

1959

Rex Holland v. Arthur E. Moreton et al : Petition for Rehearing

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 MORETON, SUSAN
MORETON TEVIS,

Defendants and Respondents.

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Supreme Court, Utah

PETITION FOR REHEARING

E. R. CHRISTENSEN
HARLEY W. GUSTIN

*Attorneys for Defendants
and Respondents*

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REX HOLLAND,
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—vs.—

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ROSE ANN MORETON, SUSAN
MORETON TEVIS,

Defendants and Respondents.

Civil No. 8740

PETITION FOR REHEARING

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF THE STATE OF UTAH:

The respondents, and each of them, respectfully petition this Court for a rehearing on its opinion filed in the above entitled cause on July 8, 1960. The grounds

for this petition and the points wherein the respondents allege that this Court has erred are as follows:

1. The holding of the Court is contrary to the First Cause of Action of plaintiffs' complaint, which cause the plaintiffs elected to submit to the jury in lieu of their Second Cause of Action, the Second Cause of Action being consistent with the opinion of the Court, but upon which there has been no trial and one is not, by the direction of this Court, contemplated.

2. By holding that the appellants were not entitled to prevail upon the cause of action and theory upon which the action was tried to the trial jury, and then to remand the action with instructions to enter a judgment upon a new and different cause of action and theory, deprives the respondent of a jury trial and of property without due process of law and is contrary to Sections 7 and 10 of Article I and Section 9 of Article VIII of the *Constitution of the State of Utah* and to Rule 39(a), *Utah Rules of Civil Procedure*.

3. The holding that appellants are entitled to a stated amount by way of punitive damages is arbitrary and deprives respondent of a jury trial and of his property without due process of law, and is beyond the jurisdiction of this Court and contrary to the constitutional provisions and to the rule referred to above, particularly in light of the holding that the theory and cause of action upon which the cause was submitted to the jury is erroneous. To be consistent, impartial and within the concept of due process, an award of punitive damages, if any

there might be, should be left to the trier of the fact upon consideration of a cause which recognizes the vested interest of the respondent in and to one-fourth of the purchase price, which the opinion recognizes but which the jury in the instant action was not permitted to consider.

4. The opinion gives the false impression that the statute of limitations (Subsection 3, Section 78-12-26, *Utah Code Annotated* 1953) was passed upon and determined by the jury. In fact the jury was not instructed nor did it pass upon the statute of limitations.

5. The opinion restricts the statute of limitations (Subsection 3, Section 78-12-28, *Utah Code Annotated* 1953) to actual notice on the part of Holland of the alleged fraud, the opinion stating: "If the jury had accepted the defendant's contention that the Hollands *knew the facts* * * * the action would have been barred by the time it was brought." The opinion, in dealing with the knowledge of the Hollands, excludes facts to support the contention and the ruling of the trial court to the effect that the Hollands were put on inquiry sufficient to charge them with knowledge more than three years before the action was commenced.

6. The opinion does not rationalize or discuss the running of the statute of limitations in this action as a question of law passed upon by the trial court in support of its ruling setting aside the verdict of the jury. The Court ignores Rex Holland's own writings of September 14, 1948, and October 13, 1948, and the telegram from Mr. Moreton of October 8, 1948. The concurring opinion

in the appeal from the summary judgment in favor of Columbia Iron Mining Company imputes to Rex Holland knowledge of the total purchase price as of September 14, 1948. This is ignored in the instant opinion.

7. The opinion places unjustified emphasis on the hearsay conversation with Canfield and on the self-serving statements by Rex Holland, which were inadmissible as evidence.

8. The opinion is contrary to law and to the facts.

Respectfully submitted,

E. R. CHRISTENSEN
HARLEY W. GUSTIN

Attorneys for Defendants and
Respondents

CERTIFICATE

The attorneys for the petitioning respondents hereby certify that this petition for rehearing is made in good faith and not for the purpose of delay.

E. R. CHRISTENSEN
HARLEY W. GUSTIN

ARGUMENT

The various points specified above are grouped for argument under the following designations:

POINT ONE

THE MANDATE TO CORRECT AND REINSTATE THE VERDICT IN FAVOR OF REX HOLLAND IS INCONSISTENT WITH THE HOLDING THAT THE CAUSE AS SUBMITTED TO THE JURY WAS ERROR.

The opinion expressly states:

“The case was submitted on the theory that if the jury believed that Moreton breached his fiduciary duty and practiced a fraud upon the plaintiffs, he was to receive none of the purchase price; and that it would be divided between the Hollands and Murie, one-third to each. The jury found for Rex Holland on this theory and awarded him one-third of the \$287,500 Moreton obtained, or \$95,833. *We think this is error.*” (Emphasis added).

