

1958

Rex Holland v. Arthur E. Moreton et al : Appellants' Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT of the STATE OF UTAH

Case No. 8740

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.

APPELLANTS' REPLY BRIEF

(Note: Numbers in parentheses refer to pages of the record. The parties will be referred to here as they appeared in the Trial Court. Thus, Appellants' original brief will be referred to as "Pl. Br." and Respondents' Brief as "Dfts. Br." All emphasis, unless otherwise indicated, will be supplied.)

Preliminary Remarks

Defendant Arthur E. Moreton is completely unmasked by his own brief. In it he indulges in complete misstatements of the law, of the Record, and of Plaintiffs' position. Although the trial court rendered no opinion and never ex-

plained its action,¹ he indulges in unwarranted and invalid speculation as to what were the trial court's reasons for its action. In desperation, he even resorts to the customary refuge of the wrongdoer and charges his victim with extortion and perjury (Dfts. Br. 33, 41, 59).

Notwithstanding all this, it is inescapable—even on the basis of his own brief—that Moreton has been guilty of professional misconduct of the most reprehensible sort. It is further inescapable that, in dismissing the action of Rex Holland (both individually and as Administrator) against Defendants Ethel T., John R. and Rose Ann P. Moreton, and Susan Moreton Tevis, and in granting Defendant Arthur E. Moreton's motion for a directed verdict and entering a judgment for Defendant Arthur E. Moreton, notwithstanding the verdict of the jury, the trial court committed serious error.

The error is particularly aggravated in this case, in that it appears that the trial court failed to apply to this case not only the law applicable to actions involving a confidential relationship, but also failed to apply important rules as to the relationship of Attorney and Client announced by this Court and all other courts, “founded upon principles of public policy” and designed to “serve various purposes, among them to prevent the dishonest practitioner from fraudulent conduct * * * and to foster respect for the profession and the courts * * *.” *Malia v. Giles*, 100 Utah 562, 114 P. 2nd 208, 212; *Gillette v. Newhouse Realty Co.*, 75 Utah 13, 282 P. 776, 779.

¹ Except that as to his dismissal of the action by Rex Holland, as Administrator, Judge Hanson mentioned a one-year statute of limitations, Sec. 78-12-37 (see Pl. Br. 58-59) and lack of proper authorization (see Pl. Br. 60-61).

Even under Defendants' own version of the facts (which the jury obviously found was not the true version), and even under Defendants' own version of the law (which is not the applicable version), the action of the trial court was not justified and was erroneous as a matter of law.

I.

Replying to Defendants' Contention That There Was No Confidential Relationship (Dfts. Br. Point I)

(a)

“ * * * The general meaning of the term ‘practice law’ or ‘practice of law’ is common knowledge, although the boundaries of its definition may be indefinite * * * it is not confined to performing services * * * in courts of justice * * * *it includes * * * the preparation of legal instruments and contracts, by which legal rights are secured * * **.” 7 C. J. S. *Attorney and Client*, Sec. 3g, p. 703.

“The word ‘attorney’ signifies in its broadest sense a substitute or agent * * *.” 7 C. J. S. *Attorney and Client*, Sec. 1, p. 702.

“Generally speaking the relation of an attorney and client is a matter of contract * * *. *Thus the contract of employment in general consists of an offer or request by the client and an acceptance or assent by the attorney, or of an offer by the attorney and acceptance of the offer by the client * * *. The contract may be express or implied, and it is sufficient that the advice and assistance of the attorney is sought and received in matters pertinent to his profession.*” 7 C. J. S. *Attorney and Client*, Sec. 65, p. 848.

We have previously listed some 15 separate legal documents which were prepared by the defendant Moreton for

use in connection with the acquisition and transfer of the various interests involved in this litigation (see Pl. Br. pp. 22-23). There is no question but that these were documents “by which legal rights are secured.” Moreton himself testified that these documents were absolutely binding” (R. 593).²

All of these documents were of course prepared by Moreton *following* his first meeting with the co-owners in the Spring (April) of 1946, when Moreton made an offer to serve as the attorney for the then co-owners of the M & H claims in patenting those claims and in selling those claims, and when his offer to that effect was fully and completely accepted by the Plaintiffs—thereby creating beyond question the contract of employment, and giving rise to the Attorney-and-Client relationship. Thus testifying as to this very first meeting between Plaintiffs and Moreton (R. 331 to 337)—the date of which was firmly fixed as a result of repeated interruptions from Defendant’s Counsel

² As indicated, the trial court rendered no opinion setting forth the reasons underlying its action. However, some clue or explanation as to what caused it to commit such serious error in a case so affected with public interest may, perhaps, be suggested by the following (R. 595-596):

“Q. (By Mr. Pollack) * * * I forget what your answer was with respect to whether these were legal documents that you drew?

Mr. Gustin: What do you mean by that? We object to the form of the question. ‘Legal documents has a connotation that would cover every writing except regarding a book.

Mr. Pollack: * * * I think the expression ‘legal documents’ has a well recognized connotation.

Mr. Gustin: Your Honor, I object to it.

The Court: Rephrase your question. *It is confusing to me, Mr. Pollack.*

Mr. Gustin: That is, I don’t believe—

The Court: The objection is sustained.”

as being in the Spring (April) of 1946 (R. 334-335), Rex Holland stated as follows (R. 337):

“He (Moreton) told us at that time (the time of the first conversation; i.e., the Spring of 1946) that he, when we started on this patent, that he would be our attorney, that he would be our attorney in getting the patent and that he would also be our attorney in the sale of these properties.”

This testimony was never denied. Moreton, in all the days he was on the stand, never denied that at the very first meeting in April 1946 he had told Plaintiffs he was going to be their attorney in getting the patent and in selling the properties.³

(b)

In their brief, Defendants completely ignore such evidence as the foregoing, which is clear and undisputed on the

³ Rex Holland and the defendant Moreton, of course, both testified that every time there was a conversation, everything was reduced to writing (R. 318-319, 592). Thus, that testimony, taken together with the uncontradicted testimony of Rex just quoted, clearly sustained a finding that the employment contract entered into at this first meeting between Moreton and his clients and giving rise to the Attorney-Client relationship, had in fact been reduced to writing and was actually contained in the first legal document which the defendant Moreton prepared—the first Option Agreement of the Spring of 1946. Plaintiffs, of course, as even the defendant Moreton was forced to admit, were never given and have never had a copy of this document (R. 335, 657-658). And Moreton (who produced every scrap of paper he felt would be helpful to him) now claims he has “lost” the original (R. 612-615). He was unable to tell when he first noticed it was “missing” from his files (R. 615). *Significantly, he did not even attempt any explanation of how or why it was that, of all the documents he himself prepared and kept, this most critical document—the first option—was the only one that was “missing”.*

Record. They urge that there was no Attorney-Client relationship and not even a Principal-and-Agent relationship, ignoring that Moreton himself testified that there were no negotiations for the sale of Plaintiffs' interest in the M & H properties other than the negotiations carried on only through Moreton (R. 821). They argue that all the documents drawn by Moreton did not require the particular skill of an attorney and could have been drawn by the Hollands and Murie themselves (Dfts. Br. 32), ignoring the fact that practically every legal document—e.g., Wills, Contracts, Leases, etc.—*can theoretically and within the realm of possibility* be drawn by a layman, but that nevertheless the public at large generally recognizes that it is better to employ and does employ a lawyer for the preparation of such documents; and that, as indicated, the preparation of such documents constitutes “the practice of law.” They even ignore the fact that Moreton himself recognized Plaintiffs were lacking in the necessary skill for preparing such documents, when on July 5, 1936, he wrote them (R. 644) that:

“It is important that you advise me promptly by return mail, and if you have received the notices (Notices of Exemption) back again from the Recorder, *please forward them to me, so that I may see that they are in proper form.*”⁴

⁴ In this same letter of July 5, 1946 Moreton warned and instructed the co-owners against discussing *their price for their property* with anyone else and told them to leave such matters entirely up to him (R. 640-641, 644). This letter was produced at Moreton's deposition and quoted in full therein but Moreton did not produce it at the trial (R. 637). Thus, its contents were placed on the record only upon Moreton being confronted with his deposition (R. 636-644).

