaintiff’s alleged conversations with Canfield in September, 1948, with reference to 25c a ton, the plaintiff and his co-owners recognized the option and made their offer to sell their interest to Columbia for \$100,000.00.

The foregoing statement with reference to 10c per ton alleged to be made by the defendant is contradictory to the written instruments theretofore and thereafter executed, and the same cannot vary or contradict the terms of the option and the later assurances to Columbia and to the defendant confirming the option.

In conformity to this is plaintiff’s testimony that he

never did ask the defendant what he was getting and in answer to the question that the reason he never brought it up was because it wasn't any of his concern, he replied, "I don't know whether it was or not, it was never brought up" (R. 439). However, plaintiff admitted that the figure of \$100,000.00 persisted to the end of the transaction (R. 442).

Plaintiffs' attorneys argue that the co-owners would have signed anything that the defendant put before them, but they signed nothing that was not in accord with and in affirmance of the original agreement of April 6, 1946. On the contrary, all subsequent writings and conversations confirmed the option.

There is nothing in the record that shows or even tends to show that the defendant used any persuasion, influence, duress or coercion of any kind whatsoever to induce the co-owners to sign any of the documents or letters in evidence. All of these papers were executed freely and voluntarily by the co-owners and in recognition of the option given to the defendant.

No one required them to sign the offer of sale and letter of October 16th, or any other letter addressed to Columbia Iron Mining Company. Plaintiff himself testified that this offer and letter of October 16th was mailed to him at Cedar City (R. 437).

Plaintiff would now ask the Court to permit him to repudiate the solemn binding documents so executed by him, because hindsight now suggests to him that he should have had more. The transaction was entered into as herein pointed out, when the outlook for a sale was anything

but promising. Fortuitously, events occurred more than 2½ years after the original transaction on April 6, 1946, making it possible to make a sale much earlier than could have reasonably been anticipated. However, one cannot look at the matter only in the light of such events, but must consider them as they existed at the time.

Plaintiff would make something of the fact that two offers were made, and pursuant thereto two Warranty Deeds were made, one by the co-owners, and the other by this defendant and members of his family. However, the reason for separate offers and separate deeds is perfectly obvious. The offer of sale was required by the company to recite that conveyance would be made by Warranty Deed, and the offers so recited. Defendant's experience with the co-owners, prior to the making of their separate offers of sale on October 16, 1948, was such that it would be inadvisable for him to have joined with the co-owners in offering to sell by a single Warranty Deed, because in such an event he would have been warranting title to the entire interest in the mining claims, both that of the co-owners and his own. He had reason to lose confidence in the co-owners, first, by reason of Rex's letter to Dr. Mathesius of September 14, 1948, in which he asked that the closing of the transaction be delayed until the option to this defendant had expired. Second, because of the undisclosed option to Davis and Lunt to purchase the mining claims for \$5,000.00, and the later asserted right of Bob Arthur to one-half interest in the claims. Bob Arthur's interest was not shown in the abstract of title. Had Bob Arthur not been settled with by this defendant,

and had he established his one-half interest, this defendant would have been committed to make good such a warranty as to title. The claims in question have been located and relocated several times, and there was always the possibility of any of the former locators asserting an interest. While the patent conveys to the patentee the interest of the United States in the lands, it is not conclusive as to the rights of other undisclosed former co-locators.

While the credibility of Rex Holland is a jury problem, nevertheless the trial court in considering all of the evidence, reviewing it to determine whether reasonable minds could differ, could not escape the definite conclusion that Rex Holland knew the nature of the transaction, knew that the property was committed to Mr. Moreton or his assigns for the price indicated, knew the nature of the ore body, the topography of the country and the volatile values so far as concerns price inherent in mining properties of the nature of the properties in question. Rex by his own conduct and by his own expressions cannot be characterized as the inferior individual and the man with limited learning and knowledge as counsel attempt to portray him. Rex Holland is a schemer and it took little coaching to indulge in attempted extortion and blackmail.

POINT IV.

MEANS OF KNOWLEDGE IS EQUIVALENT TO "KNOWLEDGE."

This Court in *Gibson v. Jensen*, 48 Utah 244, 158 P. 426, and in *Taylor v. Moore*, 87 Utah 493, 51 P. 2d 222,

so holds. In the *Taylor* case the defendants Moore were in possession of the ranch for more than five years before asserting the fraud and claiming the right to rescind. This Court held that to support a rescission of the contract or cancellation of the mortgage the evidence should be clear and convincing in character, and the preponderance of the evidence must support him who claims the right to rescind. Citing *Ferrell v. Wiswell*, 45 Utah 202, 143 P. 582, this Court said:

“We have no right to overlook the wholesome rule that where deeds or contracts are sought to be vacated and set aside upon the ground of fraud and deceit, the burden of proving the alleged fraud is upon him who asserts it; moreover, that the fraud must be established by clear and convincing evidence.”

It was held in the *Taylor* case that to justify the rescission the party seeking to avail himself of that remedy must move promptly and with all reasonable diligence to disaffirm the contract upon discovery of the fraud.

“If we assume fraud is proved and that the physical facts were insufficient to put Moore on notice that the Taylors were pretending to convey more than they owned, and that he was misled to his injury, yet, by a clear preponderance of the evidence Moore learned of the misrepresentations in March of 1926 when Mr. Duncan, the railroad engineer, told him the hotel and other ranch buildings were on railroad land. Moore, however, did nothing about the matter until after the written notice was served on him in July of 1928. In the meantime he had made payments of interest on his indebtedness, had enjoyed the use and bene-

fits of the ranch, and had exercised all of the rights and prerogatives of ownership."

In the instant case Rex Holland testified in his deposition (p. 42) that he was informed by Canfield in September, 1947, that iron ore was being sold for 25c a ton. Rex confirmed the fact of 25c per ton in his own handwriting in his letter of September 14, 1948, to Dr. Mathesius. Mr. Moreton in his telegram of October 8, 1948 (R. 238, 505) advised the Hollands and Murie that he was bargaining for the sale of the co-owners interest "for your fixed amount in cash and for as much more as I can get for mine as agreed and as set forth in our written agreements." Moreton was always available to be asked the important question of "How much?", yet he was never asked. The letter to Dr. Mathesius was calculated to provoke further inquiry, yet when Dr. Mathesius, Mr. Heald, the Moreton family, Murie, Mr. and Mrs. John G. Holland and Rex all met in Mr. Moreton's office on December 20, 1948, to close the transaction the Hollands remained mute. They executed their own deed in favor of Columbia Iron Mining Company. It is not claimed that they were coerced or forced into a delivery of the deed. The transaction was a voluntary one. There is no reason why the simple question "How much was Mr. Moreton getting for his interest?" could not then have been asked. Plaintiffs try to make a jury question by denying the testimony of Mr. Heald that at the meeting on December 20th the whole transaction, including the consideration agreed to be paid to Mr. Moreton, was carefully and methodically explained. But the rule of law is a salutary one which states that

means of knowledge is equivalent to knowledge. The Hollands had every means to determine that fact. Their suspicions had been aroused as evidenced by the September 14th letter, unless Rex was only maneuvering in order to avoid the option in favor of Moreton. Giving Rex the benefit of the doubt and assuming that he was acting in good faith when he wrote to Dr. Mathesius that Moreton was cheating him, and feeling himself free to act or not to act as he desired in the premises, he had the duty to speak up or be charged nevertheless with knowledge that his simple question would have disclosed. Thus it is said in *Taylor v. Moore*, *supra*:

“When in March of 1926 Moore learned that the railroad company owned the land on which the buildings were located, he already knew the water he was using in the hotel building and for irrigation came from the railroad tank. There was then no excuse for further delay in making inquiry to determine by what right, if any, he was and had been using water from the railroad tank for culinary and irrigation purposes. If he had at the time he entered into the contract of purchase been lulled into security by the representation of Nephi M. Taylor respecting ownership of a good water right, surely he was then, in 1926, on notice of facts which he could not further ignore. The physical facts speak louder than any representation which Taylor could have made, that the hotel was on railroad property, and also that the water from the water tank was owned by the railroad company. *Gibson v. Jensen*, 48 Utah 244, 158 P. 426. The means of knowledge is equivalent to knowledge. A party who has opportunity of knowing the facts constituting the alleged fraud cannot be inactive and afterwards allege a want of knowl-

edge that arose by reason of his own laches and negligence. *Salt Lake City v. Salt Lake Inv. Co.*, 43 Utah 181, 134 P. 603.”

The Court in *Bonded Adjustment Co. v. Anderson*, (Wash. 1936), 57 P. 2d 1046, quotes with approval from *St. John v. Hendrickson*, 81 Ind. 350, in part as follows:

“‘We do decide that where a party with full knowledge declines to repudiate a transaction known to him to be fraudulent, and fully and expressly ratifies it, he can neither rescind, nor maintain an action for damages.’”

When the Hollands and Murie delivered their deed to Columbia Iron Mining Company and received \$100,000.00 charged as they were with knowledge of what Moreton was getting for his interest, being so charged because they had the means of acquiring the knowledge, they ratified the transaction and they cannot now rescind nor maintain an action for damages.

The plaintiffs’ conduct in the instant case bars them from any relief as was stated in *Preston v. Shields* (Kan. 1945), 156 P.2d 546:

“‘So long as the risks were being taken by others the alleged breach of a trust relation by his cotenant, Young, and the fraudulent plan and device of Young and others to deprive him of his interest was of no apparent concern. When, however, those risks were transformed into profits, principles of equity underlying the relation of cotenants, and the principles of equity which guard against the bad faith and the fraudulent plans and devices of others became dominant and controlling considerations. Under such circumstances equity will not grant the relief sought.

Kirsch v. City of Abilene, 120 Kan. 749, 244 P. 1054.' 148 Kan. at pages 262, 263, 81 P.2d at page 30.

To the same effect are also Twin-Lick Oil Co. v. Marbury, 91 U.S. 587, 23 L. Ed. 328 and Preston v. Kaw Pipe Line Co., 10 Cir., 113 F.2d 311. In the last case cited headnotes 3 and 6 read:

'Equity does not concern itself with mere lapse of time before institution of action, but with inequity of permitting claim to be enforced after such time.' (Headnote 3.)

'One may not sit idly by for any considerable time, without asserting claim to property of highly speculative nature, to await outcome of others' efforts to develop and prove such property, and, when such efforts are successful, come in and claim fruits thereof.' (Headnote 6.)"

POINT V.

THE HOLLANDS HAD ACTUAL KNOWLEDGE OR THE MEANS OF KNOWLEDGE WITHIN THE CONNOTATION OF THE STATUTES OF LIMITATION.

Anticipating the defense of the statutes of limitation the amended complaint (XXV, R. 11-12) alleges that the co-owners did not discover or have any means or reason that they knew of to discover the alleged fraud and the alleged imposition perpetrated and practiced upon them until on or about December 18, 1951. The deed from the Moreton family to Columbia Iron was placed of record with the requisite amount of revenue stamps on January 5, 1949. In *Smith v. Edwards* (1932), 81 Utah 244, 17 P.2d 264, it was held that there was no fraud shown on the part of the grantor or the grantee in an action to set aside a deed and that, in any event, the statute of limitations barred the action. The defendants relied upon Sec-

tion 4900, *Compiled Laws of Utah* 1917, our present statute 57-3-2, *U.C.A.* 1953, which provides:

“Every conveyance, or instrument in writing affecting real estate, executed, acknowledged or proved, and certified, in the manner prescribed by this title, *** shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof; and subsequent purchasers, mortgagees and lienholders shall be deemed to purchase and take with notice.”

This Court held:

“Under the statute from the time of filing the conveyance with the recorder it shall impart notice to all persons of the contents thereof. From the time of recording these conveyances all persons, including plaintiffs, notice was imparted to them that the conveyances contained the statements above quoted.”

Revenue stamps totaling \$316.25 were affixed to the deed which, at \$1.10 per \$1000.00 would indicate the consideration of \$287,500.00, and under the statute would impart notice thereof to all persons. In *Froelich v. United Royalty Company* (Kan. 1956), 290 P.2d 93, it was held that the presence of revenue stamps on the recorded instrument “might well have raised a question in the minds of the appellees which would have caused them to make an investigation of the possible further propensities of the royalty conveyance.” In the case of *Smith v. Edwards*, *supra*, it is held that:

“*** the contents of the conveyances were of record and imparted notice of the contents and what the consideration was as shown thereby and all persons might be expected to inquire forth-

with of what the 'other valuable considerations' consisted, if the truthfulness was doubted and failing to do so would cause the statute to run from the time when a reasonably prudent person would have acted and thereby discovered falsity if it existed."