After the decision of this Court in *Holland v. Columbia Iron Mining Co.*, 4 Utah 2d 303, 293 P.2d 700, there remained but two causes of action. The plaintiffs were then limited to the First and Second Causes of Action as contained in their amended complaint. Paragraph numbered 2 of the Pretrial Order of October 22, 1956, so provides (R. 148-150).

The distinction between the two causes is clearly defined in the record.

“THE COURT (Judge Hanson): * * * The first and second causes of action are the only ones involved in this suit?”

MR. ROBERTS: That is right. The first cause is on the theory there was a breach of the confidential relationship existing between Mr. Moreton and the Hollands and because of that they are entitled to everything, or that Mr. Moreton is entitled to nothing, and we, in that cause, ask for judgment for the entire amount, which would mean —

THE COURT: He forfeits his \$287,000.00.

MR. ROBERTS: Of course (we) would only be entitled to two-thirds of the \$387,500.00 under that. We would be entitled to two-thirds less \$66,000.00 which we have already received.

The second cause is on the theory that each of these persons should have received a one-fourth interest in this entire thing. Mr. Moreton, along with them, is entitled to his one-fourth, which means Rex's share would be entitled to one-fourth — \$33,333.00 he has already received — and then, of course, John Holland's share being sued for by Rex as administrator." (R. 201-202)

"MR. GUSTIN: Isn't there an overlapping in the first and second?

MR. ROBERTS: There are two different theories. We couldn't recover both these sums. That is on the theory that Mr. Moreton forfeits any compensation he received. If we are not right on that, there should be no forfeiture, then we ask for our quarter interest." (R. 202-203).

"THE COURT: So the record is clear, as I understand it, the first cause of action is now the only matter that is to be submitted to the jury, and the amount of punitive damages, if any, is to be limited to the extent of \$50,000.00, is that right?

MR. ROBERTS: That is right.

MR. GUSTIN: The first cause of action?

THE COURT: Be limited entirely to the first cause of action." (R. 960-961).

The jury by the last paragraph of Instruction No. 6 (R. 267), was instructed:

"In the event said defendant Moreton fails to persuade you by a preponderance of the evidence that he made the above described disclosure to Holland or that he knew or could have known *from conversations with Moreton* and you further find from a preponderance of the evidence that defendant Moreton's failure to make the above described disclosure was wilful and deliberate then you should return a verdict in favor of plaintiff and against defendant Moreton for one-third of the amount of money paid by Columbia Iron Mining Company to the defendant Moreton. That figure is the sum of \$95,833.00." (R. 267). (Emphasis added).

The mandate in the instant action orders the correction of the judgment in favor of Rex Holland, not on the theory of the action as submitted to the jury in the court below, but on the theory of the Second Cause of Action, upon which there has been no trial. Instruction No. 6 persists "as the law of the case" notwithstanding the so-called correction of the judgment. The situation thus resulting is an irreconcilable one. The Court holds that error was committed in permitting the jury to find on the forfeiture theory, the theory upon which the action was submitted. The jury had no alternative other than

to decide the case on the theory of forfeiture or to render a verdict of no cause of action. This Court is bound by the "law of the case" just as was the jury. Instruction No. 6 inhibits this Court as it did the jury. *Pettingill v. Perkins* (1954), 2 Utah 2d 266, 272 P. 2d 185, states:

"Plaintiff asked that the case be tried on that theory, that the jury be so instructed, and that the jury find their verdict on that basis, and the law as so declared. Right or wrong, the instructions became the law of the case, were binding upon the jury, on the court and counsel."

The appeal of Rex Holland is taken from the judgment which sets aside the verdict and dismisses the action in accordance with the motion for directed verdict (R. 304). The present holding of the Court is to the effect that it was error to have submitted the case to the jury on the forfeiture theory as delineated by the First Cause of Action and by Instruction No. 6. In so holding, this Court recognizes the propriety of the trial court's action in setting aside the verdict of the jury and it then necessarily and logically follows that the judgment appealed from should be affirmed. Under the present state of the record a new trial is the only affirmative relief that the Court can grant appellants.

The mandate is a clear departure from Instruction No. 6. In *Davis v. Midvale City* (1920), 56 Utah 1, 189 P. 74, this Court held that unassailed instructions are binding upon this Court as well as the court below and the parties litigant. In that case it was said:

“As stated by appellant, these instructions became the law of the case. It is not incumbent upon this court to determine their validity or invalidity or whether the court erred in giving them or not. For the purpose of this case they are binding upon this court as well as the court below and the parties litigant.”