Defendants also ignore the fact that when Moreton wrote to the co-owners, he wrote them on his legal stationery, holding himself out as an attorney-at-law (R. 660-661); and that Rex—in his letter to H. L. Waldthausen, Jr., the mining engineer for Kaiser Steel (Ex. D. 36)—referred in capital letters to Moreton as the

“ATTORNEY AT LAW, JUDGE BUILDING, SALT LAKE CITY, UTAH, who will handle all business connected with the sale of this property.” (R. 470)

Defendants even ignore the fact that in about August, 1947, Moreton advised Plaintiffs as to the giving of a right of way to the Union Pacific over other properties belonging to Plaintiffs and adjoining the M & H claims (R. 367-368); and that Moreton at the trial claimed credit for procuring a release in November, 1948 from one Arthur (Ex. D. 50), thus settling a piece of threatened litigation involving an alleged cloud upon Plaintiffs’ title to the M & H properties (R. 418, 593, 774); and that Moreton himself testified that in October, 1948 he had received an abstract of the title to Plaintiffs’ property and that he had examined the title and passed on it (R. 792).

(c)

While Defendants’ Brief ignores these matters by not mentioning them, Defendants seek to deny them any effect or significance by erroneously arguing that the Attorney-Client relationship is unimportant unless it is shown that the relationship existed at the time the very first Option Agreement was made, in the Spring of 1946 (Dft. Br. 26,

33, 38); that otherwise everything that occurred in the first conversation in the Spring of 1946 was nothing more than a simple business transaction (Dfts. Br. 27, 28, 29, 36, 39, 42); that Moreton's entire compensation was fixed at that time (Dfts. Br. 31, 42) and since there was no Attorney-Client relationship existing when such compensation was fixed, Moreton was under no fiduciary obligation to his clients and was entitled to drive the best bargain he could (Dfts. Br. 34, 35, 42).

In the course of this erroneous contention, Defendants are guilty of what appear to be important and deliberate distortions of the Record. Thus Defendants state (Dfts. Br. 33) that the initial conversation between Plaintiffs and Moreton which Rex Holland testified to (quoted above), giving rise to Moreton's employment as Plaintiff's attorney, took place not in April of 1946 but in March, 1947.

No plainer misstatement is conceivable. The line of questioning during which Rex Holland testified about Moreton's offer to act as Plaintiffs' attorney, and their acceptance of that offer, begins with line 8 on page 331 of the Record and continues to line 26 on page 337. It is crystal-clear, throughout, that Rex is being questioned about the very first meeting with Moreton in the Spring of 1946. This appears not only at the very outset of the line of questioning (R. 331) but at other points as well (R. 334, 335, 336, 337). It is hard to believe Defendants' counsel could be confused on this score, since his frequent interruptions to the questioning were helpful in firmly fixing the date of the conversation involved in the testimony as being in

the Spring (April) of 1946 (R. 334, lines 22 to 27; R. 334, line 29, to R. 335, line 1, and R. 335, lines 14 to 16).⁵

Defendants' second important misstatement of the Record in their attempt to avoid the effect of the undisputed evidence as to the confidential relationship— lies in Defendants' various statements and suggestions and innuendos throughout their brief (Dfts. Br. 31, 32, 33, 35, 50, 51), that the price of \$100,000 was placed upon Plaintiffs' interest in the M & H claims at the very first meeting of Plaintiffs and defendant Moreton, in the Spring of 1946, at a time when the parties, according to Defendants, were dealing "at arms' length" and that, therefore, this price was not influenced by the existence of any confidential relationship of attorney and client or principal and agent, and cannot be upset because at some later date such a confidential relationship may have been created (Dfts. Br. 40). This again, of course, is in the teeth of the Record.

Rex Holland testified that the option drawn in Moreton's own hand at the very first meeting in the Spring of 1946, was left blank in two important respects: *No time* was fixed for its exercise, *and no price was fixed* (R. 333 to 337). Rex pointed out as to the price, that it was left blank because, as Moreton explained to them when Moreton in his own hand wrote out this "lost" option of April 1946, "he

⁵ Defendants' misstatement in this respect is, of course gratuitous and, actually, of no legal significance. Since *none* of the options given, including those given prior to March of 1947, were ever exercised, either by April 1947 or thereafter (R. 628, 664-665, 682-683), it makes little difference whether or not the Attorney-Client relationship was entered into in April 1946 or March 1947, because in either event it existed on the critical date of December 20, 1948 when Plaintiffs—as the result of Defendants' fraud—were induced to part with their property and suffer their damage.

(Moreton) did not know at that time just what value this property had'' (R. 337). In fact, according to Rex (R. 341-346) no price was fixed or even mentioned until a meeting which Rex definitely identified as occurring on March 10, 1947 because the power of attorney (P. Ex. 8) which Moreton got the Plaintiffs to give him at the same time was dated March 10, 1947 (R. 345). *It was at that March 1947 meeting, Rex said, that price was first discussed and that Moreton told them that, because of the overburden, the most they could get was ten cents a ton; on which basis, an overall price of \$133,000 was fixed—\$33,000 for Moreton's ¼ interest and \$100,000 for the other ¾* (R. 343-344).

Aside from Moreton's testimony (R. 623-625) about the price being contained in the "lost" option,⁶ all other evidence and testimony of every witness *including Moreton* confirms and supports Rex's testimony that the price was not contained in the original option for the reason that no one in the Spring of 1946 knew the value of the prop-

⁶ The record thoroughly justifies the suspicion that this "lost" option was really *not* lost. It justifies the suspicion that Moreton must have seen this document at least shortly before his deposition. Thus, while Moreton claims never to have seen the document since it was originally drawn (R. 615) he was, nevertheless, years later both at his deposition and at the trial, able to fix the date of it and of his first meeting with Plaintiffs as being April 6, 1946 (R. 610, lines 14-17; R. 620, lines 18-30) He attempted to explain this feat of memory by reason of a reference he claimed was contained in the option of September 1, 1946, Ex. P. 4 (R. 620-621). But even this explanation was exposed at the trial when Moreton's own chief counsel (apparently unaware of the real significance of what he was doing) took up some four pages of the Record in pointing out that the option of September 1, 1946, produced and put in evidence at the trial, contains no reference to the April 6th date or to any other date of any earlier meeting or document, option or otherwise (R. 615-619).

erty. No document was produced at the trial or at any deposition dated any earlier than July 1947 in which the price \$100,000 appears. Thus the option of September 1, 1946 does not refer to the \$100,000 figure or to any figure at all (R. 657, 662) and Moreton himself testified that the price or value of the property was not discussed in his second meeting with Plaintiffs in September 1946 “*because nobody knew. They didn’t know. I didn’t know*” the value (R. 669). And Moreton repeatedly testified that he did not know what the value of the property was in 1946 and 1947 and even up to October, 1948 (R. 601, 603, 652, 656, 666-667, 669).

It is true that at the trial Moreton did at first attempt to contradict Rex’s testimony that the price was first fixed in March, 1947 (R. 665 line 27 to R. 666 line 4), but, when confronted with his own deposition *Moreton broke down and admitted that the price or value of the M & H property was mentioned and discussed for the first time in March of 1947* (R. 666 line 5 to R. 668 line 27).

(d)

Defendants in their brief, of course, cite no authorities as to how the relationship of Attorney-Client is created. They merely announce it did not exist in this case. The general statements of the law from *Corpus Juris Secundum* quoted above, make it clear Defendants are wrong. However, since Defendants have raised such a fundamental question, we list below for the convenience of the Court, additional authorities showing that, upon such circumstances as those undisputed on the Record in this case, the relationship of attorney and client certainly did exist; and

particularly, that it did exist both in July 1947 when Plaintiffs gave Moreton a deed to a $\frac{1}{4}$ interest (R. 691, 692) (*which even Moreton, upon being confronted with his deposition (R. 701) was forced to admit (R. 702) he had not earned*) and on the critical date, December 20, 1948, when Plaintiffs sold the rest of their property.