The term "discovery" as used in subd. (3) of Section 78-12-26, *U.C.A.* 1953, was defined and analyzed in *Smith v. Edwards*, supra. This court quoted from the Minnesota case of *Duxbury v. Boice*, 72 N.W. 838:

" 'To ascertain what constitutes 'a discovery of the facts constituting the fraud,' reference must be had to the principles of equity. *** Hence, in actions in equity, the rule was that the means of knowledge were equivalent to actual knowledge; that is, that a knowledge of facts which would have put an ordinarily prudent man upon inquiry which, if followed up, would have resulted in a discovery of the fraud, was equivalent to actual discovery.' "

See also *Taylor v. Moore*, supra.

Assuming for the purpose of argument only that Moreton was acting as the agent of the Hollands, and that he was negotiating with Columbia Iron to secure as large a sum as he could for his principals, and assuming Rex Holland and his father to be the ordinarily prudent men, then the inquiry as to means of knowledge, the equivalent to actual knowledge, becomes important. Notice sufficient to excite attention becomes the subject of inquiry.

In Rex's letter to Dr. Mathesius of September 14, 1948, he states:

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

We agreed to accept \$100,000.00 for this property based upon that tonnage and have signed Articles of Agreement that will expire at the end of September, 1948.”

In the first place the Bureau of Mines report was not circulated until June 26, 1947, Exhibit D48, which was after the option and the agreed price. In the second place, the quoted statement puts Columbia Iron on notice of an alleged misrepresentation as to tonnage. Columbia Iron had estimated the tonnage to be 1.7M tons. The figure of 1.55M was a compromise between Moreton and Columbia. The figure of 1.55M tons was spelled out in Rex's letter of October 13, 1948, Exhibit P19, and again in his letter of October 16, 1948, Exhibit P16.

Assuming that the \$100,000.00 figure was based on the estimated tonnage as stated by Rex, what would the reasonably prudent man have done in the premises? Rex did not receive an answer from Dr. Mathesius and he made no further inquiry of either Moreton or Mathesius. Moreton did not cause Rex to change his position, it was the obscure and illusory Mr. Canfield who Rex says restored confidence by merely telling him that he had confused the Short Line claim with the M & Hs but still the fact remains that on October 13 and October 16, 1948, a month almost to a day, Rex signed documents estimating the tonnage at 1.55M tons. He made no inquiry at that

time. He asked for no explanation as to the substantial difference in tonnage.

The sin of omission, however, was even greater at the time of the meeting and in the presence of Dr. Mathesius and Mr. Heald, the latter the attorney for Columbia Iron Mining Company, and when a simple inquiry would have been expected from the reasonably prudent man, Rex remained silent. How can it be said that a reasonable mind, once having charged fraud by a letter communication, could remain silent in the presence of the very man the letter was written to, with the discrepancy in tonnage already revealed? Mr. Heald testified that the meeting was held for the very purpose of disclosing all of the facts and figures, including the commitment on the part of the mining company to pay the Moreton family \$287,500.00, and that this was done in the presence of Rex and his father. To deny Heald's testimony, as Rex has done, does not, nevertheless, take him out of the sphere of what the reasonably prudent man would have done under the circumstances, and does not excuse him from pursuing to its ultimate conclusion the inquiry that he himself initiated. "A knowledge of facts which would have put an ordinarily prudent man on inquiry, which, if followed up, would have resulted in the discovery of the fraud, was equivalent to actual discovery." *Smith v. Edwards*, supra. Rex is charged with that very salutary rule of law which is the crux of this case and which the plaintiffs attempted to avoid by their sham and frivolous pleading in the premises.

Other expressions in the letter of September 14, 1948, are equally as devastating:

“Since we signed the Agreement we have been advised that instead of One Million, Four Hundred Thousand tons of iron upon the property there are Three Million Five Hundred Thousand tons of iron ore and that it is being offered for sale for .25c per ton or a total sales price of \$875,000.00.

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

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

Rex recognizes that Moreton had the one-fourth interest for patenting the property. He recognizes that the remaining three-fourths interest was committed for \$100,000.00. The gist of the complaint to Dr. Mathesius is that the co-locators had made a bad bargain; that Moreton for his alleged investment of \$700.00 was about to receive an unfair proportion. But what does Rex do about it — nothing. Once he mooted the question and

went so far as to express his feelings, he had the duty of further inquiry before he could accept the fruits of his bargain and then cry fraud. The yardstick that is going to measure the conduct of the reasonably prudent man is going to require that Rex at least discuss the situation with Moreton, which he did not do. The same yardstick will require Rex to ask Dr. Mathesius on December 20th what the estimated tonnage was and the terms of the transaction as it affected Moreton. It is inconceivable that a reasonably minded man would not have concluded that the letter of September 14, 1948, provoked and made reasonably prudent the meeting of December 20th for the very purpose that Mr. Heald said the meeting was called, namely, to inform everyone of the transactions so that there could be no misunderstanding; but Rex did nothing. He made no further inquiry, he remained mute and deaf.

The meeting of December 20, 1948, was in truth and in fact the answer to Rex's inquiry of the preceding September 14th. It was the opportunity that Dr. Mathesius and Mr. Heald offered to have the whole factual premise aired and this they did notwithstanding Rex's denials. He, nevertheless, is charged with the knowledge that such inquiry would have disclosed. The situation is strikingly similar to that in *Cherrington v. Woods* (Colo. 1955), 290 P.2d 226.

“ ‘Woods was in and out of the store during approximately one week and was there on many occasions and had a full and complete opportunity to make every examination to ascertain every fact he might have wanted to know. He could have determined everything necessary, or any facts neces-

sary connected with the business during that time had he done so.' ”

The Colorado Court said :

“Without further discussion we determine that this case should be reversed, the reversal being predicated upon clear and distinct rulings of this court in former cases which we think are conclusive, namely, *Groves v. Chase*, 60 Colo. 155, 151 P. 913; *Emerson-Brantingham Implement Co. v. Wood*, 63 Colo. 130, 165 P. 263; and *Bosick v. Youngblood*, 95 Colo. 532, 37 P. 2d 1095.

‘Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor’s representations.

* * *

Whatever is notice enough to excite attention, and put the party upon his guard, and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it.

* * * The presumption is that, if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it.’ * * *
‘Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry.’ ”

There was no affirmative act on the part of Moreton or on the part of Columbia to prevent the Hollands from finding out the true facts. The record is absolutely silent as to anything done or omitted on the part of Moreton between the 14th day of September, 1948, and the day of the receipt of the money that could have lulled Rex or his father into a false sense of security. Rex had every means to discover the full state of affairs on December 20, 1948, before he received Columbia's check for \$100,000.00. By his own expressions he had been alerted to the alleged discrepancies. The rule is well stated in 34 *Am. Jur.*, Limitation of Action, Section 169, page 136:

“Full possession of the means of detecting fraud is deemed the equivalent of actual knowledge, for the presumption is that if a party affected by any fraudulent transaction or management might, with ordinary care or attention, have seasonably detected it, he seasonably had actual knowledge of it. The law does not contemplate such a discovery as would give positive knowledge of a fraud, but such a discovery as would lead a prudent man to inquiry or action. To hold that the discovery must amount to absolute knowledge of the fact of fraud would be to render the statute practically inoperative, since such knowledge is rarely had before the facts are established by adjudication. If it appears that the party has knowledge or information of facts sufficient to put a prudent man upon inquiry, and that he wholly neglects to make any inquiry, or, having begun, fails to prosecute it in a reasonable manner, the inference of actual notice is said to be necessary and absolute.”

On September 25, 1948, Exhibit D33, Moreton wrote to the Hollands in part as follows:

“You will recall that I have stated to you on many occasions that I hope to realize more than \$133,333.33 from these claims, and that therefore you should not quote a purchase price to anyone for the reason that I might not then be able to obtain more than that sum. To this you have replied on several occasions that you will not do so, and that you hope that I am able to obtain much more than that amount, and that it is perfectly satisfactory with you. Of course the Agreement provides for just that. However, let me caution you again to leave the entire bargaining and selling of these properties to me as agreed upon.”

The telegram of October 8, 1948 (R. 238, 505) from Moreton to the Hollands reads:

“Have talked on phone to president of company twice today bargaining with him for sale of your interest for your fixed amount in cash and for as much more as I can get for mine as agreed and as set forth in our written agreements I will keep you advised.”

The letter of October 13, 1948, Exhibit P19, signed by the Hollands and Murie reads in part as follows:

“Our Agreement with Mr. Moreton provides that in consideration of his assistance in holding these claims and his patenting the same, at his sole cost and expense, and other good and valuable considerations, which we have heretofore received from him, that he shall receive for his interest in said claims, all of the purchase price which may be received for said claims in excess of \$100,000.00 (which amount was fixed by us), the said sum of

\$100,000.00 to be received by us, as and for our full share of the purchase price of said claims, and for all our interest in said claims.

We have this day prepared and submitted to you our offer for the sale of our entire interest in and to said M & H Mining Claims, consisting of an undivided three-fourths interest therein (subject to our Agreement with Mr. Moreton) for the said sum of \$100,000.00, which amount is entirely satisfactory to us. It is further entirely satisfactory to us that Mr. Moreton shall negotiate for and sell his interest in said claims for whatever price you and he may agree upon, the entire proceeds therefrom to be his sole property, this being in accordance with our written Agreement and our later oral statements to Mr. Moreton that we hope that he can obtain as much as possible for his interest, it being his right to determine and to receive, whatever amount you may agree upon with him."

On October 16, 1948, Exhibit P16, the Hollands over their signature said in part as follows:

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

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

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

On November 20, 1948, Exhibit P17, the Hollands and Murie said in their writing to Columbia Iron Mining Company:

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

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

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

The various writings that we call attention to were received or signed by the Hollands after Rex’s letter to Dr. Mathesius of September 14, 1948, and at a time when the idea of tonnage and the price of 25¢ per ton was fresh in Holland’s mind. To conclude otherwise would do violence to the plain meaning of words. In connection with the agreement of ownership Rex testified:

“‘A. Well, we read it over—yes, we discussed it with Mr. Moreton that the price was the same, that the ownership was the same. And after we could see that the ownerships and the price was the same, then we signed it.

A. In other words, you were still to get a hundred thousand dollars for your three-fourths remaining interest that you, your mother and your father and Murie had?

A. Yes sir.''' (R. 507).

With reference to the offer to Columbia Iron Mining Company of October 16, 1948, Exhibit P15, Rex testified:

“Q And it was according to your offer to sell, wasn't it?

A That is right.

Q And then the question was asked:

‘Q. And this is the bargain you thought you were making and did make to sell your property to the Columbia Iron Mining Company?

A. Yes sir.''' (R. 509).

It is undisputed that the plaintiff asked the defendant for, and received from him several advances on the purchase price. On July 14, 1948, (Exhibit D32) the plaintiff wrote to the defendant requesting an advance of \$600.00 upon the purchase price, stating in said letter “Because you understand how the mining claims are held and that the anticipated early sale of the patented M & H's would return the money to you I am not going to try a Bank for a loan.” On November 30, 1948, the plaintiff wrote the defendant, “if convenient I would appreciate another \$200.00 check which together with the \$300.00 sent me last month will be deducted from the monies received from the sale of the M & H's.” (Exhibit D30).

It is undisputed in the record at the trial that \$1,-

500.00 in all was paid by the defendant to the co-owners on account of their several requests, which sums of money were paid by the defendant in reliance upon his option and the written affirmation thereof by the co-owners to Columbia Iron Mining Company (R. 682).

The question of discovery and time thereof should not be an issue in this case, because it would seem from the decision of this Court, dismissing the steel companies, that this Court was of the opinion, as was the trial court, that the co-owners had been made fully acquainted with the total purchase price at the time of the closing of the transaction. Surely this question of "discovery" cannot again be litigated between the same parties and in the same case.

Plaintiff could not discover what he already knew. Rex's testimony with respect to the time he "discovered" the total purchase price does not square up with his letter to Dr. Mathesius of September 14, 1948, from which it is evident that he knew the prevailing price was 25c per ton. He knew the estimated tonnage was 1.55M tons.

Furthermore, Rex's letter to Moreton under date of December 16, 1951, Exhibit P24, indicates definitely his knowledge of the total purchase price, which, as he states therein, was a "matter of common knowledge" in Cedar City. What he complains about in this letter is *not* that he had just learned of the total purchase price, but he complains of the fact "*that I am getting a lot of both criticism and advise (sic) from many people who now have learned what actually happened in the sale of the*

*M & H claims. I do not know just where it originated but it is common knowledge that the price received for the sale was \$387,000.00 * * *. Because of the criticism I am getting from men who are interested in the continued development of the iron deposits I am keeping this among us * * *. * * * with the outside influence from others not being considered * * *. I have avoided as much criticism as I can and yet because it continues I have now gone to one of the best law firms in Salt Lake and found on what ground I stand. * * * What I want to do is to come to some solution where we both will feel better about the whole thing so I am going to present my side of the story to you."* This is followed by an offer to sell to Mr. Moreton a 1% interest for \$75,000 of Rex's 20% interest in a titanium property.

The significant thing about the foregoing letter is not that Rex had just "discovered" the total purchase price, but that "he is being criticised by others" who do not understand the division of the purchase price, which was a matter of "common knowledge."