In *Sierra Nevada Mill Co. v. Keith O'Brien Co.* (1916), 48 Utah 12, 156 P. 943, this Court said:

“If, on a review of the proceedings resulting in the judgment, error should be found to plaintiff's prejudice, still we would not be authorized to enhance the judgment; we would only reverse it and grant a new trial. This is so because we are not authorized, in a law case, to try the issues on the record and make, or direct, findings, or treat as found that which ought to have been found.”

Cases from other jurisdictions are equally decisive:

Goggins v. Herndon (Idaho 1952), 249 P. 2d 203, holds:

“We must decide the case in accordance with the theory of its presentation in the trial court.”

Shumate v. Johnson Publishing Company (Cal. 1956), 293 P.2d 531, holds:

“The theory on which the case was tried in the court below must be followed on review.”

Cleary v. Indiana Beach, Inc. (C.C.A. 7), 275 F.2d 543, holds:

“Since plaintiff did not submit the case for trial on a wilful and wanton theory, he may not

now rely, in this court, on a wilful and wanton theory for reversal of the judgment.”

United States v. Waechter et al., (C.C.A. 9, 1952), 195 F.2d 963, holds:

“We agree that the government, whatever may be the strength of its present argument, cannot fairly urge as a ground for reversal a theory which it did not present while the case was before the trial court.”

Russell v. Sunburst Refining Co. (Mont. 1928), 272 P. 998, holds:

“The Supreme Court will review a case upon the theory upon which it was tried in the district court (*Smith v. Barnes*, 51 Mont. 202, 149 P. 963, Ann. Cas. 1917D, 330), and in determining what that theory was resort may be had to the instructions which the court was requested to give.

* * *

It is therefore apparent that the plaintiff's theory on the trial of the case was that, in order to prevail, he must by the evidence which he introduced bring himself within one of the conditions named in this instruction, and that, if he did not do so, the verdict of the jury must necessarily go for the defendant.”

The holding of this Court to the effect that the jury could not return a verdict on the theory of forfeiture is in accord with the ruling of the trial court setting aside the jury verdict and entering judgment in accordance with the motion for a directed verdict. This Court sustains the action of the trial court and yet, contrary to all precedent, rewrites the verdict, then directs the entry of the

verdict as rewritten, not considering it to be bound by the law of the case.

Having determined that Rex Holland cannot prevail upon the theory submitted to the jury as reflected by Instruction 6, the Court can only affirm the decision of the trial court. This Court, as stated in *Sierra Nevada Mill Co. v. Keith O'Brien*, *supra*, is not authorized to try the issues on the record and make or direct findings or treat as found that which ought to have been found.

In 3 *Am. Jur.*, Appeal and Error, Section 1218, page 720, it is said:

“Generally, it may be said that when it appears that the plaintiff can probably make a better showing on his trial, the court, upon reversing the judgment, should remand it for a new trial. But the court is required to remand for a new trial only when a new trial is necessary. *That condition, however, is always deemed to exist, as to a jury case, when, under any circumstances, a new trial might result otherwise than in such a judgment being awarded as would have been rendered before had the error or errors not been committed.*” (Emphasis added.)

The trial court did not set aside the jury verdict on the statute of limitations alone. Its ruling was sufficiently comprehensive to include the holding of this Court that Rex Holland could not prevail upon his theory of forfeiture. That being the state of the record there can be no reversal. Furthermore, the plaintiff elected to submit the action on the theory now determined to be untenable and he should not now be entitled to prevail

short of a new trial upon the theory of his Second Cause of Action, which theory he elected not to pursue at the trial level.

POINT II.

THE OPINION IS CONTRARY TO THE ENUMERATED CONSTITUTIONAL PROVISIONS.

The effect of the opinion is to direct the entry of a judgment upon plaintiffs' Second Cause of Action in favor of Rex Holland. In so doing the Court ignores the fundamental right of trial by jury and compounds the basic error, if such can be done, by arbitrarily assessing an award of \$25,000.00 as punitive damages as if the case had been tried and presented to the trier of the fact on the theory that Mr. Moreton had a vested interest.

The opinion recognizes that Mr. Moreton became vested with ownership of a one-fourth interest in the mining claims. "He is therefore entitled to his fair proportion of the price for which they were sold." Under this connotation the Court presumes to say that the jury, if the action had been tried on that theory, would have awarded \$25,000.00 by way of punitive damages. The award that the jury made was based upon the theory that Mr. Moreton had no interest in the claims or any interest in the purchase price. On that theory, and justifiably so, the Court holds the verdict to have been erroneous. By the same token it should be said that the jury's concept of punitive damage was in error.