In *Keenan v. Scott*, Sup. Ct. W. Va., 1908, 61 S. E. 806, plaintiff claimed he had employed Scott & Cobb to be his attorneys in litigation involving some land, the title to which those attorneys acquired in their own name subsequent to the alleged employment.

In reversing a decree for the defendants, the Supreme Court of West Virginia began by saying it would "inquire as to when did this professional relation commence". It then quoted from *Weeks on Attorneys*, Section 183, as follows:

"An attorney may be employed without formalities of any kind. *The contract may be made by parole and is often largely implied from the acts of the parties.*"

Following that and the citation of other authorities, the Court announced (l. c. 809) that:

"*These authorities and many others which might be cited, are conclusive of the proposition that, as soon as the client has expressed a desire to employ an attorney and there has been a corresponding consent on the part of the attorney to act for him in a professional capacity, the relation of attorney and client has been established and that all dealings thereafter between them relating to the subject of employment will be governed by the rules applicable to such relation.*"

In its opinion the Supreme Court of West Virginia cited the case of *Eoff v. Irvine*, 108 Mo. 378, 18 S. W. 907, in which the Supreme Court of Missouri, in reversing the Court below, held that the Attorney-Client relationship existed as a matter of law on the basis of the following stated facts:

“It appears that the plaintiff and a Mr. Stevens (a retired lawyer) were neighbors * * * plaintiff gave Stevens the abstract of title * * * but Stevens being out of the practice, advised plaintiff to employ Blair & Irvine. The plaintiff did not know these attorneys, and he requested Stevens to take it (the abstract of title) to them for examination. The evidence of Stevens is that he left the abstract at the office of the attorneys on a table but he does not know whether either of them was present * * *. In a short time plaintiff received a note from Irvine (who in the meantime had, through straws, acquired certain rights to the property) asking whether he would pay \$1,000 for a quit claim deed, with the request to call. He says he called at the office of these attorneys and Irvine pointed out the defects in the title and advised him to procure a deed from the owners * * *. The plaintiff paid the attorneys nothing for their services and they made no demand upon him for compensation * * *.”

As to such facts, the Supreme Court of Missouri declared:

*“This evidence as a whole shows beyond doubt that Stevens did employ these attorneys and that they examined the abstract pursuant to that employment. The relation of attorney and client, therefore, did exist * * *.”*

In *Healy v. Gray*, Sup. Ct. Iowa 1918, 168 N. W. 222, the plaintiff, whose father had just died, met the defendant, an attorney, in the street, and in an informal conversation asked that the defendant procure plaintiff's appointment as administrator of his father's estate. Subsequent thereto the defendant's law firm (unbeknownst to plaintiff) acquired title to certain valuable land which, plaintiff claimed, properly should have been acquired by the estate. Defendants made the familiar contention that they thought plaintiff *wanted* them to have this land. The Supreme Court of Iowa said:

*“The decision of this case turns upon the question whether the relation of attorney and client existed between the parties hereto * * * at the time Appellants purchased the land * * * the employment of Appellants by Frank Healy to procure his appointment as administrator is conceded by Appellants, but they seek to limit the scope thereof to that purpose only * * * .*

*“While the relation of attorney and client rests upon contract, it is not necessary that any particular formalities be observed in relation thereto, or that a retainer be demanded or paid. The contract may be implied from the conduct of the parties * * * .*

“ * * no definite course of procedure was considered or discussed, except Appellant's claim that Frank said it was all right for them to buy the land. That the relation of attorney and client existed between Frank Healy as administrator and Appellants at the time in question admits of no controversy * * * .*

“ * * Frank Healy believed and understood that, when he gave the letter to R. C. Gray, the firm was*

acting for him in all matters pertaining to the estate of his father. *If Appellants desired a more definite understanding, or contract, as to the extent and scope of their employment, they should have so informed Healy.*”

This Court has held that an Attorney-Client relationship exists whenever one undertakes to draft and prepare legal documents for another, notwithstanding that the party drafting the documents is not even a lawyer admitted to practice at the time. Thus in *Malia v. Giles*, 100 Utah, 562, 114 P. 2d, 208, 212, this Court said:

*“The practice of law includes the preparation of legal instruments and contracts by which legal rights are secured. 7 C. J. S. Attorney & Client, p. 704, Sec. 39 and Note 30. The preparation of the deed, the note and the mortgage was the practice of law. This was done by Mr. Stanley for Mr. Baird at a time when the former was not admitted to practice to the Bar of this State. It was the practice of law nevertheless, and Mr. Stanley was Mr. Baird’s attorney in performing these services. * * * Therefore, his method of attaching and selling the note to other clients of his own was flying right in the teeth of his duties to Mr. Baird. It was conduct that public policy will not tolerate.”*

Additionally, this Court, later in the same opinion gave a complete answer to Defendants’ contention (which we discuss in more detail in our next point) that an employment agreement is any kind of defense to fraud and that a dishonest practitioner can successfully, and without liability, practice fraud on his clients by cunningly arranging and scheduling the manner, method, timing and sequence of

the events whereby he is retained and by including the means of accomplishing his fraud in the very agreement by which he is employed. Such a thing, this Court announced in no uncertain terms, would never be countenanced, saying:

*“Mr. Baird’s defense based upon this conflict of interest in Mr. Stanley as an attorney, is well taken. To permit an attorney to so deal with his clients’ property would countenance a fraud upon the client. * * * That the client may ultimately win the case makes the transaction none the less reprehensible. We have already frowned upon the conduct of an attorney whose interests are conflicting. Gillette v. Newhouse Realty Co., 75 Utah 13, 228 P. 776, 779, held ‘* * * An attorney may not by a contract of employment with his client, place himself in a position where his own interests are in conflict with those of his client. The relation of an attorney and client is one of trust and confidence requiring the attorney to use all care, skill and diligence at his command to serve his client alone * * * and without any temptation to serve his own interests at the expense of his client. The rule that an attorney may not by his contract of employment place himself in a position where his own interest or the interests of another whom he represents conflict with the interests of his client, is founded upon principles of public policy. It is designed to serve various purposes, among them to prevent the dishonest practitioner from fraudulent conduct * * * to further the orderly administration of justice and to foster respect for the profession and the court * * *. The attachment in this case is void as against public policy. * * * reversed, and judgment of no cause of action entered in favor of the Bairds.’”*

See also *Lucas v. Smith*, Sup. Ct. Cal., 1956, 300 P. 2d 828, 830.

(e)

Defendants cite no authority for their contention that the Attorney-Client relationship did not exist in this case nor do they cite any authority which in any way excuses Defendant Moreton's reprehensible conduct. Instead they cite certain cases in support of the irrelevant proposition by which Moreton seeks to escape liability for his fraud, namely that an attorney at the time he accepts an employment agreement from his client is entitled to drive the best bargain he can; and that once the retainer agreement is made, the client cannot thereafter upset the agreement merely because the other party to it was an attorney.

No one of course disputes the validity of this proposition; however it is not at all applicable to this case. Additionally, as Defendants' own authorities reveal on their face it has its limits. Thus the statement of the general rule appearing in *American Jurisprudence* quoted by Defendants (Dfts. Br. 35) expressly states that while employment contracts between an attorney and client "are not within the rule of presumption against the attorney," they will be upheld and enforced only "if" they are "*fair and reasonable*" and do not "*for other reasons contravene public policy*." Cf. *Malia v. Giles*, *supra*, from which we have just quoted and *Newhouse v. Gillette*, 75 Utah 13, 228 P. 776, 779 cited and quoted therein.

This same limitation appears either expressly or by clear implication in at least two of the six cases cited by Defendants under their Point I (which are the only two of

the six in which an attorney's employment contract was involved). Thus *Swanson v. Hempstead*, 149 P. 2d 404 (Dfts. Br. 40) held merely that a 50% contingent fee contract was not, as a matter of law, "unconscionable;" and in *Hansel v. Norblad*, 151 P. 962 (Dfts. Br. 35), the court, after pointing out that "no false pretence or any act of fraud is alleged" stated only (l.c. 966) that:

" * * * we are not prepared to say from the testimony that the fee charged for defending a man for murder in the first degree is *so excessive as to impute fraud* to the attorneys."