The so-called time of "discovery" (in spite of all the written documents and letters to Columbia and Moreton, Rex's letter to Dr. Mathesius, and that the price per ton and purchase price was a matter of common knowledge in Cedar City), is also an ingenious afterthought designed to toll the running of the statute of limitations. It would be difficult for Rex to "discover" what he knew at all times. In this connection the Court's attention is directed to the testimony of Moreton relating to the conversation with Rex at Cedar City in November of 1948

with respect to the settlement of the claim of Robert A. Arthur, in which conversation Moreton declined to accept the offer of plaintiffs that the sum of \$1500.00 so paid to Arthur be deducted from the co-owners' share of the purchase price. In this conversation Moreton told the co-owners "I am making a big profit out of this transaction, as you well know, on the tonnage, and the 25 cents per ton," to which statement Rex replied: "I think you are." This conversation was never denied (R. 773-777).

However, as we have pointed out, the time of discovery is a matter of law for the Court to determine. Rex's letter was written December 16, 1951, but suit was not instituted until December 19, 1952. Evidently Holland was not too greatly disturbed by this criticism.

In view of the record herein it cannot be said as contended that plaintiffs believed that the purchase price "might be as much as \$155,000, but no more," and that Moreton was to receive the difference between that sum and \$100,000.00.

In view of the overall price for Moreton's interest fixed in the option, price per ton and tonnage was of no concern of theirs. By their written communications and their participation in the closing of the transaction they thereby expressed affirmance and acquiescence to Moreton as well as to Columbia. Without such approval by the co-owners Columbia would not have purchased the interest of the co-owners, nor that of Moreton.

Plaintiffs are now estopped to contend that Moreton did not act within his rights, but if not within his rights as contended by the plaintiffs, then certainly under

the express authority given to him. Plaintiffs induced Moreton and assisted and encouraged him in every way to make the sale on the basis he did. They accepted the benefits and the patenting of the claim and received the proceeds therefrom.

Under such circumstances as held by this Court in the case of *Moses v. Archie MacFarland & Son*, 119 Utah 602, 280 P.2d 571, the plaintiff by his conduct indicated his assent to become a party to the transaction and cannot "escape ratification thereof." To the same effect is the case of *LeVine v. Whitehouse*, 37 Utah 260, 109 P.2.

In Vol. 1, *Williston on Contracts*, Revised edition, Section 278, page 807, it is said:

"But silence may justify reasonable inferences, as well as positive action, and a person is no more justified in keeping silent when he knows, or ought to know, that a reasonable person will regard his silence as assent, than he is in making a gesture that he knows is ordinarily regarded as a manifestation of assent, and afterwards asserting that it was not so intended and that he made the gesture merely in the exercise of his privilege to move his hand about in the way that seemed most comfortable. So a purported principal may not be wilfully ignorant, nor may he purposely shut his eyes to means of information within his possession and control and thereby escape ratification 'if the circumstances are such that he could reasonably have been expected to dissent unless he were willing to be a party to the transaction.' "

What plaintiffs are now complaining about is that the transaction resulted in a greater profit than was perhaps originally anticipated, and that, therefore, it was

a bad bargain and that they should not only be relieved of the same but that they should recover punitive damages. It was Moreton who took the risks, because except for the purchase of the Geneva Plant by Columbia from the United States, and purchase of the Milner property, there would have been no sale perhaps for many years, as admitted by the plaintiffs at page 68 of their brief. See *Ruthrauff v. Silver King Western Min. & Mill. Co.*, 95 Utah 279, 80 P.2d 338; *Great West. Min. Co. v. Woodmas of Alston Min. Co.*, (Colo. 1890), 23 P. 908, and *Beebe v. James* (Mont. 1932), 8 P.2d 803.

POINT VI.

THE TRUST RELATIONSHIP, IF ANY, WAS REPUDIATED LONG PRIOR TO DECEMBER 20, 1948.

Rex is not a stupid individual, although both he and his counsel would have him appear to be so. Simultaneously with the offer to sell for \$100,000.00, and in the letter prepared by Moreton dated the same day, Exhibit P16, Rex, his father and Murie unequivocally said that the money that they were to receive would be in full for their interest and that Moreton may sell his interest for whatever price is agreed upon and that the entire proceeds therefrom will be "his sole property, it being his right to determine and to receive, whatever amount you may agree upon with him." A repudiation could not be couched in stronger terms and it becomes all the more meaningful when viewed in the light of Rex's letter of September 14th.

That the statute of limitations starts to run at the time of the repudiation of the confidential relationship

has been well stated by this Court in *Felkner v. Dooly*, 28 Utah 236, 78 P. 365, as follows:

“Without further reviewing in detail the facts and proceedings of the former cases in which the trust funds in question were the subject-matter of litigation, it sufficeth to state that the record shows that the plaintiffs and their assignees, for nearly 10 years prior to the commencement of this action, had knowledge of the fact that Dooly had repudiated and denied the trust as to the proceeds of the sale of the Charles Dickens property. And the authorities uniformly hold that when a trustee of an express trust denies the trust and assumes the absolute ownership of the trust property, and this claim of ownership is brought home to the cestui que trust, a cause of action exists in favor of the latter from the time he receives notice of the repudiation of the trust by the trustee, and the statute of limitations begins to run from that time.

In the case of *Thomas v. Glendinning*, 13 Utah 47, this court held that: ‘It is well settled that, as between the trustee and cestui que trust, the statute of limitations does not operate, in cases of express or direct trust, so long as such trust continues. But when the trustee denies the trust and assumes ownership of the trust property, or denies his liability or obligation under the trust relation in such manner that the cestui que trust has actual or even constructive notice of the repudiation of the trust, then the statute of limitations attaches and begins to run from that time, for such denial or adverse claim is an abandonment of the fiduciary character in which the trustee has stood to the property.’ ”

Mr. Moreton’s letter of September 25, 1948, Exhibit D36, repudiated the alleged relationship. He stated in no

uncertain terms that he expected to get much more than the amount stated in the ownership agreement for his own account. The telegram of October 8, 1948, is another repudiation. Moreton said that he was bargaining for the sale of the M & H interests "for your fixed amount in cash and for as much more as I can get as agreed and as set forth in our written agreements."

Every subsequent letter that Moreton prepared for the signature of the Hollands, and in which they said in effect that Moreton could receive in his own right all over \$100,000.00, was an express repudiation of all that the plaintiffs would contend for now, whether it be on the theory of principal and agent or attorney and client. The case of *Felkner v. Dooly*, supra, holds in accordance with recognized principles that the statute of limitations attaches and begins to run from the time the trustee denies the trust and assumes ownership of the trust property, or denies his liability or obligation under the trust relation in such manner that the beneficiary has actual or even constructive notice of the repudiation of the trust.

POINT VII.

THE STATUTES OF LIMITATION HAVE RUN AGAINST THE ACTION BY REX HOLLAND.

Subdivision (3) of Section 78-12-26, *U.C.A.* 1953, requires an action for relief on the ground of fraud or mistake to be commenced within three years of the discovery by the aggrieved party of the facts constituting the fraud or mistake. The plaintiffs concede that the cause of action accrued on December 20, 1948 (R. 135). We say that it accrued earlier, but be that as it may more than three

years elapsed from December 20, 1948, and the filing of this action on December 19, 1952. There can be no question but what Rex Holland knew or had the means of knowing on December 20, 1948, the amount that Moreton received or was to receive for his interest in the property. To believe otherwise would distort reality into a shambles. In *Gibson v. Jensen*, supra, the evidence was undisputed that the plaintiff was fully advised of the fraud by a letter to her from the person who it was claimed practiced the fraud, in which letter there was a statement respecting his faults in the transaction. It was not necessary for the plaintiff to be informed of all of the details. If she was made aware of the principal or controlling fact, it was sufficient.

“By that we mean it was sufficient if she was fully informed of such facts as would put a person of ordinary intelligence and prudence upon inquiry. If she was so informed, then she had all the information contemplated by the statute.”

The statute of limitations is now generally regarded as a statute of repose. This is so in cases of fraud as well as in other cases. The finding of the trial court in the *Gibson* case was that the plaintiff did not discover the facts of the transaction until on or about the 10th of December, 1913, although she used due and reasonable diligence in her endeavor to do so. The Supreme Court held that the evidence was undisputed that the plaintiff was fully advised of the fraud by the letter of July 27, 1909, and called attention to 28A *Words and Phrases*, page 500 where it is said:

“Whatever is ‘notice’ enough to excite attention and put party on his guard and call for inquiry is notice of everything to which such inquiry might have led. *Rubendall v. Talla*, Okl., 119 P.2d 851, 853.”

The Court states that the statute is to be given a fair and reasonable application and that not to do so is tantamount to a setting aside of its “wholesome provision.” The Court also states that it has demonstrated many times that where cases are timely instituted it will lend its aid in actions for fraud to the full extent of its powers, and that while the temptation is very strong to aid the aged plaintiff “yet the duty imposed upon us to remain within the law is equally strong; and the latter duty must, as it always should, prevail.”

The Montana case of *Kerrigan v. O’Meara*, 227 P. 819, holds that there must be some affirmative act or representation, or what is equivalent thereto designed to prevent, and which does prevent, discovery. The Montana Court quotes with approval from *Wood v. Carpenter*, 11 Otto. 135, 25 L.Ed. 807:

“Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together.”

See also *Teeter v. Brown* (Wash.) 228 P. 291.

In *Towle v. Sweeney* (Cal. 1905), 83 P. 74, the Court said:

“The statute of limitations is a provision of law rather than a fact; and, being a defense to the plaintiffs’ right of action which must be specifically pleaded, it forms an issue which the court must determine from the facts connected with the transaction out of which the right of action arose, whether such facts are presented in the form of an agreed statement or by evidence. Whether a cause of action is barred by the statute of limitations is, like ownership, a mixed question of law and fact, and may be either, according to the manner in which it is presented. As a recital in the nature of a right or of a defense, it is a fact, while, as the determination of an issue in the cause pending before the court, it is a conclusion of law. *Richter v. Henningsan*, 110 Cal. 530, 42 Pac. 1077. It does not cease to be a conclusion of law by reason of being found among the findings of fact, and is to be regarded according to its character, notwithstanding its misplacement. *Savings Bank & L. Soc. v. Burnett*, 106 Cal. 514, 39 Pac. 922; *Burton v. Burton*, 79 Cal. 490, 21 Pac. 847; *Hamilton v. Delhi M. Co.*, 118 Cal. 148, 50 Pac. 378. The court, therefore, did not err in making a finding upon the defense of the statute of limitations set up by the answer of defendants, and rendering judgment accordingly.”

See also *Bainbridge v. Stoner* (Cal.), 106 P.2d 423.

The myriad of cases in which a nonsuit or directed verdict have been granted solely upon the statutes of limitation is sufficient upon which to premise the state-

ment that in our system of jurisprudence the mixed question of fact and law is left solely to the Court to be determined as was done in the instant case.

POINT VIII.

THE STATUTES OF LIMITATION HAVE RUN AGAINST REX HOLLAND AS ADMINISTRATOR.

Section 78-12-37, *U.C.A.* 1953, provides that 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. John G. Holland died October 9, 1949. The amended complaint was filed in this action on November 7, 1953 (R. 1-44), the date that Rex Holland as administrator first appeared. More than three years had elapsed since December 20, 1948, and more than one year had elapsed since the death of John Holland. The statute therefore had clearly run under any conceivable construction of the language of the statute itself.

POINT IX.

PLAINTIFFS DEVIATE FROM THE PRETRIAL PROCEEDINGS AND THEIR THEORY OF THE CASE.

Plaintiffs made their election to stand on Count 1 for the recovery of the entire purchase price paid to all interested parties, together with interest thereon, plus punitive damages. This was on the theory expressed and elected by plaintiffs that the individual defendant Arthur E. Moreton was the agent of the co-owners for the purpose of making a sale and what he received was a com-

mission, and that in making such sale he was unfaithful in that the full purchase price was not disclosed to the co-owners, and that, therefore, the defendant Moreton is entitled to nothing, but on the contrary the co-owners should recover from him what was paid to him. This theory of necessity involves the elimination of the option to Moreton and the conveyance to him of the one-fourth interest pursuant to the said option. The other count (which plaintiffs relinquished) was to recover from Moreton an equal division of the purchase price on the theory that all interests, notwithstanding Moreton's option, were of the same value. However, plaintiffs' attorneys made their decision on their theory of the case that it was "whole hog or nothing," and upon this theory the case was tried and presented to the court and to the jury.

At the pretrial plaintiffs' attorneys stated definitely that they were not attacking any of the documents in the case. At page 317 of the transcript Judge Hanson stated: "I concluded that the one (pretrial order) that Judge Jeppson had prepared, *** would be sufficient for this matter *** and so we will follow Judge Jeppson's pretrial order, unless it becomes necessary to modify it in some respect, of course."