Had the jury been instructed on the theory that Mr. Moreton did in fact obtain the patents to the claims as he agreed, and therefore under the agreement of ownership became vested with an interest in the claims and in the purchase price, the jury's view of the punitive side of the action could well have been different. The incredible silence of Rex Holland after his letter to Dr. Mathesius wherein he stated that he was advised of 25¢ per ton being the prevailing price, his knowledge of the estimated tonnage at 1.55 million tons and after the telegram from Mr. Moreton to be hereafter referred to, and in which telegram Mr. Moreton stated that he was bargaining for as much as he could get for his own interest in addition to the fixed amount for the Holland interest, could be argued as showing bad faith on Rex Holland's part and good faith on the part of Mr. Moreton. Rex Holland remained silent at the closing of the transaction after he had been alerted to the fact that Mr. Moreton was actually receiving more than an equal fourth of the transaction. Rex Holland's silence could be said to have been a trap to enable him to thereafter change his position, once having secured his portion of the \$100,000.00 for which he had bargained.

These observations are not intended to persuade this Court on the merits of the controversy as the problem is inherently one for the trier of the fact. It is the prerogative of the trier of the fact under appropriate instructions, if by a jury, to determine good faith or the want of it and the propriety or impropriety under

all of the circumstances going to the award of punitive damages. The appellate court on appeal is limited to "questions of law alone." Section 9, Article VIII, *Constitution of the State of Utah*.

Had the jury been instructed that in determining compensatory damage it should include interest at the rate of 6% per annum from the 20th day of December, 1948, and that the award of punitive damages should not be disproportionate to the actual damage sustained or should bear some relation to the injury complained of and the cause thereof, as held in *Falkenberg v. Neff* (1928), 72 Utah 258, 169 P. 1008, its concept of the award of \$25,000.00 might have been different.

This Court, in changing the theory upon which Holland might recover and stating a new premise of actual damage, adhering nevertheless to the former award of punitive damages, deprives respondent from a jury determination of the relationship between the punitive damage and the actual damage, an important facet that the jury alone has the right to determine. Furthermore, the Court in reducing the amount of the actual damage has, in effect, increased proportionately the amount of the punitive damage. While this Court has, in some instances, reduced the amount of punitive damage as being disproportionate to the actual damage, we know of no case where the Court has increased the amount of punitive damage.

Correcting the judgment to add interest at 6% from December 1948 to the date of the verdict in July

1957 adds almost 50% of the principal sum of \$63,542.00 to the verdict. Under proper instructions the jury would have been permitted to weigh the circumstance of approximately \$30,000.00 in interest in its consideration of a punitive award, if any.

In *Ostertag v. LaMont* (1959), 9 Utah 2d 130, 339 P.2d 1022 this Court said:

“As with damages for injuries generally, there is no method for exact calculation as to punitive damages, nor is there any precise formula for the relationship of punitive damages to actual damages. The jury from its advantaged position must necessarily be allowed a broad discretion in such matters. It is true that this court has stated a number of times that the punitive damages must bear some reasonable relationship to actual damages. This is so because they must not be so disproportionate as to manifest that they were awarded as a result of passion or prejudice, or under misconception of, or in disregard of the law or the evidence. But the relationship of the punitive damages to actual damages awarded is only one of the facts to be considered in determining whether the amount awarded should be sustained.”

In *Fell v. Union Pac. Ry. Co.* (1907), 32 Utah 101, 88 P. 1003, the Court, by way of dicta, calls attention to the fact that there are cases where both interest and exemplary damages are not allowed. The case contains the following:

“General justice is never promoted by an effort to reach it by ignoring sound principles of law in particular cases. Whenever possible,

it ought not be left to the mere caprice of either court or jury to either grant or withhold that which is due. A fixed rule, when based on sound principles, is, in most instances, a safer guide than the judgment of a few individuals, however honest or pure their motives.”

The opinion as it is now written deprives Mr. Moreton of his property without due process of law, and in so doing usurps the function of the trier of the fact in regard to punitive damage. The opinion as now written is authority for the proposition that an appellate court can make an award of punitive damages on a cause or a theory not presented to or passed upon by the lower court.

In the case of *Norback v. Board of Directors of Church Extension Society* (1934), 84 Utah 514, 37 P.2d 339, it is stated:

“That either party to an action at law has the right to a trial by jury when timely and properly demanded is supported by the law and the decided cases.”