In *Lindsay v. Marcus*, 325 P. 2d 267 (Dfts. Br. 36) the defendant (Lindsay, a layman) took property in his own name and then repudiated a joint venture agreement for the acquisition of that property previously entered into between himself and two others, one of whom happened to be an attorney who had in other matters sometimes performed legal services for Lindsay. No fraud, concealment, misrepresentation, deception or false pretense of any kind was shown on the part of the attorney. Moreover as the court itself pointed out (l.c. 272) the Attorney-Client relationship was not involved.

In *Goodson v. Smith*, 243 P. 2d 163 (Dfts. Br. 33) the attorney was not even a party to the contract in dispute. The contract referred to in the excerpt from that case which Defendants quote (Dfts. Br. 33-34) was not, as Defendants would make it appear, a contract with the attorney at all, but a contract for the sale of oil and mineral rights entered into between the plaintiff and the principal defendant in that case, a man named Christy. The attorney's only connection with this contract was that he had drafted it at

the insistence of the plaintiff; and as the court pointed out “*there is no indication whatever that the (attorney) had any motive for drawing any instruments which did not contain the wishes she expressed to him.*” A far cry from the facts in the Record before this Court.

In re Blodget's Estate, 93 Utah 1, 7 P. 2d 742 (Dfts. Br. 39) is of course no help at all to Moreton; on the contrary, the very language of this Court which defendants quote (Dfts. Br. 39-40) is sufficient to convict him. Thus, as this Court there pointed out, the fiduciary-administrator had a duty to:

“ * * * 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 the Record in this case is overwhelming—even to the inclusion of an express and unequivocal confession from the fiduciary—attorney/agent, himself—that the fiduciary now before this Court did *not* disclose all information as to all transactions and that he did not put the Plaintiffs on an even plane with himself (R. 832 lines 24-30).

Moore v. Hoar, 81 P. 2d 226 (Dfts. Br. 37) did not even involve an attorney/client dispute of any kind. In fact on analysis it involves only a dispute between two objects of a dead man's bounty; one, an attorney who was given an assignment of an interest in some unpatented mining claims while the man was still living and the other, the beneficiary under the dead man's will.

No false pretense or concealment or fraud of any kind were, it appears, even charged to have been committed by

the attorney. Instead, it was only charged (in order to get the benefit of the presumption of invalidity of contracts between attorneys and their clients) that an Attorney-Client relationship existed at the time of the assignment. However, it was found as a fact at the trial (conducted without a jury) that the relationship of attorney and client did not exist at such time and the California District Court of Appeals (while describing the testimony as to the *absence* of any Attorney-Client relationship as “far from satisfactory”) said that, nevertheless it “must be conceded” that the Trier of the Fact (who had had the opportunity to observe the demeanor and appearance of the witnesses on the stand), “was entitled” to make such a finding and (l.c. 237):

“It may not, therefore, be declared, as appellants contend, that the finding negating the existence of the fiduciary relationship on the date mentioned is so lacking in evidentiary support that it must be set aside.”

Thus, on analysis the decision in *Moore v. Hoar*, which Defendants cite is really authority for Plaintiffs’ proposition (urged in our next Point II), that *the existence or non-existence of an Attorney-Client relationship is a question of fact and is, therefore, for the determination of a jury when one is demanded as it was in the case at bar.*

II.

**Replying to Defendants' Contention That the
Existence of the Confidential Relationship
Was a Matter for the Court and Not the Jury
(Dfts. Br. Point I)**

(a)

Defendants state on page 34 of their brief that "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". Preceding that they state on pages 27 and 28 that "if any such relationship of attorney and client was created, it would necessarily have to arise from the interpretation and construction of the option, which we submit is impossible".⁷

The "option" they are talking about is, of course, the "lost" option of April 6, 1946 and we agree with them that it was "impossible" for the trial court to have interpreted that option. It was rendered "impossible" because the Defendant Moreton who drew the option and was *the*

⁷ In this connection Defendants burden their Brief with what appears to be another misstatement. Thus on page 28 they state "We agree with plaintiff's Point I to the effect that the relationship between the parties was a matter of law for the Court to determine." This of course represents a completely erroneous description of Plaintiffs' position. Point I of Plaintiffs' Brief recognizes that the existence of the confidential relationship is a matter of fact to be determined by the jury; but, we pointed out that, on the Record in this case, the evidence establishing the existence of the fiduciary relationship was so undisputed and one-sided, that the Court could properly have taken the issue away from the jury and decided it as a matter of law. (Pl. Br. 20-24)

only person who ever had a copy of that option, failed to produce it at any time during the course of this litigation either during his deposition or any of the other depositions or at the trial (R. 622) and, further, failed to give any explanation as to how or why this document, of all documents involved, happens to be the one he did not produce.

Obviously a defendant's suppression of documentary evidence can never be the basis for escaping liability which the documents, had they been produced, would impose. In fact, there is a presumption operating against a party, known to have had evidence in its possession bearing upon an issue, which such party without any plausible explanation (in fact in this case without any explanation at all) fails to produce. The presumption is that the evidence if produced would have been unfavorable to the contention of such party. Thus on this state of the Record, Moreton's failure to produce the "lost" option agreement of the spring of 1946 brings into play against Moreton the presumption that had this "lost" option been produced it would have established the existence of the Attorney-Client relationship as of the date it bore, which date Moreton himself has fixed as being April 6, 1946. In such a situation it cannot be maintained as Defendant contends that the trial court had any basis for directing a verdict for the Defendant Moreton because the Attorney-Client relationship had not been established.

Moreover even giving Defendant Moreton the benefit of every doubt, even assuming that his failure to produce the "lost" option was excusable and that the presumption should not be employed against him, *the Trial Court was still not justified in directing a verdict on the basis of this*

issue because it is the unanimous holding of all courts that whenever the creation, existence, continuation, repudiation, termination or abandonment of a confidential relationship, including the relationship of Attorney-Client, is in dispute it is a question of fact to be determined by a jury whenever, as in this case, a trial by jury has been demanded.

(b)

For the convenience of the Court we have collected below some cases which illustrate the unanimity of all courts on this point.

In *Pettine v. Arster*, 136 Atl. 8: the Supreme Court of Rhode Island stated:

*“Plaintiff testified that defendant asked him to try the case. Defendant denied this statement * * * this conflicting testimony required submission of the issue to the jury.”*

In *Bonelli v. Conrad*, 1 C. A. 2nd 660, 37 P. 2d 137, 141, the California District Court of Appeals held:

“The court did not err in refusing to instruct the jury that the undisputed evidence showed that the contract in question was entered into while the relationship of attorney and client existed. This was a question of fact in issue before the jury, and the court properly refrained from invading its peculiar province.”

In this case Rex Holland's testimony as to the conversation between Plaintiffs and Moreton in the spring of 1946, when they accepted Moreton's offer to act as their attorney, was, as previously indicated, *undenied* by Defendant

Moreton. Thus this is a much *stronger* case *on its facts* than *Graeser v. Jones*, 251 N. W. 162, in which, as to the Attorney-Client employment contract, the Supreme Court of Iowa stated:

“Appellant predicates error on the action of the trial court in submitting the case to the jury, claiming that there was not sufficient evidence that a contract was entered into, as alleged, to warrant the submission of the question to the jury. *Plaintiff testified to the conversation with Jones, in which it is claimed the agreement was made. He testified to every fact necessary to create a contract. The defendant denied essential portions of the conversation as related by plaintiff. This conflict in the testimony did not destroy plaintiff’s testimony. It was a question for the jury to say whether they would believe plaintiff or defendant. It follows that the court properly submitted the case to the jury.*”

In *Kreatz v. McDonald*, 143 N. W. 975, 976, the Supreme Court of Minnesota similarly held that:

“*Whether or not plaintiff employed defendant to foreclose the lien was, no doubt, a question for the jury.*”

It has been held error for a court to direct a verdict on the waiver or abandonment of an alleged relationship of Attorney-Client. Thus the Supreme Court of West Virginia in *Buckhannon Bank v. O’Brien & Hall*, 180 S. E. 258, 260, reversed the trial court for directing a verdict in such a situation saying:

“So, as we see it, the correctness of the court’s action depends on whether there was sufficient evi-

dence of a waiver or abandonment of the alleged relationship between the Bank and defendants to have gone to the jury * * *.