In the pretrial proceedings before Judge Jeppson appears the following (R. 132):

“THE COURT: Now, do you have anyone more than the two co-tenants on that deal?

MR. ROBERTS: He is acting as their agent.

THE COURT: Well I know, but could he have done the same thing without being attorney?

MR. ROBERTS: Surely could.

THE COURT: After the proposition was all finished, was there anything thereafter that was peculiar to the right of an attorney?

MR. ROBERTS: Nothing else, just the deeds and papers."

Mr. Roberts recognized that the cause of action arose as early as the time of the closing in December, 1948. His statement in this transcript (R. 135) is as follows:

"MR. ROBERTS: *** Now, we come to consideration of this letter of September 14th, 1948. Counsel has been, of course, as I understood it, he said that this had something to do with the statute of limitations. No cause of action had arisen at that time. This cause of action arose on December 20, 1948, at the time that Mr. Moreton received the \$287,500.00 for his one fourth interest, and each of the others received \$33,333.33 for their interest; that's when your cause of action arose, if it did, at that time."

At page 4 of the pretrial proceeding (R. 203) Judge Hanson said:

"But the basis of this, as I read it, and that is summarily, that the Court says in the Pretrial Order, and apparently you all agree, that so far as the Pretrial Order might be in conflict with anything the pleadings stated that the Pretrial Order governed, and that the basis for the recovery of the amounts contained in the first cause of action was based on, of course, the setting aside of the instruments."

Mr. Gustin said before Judge Hanson (R. 205):

"There is a question here as to whether this

is an equity or a law case. I think under these pleadings that it very definitely is an equity case.

* * *

(R. 206) They attack the acquisition of an interest by Moreton which is an equitable issue and must be determined before you could get into a situation of damage, because the jury can't interpret those contracts."

Mr. Gustin asked Mr. Roberts, who appeared for the plaintiffs (R. 207):

"Do you claim that there was anything wrong in the acquisition by Moreton of an undivided one-fourth interest in this property?

MR. ROBERTS: Not originally, but again it was not breached.

* * *

MR. GUSTIN (R. 209): What I would like to know if there is anything wrong in the conception of the deed to Moreton of one-fourth interest.

THE COURT: He has already said there was not.

* * *

MR. GUSTIN: (R. 211): Did Mr. Moreton breach his confidential relationship in acquiring that quarter interest, and the interest?

THE COURT: He says no.

MR. ROBERTS: No.

* * *

MR. ROBERTS: Then, of course, the transaction from then on would be that of agency." That it was the court's right to determine, as it did, the issue was admitted by Mr. Roberts by the question and answer as follows:

“MR. GUSTIN (R. 215): The jury shouldn’t be called upon to determine what that means. It is the Court to determine what that means.

MR. ROBERTS: If the Court directs a verdict. I suppose he does if he tells the jury a certain issue has been determined. As a matter of fact he can tell them by instructions, ‘*I construe these documents this way.*’ ”

At the pretrial proceedings appears the following:

“MR. GUSTIN (R. 223): Well now, as I understand it, you are not contending more value than the 25 cents a ton?

MR. ROBERTS: Correct.

MR. GUSTIN: And you are not contending for any tonnage greater than 1.55 million tons?

MR. ROBERTS: You are correct.”

At the trial Judge Hanson said:

“*** In our pretrial conference here it was agreed and understood that there was nothing wrong with any of these instruments, as I understood it, and if you are going into that, it seems to me you are going into the validity, and that isn’t an issue, is it? (R. 626).

With respect to an objection to testimony respecting the option Mr. Gustin said:

“Your Honor, there is no issue in this case about these documents.” (R. 665)
and the objection was sustained by the court.

In the pretrial proceedings by Judge Jeppson, which were adopted by Judge Hanson, the plaintiffs contended the question involved was a matter of agency. Judge Jeppson asked, in effect, is there anymore to this than a

co-owner selling his own interest for the best price obtainable? And doesn't he have such a right, and further, what did Mr. Moreton do that any other person couldn't have done, who was not an attorney? (R. 132)

Even Holland recognized the option for patent as well as the option to purchase, testifying as follows:

“Q And was there any further discussion or conversation?

A Then Mr. Moreton told us that if he was going to get this patent he wanted an assurance from us that we would not sell our three-quarters interest to any other parties, and at that time Mr. Moreton did not have his stenographer or his typewriter with him, and I think it was on a letterhead of the hotel, in which it was written out in longhand, that he would get a one-fourth interest in the mining claims for obtaining the patent.” (R. 336).

Further (R. 432) Rex admitted that he knew that the offers of sale had been accepted, and that the co-owners would get no more than \$100,000.00, and that the date of this was November 30, 1948. That the option was exercised is the testimony of Mr. Moreton:

“A Yes, that option was exercised. It reads to me and my assigns. It was exercised by the payment of money by me to Murie and Hollands during the interim, between the time of that option and the closing, of moneys owing, oh, I don't know, somewhere, \$1500.00 or thereabouts, that they wrote me, asking to advance on the purchase price, and rather than to go to the bank and borrow. And they wrote me, ‘You know how these properties are

being sold. We would rather borrow from you than go to the bank.' It was exercised in that respect, and exercised by the United States Steel Company, or Columbia Iron Mining Company, since they paid to the Hollands, or me, the \$100,000. So it was exercised in that fashion." (R. 682).

The plaintiffs and their attorneys would now have Mr. Moreton pay what they hoped and failed to recover from the Steel Company, based on the same contention in their previous appeal, that the purchase price was not disclosed.

To arrive at the result which plaintiffs seek in this case would require the elimination of the option and the conveyance to Mr. Moreton of his interest and the admissions by plaintiffs in the pretrial with respect to these two instruments. Further, such a result could not be achieved in the face of the telegram to the co-owners of October 8, 1948, their subsequent offers of sale to the steel company, and the letters in connection therewith. Further, such a result would require that no consideration be given the finding of this Court that the full purchase price had been made known to the co-owners. In their brief on the former appeal, they stated "that without the cooperation" of the steel companies, Moreton would not have received what he did. The plaintiffs would now make Moreton the victim of inferences and innuendoes.

The result which plaintiffs seek in this case is contrary to the evidence, the well established rule that the burden of fraud is upon the one who charges it, and further it would be contrary to the principles of equity, fair

dealing and estoppel, and would ignore all principles of ratification of even an unauthorized act of an agent, acquiescence and waiver, as well as the statute of limitations.

POINT X.

TO REINSTATE THE JURY VERDICT WOULD BE TO DEPRIVE DEFENDANT OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW.

Notwithstanding plaintiffs' alternative motions for a new trial in all capacities and against all of the individual defendants, except on behalf of himself individually and against defendant Arthur E. Moreton individually on the statutory grounds, including errors at law occurring at the trial, the plaintiffs claim that this Court should reinstate the jury verdict should it find contrary to our position as herein stated. They even go so far as to say that this Court should direct the entry of a judgment in favor of Rex Holland as administrator in the same amount, including punitive damages, while confessing that they find no authority in point on the subject. Rather than to moot the propriety of such procedure and being mindful of the care that this Court takes in preserving the full connotation of due process of law, we, nevertheless, pause in this brief long enough to point out to the Court the fallacy of plaintiffs' position and to demonstrate that to reinstate the verdict or direct the entry of a verdict under any consideration would be to condone a wholly inadequate record and to violate every concept of a judicial proceeding within the constitutional safeguards of due process of law.

Aside from the award of punitive damages the verdict against Arthur E. Moreton included the amounts paid Ethel T. Moreton, John R. Moreton, Rose Ann P. Moreton and Susan Moreton Tevis, tenants in common in the ownership of the undivided one-fourth interest. The allegation in the complaint is to the effect that Arthur E. Moreton and the members of his family acted in concert. The evidence is that they participated equally in the consideration paid. This fact alone reflects upon the integrity of the jury verdict and the proceedings incident to the same, as the case was dismissed against the defendants Ethel T. Moreton, John R. Moreton, Rose Ann P. Moreton and Susan Moreton Tevis and the jury so instructed. The effect of reinstating the jury verdict would be to assess the entire consideration against the defendant Arthur E. Moreton contrary to plaintiffs' charge of conspiracy and concert of action in the premises, and would give to Rex Holland four times more than Mr. Moreton actually received.

The verdict contains an item of \$25,000.00 "punitive damages" which is unsupported by fact or in law. To reiterate the facts would be to unduly extend this brief, but suffice it to say that Rex Holland, who remained silent after his letter of September 14, 1948, and during the closing of the transaction, is in no position to say that the conduct of Mr. Moreton was either wilful or malicious so as to sustain a finding for punitive damages.

Under point IV of plaintiffs' brief it is argued that an agent is entitled to no compensation for even properly performed services if the breach of his service contract is

wilful and deliberate, but this is far from a holding that in addition the principal is entitled to punitive damages. The very theory of the plaintiffs' action is punitive and to add \$25,000.00 more to the theory of recovery, including interest, has no support by any authority coming to our attention and plaintiffs cite none. The jury in awarding to Holland the entire amount of the consideration, although four-fifths of it was received by parties dismissed out of the case, and then adding \$25,000.00 under the guise of punitive damages, is an example of the prejudice injected into the proceedings and which this Court is asked to subscribe to.

Sixteen separate instructions were given to the jury (R. 259-276), of which instructions Nos. 1, 3, 5, 7, 8, 9, 10, 11, 12, 13, 14 and 15 are "stock instructions." Instruction No. 2 (R. 261-263) purports to state the issues. Instruction No. 4 (R. 265) purports to define an "attorney" and an "agent." Instruction No. 6 (R. 267) purports to cover the alleged confidential relationship and the burden of proof with respect to the same. Instruction No. 6A (R. 268) purports to state the circumstances under which punitive damages can be awarded.

Defendant excepted to the giving of Instruction No. 2 (R. 1036-1039) and among the exceptions so stated called attention to the fact that the instruction failed to state the issues of ratification, acquiescence, laches, estoppel, the statutes of limitation and other defenses raised by the defendant Moreton. Instruction No. 2 is entirely inadequate and wholly fails as a summary of the claims and the allegations of the respective parties. The plain-

tiffs would ask this Court to subscribe to such proceedings.

Instruction No. 4 was excepted to (R. 1039) for the basic reason that the relationship of the parties, whether it be that of attorney and client or principal and agent, was a question of law for determination by the court, and for the further reason that the instruction fails to state that a principal or client may ratify and confirm what his attorney or his agent may have done in the premises. Furthermore, the instruction did not include the applicable law with reference to the practical interpretation of the options and agreements between the parties by their own acts and conduct, particularly the conduct of Rex Holland.

Instruction No. 6A was excepted to (R. 1039) for the reason that there is no evidence whatsoever in the case that would justify the award to plaintiffs of punitive or exemplary damages. Further that there is no evidence in the case that defendant Moreton's conduct was wilful or malicious.

Instruction No. 6 was excepted to (R. 1041-1045) by both parties, and particularly by the defendant on the various grounds disclosed by the record, to which reference is made. It was left to the speculation of the jury whether Moreton was engaged by Holland to act as an attorney or an agent and whether there was a confidential relationship. The instruction commingles the undivided one-fourth interest given to Mr. Moreton for patenting with the undivided three-fourths interest remaining to

the co-locators, and confuses the burden of proof with respect to each.

On the question as to whether a full disclosure was made to Holland at the time of the closing of the transaction, the instruction forecloses the disclosure made by Dr. Mathesius according to the testimony of the witness Heald. That the instruction is highly prejudicial in excluding the issue of Holland having acquired notice of the terms of the sale through the witness Heald or Dr. Mathesius, or from other persons or by the public records, is obviously prejudicial. Among the exceptions urged to the instruction were the following:

“MR. CHRISTENSEN: In addition to the exceptions taken to Instruction No. 6, the defendant excepts to No. 6 in this particular, wherein the Court states that ‘the plaintiff Holland knew or could have known from conversations with Moreton that Columbia Iron Mining Company was paying \$387,500.00 for said mining claims,’ which is repeated again in the last paragraph of Instruction No. 6, and we except to that, and each of them, upon the grounds that it limits the information to coming direct from Moreton, whereas it should be just as binding upon the plaintiff Holland if he received the information from any other person or could have received it from any other source.

The defendant further excepts to Instruction No. 6, and for the failure of the Court to have instructed otherwise in his instructions to the jury, with respect to the following:

(a) Plaintiff must prove that the acts complained of were committed under circumstances that he would not be presumed to have knowledge of, and that if he had notice that would put him on inquiry that would lead

to knowledge, the facts are presumably within his knowledge.

(b) That where means of knowledge of the acts complained of are at hand the plaintiff must use them.

(c) That the statute of limitations began to run from the time the trustee, the attorney or agent repudiates the trust.

The defendant excepts to the failure of the

Court to instruct the jury that to establish a constructive trust the evidence must be clear, certain, unequivocal and conclusive and show the existence of the same beyond reasonable controversy.