The Supreme Court of the United States in the case of *Jacob v. City of New York*, 315 U.S. 752, 86 L.ed 1166, states:

“The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.”

In *Bodon v. Suhrmann* (1958), 8 Utah 2d 42, 327 P.2d 826, this Court held that an award of \$100.00 to a twenty year old man who contracted a mild case of trichinosis should be increased to \$500.00 on condition that if the defendant refused to accept the increase a new trial would be ordered. The appeal was taken on the grounds of inadequacy of the award. The dissenting opinion forcibly attacks the additur and calls attention to the fact that "To date the only relief in such cases has been to grant a new trial." The dissenter goes further and points out that in permitting such procedure and granting the relief asked for for the first time on appeal this Court assumes the role of a trial court and indulges a procedure that is a stranger to both the trial court and the record.

"In my opinion, this decision gives the court a power it never had and one that trespasses into constitutional territory involving denial of both a jury trial and due process. It lays down what I think is a dangerous rule, that, even where no one seeks the relief, we, who were not particeps at the trial, can grant a new trial unless defendant pays a sum we arbitrarily set, forcing the plaintiff, who has absolutely no choice in the matter, to take the added amount without any possibility of having a jury pass on the matter."

The opinion in the instant case does not involve an additur but does "trespass into constitutional territory involving denial of both a jury trial and due process" to an extent far greater than is pointed out by the dissenting opinion in the *Bodon* case. In fact the instant

opinion emasculates all concept of the right to a jury trial and of due process. The judgment ordered to be corrected and the verdict ordered to be modified are upon a theory not presently before the Court and not passed upon at the level of the trial court. It is just as if there had been no trial and the parties were appearing before this Court, asking for relief on the premise that this Court is of original and general jurisdiction.

POINT III.

THE STATUTE OF LIMITATIONS.

The opinion implies that the trial court vacated the jury verdict and dismissed the Rex Holland action upon the sole ground that the action was not brought within three years after the discovery of the fraud. While this Court says that the action of the trial court was "apparently upon the ground" of the statute of limitations, the trial court did not expressly so state. The motion contained several other grounds including the contention that Rex Holland was not entitled to prevail upon the theory of his action as submitted to the jury, and on which ground this Court, by its opinion, concurs.

The motion for a directed verdict made under Rule 50, *Utah Rules of Civil Procedure*, is found on pages 237 through 242 of the record. A further ground was urged at page 958 of the record. The motion to set aside the verdict and for a judgment of dismissal found at page 287 of the record adopts the grounds stated both in writing and orally on the motion for a directed

verdict, and then calls specific attention to the fact that “the evidence is insufficient in law to form a basis for the verdict rendered and the same is against law.” This Court is in accord with the latter statement in holding that Rex Holland cannot recover on the forfeiture theory.

The order and judgment of the trial court (R. 292-294) setting aside the verdict of the jury and dismissing the Rex Holland action does not delineate the grounds, except as it incorporates the motion for a directed verdict. The opinion of this Court therefore inaccurately suggests that the motion was granted by reason of the trial court’s concept of the statute of limitations and does further injustice to the record by not pointing out that there were other grounds prompting the dismissal, including the proposition that the verdict was in error in awarding Rex Holland one-third of the entire purchase price.

The opinion furthers the suggestion that the trial court dismissed the action on the sole ground of the statute of limitations

“We see no basis in the record to justify a ruling by the trial court as a matter of law that the plaintiffs had knowledge of fraud more than three years before the action was commenced.”,

which expression is found in the same paragraph that gives emphasis to the hearsay conversation with Canfield and the self-serving statement that Canfield later “alayed” Rex Holland’s apprehension.

The Court makes no reference to nor does it attempt to rationalize the Rex Holland letter to Dr. Mathesius of September 14, 1948, and the telegram from Mr. Moreton to Holland on October 8, 1948, in concluding that the record was insufficient to justify a ruling as a matter of law that the plaintiffs had knowledge of fraud more than three years before the action was commenced. On the concept that this Court will do no conscious wrong, we cannot do other than conclude that the omission of any reference to the Rex Holland letter of September 14, 1948, and to Mr. Moreton's telegram to Holland of October 8, 1948, when making specific reference to the Canfield conversations, was an inadvertence. If the letter of September 14, 1948, and the telegram of October 8, 1948, had been in the mind of the Court when writing the opinion, the Court would certainly not have said that there was "no basis in the record to justify" a ruling by the trial court as a matter of law that the plaintiffs had knowledge of fraud more than three years before the action was commenced.