We are of the opinion that under the circumstances the case should have been permitted to go to the jury under proper instructions.”

Similarly, the Texas Court of Civil Appeals in *Jinks v. Moppin*, 80 S. W. 390, 393, held it was error to take the issue of continuance of the confidential relationship of Attorney-Client away from the jury so long as there was some evidence showing its continuance. The court stated:

“If it can be said that some evidence was adduced tending to show the continuance of the relation, the question should have been left to the jury.”

To like effect is the holding of the Supreme Court of North Carolina in *Francis v. Mortgage Security Corp. of America*, 153 S. E. 317, 318, where the court said:

*“There was a direct conflict in the evidence as to whether the plaintiff was employed * * * and the issue necessarily called for a determination of this question. Hence it was error to direct a verdict thereon.”*

Even the question of whether a certain writing should be regarded as an attorney’s employment contract has been held to be one for the jury. Thus the Supreme Court of Kansas in *Austin v. Prudential Trust Company*, 112 Kan. 545, 212 P. 77, 80, said:

*“ * * * The question of whether it (the writing) should be * * * regarded as an employment of the plaintiff by the trustee to prosecute such action as*

his attorney was one to be determined by the triers of fact.”

In *Gillis v. Paddocks Estate*, 109 N. W. 734, the Trial Court at the close of the trial directed a verdict for the defendant. The Supreme Court of Nebraska after pointing out that there was conflicting testimony reversed, saying:

“ * * * Under that set of facts the *case should have been submitted to the jury, with proper instructions, to determine when the contract of employment was in fact made* * * *.”

The Supreme Court of Oregon has held it is *not* error for a trial court to overrule defendant's motion for a non-suit and refuse to direct a verdict in favor of the defendants as to the issue of the existence or non-existence of an attorney-client relationship. So long as there was *some* evidence tending to support the claim of one of the parties on this point, the sufficiency of that evidence, the court pointed out, was a matter to be determined by the jury and not by the judge at the trial. Thus in *Currey v. Butcher*, 37 Ore. 61 P. 631, 634, the court stated:

“This motion was based upon the contention that there was no proof that the defendants were actually employed by the plaintiff to examine the title to the land referred to, or that the relation of attorney and client existed between them. *It is sufficient to say that an examination of the record discloses that there was some evidence tending to support the plaintiff's claim upon this point. Its sufficiency was for the jury, and not the court.*”

III.

Replying to Defendants' Contentions That the Parties Were Engaged in a Mining Partnership and That as a Co-Tenant Moreton Had No Duty to Disclose (Dfts. Br. Point II)

(a)

Upon the citation and quotation of excerpts from authorities on Mining Law, and cases involving mining partnerships, Defendants seek to create the erroneous impression that Plaintiffs and Moreton either were engaged in a mining partnership or that their only relation with each other was that of co-tenants (Dfts. Br. 43-47).

This co-tenancy came about, Defendants misleadingly relate, when Plaintiffs "sought Mr. Moreton out as a prospective purchaser for the claims" (Dfts. Br. 42) and upon this "ground alone", they erroneously contend, the trial court would have been justified in granting the judgment notwithstanding the verdict (Dfts. Br. 42).

The Record, of course, does not bear out Defendants' version that Plaintiffs sought out Moreton, although Moreton tried hard to make it appear that way at the trial. Thus Moreton testified that on the original meeting in the Spring of 1946, Plaintiffs "came to me" (R. 609). But he was almost immediately forced to concede that neither Rex Holland nor his father John ever said anything to indicate that they had sent for Moreton to come down to Cedar City (R. 610), and further admitted that the night before he ever saw the Plaintiffs, he (Moreton) together with Murie—whom Moreton was paying at least up to the time of the trial (R. 448)—had actually gone out and examined

the M & H properties (R. 633, 799-800). Likewise Moreton's attempt to explain the open map he had laid out showing the M & H properties when Plaintiffs first walked into his (Moreton's) hotel room (R. 332-333), on the ground that "I brought it * * * (the map) in connection with my own claims" (R. 610-611) is contradicted by the fact that Moreton's own claims were, as he himself said, "about twelve miles west, clear across the desert and on the other side of the mountain" from the M & H claims (R. 587).

And, finally Moreton's testimony that on September 1, 1946 he stopped at the El Escalante Hotel and stayed "there that night and probably the next two or three" (R. 801), on business "in connection with my own properties" was completely punctured by testimony from Mr. Fred Warner, Manager of the El Escalante Hotel, that the records of the hotel do not show that Moreton stayed there overnight on any night during the period August 24 to September 5, 1946 (R. 843). So that, it would appear Moreton came down to Cedar City on September 1, 1946 for the sole purpose of seeing Plaintiffs and procuring their signatures to the second option (P. Ex. 4), dated September 1, 1946, and then left for Salt Lake immediately thereafter on the same day that he came down.⁸

⁸ The records of the El Escalante Hotel *also* contradict *Moreton's testimony as to his first visit* to Cedar City in the Spring of 1946. Moreton denied that he went down to Cedar City on that trip with his wife; he said "I am sure I did not" (R. 800) but P. Ex. 59, one of the registration cards which Moreton signed when he registered at the hotel in the Spring of 1946, shows that he must have brought his wife with him because she was registered as sharing Moreton's room for the length of his stay (R. 841-843) which began at 6:15 p. m. on the evening of April 2, 1946 (R. 843).

(b)

Thus Defendants' picture of Moreton as an innocent purchaser whom Plaintiffs badgered every time he came to Cedar City until they finally importuned him either to enter a mining partnership or become a co-tenant with them, is not at all supported by the evidence and testimony in the case. Additionally, even if true, it is no defense, as even Defendants' own authorities reveal.

In their attempt to create the impression that there was a mining partnership between the parties in this case, Defendants cite *Harris v. Lloyd*, 28 P. 736 (Dfts. Br. 43, 44). They also cite one of the cases relied on and quoted in *Harris v. Lloyd*—the case of *Bissell v. Foss*, 114 U. S. 252, 5 Sup. Ct. Rep. 851, 29 L. Ed. 126. But, neither of these cases has any pertinence to the case at bar for any purpose other than to establish that whatever relationship the parties had, it was certainly not a mining partnership.

In *Harris v. Lloyd*, certain property on which mining operations had previously been carried on, was sold, and one of the tenants in common owning that property, Lloyd, got \$30,000 more than his co-tenants. For some years prior to the sale Lloyd and his co-tenants had also been parties to a mining partnership in the operation and exploitation of the mine but that partnership had been terminated and all mining operations pursuant to it had ceased at least two weeks before the sale. Following a trial, *the jury had brought in a special verdict, finding that Lloyd had not "in any manner whatever" induced the co-tenants to sell their interest, and further, that Lloyd had not "at any time or at all" made any false statements whereby his co-tenants were induced to sign the contract of sale.*

The trial judge, who was apparently unaware of the difference between a mining partnership and an ordinary commercial partnership, held that Lloyd actually stood in a partnership relation with his co-tenants at the time of the sale, and that notwithstanding the jury's verdict that he did not induce the sale and that he made no false statements "at any time or at all" to induce the sale, he was, nevertheless, as a partner, liable because of his failure to disclose to the others that he was getting \$30,000 more than they were.

The Supreme Court of Montana reversed, noting that there was no basis for any finding by the trial court of any kind of fraud on the part of Lloyd in view of the jury's finding to the contrary. It pointed out that the only partnership relation between the parties had been a mining partnership relation and cited *Bissell v. Foss* for the proposition that members to a mining partnership do not have the same duties as regards the sale or transfer of their interest in the partnership that members of an ordinary commercial partnership have. It held that upon the termination of the mining partnership, the only relation between the parties was one of co-tenancy, and that under that relation Lloyd had no duty to disclose what he was getting for the sale of his interest and that thus, the mere fact that he did not disclose to them that he was getting the extra \$30,000 was not sufficient to render him liable to them for it, citing for that proposition the leading case of *Matthews v. Bliss*, 22 Pick. 48—which, as we will show below, conclusively establishes Moreton's liability on the Record in this case.