The defendant excepts to the failure of the Court to have instructed the jury that the evidence of fraud must be clear and convincing." (R. 1043-1044)

As pointed out in the exceptions to the instructions the defendant Moreton excepted to the submission of the case to the jury for any purpose whatsoever for the basic reason that the action is one in equity and not in law (R. 1037). See *Willow Creek Irrigation Co. v. Michaelson*, 21 Utah 248, 60 P. 943; *Ketchum Coal Co. v. District Court*, 48 Utah 342, 159 P. 737; *Park v. Wilkinson*, 21 Utah 285, 60 P. 945; *Sipe v. Taylor* (Kan.), 300 P. 1077; *Wasatch Oil Refining Co. v. Wade*, 92 Utah 50, 63 P.2d 1070; *Murphy v. Sheftel* (Cal.), 9 P.2d 568; *Walsh v. Majors* (Cal.), 49 P.2d 598; *Warner v. Coleman* (Okla.), 231 P. 1053; *Tomlin v. Roberts* (Okla.), 258 P. 1041; *Norback v. Board of Directors of Church Extension Soc.*, 84 Utah 506, 37 P.2d 339; *Haws v. Jensen*, 116 Utah 212, 209 P.2d 229.

The testimony of Rex Holland concerning the statements made to him by Canfield, one conversation alleged to have taken place on September 14, 1948, and the other about two weeks later, and the self-serving testimony of Rex Holland as to his state of mind was admitted over the objection that the same was hearsay and self-serving (R. 374-385). The hearsay testimony as to what Canfield is alleged to have said at the meeting at the home of Parson U. Webster in October of 1951 (R. 399-401) makes the record almost as bizarre as Rex Holland's concoction of the story of confidence lost and then restored. It is upon that kind of a record that plaintiffs would have this Court reinstate the obviously prejudiced jury verdict.

CONCLUSION

The handwritten letter of September 14, 1948, from Rex Holland to Dr. Mathesius, the responsible head of a concern that was about to pay \$387,500.00 for the mining claims, prompted the further assurances as reflected by the various writings subsequent to that date, particularly the assurances that all that the Hollands and Murie could expect from the transaction was \$100,000.00. The letter also prompted the meeting of December 20, 1948, in the office of Mr. Moreton, which meeting was attended by members of the Moreton family, Mr. and Mrs. John G. Holland, Rex Holland, Mr. Murie, Mr. Heald and Dr. Mathesius (R. 559-561, 570). Dr. Mathesius wanted

everybody to understand the transaction (R. 570), and read the documents including item 10 of the correspondence side of Exhibit D45, a transmittal letter dated December 20, 1948, addressed to Mr. Moreton, a copy of which is set forth in the appendix (R. 570-571). The letter states the price of \$287,500.00 agreed to be paid for the Moreton interest and transmits the initial payment of \$71,875.00. The closing documents and the agenda for the meeting were prepared by Merrill L. Heald, the Attorney and Assistant Secretary of Columbia Iron Mining Company (R. 549-550, 554, 561-562, 566-567, 569-570). Revenue stamps were placed upon each deed (R. 572-573) in the presence of the Hollands and the whole transaction took more than an hour to consummate (R. 574). The trial court summarily dismissed Columbia Iron Mining Company from these proceedings, the reason being that there was no genuine issue to resolve as to it, which action was sustained by this Court in *Holland v. Columbia Iron Mining Co.*, supra. The same result should obtain for the individual defendants.

Rex Holland does not deny that the meeting of December 20, 1948, was held. He says that he did not hear Dr. Mathesius make the explanation of the Moreton side of the transaction. But his letter of September 14th required him to pursue his inquiry at the opportunity thus afforded him, so either horn of the dilemma is equally disastrous, as the record shows that Rex Holland remained

mute and made no inquiry whatsoever of Mr. Moreton, Dr. Mathesius or anyone else, either at the meeting or at any other time as to what Mr. Moreton was getting for his interest. This course is consistent with the theory that Rex Holland at that time was either not concerned with the Moreton side of the transaction or he had been fully informed in the premises. In any event, to say that Rex Holland could make a jury issue out of the case by merely saying that he did not hear or that Dr. Mathesius did not state the amount of the consideration would be to ignore the realities of the situation and the reasonable consequences of the September 14th letter translated into what might be expected from a reasonably prudent business concern that was about to pay over the sum of money that was actually paid in the transaction. To say that the ratification and estoppel evolving around the December 20th meeting do not exist as a matter of law would be to disregard the factual premise obvious to every reasonably minded person. Reasonable minds, impartial and unemotional, cannot conclude other than to say that if Rex Holland and his father were dissatisfied, the time to express such dissatisfaction has long since expired. The plaintiffs have no case.

The plaintiffs have failed in their proof to show a relationship of attorney and client or principal and agent at the time of the execution of any of the various documents. The Moretons had the right to deal with their

interest in the mining property independently of the Hollands and Murie. The Hollands and Murie committed themselves to a sale of their interest for the precise amount of money that they received from Columbia, in which negotiations Mr. Moreton was not acting in any relationship of trust and confidence. In any event, the Hollands knew or are chargeable with knowledge of the fact that Mr. Moreton was negotiating so that he would receive as much as he could over the specified sum for his own account. If there ever was a trust it was expressly repudiated, and if there was ever a cause of action it was barred long prior to the institution of this action. The judgment appealed from should be affirmed.

Respectfully submitted,

E. R. CHRISTENSEN
HARLEY W. GUSTIN
*Attorneys for Defendants
and Respondents*

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EXHIBIT P8

Letter agreement to Moreton signed
by the Hollands and Murie with re-
spect to patenting the M & H claims.

March 10, 1947

Mr. Arthur E. Moreton

433 Judge Building

Salt Lake City, Utah

Dear Mr. Moreton:

Pursuant to our agreement with you, previously entered into, authorizing to you patent the M & H, M & H #1 and M & H #2, for an undivided one-fourth interest to be deeded by us to you, provided application for patent survey was made on or before April 1, 1947 and said patents carried through to a conclusion, we have this day made, executed and delivered to you, Power of Attorney and Authority to Act for us, with respect to securing such patent and have signed the application to the District Cadastral Engineer for a survey of said mining claims.

It is our further understanding that you have employed Robert Gorlinski, Deputy United States Mineral Surveyor to survey said claims, and that you shall pay for his services, together with any and all other expenses of securing patent survey and the patent, including, among other things, fees charged by U. S. Cadastral Engineer, cost of advertising and payment of purchase price to the government for the land so to be patented.

Yours truly,

John G. Holland

William C. Murie

Rex K. Holland

EXHIBIT D35

Handwritten letter to Mr. Moreton
from Rex Holland

Cedar City, Utah

July 9th, 1947

Dear Mr. Moreton:

In the fall of 1945 the mining engineer for Henry J. Kaiser asked me to send him a report of the drilling of the M & H. claims as soon as it was released.

Upon receipt of these reports from the Bureau of Mines I immediately mailed Mr. H. L. Walthausen, Jr., Mining Engineer, Kaiser Corporation, a report for him to examine and asked that he write you immediately if they the Kaiser Corporation was interested in acquiring this property, and give him your office address in Salt Lake City.

Saturday night I was out to dinner with one of the chemists at Kaisers mill here and he told me that Kaiser had received an immense steel contract and that they were drilling a possible iron ore deposit in California. If this did not assure them a source of iron ore supply to fill the steel contract then they would have to acquire more iron ore properties in the Southern Utah deposit.

If it will hasten a sale of our claims I have done the right thing in mailing the report and not to wish them any bad luck but I hope the California deposit is good enough to mine low grade ore but they must acquire the ore from the M & H's to mix with it.

With best regards I am

Yours truly,
Rex Holland

a 3

EXHIBIT D36

Handwritten letter to Mr. Wald-
thausen from Rex Holland
Cedar City, Utah
July 9th, 1947

Mr. H. L. Waldthausen
Kaiser Engineers
1924 Broadway
Oakland 12, California

Dear Sir:

I am enclosing the latest Report, just off the press, released by the Bureau of Mines of the Iron Deposits, Iron County, Utah in which you can see the report of the drilling on the M & H. property on pages 77 to 79. Drill Holes Nos. 24, 29, 30, 32, 34 and 36 inclusive.

I am mailing this Report with the understanding that it be returned to me as soon as you have examined it and I sincerely hope it will give the information you need. Not only on the M & H claims but others.

In all future business letters I am obligated to refer you to MR. ARTHUR E. MORETON, ATTORNEY AT LAW, JUDGE BLDG. SALT LAKE CITY, UTAH. who will handle all business connected with the sale of this property. When writing to him please send a copy of correspondence to me at Cedar City, Utah so that we can have a copy on file here.

While in Salt Lake City last week Mr. Moreton stated that Dr. Mathesius of the Geneval Steel Co. had

been in the office concerning this property so it may be well if it is needed by you to contact Mr. Moreton at an early date.

Yours truly,
Rex Holland
125 So. 3rd East St.
Cedar City, Utah

Impeachment of Rex Holland on letter to Waldthausen

“Q (By Mr. Gustin) Mr. Holland, do I understand correctly that the value of this property did not become apparent to you until your conversation with Mr. Canfield on September 14, 1948, or am I in error?

A The value of this property never become apparent to me until 1951 in a conversation in which Mr. Canfield was present at a meeting.

Q Well, you knew prior to that time the character of this property, didn't you, the depth of the drill holes and the core analysis and the quality of the ore? That is a fact, isn't it?

A I knew to one dimension, and that one and only dimension.

Q What dimension?

A The depth.

Q Just the depth?

A Just the depth.

Q That is all?

A. That is all.

Q Well now, I show you what has been marked here as Exhibit D35, a letter dated at Cedar City, Utah, on July 9, 1947, addressed to Mr. Moreton and purportedly signed by yourself, and I ask if that is your handwriting and your signature?

A That is my handwriting and my signature.

MR. GUSTIN: As a part of the cross-examination we offer D-35.

THE COURT: It is the one contained in the group of letters:

MR. ROBERTS: I understand. No objection.

THE COURT: Exhibit D-35 will be received.

Q (By Mr. Gustin) By that letter you meant that the ore on the M & H was all good quality and would upgrade low grade ore?

A Absolutely.

Q So you knew that much about it, didn't you?

A Sure I did.

Q And that was in 1947?

A From that date of July, 1947, I knew that.

Q And you referred to a report from the Bureau of Mines, didn't you?

A I did.

Q And you knew that a report from the Bureau of Mines was in existence?

A I did.

Q And that such a report would disclose the nature and the various values of the deposits in the ground, didn't you?

A I did not.

Q You didn't? Didn't you mail this report?

A As far as I know I mailed a report from the Bureau of Mines.

Q All right. Now, let's see. You know, Mr. Holland, in your deposition that you said you did not mail that report to the Kaiser Company. Do you recall that?

* * *

Q (By Mr. Gustin) In your deposition that was taken on February 12, 1953, and this is '57, that is four years, referring to the exhibit that I have just read:

'Q Now I notice in this letter to Mr. Moreton, Exhibit 6, among other things you say: "In the fall of 1945 the mining engineer for Henry J. Kaiser asked me to send him a report of the drilling of the M. & H. claims as soon as it was released." Is that true?

A Apparently it is, sir.'

That was your answer, wasn't it?

A That was my answer.

Q 'Q "upon receipt of these reports from the Bureau of Mines I immediately mailed Mr. H. L.'—I am not sure of the pronunciation—'Waldthausen.' What do you call it? W-a-l-d-t-h-a-u-s-e-n?

A I don't know how to pronounce it.

Q Well, this gentleman whose name I spelled out for you—'Jr.'—you say you immediately mailed him a copy of the Bureau of Mines report, is that correct? Did you mail it to him?

A No, sir.'

Did you make that answer?

A I made that answer.

Q 'Q You didn't tell the truth in this letter, is that right?

A I had no report to mail him.'

Did you make that answer?

A I made that answer at that time.

Q Well, after four years have you changed your mind?

MR. POLLACK: Don't you want to read on Page 90? That clears up the whole thing so that we don't lose the continuity of it.

MR. GUSTIN: Your Honor, I am not just going to let this man talk to me.

THE COURT: I think, Mr. Pollack, you can take care of that on redirect examination.

THE WITNESS: In that deposition I didn't know—

MR GUSTIN: Just a minute.

THE COURT: Wait until he asks you the question.

Q (By Mr. Gustin) Now I show you an exhibit marked here for identification as D-36, a photostat of a letter, dated at Cedar City, Utah, July 9, 1947, addressed to Mr. H. L. Waldthausen, Kaiser Engineers, purportedly signed by Rex Holland. Do you recognize that as your signature and your handwriting?

A I do.

Q When you gave your testimony had you forgotten this letter?

A I was not clear as to which report we were referring to.

Q I show you what has been marked in this case as Exhibit D-37, a report dated May, 1947, the United States Department of the Interior, 'Iron Ore Deposits, Iron County, Utah,' by W. E. Young, and ask you to state if you recognize that report?

A I recognize that report now.