The Washington Court *In Re Sackman's Estate* (1949), 210 P.2d 682, reiterates the familiar rule as follows:

"In *Noyes v. Parsons*, 104 Wash. 594, 177 P. 651, 654 the court said, in part: 'The broad assertion that the statute does not run until the fraud is discovered is not tenable. *The statute begins to run when the fraud should have been discovered, and a clue to the fact which if followed up diligently would lead to discovery is*

in law equivalent to discovery. Deering v. Holcomb, supra (26 Wash. 588, 67 P. 240, 561). A general allegation of ignorance at one time and knowledge at another is of no effect.’ ”

Instruction 6 requires a disclosure to Holland *from conversations with Moreton*. In the same vein the opinion ignores the rule just above stated and holds that the statute does not run until the Hollands “knew the facts.” In the same paragraph the opinion implies that the jury was instructed as to the statute of limitations, which is not the fact.

The record does not justify the statement in the opinion that “the running of the statute of limitations of three years for actions in fraud is closely tied to the jury’s findings on the primary issue of whether a fraud was perpetrated” and “the jury chose to believe the plaintiffs’ evidence which was to the effect that they did not know the facts at the time of the transaction and that the first knowledge they had of the true facts was in October 1951.”

The letter of September 14, 1948, Exhibit P 14, is characterized in the concurring opinion in *Holland v. Columbia Iron Mining Co.*, supra, as follows:

“In this connection it is significant to remember that in Rex Holland’s letter of September 14th he had said that Moreton misrepresented the price at 10 cents per ton, whereas, Hollands claimed it should have been 25 cents per ton. Twenty-five cents per ton was the price actually paid and the only evidence in the record is that this was equal to the highest price Columbia paid

for iron ore to anyone in the area. 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."

The telegram from Mr. Moreton to Rex Holland under date of October 8, 1948, the receipt whereof is admitted by Rex Holland (R. 506), puts Holland squarely on notice that Mr. Moreton was bargaining for as much as he could get for his vested one-fourth interest in addition to the fixed amount for the Holland interests (R. 238, 505 and Respondents' Brief page 73). The telegram of October 8, 1948, was not before the Court in *Holland v. Columbia Iron Mining Co.*, supra, and therefore does not come under the reference to that case in considering the factual background, to which case the reader of the opinion in the instant case is referred for "such further facts as are necessary to the disposition of the issues presented on this appeal." The telegram, coupled with Rex Holland's letter to Dr. Mathesius of September 14, 1948, imputes knowledge to Rex Holland within the connotation of the opinion that if the Hollands *knew the facts* the statute would have commenced to run at that time. In any event, the letter to Dr. Mathesius and the telegram from Mr. Moreton cannot be expunged from the record, or swept under the rug so to speak, by the statement:

"We see no basis in the record to justify a ruling by the trial court as a matter of law that the plaintiffs had

knowledge of fraud more than three years before the action was commenced.”

In addition to Rex Holland's letter to Dr. Mathesius and the telegram from Mr. Moreton there is Exhibit P 19, a letter signed by Rex Holland, his mother, father and Murie under date of October 13, 1948, addressed to Columbia Iron Mining Company. The letter was introduced in evidence by Rex Holland (R. 388) and in point of time is one month after the alleged conversation with Canfield on September 14, 1948, when Canfield is said to have stated that iron ore was bringing 25¢ a ton which conversation prompted the letter to Dr. Mathesius (R. 382). The letter of October 13, 1948, reads in part:

“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.”

The above should be compared with Rex Holland's own handwritten letter to Dr. Mathesius on September 14, 1948, Exhibit P 14, which states in part:

“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 * * *.”

The letter of October 13, 1948, was not before the Court in *Holland v. Columbia Iron Mining Co.*, supra (R.

389) and has undoubtedly been overlooked by the Court in the instant action when it says:

“We see no basis in the record to justify a ruling by the trial court as a matter of law that the plaintiffs had knowledge of fraud more than three years before the action was commenced.”

The words of the opinion “We see no basis in the record to justify” the ruling of the trial court on the statute of limitations encompass the entire record without qualification.

After the letter of September 14, 1948, to Dr. Mathesius there was nothing done or said by Mr. Moreton or by Columbia Iron Mining Company, or anyone else, to dissuade Rex Holland from the suggestion that the prevailing rate was 25¢ per ton, except Holland’s own self-serving statement as to *his state of mind* gleaned from the hearsay conversation with Canfield (R. 384) some two weeks after the first conversation (R. 382). Canfield did not repudiate the price of 25¢ per ton, and over objection, Holland was permitted to say that he concluded that there was no basis upon which to estimate the tons of ore in the property and “if he (Canfield) was not correct on the tons, then how could he be correct on the price.” (R. 384.)