A mere reading of *Harris v. Lloyd* is sufficient to establish that Defendants' suggestion that a mining partnership existed between Plaintiffs and Moreton merits no consideration. In distinguishing between mining partnerships and other partnerships, the court in *Harris v. Lloyd* cited and quoted not only from *Bissell v. Foss*, but also from the opinion of Mr. Justice Field in the later case of *Kimberly Arms*, 129 U. S. 512, 32 L. Ed. 764 which delineates the line between a mining partnership and an ordinary partnership and shows conclusively why there was no mining partnership in the case before this Court. Mr. Justice Field said (l. c. 770-771):

“The case of *Bissell v. Foss*, 114 U. S. 252, 5 Sup. Ct. Rep. 851, does not seem to us to have any bearing on the subject under consideration. There the question was whether a member of a *mining partnership*—that is, a partnership formed for the development and working of a mine—could acquire the shares of an associate without the knowledge of the other associates and hold them on his own account, and the court held it was lawful for him to do so. * * * The partnership between *Arms and Kimberly* was not a mining partnership, in the proper sense of that term. It was not a partnership for developing and working mines, but for the purchase and sale of minerals and mining lands, and in that respect was subject to the rules governing ordinary trading or commercial partnerships. It can no more be called a mining partnership than a partnership for the purchase of the products of a farm and the lands upon which those products are raised can be called a partnership to farm lands.”

(c)

As previously indicated, even if Defendants' erroneous contention that the only relation between the parties was one of co-tenancy, be, for the sake of argument, assumed, the error of the trial court must still be reversed, for on the *undisputed Record* in this case, and under the authority of *Matthews v. Bliss, supra* (cited, quoted and heavily relied upon in *Harris v. Lloyd* on which Defendants principally rely), Moreton's liability appears as a matter of law.

In *Matthews v. Bliss*, one of several co-owners of a ship sued the others, alleging that they had conspired to get him to sell his interest in the ship for a price lower than that which they had already arranged to receive for theirs. The trial court directed a verdict for the defendants on the ground that since the only relationship of the parties was as co-owners of a ship, the defendants had no duty to disclose the higher price defendants were getting for their interest in the ship. The Supreme Court of Massachusetts, while conceding that this was a correct statement of the law, nevertheless reversed, because as its opinion reveals, co-tenants, while they have no duty to disclose, have other duties which if breached, render them liable. The Court said:

“ * * * The Court are of the opinion, that the tenants in common of a vessel who are not engaged jointly in the employment of purchasing or building ships for sale, do not stand in such a relation of mutual trust and confidence towards each other, in respect of the sale of such vessel, that each is bound in his dealings with the other, to communicate all the information of fact within his knowledge which may effect the price or value. * * * but, *aliud est tacere, aliud*

celare. With this advantageous knowledge, if there be studied efforts to prevent the other party coming to the knowledge of the truth or if there be any, though slight, false and fraudulent suggestion or representation, then the transaction is tainted with turpitude, and alike contrary to the rules of morality and law."

Thus, the establishment of either of two elements (preventing the other parties from learning the truth and any false or fraudulent suggestion, however "slight")—*both of which are undisputed in the record of this case*—would be sufficient under *Matthews v. Bliss* to render "*the transaction * * * tainted with turpitude, and alike contrary to the rules of morality and law.*"

Moreton himself admitted he prevented the plaintiff from "coming to the knowledge of the truth" when he sent back the single document embodying the Contract of Sale which Columbia, according to its usual practice (R. 549) had drafted (R. 551, 770-771) and insisted that two separate documents be employed—one covering the sale of his one-quarter interest and the other covering the sale of his client's three-quarter interest in the M & H claims (R. 771).

Had the single contract been employed, Plaintiffs would of course have learned the truth as to the "false and fraudulent suggestion or representation" which Moreton made to them at his meeting with them in Cedar City on March 10, 1947 when, according to Rex Holland (R. 343 to 344):

"A. And the price at that time was mentioned.

"Q. Tell us what was said about that subject.

A. That price came from Mr. Moreton, that because of the depth of the ore body, because of the vast amounts of money that would have to be spent to

move the overburden over that ore to open pit mine that, that we could not expect to get more than ten cents a ton for the ore that was in that ore body.” And—“A. It come from Mr. Moreton, that he thought that we could get \$133,000 as an overall price for the property. Out of this \$133,000 we were to get \$100,000 and that would leave him \$33,000, which would be equal to our individual one-fourth interest.”

Had Moreton not prevented the employment of the original single document, Plaintiffs would have also learned of Moreton’s further misrepresentations in July of 1947 when the Agreement of Ownership was signed (R. 359-365)⁹ set forth in Rex’ testimony as follows (R. 365):

“The Court: All right. Was anything else said, Mr. Holland?

“The Witness: There was something said in there about—

“Mr. Gustin: In where? Now, just a minute.

“The Witness: Not in this, no.

“The Court: In this conversation.

“The Witness: In this conversation about the thought of 1,550,000 tons at 10 cents a ton would not exceed \$150,000.”

Note: This testimony was never denied. Moreton, in all the days he was on the stand, never denied making these misrepresentations in March and July, 1947. As a matter of fact, Moreton’s own testimony substantiates and confirms Rex’ testimony. Moreton repeatedly in his testimony

⁹ As the above record reference indicates, Defendants’ statement (Dfts. Br. 31) that the record shows no misrepresentation when the Agreement of Ownership was signed—is simply not true.

stated that nobody knew "what price per ton could be obtained" because the size of the overburden and whether or not the ore could be mined by open pit method were critical factors in determining that price (R. 600, 601, 603, 604, 645, 669, 676, 784, 829, 830). Moreton even admitted (after being confronted, of course, with his deposition) that he had actually quoted the Plaintiffs a price of "12½¢ for underground ore" (R. 831-832).

IV.

Replying to Defendants' Contentions as to the Statute of Limitations (Dfts. Br. Pts. IV, V & VI)

(a)

Defendants attempt to justify the error of the trial court on the ground that the action was barred by the Statute of Limitations and, in that connection, they announce that "the time of discovery is a matter of law for the Court to determine" (Dfts. Br. 79).

They cite no cases for this proposition and there are none: the law is entirely to the contrary. Thus in 54 C. J. S. Limitation of Actions Sec. 400 p. 552 it is said that:

"Ordinarily where fraud, mistake, concealment or a trust relationship is relied on to take the case out of the operation of the statute of limitations, *the matters to be determined by the jury or trier of fact as questions of fact include the existence of the fraud or concealment or of the trust relationship, the time when plaintiff first discovered the fraud, or received notice of the repudiation of the trust, and whether by the exercise of due diligence he could have discovered at an earlier date, that he had a cause of action; and*

these matters will not be decided by the court as questions of law."