Q That is the one you sent to the Kaiser Company?

A It certainly is.

Q With this letter of July 9, 1947?

A Yes.

MR. GUSTIN: We offer the letter as part of the cross-examination, and this report.

MR. ROBERTS: No objection, sir.

MR. GUSTIN: Your Honor, I would like to read the letter.

THE COURT: Exhibits 36 and 37 will be received.

Q (By Mr. Gustin) Now can you state—Let me ask you this. In your deposition, the one that I have read from, you denied sending any report to Kaiser Steel, didn't you?

MR. POLLACK: That is not true, your Honor.

THE COURT: Let him answer the question.

Q (By Mr. Gustin) Didn't you?

A I both denied—I said I did and I said I didn't because at that time it wasn't clear. Up until—

Q Just a minute. You said you both—

MR. ROBERTS: Now I think he can explain this now. I object to counsel interrupting. I don't think it is fair.

THE COURT: Go ahead and answer, Mr. Holland.

THE WITNESS: In my deposition I said I did send a report, and in my deposition there again I said I didn't send a report, because I didn't know at that time which report it was referring to.

Q (By Mr. Gustin) Why, Mr. Holland, you were being interrogated about the letter dated July 9, 1947, ad-

dressed to Mr. Moreton, in which you stated that you had mailed such a report, and then you said—then you were asked:

‘Q Did you mail it to him?’

That is the gentleman whose name was so difficult to pronounce. And you said:

‘A No, sir.

Q You didn’t tell the truth in this letter, is that right?

A I had no report to mail to him.’

And on the very same day, July 9, 1947, you did mail a report to Kaiser Steel, as it now appears, isn’t that correct?

A That is correct.

Q And you denied it four years ago in your deposition. Now what refreshed your recollection? Was it—Let me ask you this, was it the fact—

A By reading the report.

Q —that I served a notice on counsel that I would produce such a letter at this hearing?

A And the report.

Q Yes, and the report.

A Can we refer to the pages?

Q Is that the thing that refreshed your recollection, when you knew I had the letter?

A No, no.

Q What was it?

A When I saw that report, a copy.

Q Where did you see the report except in my hand?
Was your recollection refreshed just this minute?

A I again sent into the Bureau of Mines for a report.

Q When did you do that?

* * *

Q (By Mr. Gustin) I want to know, what I am trying to find out, what you knew about this property when you sold it to Columbia Iron. I know, and you have admitted here that your father was a helper, a drill-er's helper, on this very property for the Bureau of Mines and that your father was an experienced mining man.

* * *

A Coal mining.

Q (By Mr. Gustin) And you lived in Iron County.

When did you order another of these reports?

* * *

Q (By Mr. Gustin) When did you order the second copy from the Bureau of Mines?

A It was after my deposition.

Q Was it before?

A It was after my deposition.

Q You mean that you ordered a copy of this report after your deposition was taken in 1953?

A I can't remember just when it was on that. I admit I can't remember.

Q As a matter of fact, Mr. Holland, you ordered that copy from the Bureau of Mines before you closed your sale with Columbia Fuel because you wanted to know something about the property?

A I will admit that on the copy there, that I did get one from the Bureau of Mines.

Q When did you get the second one?

A I can't remember.

Q Was it before or after you closed the deal with the fuel company?

A It was before I closed the deal.

Q You just got through telling me it was after 1953 when your deposition was taken.

MR. POLLACK: That is an unfair statement. He testified on direct examination.

THE COURT: I think the record is clear, Mr. Gustin and Mr. Pollack. Go ahead.

• • •

Q Now, Mr. Holland, the Exhibit D37—

MR. GUSTIN: I think that was received in evidence, your Honor, yesterday.

THE COURT: My recollection, yes.

MR. GUSTIN: Which is the report of, 'Investigations, Iron Deposits, Iron County, Utah, Dated May, 1947, by W. E. Young.

Q (Continued)—I will ask you if you would consider that a report from the Government, as to what was done down there?

A I would consider that as a report from the government as to what was done.

Q Down on the claim?

A Yes.

Q I call your attention to Page 40 in your deposition.

MR. POLLACK: The page?

MR. GUSTIN: 40.

THE COURT: February 12th.

MR. GUSTIN: February 12, 1953.

Q 'Q. Did you ever get a report from the Government as to what they had done down there?

A. At that time, no.

Q. Did you ever get one?

A. Yes sir.

Q. Would you remember when that was?

A. That was in, as I recall it was in 1949.

Q. '49?

A. Yes sir.

Q. After you had sold the property?

A. Yes sir.

Q. You didn't get one before that?

A. No sir.'

Is that your testimony, under oath, given at the time, given in this deposition?

A That is my testimony, under oath, given at the time the deposition was taken.

Q Now, I will ask you whether or not you gave a written consent to the Bureau of Mines for exploratory operations, or in connection with drilling of the M & H Claims, prior to 1947 at any time?

A This question—

Q Did you ever give the Bureau of Mines consent, along with your father and Mr. Murie, for them to move onto this property, the M & H, to drill at any time?

A I received a letter while I was in the Service, written to me by my father, concerning a Power-of-Attorney, a general Power-of-Attorney. We were in some drilling there, that these came up, and whatever father did send me concerned this deal for a Power-of-Attorney to act in my behalf while I was there, I did sign for him.

Q And that was in 1945, as I recall your saying?

A It would be 1944, between '42 and '44, in the fall.

Q You knew these properties were drilled in 1945, didn't you?

A According to father, that he was then working as a driller's helper on those properties.

Q Now, I will ask you if you addressed a letter to the United States Bureau of Mines, in Salt Lake City, under date of February 24, 1947, signed by yourself and your father and William Murie, requesting a copy of the printed report then about to be published, covering the results of all of such exploratory work in Iron County, Utah?

A I could have done.

Q You say that you did or you didn't, or you are not sure?

A Well, I am not sure of the date. I know that I did write for a copy of this engineer's report.

Q Could that have been on February 24, 1947?

A It could have been on that date.

Q I will ask you if, on or about March 3, 1947, you received a copy, or you received a letter dated March 3, 1947, written by Paul T. Allsman of the Bureau of Mines, to yourself, to the effect that a copy of said report would be mailed to you as soon as printed?

A Yes.

Q Do you have that letter with you or do your attorneys have it?

A I don't have the letter and I don't ever remember of turning it over to the attorneys.

Q I will ask you if you received from the Bureau of Mines the report, either Exhibit D37, or a copy of the same, by letter dated June 26, 1947?

A Yes, this is a copy of the report that I received.

Q So you received this report on June 26, 1947, is that correct?

A According to—Yes.

Q All right. Then in your deposition where you said that you did not receive this report until 1949, after this deal was closed, you were in error, weren't you?

A I could have been in error, because at the beginning of that deposition—

Q I am not asking you why. I called your attention to your testimony. Now, can't you answer that question 'Yes' or 'No'. I asked you if you were in error?

A I was in error on that question." (R. 467-480)

EXHIBIT P46

Typewritten letter to John G.
Holland and Wm. C. Murie from
Arthur E. Moreton

July 17, 1947

Mr. John G. Holland

124 South 3rd East

and

Mr. Wm. C. Murie

99 North 3rd East

Cedar City, Utah

Dear John and Bill:

I told Ed to tell you both that I expected to be down soon, at which time I would bring with me additional papers to be signed in connection with the Application for Patent of M & H Claims.

Mr. Gorlinski filed the plat and field notes as prepared by him, and I have called the office of the United States Cadastral Engineer a number of times, the last of which was yesterday, to see if the same had been approved. That office advised me that they had been extremely busy with other business, ahead of this, but approval could be expected within the next few days, at which time, the plat, would be sent to Denver to have copies thereof made. However, we will not wait for that, as I am satisfied that approval will be given to Mr. Gorlinski's work and I will bring the necessary papers down with me.

I am coming down on the train this time, leaving Monday night, July 21st and returning on the train the

next evening, which should give us ample time if you are both there, together with Rex to take care of what we have to do.

I received Rex's letter of July 9th, advising me of the talk he had with one of the Chemists at the Kaiser plant, also the letter he had written. I have had no reply to that inquiry sent by Rex. However, I do think that the time is approaching very shortly when we can expect to make a deal on these M & H Claims. I will tell you all about it when I come down. I am really very much encouraged and have been in contact with the right party. I know that Kaiser may be interested in acquiring Utah ore, but it is another company entirely that I have in mind and with whom I have contact. I will tell you about it when I get down.

I know that there is talk that Kaiser's Eagle Mountain deposit carries too much sulphur, at least in parts of it.

I have had a further talk with Mr. Mathesius, and only recently, and I told him about the M & H claims.

When I come down I will also answer the inquiry made by Rex, with respect to the corporation which does not do what it said it would and that you filed claims of exemption. We will also dispose that matter when I get down with respect to it.

Please arrange to be on hand so that we can talk about these matters as soon as I arrive on the train, early Tuesday Morning, July 22nd, as I want to complete our business that day and return that evening.

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Please acknowledge receipt of this letter so that I will know that you three owners of the M & H Claims will be there.

With kind regards.

Yours truly,
Arthur E. Moreton

P. S. Please do not discuss price and terms of this option with me, as it may interfere with what I have in mind.

EXHIBIT P5

Undated option in favor of Arthur E. Moreton signed by the Hollands and Murie.

OPTION

For and in consideration of the sum of ONE AND NO/100 (\$1.00 DOLLAR) and other good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned hereby give and grant unto ARTHUR E. MORETON, of Salt Lake City, Utah, optionee, and his heirs, executors, administrators and assigns the exclusive right, privilege and option for a period of twelve months from date hereof, (and so long thereafter as the said Arthur E. Moreton shall have negotiations for the sale of said claims to others, actively pending) to purchase from them all their right, title, and interest, consisting of an undivided three-fourths interest in and to the following unpatented lode mining claims, to-wit:

M & H, located Spetember (sic) 27, 1941 by W. C. Murie, J. G. Holland and Rex Holland. Notice of Location of which, was recorded in the office of the County Recorder of Iron County on October 27, 1941 in Book "L" of Locations, page 215.

M & H No. 1, located October 9, 1943, by C. M. Murie and C. S. Holland. Notice of Location of which, was recorded in the office of the County Recorder of Iron County on November 1, 1943, in Book "L" of Locations, page 323. As amended by Notice of date June 21, 1945 and recorded in the office of the County Recorder of Iron County on June 29, 1945, in Book "L" of Locations, page 375, as reamended by Reamended Location Certificate of date April 21, 1947, and recorded in the office of the County Recorder of Iron County on April 21, 1947 in Book "L" page 474.

M & H No. 2, located October 9, 1943, by C. M. Murie and C. S. Holland. Notice of location of which, was recorded in the office of the County Recorder of Iron County on November 1, 1943, in Book "L" of Locations, page 324, as amended by Amended Location Certificate of date April 21, 1947, and recorded in the office of the County Recorder of Iron County on April 21, 1947 in Book "L" page 473.

Said claims are situated in the Iron Springs Mining District, Iron County, Utah, and notices of location of same were recorded in the office of the County Recorder of Iron County, State of Utah, that being the proper office of record. for the sum of 100,000 (one hundred Thousand) Dollars, payable as follows, to-wit: either in cash or in 10 equal annual payments, and without interest (sic) thereon

Witnessed by:
Ed H Parry

John G. Holland
William C. Murie
Rex Holland

EXHIBIT P6
AGREEMENT OF OWNERSHIP

The undersigned, John G. Holland, William C. Murie and Rex Holland, of Cedar City, Utah, are the owners by location of the M & H, M & H No. 1 and M & H #2, Unpatented Lode Mining Claims, situated in Iron Springs Mining District, Iron County, State of Utah, in undivided one-third interests.

For and in consideration of the patenting of said claims, by Arthur E. Moreton, of Salt Lake City, Utah, at his sole cost and expense, and other good and valuable considerations, receipt of which is hereby acknowledged, the undersigned have agreed to and by Deed of even date, herewith have conveyed to the said Arthur E. Moreton, an undivided one-fourth interest in and to said mining claims, to the end that each of the three parties hereto and the said Arthur E. Moreton, shall henceforth each own an undivided one-fourth interest in and to each of the said claims.

For and in consideration thereof, it is further agreed that if the said claims be sold, leased or otherwise disposed of on a tonnage basis for \$133,333.33, either on a cash basis or on a basis of equal annual payments, without interest, over a period not exceeding 15 years, the said sum of \$133,333.33 shall be divided as follows: one-fourth thereof to the said Arthur E. Moreton and one-fourth thereof to each of the undersigned, provided, however, that if said property shall be sold, leased or otherwise disposed of on a tonnage basis, for a sum in excess of \$133,333.33, the amount of such purchase price or re-

ceipts from lease, or otherwise on ore contained in said claims in excess of \$133,333.33, together with the said one-fourth of said sum of \$133,333.33, shall be paid by the purchaser to the said Arthur E. Moreton and received by him as his sole property, for his said interest.