“Q (Rex Holland) Now, did you come to any conclusion in your own mind, at that time, or thereafter, with respect to the price of 25 cents?

MR. GUSTIN: Now, we must object to that.

THE COURT: The objection will be sustained on that.

* * *

Q (By Mr. Roberts) After your conversation with Mr. Canfield, what was your state of mind with respect to the price of this ore?

MR. GUSTIN: We must object to that, your Honor.

THE COURT: Objection overruled. (R. 383).

* * *

A Yes, I understand your question on that. At that time he had quoted me a figure of 3,500,000 tons, which I thought he was referring only to the M & H claims. And then later on he tells me that he had not meant it was in the M & H claims alone, but it was in the complete ore body. So, I concluded that he had no basis at all on which to base his estimated tons of ore in that property, and, if he was not correct on the tons, then how could he be correct on the price.

THE COURT: Now, Mr. Roberts, is that all that you are going to ask in this connection?

MR. ROBERTS: Yes, your Honor.

THE COURT: Mrs. Harbrecht, and gentlemen of the jury, the purpose of admitting this testimony at this time is merely to show the state of mind of the plaintiff, Mr. Holland, and you are not to assume from his statements, as to the truth or correctness of the amount of tonnage, etc. The only

purpose of admitting this testimony is to go to Mr. Holland's state of mind in connection with this conversation on this body of ore.

* * *

MR. ROBERTS: Mr. Pollack has called my attention to one question I didn't ask in connection with the same matter, if I might retract my statement I was through, and ask one more matter.

THE COURT: As long as the jury understands this is merely to go to the state of mind, and not to the (R. 384) facts, as far as the tonnage is concerned. I think those have been established in the pre-trial, so there is no question —

MR. POLLACK: That is correct.

THE COURT: — as to the amount of the tonnage and the price per ton.

MR. POLLACK: That is correct.

MR. ROBERTS: The price has not been established. It was just the quantity.

THE COURT: Go ahead with your question.

Q (By Mr. Roberts) At this time, or after this second conversation with Mr. Canfield, what was the state of your mind as far as Mr. Moreton was concerned, and what he had told you concerning the price?

MR. GUSTIN: Now, your Honor, again, in addition to the objection urged in Chambers, we must add here that that reaches out into the mind of another person, and it is incompetent in the conclusion.

MR. ROBERTS: I certainly did not mean to reach anybody else's mind.

THE COURT: The objection is overruled, subject to my previous statement to the jury.

MR. GUSTIN: May the reporter read it, rather than repeat it.

A I concluded then that Mr. Canfield had no basis —

MR. ROBERTS: No, no. My question goes directly to the state of your mind as far as Mr. Moreton was concerned.

A That Mr. Moreton had advised us correctly as to the (R. 385) tonnage and the price of the ore in the M & H claims." (R. 386)

We envision a petition for rehearing and the rule with respect thereto as a means whereby the Court can correct and rectify an inadvertence or error in its own decision. Here we have three documents that have a direct bearing on the statute of limitations and there is no specific reference to the same in the opinion. True, the letter to Dr. Mathesius is commented on in *Holland v. Columbia Iron Mining Co.* and given special consideration in the concurring decision, which decision was concurred in by the writer of the opinion in the instant action. Assuming that it can be said that the letter to Dr. Mathesius written by Rex Holland was not worthy of comment in determining the propriety of the trial court's ruling, can the other documents be so treated? The telegram from Mr. Moreton is new to the case and by it a reasonable mind is put on inquiry. It plays

an important part, not only on the issue of fraud but on the running of the statute of limitations. It has been inadvertently omitted in the Court's consideration of the problem.

Exhibit P 19, the letter signed by Rex Holland on October 13, 1948, charges him with knowledge of the tonnage involved and reasserts his disclaimer to any dollar amount to be received by Mr. Moreton over and above the sum of \$100,000.00. *This letter was introduced by the plaintiff himself*, not on cross-examination but as a part of his case in chief.

Not to mention the letter or to rationalize the same with the contentions urged before the Court is most certainly an inadvertance and one that should be rectified in order to maintain the integrity of the record, and then, if the Court can say that it sees no basis in the record to justify the ruling of the trial court, the litigants cannot say, on that score, that matters of consequence have been ignored or overlooked.

POINT IV.

THE OPINION IS CONTRARY TO LAW AND TO THE FACTS.