Numerous pronouncements of the courts are in accord; thus:

Stevens v. Marco (Cal.), 305 P. 2nd 669, 684:

*"From the evidence we cannot hold as a matter of law that any of the circumstances known to plaintiff should have put a reasonably prudent person on inquiry. This is usually a question of fact. * * * it was a question for the jury to determine whether plaintiff's delay was reasonable or excusable. It is not a question we can decide as a matter of law on these facts."*

Easton v. Chaffe (Sup. Ct. Wash. 1941), 113 P. 2nd 31, 34:

*"Respondent argues that Appellant had knowledge of all the facts upon which he bases his cause of action more than three years before the complaint was filed. We think, however, that appellant's evidence supported all the material allegations * * * and was therefore sufficient to take the case to the jury. In reaching this conclusion, we have not overlooked respondent's contention that the court rejected certain letters offered by respondent for the purpose of proving appellant's knowledge of the facts more than three years before the action was brought. Assuming the letters were admissible and that they had been admitted, the issue would have still been for the jury."*

Linebaugh v. Portland Mortgage Co. (Sup. Ct. Ore. 1925), 116 Ore. 1, 239 P. 296, 199:

“When the alleged fraud was discovered, or whether reasonable diligence was exercised by plaintiffs to *discover same are ordinary questions of fact for the jury.* 37 C. J. 1255. * * * *In the consideration of this question we are not unmindful of the constitutional provision (Article 7, Sec. 3) which precludes us from invading the province of the jury, and will therefore not be concerned with matters upon which the evidence is conflicting.’*”

Birmingham Bond & Mortgage Co. v. Lovell, 5th Cir., 1936, 81 Fed. 2nd 590, 593:

“Suit was filed within one year after the date upon which Lovell testified he had discovered the fraud. Under the provisions of the * * * Alabama Code, the statute did not begin to run until the fraud was discovered. *It was clearly the province of the jury to resolve the conflict in the evidence and to determine whether, on all the evidence the statute of limitations created a bar to the suit.’*”

Schillner v. H. Vaughan, 2nd Cir., 1943, 134 Fed. 2nd 875, 878-879:

“The appellants contended that in the exercise of reasonable diligence the discovery should have been made before July 25, 1938 and so the action was barred * * * *the issue of reasonable diligence was properly submitted to the jury. Its verdict is conclusive.’*”

(b)

Defendants further argue on the issue of Limitations that Plaintiffs were charged with knowledge of what was contained in the recorded deed. They ignore and make no

effort to distinguish the cases cited in our original brief to the effect that the recording acts will not be employed to aid in the accomplishment of a fraud (Pl. Br. 55) and that the constructive notice rule does not apply where the existence of a fiduciary or confidential relationship is shown (Pl. Br. 56).

They themselves cite no cases involving a fiduciary relationship; moreover such cases as they do cite either support Plaintiffs' position or are distinguishable for an additional reason over and above those given in our original brief (Pl. Br. 55-57); this appears from the following in 54 C. J. S. Limitation of Actions, Sec. 189b, p. 194:

“The record of a conveyance is notice only to those who are bound to search for it, and in this behalf it has been said that the record of a deed or other instrument is constructive notice only to those acquiring the interests subsequent to the execution thereof; and the recording of a deed which fraudulently included more land than was intended to be conveyed is not notice to the grantor of a fraud
* * *.”

In *Davis v. Monroe*, 41 Atl. 444, the Supreme Court of Pennsylvania in reversing a judgment for plaintiffs said:

“But as to any land not intended to be granted, and only included in the deed through fraud, defendant continued to hold his former title and the Statute of Limitations did not run against him until discovery, or such notice as to put him on inquiry. The learned Judge was of the opinion that the recording of the deed was constructive notice to appellant of the extent of Cobb's claim under it, and that after twenty-

one years, appellant could not be held to dispute his grant. In this he gave too broad an effect to the notice employed by the recording acts. *The record is only notice to those who are bound to search for it, including parties subsequently dealing with the land, or concerned with its title * * ** but, in general, antecedent rights are not affected. *The recording of a deed is the act of the grantee, and in his interest. He may or may not put it on record for years or at all. The grantor is under no obligation to see to its recording or to examine the terms thereof. Consequently it is no notice to him.*''

The Supreme Court of Oklahoma in *Stocklassa v. Kinnamon*, 269 Pac. 1080, 1081-1082, said:

“ * * * It is next contended that the recording of the deed constituted constructive notice such as to set the Statute of Limitations in motion * * *. In the case of *Webb, et al. v. Logan, et al.*, 48 Okla. 354; 150 Pac. 2d, 116 * * * the Court said: ‘To hold that the recording of deeds of this character would be constructive notice to the grantor and start the Statute of Limitations would work a great injustice in this state, and to our minds, *would put a premium on dishonesty and rascality.* * * *’ The doctrine announced in this case, we think is sound, and should, at least in principle, control this question in the instant case. No duty rests upon the grantor to examine the records with reference to the title of the land after it was purchased and hence the public record thereof is not such constructive notice as will set the Statute of Limitations in motion.”

In *Wagner v. Wagner*, 38 N. W. 2d 609, 610, the Supreme Court of Iowa said:

“It appears they (certain instruments) were filed for record in 1936. The question here is whether this gave plaintiffs constructive notice of the contents of the instruments so as to start the running of the Statute of Limitations at that time. We hold it did not. * * * *It is not the purpose of the recording act to charge the parties with constructive notice of the precise contents of the instruments they execute but to notify subsequent purchasers and encumbrancers of the rights such instruments are intended to secure.* Therefore it cannot be said that the action was not commenced within the time limit of the Statute.”

(c)

Defendants' authorities do not contradict the foregoing; in fact those that are at all relevant to the issue support Plaintiffs' position. For instance, *Smith v. Edwards*, 81 Utah 244, 17 P. 2d 264 (Dfts. Br. 64, 65, 66, 68), on which Defendants so heavily rely, plainly establishes only that this Court (in accord with other courts) does not view that the recording of deeds is, of itself, sufficient notice to set the Statute of Limitations in motion where fraud is charged. In that case defendants' creditors moved to set aside as fraudulent defendants' conveyance of certain tracts to his sons. The conveyances had been made and duly recorded on or before the end of 1920, but the action was not commenced until 1927. *Thus if mere recording was sufficient to start the statute, the action was clearly barred and no discussion of any other evidence was necessary on the issue of limitations.* Since, on those facts this Court, nevertheless did discuss the evidence it is plain that mere recording was not deemed to be enough. And any question as to this is resolved by the citation in *Smith v. Edwards* of *Chinn v.*

Curtis, 71 S. W. 923; *Duxbury v. Boice*, 70 Minn. 113; 72 N. W. 838.

In *Chinn v. Curtis*, the Supreme Court of Kentucky (affirming a ruling below that the action was *not* barred by limitations) said (l. c. 924):

“ * * * the recording * * * throws little light on the question of discovery. It is admissible evidence on that question; and when the manner of its execution and registration, and other facts and circumstances in the case, would be sufficient to put a person on inquiry, the law declares this to be notice. * * * ”

And in the *Duxbury* case (which Defendants also cite on page 66 of their brief) the Supreme Court of Minnesota said (1 c. 839):

“ * * * the question is what constitutes a ‘discovery’ within the meaning of the statute? *Mere constructive notice of the deed by reason of its being filed for record is not notice of the facts constituting the fraud.*”

Neither *Smith v. Edwards* nor *Chinn v. Curtis* nor *Duxbury v. Boice* involve a fiduciary relation. Nor did *Taylor v. Moore*, 51 Pac. 2d 222 (Dfts. Br. 59), which further did not even involve a statute of limitation defense but was only an action for rescission in which this Court expressly said that while plaintiffs may have waived the right to rescind “*they must be left to every remedy at law for damages.*” No fiduciary relation was involved in *Gibson v. Jensen*, 15 Pac. 426 (Dfts. Br. 59, 84). Moreover, “the evidence of fraud” there was not “strong”, and it was “undis-

puted that plaintiff was *fully* advised of the fraud practised upon her * * * *in a letter from Mr. Healey to her in which he made a full statement respecting his faults in the transaction.*” Such a decision of course is no help to Moreton who confessed at the trial that he never disclosed “his faults in the transaction” (R. 832). Similarly in *LeVine v. Whitehouse*, 109 Pac. 2d (Dfts. Br. 80), there was no fiduciary relation and the plaintiff himself testified (l. c. 6) that he discovered the fraud within a month after it was practised.

And in *Ferrell v. Wiswell*, 143 Pac. 582 (Dfts. Br. 60) not only was there no fiduciary relation but according to the statement of the court the evidence was overwhelming that “there was no deceit, fraud or misrepresentation of any kind practised upon the appellant”. The trial court did not make and on the Record could not have made any such statement in this case.