WITNESS:

Pearl Clegg

John G. Holland
William C. Murie
Rex Holland

STATE OF UTAH }
COUNTY OF SALT LAKE } SS.

On this 23rd day of July, 1947, personally appeared before me John G. Holland, William C. Murie and Rex Holland, the signers of the foregoing instrument, who duly acknowledged to me that they executed the same.

Pearl Clegg
Notary Public
residing at
Salt Lake City, Utah

(SEAL)

EXHIBIT D32

Handwritten letter to Mr. Moreton
by Rex Holland

Cedar City, Utah
July 14, 1948

My dear Mr. Moreton:

I am planning on expanding my painting business here and would appreciate your considering purchasing the 3% of the 331 $\frac{1}{3}$ % of the M & H patented Iron Mining Claims I own.

a 23

I need \$600.00 to purchase equipment and will offer the 3% which amounts to \$999.99 for the necessary \$600.00 to set me up in business. If possible I would like to have \$300.00 now and the other \$300.00 the First of Sept.

Because you understand how the mining claims are held and that the anticipated early sale of the patented M & Hs would return the money to you I am not going to try a Bank for a loan.

Hoping this can be arranged, I am

Yours truly
Rex Holland
125 So. 3rd East St.
Cedar City, Utah

EXHIBIT P14

Handwritten letter to Dr. Mathesius
by Rex Holland
Cedar City, Utah
Sept. 14, 1948

Dr. Walter Mathesius
Geneva Steel Corporation
Provo, Utah

Dear Sir:

I sincerely hope that you will give this letter a lot of consideration as it means so much to us as the original owners of the M & H Iron mining property located at Desert Mound, Utah that has been placed in the hands of Mr. Arthur E. Moreton, Attorney at Law, Judge Bldg., Salt Lake City, Utah who has advised us that the United

States Steel Co. has expressed to him their intentions to purchase this property and the reason I am writing you to postpone the purchase of this property until a more satisfactory agreement can be reached between we, the original & present owners, and Mr. Moreton.

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

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

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

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

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who have been doing yearly assessment work for many years, to keep the property with a clear title, will enter into the sale of our property on a $\frac{3}{4}$ equal basis.

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

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

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

Yours truly
Rex Holland
125 So. 3rd East St.
Cedar City, Utah

EXHIBIT D33

Letter to John G. Holland from Mr.
Moreton

September 25, 1948

Mr. John G. Holland
124 South 3rd East
Cedar City, Utah

Dear Jack:

Upon my return from California, I found on my desk a letter from Rex, requesting that I mail you and Bill Murie a copy of the Agreement we entered into with re-

spect to the patenting and the sale of the three M & Hs. Accordingly, I have had such copies made, and I enclose a copy for you and Rex.

I have also made an additional copy, which I am sending to Bill Murie, with a copy of this letter.

I had expected by this time that Mr. Heald, General Counsel and Secretary of the Columbia Iron Ore Mining Company would have sent me the papers with respect to the purchase of these claims. I have talked to him and Mr. Mathesius many times about this purchase and expect to hear from them most any time, and will promptly get in touch with you the minute I do. As I have told you before, it will not be long now in my opinion. However, the patent has not come through, although the final certificate was issued last January. I have written several times and I expect that it will be received most any time, particularly in view of the fact that the Washington Office wrote me, requesting that I send another statement of costs in lieu of the one which I signed. You will recall I sent you this, and you signed it and I returned it to them early in August. I shall write them again about the matter.

In addition to the enclosed Agreement of Ownership, you gave me earlier, an option for the purchase of these claims for the sum of \$100,000.00, which amounts to the same division of the purchase price, in that each of you three would receive one-third of the \$100,000.00, under the option arrangement. However, we considered the enclosed Agreement of Ownership as a better way to handle the matter as you will recall.

You will recall that I have stated to you on many occasions that I hope to realize more than \$133,333.33 from these claims, and that therefore you should not quote a purchase price to anyone for the reason that I might not then be able to obtain more than that sum. To this you have replied on several occasions that you will not do so, and that you hope that I am able to obtain much more than that amount, and that it is perfectly satisfactory with you. Of course the Agreement provides for just that. However, let me caution you again to leave the entire bargaining and selling of these properties to me as agreed upon.

I expect to come down to Cedar City either the end of next week or the first of the following week and will see **you at that time.**

With kindest regards, I am

Very truly,
Arthur E. Moreton

AEM:pc

cc: William C. Murie

EXHIBIT P19

Letter to Columbia Iron Mining
Company signed by John G., Clara
S. and Rex Holland and William C.
Murie

October 13, 1948

Columbia Iron Mining Company
Provo, Utah

Attention Dr. Walther Mathesius, President

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

Gentlemen:

We have been informed by Arthur E. Moreton on several occasions during the last five or six months that he has been negotiating with your company for the purchase of the three M & H Claims at Desert Mound, Iron County, Utah, known as M & H, M & H No. 1 and M & H No. 2 Lode Mining Claims, adjoining the Milner Claims known as the Short Lines.

He has informed us that consumation of such proposed sale is awaiting (1) determination of estimated tonnage (which we understand you estimate at 1.55 million tons), price per ton and time and terms of payment. (2) Issuance of patent to us by the United States Government. Final Certificate for these claims was issued by the Government on January 8, 1948, and it is expected that patent will issue at an early date, as is indicated by correspondence between Mr. Moreton and the Bureau of Land Management.

We realized that in order to interest a purchaser in these claims, it would be necessary that the claims be patented. However, we were without such funds or means to secure such patent and costs incident thereto, and we therefore asked Mr. Moreton to secure such patent for us, at his sole cost and expense.

Accordingly we entered into an Agreement with Mr. Moreton for the patenting of said claims. At the time the tonnage in said claims, and more particularly the prospect for sale, if any, and the purchase price, if sale could be made when such patent was received, were uncertain and speculative, as a result of which the return to Mr. Moreton would necessarily be contingent.

Our Agreement with Mr. Moreton provides that in consideration of his assistance in holding these claims and his patenting the same, at his sole cost and expense, and other good and valuable considerations, which we have heretofore received from him, that he shall receive for his interest in said claims, all of the purchase price which may be received for said claims in excess of \$100,000.00 (which amount was fixed by us), the said sum of \$100,000.00 to be received by us, as and for our full share of the purchase price of said claims, and for all our interest in said claims.

We have this day prepared and submitted to you our offer for the sale of our entire interest in and to said M & H Mining Claims, consisting of an undivided three-fourths interest therein (subject to our Agreement with Mr. Moreton) for the said sum of \$100,000.00, which amount is entirely satisfactory to us. It is further en-

tirely satisfactory to us that Mr. Moreton shall negotiate for and sell his interest in said claims for whatever price you and he may agree upon, the entire proceeds therefrom to be his sole property, this being in accordance with our written Agreement and our later oral statements to Mr. Moreton that we hope that he can obtain as much as possible for his interest, it being his right to determine and to receive, whatever amount you may agree upon with him.

John G. Holland
Clara S. Holland
Rex Holland
William C. Murie

EXHIBIT P15

Letter to Walther Mathesius, President, Columbia Iron Mining Company signed by the three Hollands and Murie

October 16, 1948

Mr. Walther Mathesius, President
Columbia Iron Mining Company
P.O. Box 269
Salt Lake City 8, Utah

Re: Sale of M & H, M & H No. 1 and
M & H #2 Lode Mining Claims

Dear Mr. Mathesius:

Relative to the purchase by Columbia Iron Mining Company of our undivided three-fourths interest in and to the M & H, M & H No. 1 and M & H #2 Lode Mining

Claims, consisting as recited in Final Certificate of a total of 39.502 Acres, adjoining the Short Line Mine, Short Line Wedge and Anaconda Lode Mining Claims and situate in the Iron Springs Mining District, Iron County, Utah, please be advised that all proceedings in the Bureau of Land Management for the patenting of the said M & H Claims have been completed. The Bureau of Land Management has approved said proceedings and application to purchase the said M & H Claims from the United States was filed on January 8, 1948.

On January 8, 1948, Final Certificate, Serial # 067748 was issued, wherein it is recited that the area of the said M & H Claims is 39.502 Acres; that there were certain conflicts, but such conflicts have been excluded from the foregoing area; and that on said 8th day of January, 1948, the applicants purchased the said M & H Claims and patents or patent to the same will issue upon presentation of the Certificate to the Director of Land Management in Washington, together with plat and field notes of survey of said claims, and the proofs required by law, all of which were approved by and sent by the Salt Lake City office to the Director in Washington, including the Final Certificate. To date, patent or patents have not been issued on said claims.

The undersigned, hereby tenders to Columbia Iron Mining Company a proposal for the sale of their undivided three-fourths interest in and to said M & H Claims, upon the terms and conditions herein expressed.

Within 15 days after the date of this offer, we shall furnish Columbia Iron Mining Company with an abstract

of title to the said M & H Claims, brought down to date. Columbia Iron Mining Company shall have 45 days in which to investigate the abstracts of title and notify us whether the same is satisfactory. In the event the title to said claims is unsatisfactory to Columbia Iron Mining Company, the company may require any cloud on said title to be cured, or may not accept this proposal. In the event the title to said mining claims is satisfactory to Columbia Iron Mining Company, we hereby offer to sell and convey to Columbia Iron Mining Company for a purchase price of ONE HUNDRED THOUSAND AND NO/100 (\$100,000.00) DOLLARS, our undivided three-fourths interest in and to the said M & H, M & H No. 1 and M & H #2 Lode Mining Claims. Our title is and our conveyance will be subject to Right of Way to L.A. & S. L. R.R. Co., as shown in abstract of title.

The said purchase price of ONE HUNDRED THOUSAND AND NO/100 (\$100,000.00) DOLLARS, for our undivided three-fourths interest in and to said M & H Claims, shall be paid to us upon issuance of patent or patents to all of the said M & H Claims, and issuance and delivery to Columbia Iron Mining Company of a Utah Statutory form of Warranty Deed by us, of our said undivided three-fourths interest in and to said claims. Said conveyance shall be by good and marketable title, free and clear of all adverse claims, liens, encumbrances (sic) and taxes and shall in all respects be subject to approval by Columbia Iron Mining Company's legal counsel. The conveyance shall be in fee simple, with covenants from the undersigned, that they are lawfully pos-

sessed of an undivided three-fourths interest in and to said mining claims, and that they will warrant and defend the title of Columbia Iron Mining Company, its successors and assigns from all lawful claims whatsoever. (Subject to above mentioned Railroad Right of Way.)

Columbia Iron Mining Company shall have 60 days from the date of this proposal in which to accept or reject the offer contained herein. Failure to inform us of Columbia Iron Mining Company's determination within said period of time shall be considered as a rejection of said proposal and shall automatically cancel the same.

It would be appreciated if you would please acknowledge receipt of this letter by signing in the space provided at the end hereof and returning the copy which is hereto **attached**.

Very truly yours,

John G. Holland
Clara S. Holland
Rex Holland
William C. Murie

Receipt acknowledged this 2nd day of November,
1948.

COLUMBIA IRON MINING COMPANY
by Walther Mathesius, *President*

EXHIBIT P16

Letter to Columbia Iron Mining
Company signed by the three Hol-
lands and Murie

Cedar City, Utah
October 16, 1948

Columbia Iron Mining Company
Provo, Utah

Attention Dr. Walther Mathesius, President.

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

Gentlemen:

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

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

We realized that in order to interest a purchaser in these claims, it would be necessary that they be patented. However, we were without such funds or means to secure such patent and costs incident thereto and we therefore asked Mr. Arthur E. Moreton to secure such

patent, at his sole cost and expense in return for an interest. Needless to say, Mr. Moreton may offer and sell his interest in said claims for whatever price you and he may agree upon, if he so desires, and the entire proceeds therefrom will of course be his sole property, it being his right to determine and to receive whatever amount you may agree upon with him.

Sincerely yours,

John G. Holland
C. S. Holland
Rex Holland
William C. Murie

EXHIBIT D28

Handwritten letter to Mr. Moreton
by Rex Holland
Cedar City, Utah
Nov. 4, 1948

My dear Mr. Moreton:

Something was told me tonight relative to the M & H Mining property that I know you must know about.

I was talking with Bill Murie just a few minutes ago who told me that Robert A. Arthur advised him today that he was going to attempt to throw the deal we are all in on into litigation if he was not paid for his old interest in the claims.

As you was told, while at our house on your last visit to Cedar City, this man Arthur did many years ago have an interest in the mining claims but at his own desires and by his own actions told father that he did not want

any more to do with the "damn property" and would not spend another cent for assessment work.

Since that time he has not furnished either cash nor labor to do the necessary assessment work therefore his name was not written on the location notices after that year.

Since you have returned to Salt Lake my father has been quite ill therefore I do not want him to know of Arthurs threat to give us trouble but would desire that you know of this action so that you could prepare to overcome his ambitious plot to jump in at this time and try to get something out of the property he refused to help keep a clear title to.

Father is going to town now for a few minutes each day and I am afraid that he will soon learn that Mr. Arthur is going to attempt to block the sale which would mean that father would go directly to Arthur and have it settled the old way they used to settle disputes over mining property. This we don't want because I had an argument with this man once before and since being in the Army I am not so sure I can hold my temper as I did at that time. I know that you can handle this man he, in my estimation, is not too strong in the will power having had a Pool Hall left to him when a young man has come up that road along with being pretty fast with a deck of cards his life has been that of a slicker. He is now employed by his son, who owns a little corner grocery store, to do the filling of the shelves and other jobs that need be done in the conduct of that business and not having too much money he plays poker to try to get by. I am sure he would

not go too far if he was reasoned with and shown that his little game will be met and backed up with the law governing mining properties so when you come down to clear this thing up bring along what papers have been recorded since he advised us he was forfeiting the property because he refused to keep up the assessment work and we all will arrange a meeting and come to an agreement.

Hoping to hear from you at an early date I am
Yours truly,

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

EXHIBIT P60

Letter to William C. Murie from
Arthur E. Moreton

November 6, 1948

Mr. William C. Murie
99 North 3rd East
Cedar City, Utah

Dear Bill:

Enclosed please find copy of a letter I just received from Rex Holland.

You will note that he does not want his father to know about this claim of Robert A. Arthur, because his dad is ill and he doesn't want him to be distrubed (sic) or upset by it.

Therefore, I am writing directly to you and you can

show this letter to Rex so that he will know I received his letter and I am giving the matter attention.

I enclose the copy of Rex's letter so that in reply to this letter you may tell me just what you know about the matter in addition to what Rex has written me.

Nowhere in the abstract of title does the name of Robert A. Arthur appear, however, the abstract shows an old location of the Rex No. 3 by *John Holland* and *J. H. Arthur* of date July 2, 1921, which merely describes a claim 600 feet by 1500 feet, situated in the West end of Desert Mount and without further ties to any other claim, so that in any event the description was not sufficient. The abstract does not show that proof of labor on this Rex No. 3 location was made by J. H. Arthur nor any claim of exemption, and the same so far as the record appears has lapsed. However Georgia Stowe is making up her abstract showed this location notice.

However, you will note that it was *not Robert A. Arthur* on the notice as stated in Rex's letter as being the one who is making the claim, but J. H. Arthur.

I have no fear that he can stop the sale of the property. However, I would like to know just exactly *which Arthur it was* and what was said with reference to giving up the "damn property" and that he would not spend another cent for assessment work.

Tell Rex not to get excited about this claim and not to have any trouble with him about it, and in fact it would be best for neither you or Rex to discuss the matter with Arthur. Therefore, don't talk to him about it.

How did Arthur hear that the property was about

to be sold? These are the things that always bob up when a deal is about to be made. Some old locator comes along and thinks that after doing nothing for twenty or thirty years, he should still be considered. However, I think he is definitely out of the picture, but please answer the questions I have asked herein as to which Arthur it is and what he ever told you about the abandonment of the claim.

In view of the very cold weather the last few days, I am wondering if Bob Gorlinski has been able to go ahead with the survey. The paper predicts warmer weather next week. Please let me know about that too by return mail.

As I told you on the phone, I plan on coming down there next week and will let you know in advance and then we will further discuss this claim made by Arthur.

Sorry to know that John Holland hasn't been feeling well, but hope that he is himself again. However, I think Rex is right in not telling him about this claim made by Arthur because it would disturb him greatly and I think the situation can be handled without annoying him.

Yours truly,

ARTHUR E. MORETON

AEM:pc

It may not be necessary for me to come this week, now that I have talked to Bill.

AEM

EXHIBIT D27

Notice to Mr. Moreton by Robert A.
Arthur

NOTICE

Mr. Arthur E. Moreton
Attorney at Law
Judge Building
Salt Lake City, Utah

Dear Mr. Moreton:

Please take notice that I am the owner of an undivided one-half interest in and to the following described mining claims situated in the Desert Mound Mining District in Iron County, Utah: M-H, and M-H 1, 2, 3, 4, and 5, which said mining claims were formally known and designated as Pedro, Pedro No. 1, 2, 3, 4, and 5.

No person has been authorized to sell, encumber, or dispose of my said undivided interest in and to said mining claims, and you are hereby notified not to make, or attempt to make, any deal for the purchase of my said interest in said property with anyone except me.

This Notice is being sent to you by registered mail.

Dated at Cedar City, Utah, this 17th day of November, 1948.

Robert A. Arthur
Cedar City, Utah

EXHIBIT P17

Letter to Columbia Iron Mining
Company signed by the three Hol-
lands and Murie

Cedar City, Utah
November 20, 1948

Columbia Iron Mining Company
Provo, Utah

Attention Dr. Walther Mathesius, President:

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

Gentlemen:

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

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

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

Sincerely yours,

John G. Holland
C. S. Holland
Rex Holland
William C. Murie

EXHIBIT D30

Handwritten letter to Mr. Moreton
by Rex Holland

Cedar City, Utah
Nov. 30th, 1948

My dear Mr. Moreton:

Yesterday I went to see a local doctor about treating a sinus trouble that has been giving me much pain and headaches since I was injured while in training at Fort Dix, New Jersey.

After making an examination he suggested that I apply for entrance to the Veterans Hospital at Salt Lake and stay there long enough to have it treated thoroughly also while there the doctors could examine my left eye and determine whether or not by removing the catarack they could restore the sight of the eye.

This will put me in Salt Lake so that when the final papers are completed on the M & H's I will be there to work with you until the final papers are signed. The local director of Veterans Affairs recommended that I also apply for Disability Compensation for the injury to my sinus glands and that when they see that I honorably served for three years with but the sight of one eye they will accept my application so I ask that you please be careful when you come to visit me that you do not reveal the sale of mining property.

I have talked this point with the local director and he takes the stand that the laws have been passed and funds appropriated for service men who were injured while in service and that we have held the property for

many years and receiving no benefits from it. That it may be several years before a sale is made so that I do not need to mention the property. That when it is sold I may cancel my pension, depending upon the amount and the amount of money I get from the sale when state and federal taxes are deducted.

I suppose I will leave for the hospital sometime next week and due to Christmas coming on I will need additional money for Christmas gifts and clothing to wear while at the Hospital so if convenient I would appreciate another \$200.00 check which together with the \$300.00 sent me last month will be deducted from the monies received from the sale of the M & H's.

Father, mother and Bill Murie are all about the same.
Hoping to hear from you soon I am

Yours truly,

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

P.S. when I arrive in Salt Lake I will contact you and let you know the doctors decision.

EXHIBIT D31

Letter to Rex Holland by Arthur E.
Moreton

December 2, 1948

Mr. Rex Holland
125 South 3rd East
Cedar City, Utah

Dear Rex:

I received this morning your letter. Sorry that you have been having sinus trouble but think it is a fine idea

for you to get treatment at the Veterans Hospital, and at the same time have them determine what they can do with respect to removing the catarack. I sincerely hope that they can do something.

I also carefully noted that you said about applying for disability compensation and what was told to you down there about making such application.

I will be pleased to see you when you come up. I am glad to know that your father and mother and Bill Murie are well.

I enclose check for \$200.00 and can appreciate under the circumstances that you will need the same.

AEM:pc

With kind regards to all.

Yours truly,

ARTHUR E. MORETON

Item 10 of EXHIBIT D45

Letter of transmittal to Arthur E.
Moreton from Dr. Mathesius.

December 20, 1948

COLUMBIA IRON MINING COMPANY

Arthur E. Moreton, Esq.

Attorney at Law

Judge Building

Salt Lake City 1, Utah

Re: Purchase of M&H Lode Mining Claims

Dear Mr. Moreton:

Pursuant to the provisions of paragraph 4 of the
December 20, 1948 Agreement between Columbia Iron

Mining Company and Arthur E. Moreton, Ethel T. Moreton, John R. Moreton and Susan Moreton Tevis for the purchase of an undivided one-fourth interest in and to the M&H, M&H No. 1, and M&H No. 2 Lode Mining Claims situate in the Iron Springs Mining District, Iron County, Utah, Columbia Iron Mining Company hereby acknowledges receipt of the Utah statutory form of Warranty Deed conveying said undivided one-fourth interest to the Company. Said deed is approved by the Company's counsel.

There is transmitted herewith the Company's Voucher Treas. No. 01931 drawn on Wells Fargo Bank & Union Trust Co., San Francisco, California, to Arthur E. Moreton, Ethel T. Moreton, John R. Moreton and Susan Moreton Tevis in the amount of Seventy-One Thousand Eight Hundred Seventy-Five Dollars (\$71,875) as initial payment upon the purchase price of Two Hundred Eighty-Seven Thousand Five Hundred Dollars (\$287,500) for said undivided one-fourth interest. Will you kindly have the enclosed receipt executed before two witnesses and thereafter return the same for our files.

Very truly yours,

/s/ W.M.

President

encs

cc: M. L. Heald

cc: J. Wohlwend

a 46

EXHIBIT D67A

Portion of letter to Mr. Moreton
from Rex Holland

Cedar City, Utah
February 28, 1951

Mr. Arthur E. Moreton
Attorney at Law

Salt Lake City, Utah

Dear Mr. Moreton:

* * *

I am now almost at the end of the money you got for us for the M & H's but have made a good investment in these Snow claims and since talking with Mr. Canfield, who tells me that he has discovered another large ore body in the same area as the Snow group I would like to have you consider making me a loan of \$3,000.00 for which you will receive a 1% interest in this new discovery but will also be repaid the \$3,000.00 out of the sale of the Snow group of claims. The 1% interest in this new discovery, which if it is only half as large as the Snow deposit, should have a value of well over another \$5,000.00 to you.

* * *

Yours truly,

Rex Holland
125 South 300 East
Cedar City, Utah

EXHIBIT P24

Handwritten letter to Mr. Moreton
by Rex Holland

On stationery of Hotel Wilson
postmarked at Salt Lake City, Utah
December 16, 1951

Dear Mr. Moreton:

I have decided to write you because I find that I can express myself better this way than by talking about a matter that I am getting a lot of both criticism and advise (sic) from many men who now have learned of what actually happened in the sale of the M & H claims.

I do not know just where it originated but it is common knowledge that the price received from the sale was \$387,000.00 or \$287,000.00 more than what we as owners received.

It seems that my father had the respect of all who was associated with him and why that after the many years that he spent trying to develope (sic) his property that he did not get an equal share in what they were sold for is the cause of other parties criticising me for not standing on my rights.

I know, and you know, that you sent us a letter before the sale was made stating that there was 1.6 million tons of good grade iron ore on those claims, proven by diamond drilling and that the Geneva Steel Co. would pay 10 cents per ton for the deposit, and it was because of this letter, which is still at home, that we decided that for your services we were willing to take the \$100,000.00 and you would get the \$60,000.00.

Because of the criticism I am getting from men who are interested in the continued development of the iron deposits I am keeping this among us because we have always been able to discuss this business among ourselves with the outside influence from others not being considered.

I have avoided as much criticism as I can and yet because it continues I have now gone to one of the best law firms in Salt Lake and found on what ground I stand. I have not mentioned any names but have kept to the facts and figures of the sale.

This law firm called me on the phone yesterday and want to take the case whereby they will, if necessary, go to court to get an equal share of that amount above the 1.6 million tons as stated in the letter to us and on which our price was based.

Frankly, Mr. Moreton, I do not want to have to go into Court to get what I believe rightfully belongs to I and mother above the \$160,000.00 that were led to believe would be the total amount received from that sale, which additional amount will equal close to \$75,000.00 now that the taxes have been paid by you on that additional amount, \$287,000.00.

What I want to do is to come to some solution where we both will feel better about the whole thing so I am going to present my side of the story to you.

I have told you about the property in Canada that has the 8½ to 11% Titanium. just before coming to Salt Lake this trip I received letters from the National Lead Co. the International Titanium Co. and the Olefractory

Company wanting information on this property and that they were buying Titanium ores. The General Electric Company wrote that they were now conducting experiments and would contact us when their experiments were completed. These companies, as well as the DuPont Company, are sound and well recognized.

The price for Titanium ores, concentrates, as quoted very recently is \$5 per pound. Even though the ore would average but a low 5% makes it a \$500.00 per ton ore.

There is exposed a deposit of this for at least 2 miles in length by 50 feet in height, the depth below the surface is not known but the width is more than a hundred feet. It is estimated that there are more than 10 million tons already to mine and concentrates.

Because of our past associations I would like to see you get an interest here and now that this other matter has come up I am offering to make you a quit claim deed to a 1% interest of my 20% interest for the \$75,000.00 in question. Paying \$10,000.00 per year until the \$75,000.00 has been paid.

This will quiet these other parties and make me feel better about both deals and at the same time provide you with an interest in the Titanium.

Consider this and before I leave for Cedar City I will come to your office before I go any further.

Yours truly
Rex Holland