Nor is *Bonded Adjustment Company v. Anderson*, 57 Pac. 2d 1046 (Dfts. Br. 63) any help to Defendants. Ratification, the critical issue in that case (which like the rest of Defendants’ cases involved no confidential relation), is not supported in any way by the Record in this case. Additionally, the *Bonded Adjustment Company* case is completely inapplicable to this case by reason of the limitation of its holding which appears on the face of the decision in *St. John v. Hendrickson* (a case also involving no confidential relation) cited, quoted and relied on both by the court in *Bonded Adjustment company* and by Defendants here. In *St. John v. Hendrickson*, 81 Ind. 350 (Dfts. Br. 63), the court first said:

“We fully recognize and approve the rule that a party may retain whatever he receives, stand to his bargain and recover for the loss caused him by the fraud. We do not mean to run counter to this rule. We neither hold nor mean to hold that affirmation by retention of the thing bargained for cuts off an action for damages.”

Having thus circumscribed its position, what follows must be read as a holding only:

“that where a party, with full knowledge of all the material facts does an act which indicates his intention to stand to the contract and waive all right of action for fraud, he cannot maintain an action for the original wrong practised upon him.”

It is undisputed on this record that as soon as Plaintiffs secured “full knowledge of all material facts” they plainly and unmistakably manifested an intention to sue (R. 400-402, 449-452). Nothing in the record even remotely suggests that they had any intention after they acquired “full knowledge” to “waive all right of action for fraud”. See, for instance, Ex. P-68 and Ex. P-69 (R. 909-911).

Preston v. Shields, 156 Pac. 2d 543 (Dfts. Br. 63), involved no fiduciary relation and no fraud. The decision in that action to quiet title turned on the fact that the plaintiff had sat by and permitted defendant to seriously change its position and spend large sums of money over a period of years in discovering oil on the properties. But Moreton never spent one penny to develop the M & H properties. Moreover, there is nothing in the Record indicating any serious change of position on his part or any prejudice to him resulting from the fact that Plaintiffs did not sooner

discover his fraud. If anything, the delay in commencing the action has been a benefit to him in that he has had the use of the fruits of his fraud during a period of unparalleled national prosperity which offered countless opportunities for investment and profit to any one possessed of such a tremendous sum.

Neither is *Cherington v. Woods*, 290 Pac. 2d 266 (Dfts. Br. 70) at all relevant to any issue in this case. It involved no confidential relationship and no fraud. There the purchaser of a liquor store had under his contract of purchase the express right to examine the books and records of the store in order to ascertain the truth of sellers' representation as to the profitability of the store; since the buyer did not avail himself of this right, the court held that he was in no position to complain; the court pointed out "there is absolutely no fraud in the record". And *Froelich v. United Royalty Co.*, 291 P. 2d 93 (Dfts. Br. 65)—involving like all the others no confidential relationship—merely announces the rule (inapplicable to this case) that recorded instruments constitute notice to *subsequent purchasers*.

V.

Replying to Defendants' Contention That Plaintiffs Had Actual Knowledge of the Price (Dfts. Br. Points III, IV and V)

Defendants' attempt to make something of the fact that the price of 25¢ per ton was referred to in Rex' letter to Dr. Mathesius (P. Ex. 14). This they say proves that Rex knew that the price Columbia paid for the M & H properties was 25¢ a ton. On the record it is clear and undisputed even from the testimony of defendant Moreton

himself that it proves no such thing. As Moreton repeatedly stated, 25¢ a ton was the highest price Columbia was known to have ever paid for ore in the State of Utah (R. 602, 603, 604, 765, 828-832). But, Moreton also said, again and again, that was no indication of what price Columbia would actually pay for ore in the M & H claim or any other specific claim because the actual price to be paid for any specific claim, including Plaintiffs' M & H claim, would depend on many things (R. 601-605) including the depth of the ore body and whether or not the ore could be readily mined by open pit methods (R. 645, 669, 676, 784, 830, 832). Thus, according to Moreton, himself, while Rex and everyone else in Iron County might have known that 25¢ was the highest price Columbia had ever paid for ore in that area, neither Rex nor Moreton nor anyone had any way of knowing from that fact whether or not Plaintiffs would get that highest price for the ore in their M & H claims (R. 601, 603, 604, 645, 656, 666-668, 669, 828-832). Therefore any knowledge of Rex as to the theoretical 25¢ maximum price per ton cannot be said to have been knowledge of the price per ton that Columbia was going to pay or did pay for the ore in the M & H claims. And this is made clear by Moreton's own testimony (R. 601-605, 656, 669) and especially that immediately preceding and leading up to his final confession (R. 828, line 18 to R. 832, line 29).

Conclusion

It is impossible to see how anyone on the Record in this case could give serious consideration to Moreton's testimony. First of all he was telling a highly improbable story. It will be remembered that according to Moreton

there was "bargaining" at the original meeting between himself and the Plaintiffs in the Spring of 1946 (R. 624-625, 631-632). Moreton testified that he told Plaintiffs that in "ordinary and in other cases" a 50% interest in claims "had been given" to patent "unpatented claims in the area" (R. 624). He further testified that Plaintiffs refused to give him an interest of that size notwithstanding that they did not, according to Moreton, dispute that "in ordinary and in other cases" 50% had been given. In fact he testified that they refused to give him any more than a one-quarter interest (R. 625). Following such testimony, Defendants then asked the jury and now ask this Court, to believe that Plaintiffs who, according to Moreton, were unwilling to give Moreton any more than one-fourth in the Spring of 1946, thereafter, for no reason suggested, became willing to give him *three-fourths*.

On top of this inherent improbability, there is the fact that Moreton was repeatedly and crushingly impeached during his performance on the witness stand at the trial. For instance, Defendants describe an alleged statement which Moreton testified he made to Rex Holland and Rex' answer thereto as follows: "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¢ per ton', to which statement Rex replied, 'I think you are' " (Dfts. Br. 79).

This conversation, Defendants claim (Dfts. Br. 79), was never denied. But the fact of the matter is that it was completely and thoroughly denied, and it was denied by Moreton himself. Immediately after this testimony that Defendants have quoted, Moreton was confronted with contradictory testimony from his own deposition (R. 775 lines 26 to 29,

'77 line 28 to 779 line 25), and shortly thereafter broke down and completely and irrevocably impeached and destroyed himself when he testified (R. 832):

“Q. Will you now tell me when it was that you told the Hollands and Murie, for the very first time, that Columbia was paying 25 cents a ton for the M & H claims? A. I never told them that at any time.

“Q. You never told them? A. No.”

Over and over again at the trial Moreton was similarly embarrassed and impeached (R. 616-630, 664 line 1 to 668 line 23, 669-673, 700-704, 775-779, 781-788, 789, 831-832). We mention this only to show that Moreton's testimony is so absolutely unworthy of belief that the trial court could not appropriately predicate any ruling upon it. Indeed, it is respectfully submitted that any reliance placed on Moreton's testimony by the trial court must on this Record be considered to have been an abuse of discretion.

We, of course, do not know that the trial court's action was based on Moreton's testimony. However, we further respectfully submit, we do not know (since the court wrote no opinion)—what else it could have been based on. We can see no other basis. We submit there is none.

It has been said that “The courts will not lightly seize upon some small circumstance to deny relief to a party plainly shown to have been defrauded” (*Victor Oil Co. v. Drum*, 148 Cal. 226, 193 P. 243, 249, cited and quoted in *Adams v. Harrison*, 93 P. 2d 237, 244) yet, we submit, in this case relief was denied to parties plainly defrauded without the showing of *any* circumstance for such denial.

Defendants in their Brief talk about the deprivation of constitutional rights (Dfts. Br. 94-100). But that complaint could be more appropriately made by Plaintiffs, for the action of the trial court in setting aside the verdict of the jury and entering judgment for defendant Moreton notwithstanding the jury's verdict (all without explanation or opinion and in the very teeth of a Record such as this) actually amounts, in effect, to nothing less than an unwarranted deprivation of Plaintiffs' constitutional right to a trial by jury.

It is respectfully submitted that the serious error of the trial court in this case cannot be permitted to stand and that the relief requested in our original brief should be given.

Earnestly and sincerely urging all of the foregoing this brief is

Respectfully submitted,

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