(a) The opinion recognizes Mr. Moreton's vested interest in one-fourth of the purchase price. It flows from the bargain for an undivided one-fourth of the mining claims as subsequently patented, but the opinion gives no effect to his *option* to purchase the remaining three-fourths, a part of the same transaction. The in-

consistency is compounded by a misstatement of the contractual arrangement, the opinion stating:

“It also recited that if the sale was ‘slightly in excess’ of \$133,000 Moreton could have the excess as *compensation for his option to purchase their interests.*” (Emphasis added.)

In connection with a reconsideration of this case, we feel obliged to say with reference to the above Ownership Agreement, that it did not so provide as quoted above, but on the contrary, provided that Moreton would have all the excess over \$100,000. The quotation above was the testimony of Rex Holland in contradiction to the expressed terms of the written agreement to which testimony timely objection was made. There is no limitation in the written agreement as to what Moreton should receive over and above the specified sum of \$100,000, if sold on a tonnage basis as they indisputably were so sold.

We further feel obliged to call to the court’s attention Holland’s letter to Moreton of date December 15, 1951, (Ex. P-24, to be found on pages A47, A48 and A49 of our original brief), wherein he stated, and in accordance with his oral testimony, “We decided we were willing to take the \$100,000 and you should get \$60,000 * * * which we were led to believe was the total amount received from that sale, which additional amount would equal close to \$75,000 now that the taxes have been paid by you on that additional amount \$287,000.”

It is not understandable how the court could, or would award Holland more than he claimed. It is further not understandable how interest could be allowed to Holland on the amount of the total sum awarded him when as a matter of law Holland would had to have paid 5% state income tax and 25% federal income tax by April 1, 1949. It is clearly manifest that this court's decision awarded to Holland more than he himself claimed.

The portion of the opinion quoted above, while ambiguous, departs from the true commitment to the effect that the patenting of the claims was the consideration for the acquisition of the one-fourth interest and for the option to acquire the remaining three-fourths interest. All of the writings are to that effect and there is no effort made in the instant case to set any of them aside (R. 626 and 665). The option is an integral part of the contract vesting the one-fourth interest and cannot be treated separately or ignored. This is the holding of this Court in *Moody v. Smith* (1959), 9 Utah 2d 139, 340 P. 2d 83, where the Court states:

“Plaintiff’s attack is directed against the existence of the option clause, and this allegedly challenges the creation of a contract. Inspection does not support such a conclusion; the option is an integral part of a larger contract, the lease. This encompassing lease was admittedly a valid and binding agreement and would unquestionably be altered and varied should any change be made in the meaning or effect of the option.”

(b) The opinion as presently written is on the theory of plaintiff's Second Cause of Action which he elected to forego in the interest of his misconceived First Cause of Action where he looked to recover on the extremely punitive theory of forfeiture. The casual reader of the opinion would not be aware of the election as between the First and Second Causes of Action. What the Court has done cannot be said to be a mere coincidence as between the two causes or to be reconciled by the language that the verdict "should be modified" and the remanding of the case "for correction of the judgment." Under the guise of "correction" and of "modification" the Court has substituted the Second Cause of Action contrary to the law of the case, has deprived Mr. Moreton of a trial by jury on issues not presented at the trial level, including the issue of punitive damages. Property is taken without due process of law. The opinion departs from the record made in the court below in violation of constitutional provisions and of the statutes and rules promulgated thereunder.

(c) The direction of a new and revised judgment in this action prevents Mr. Moreton from testing in any manner whatsoever the legality of the same under previously accepted and recognized standards laid down by the constitution and laws of this State, including the decisions of this Court. Among other things, Mr. Moreton is deprived of a direct attack upon Instruction No. 6A (R. 268), which is clearly erroneous as to the concept of punitive damage, the hearsay and self-serving

Canfield-Rex Holland purported conversation, the method used by appellants to get before the jury *as a fact* the so-called “confidence restored” aspect of the Canfield conversation which this Court says “allayed” Holland’s apprehensions, and that such was admissable as a state of mind. Those matters, including the approach that is reasonably available on the theory of contract and many other matters, are swept aside by the opinion as it is now written, resulting in a deprivation of rights of a litigant under the concept of due process.

(d) The dissenting opinion points out in no uncertain terms the basic fallacy of the majority holding. When able jurists disagree as to whether “fraud” has or has not been disclosed by the record, it strengthens the contention that fraud is not shown by clear and convincing evidence. The criticism leveled at the majority opinion by the dissenter, coupled with the inconsistencies and the procedural difficulties pointed out above and the treatment of the punitive damages, should, we respectfully suggest, be sufficient to cause the Court to again review the entire record in order that no injustice be done.

The petition for rehearing should be granted.

Respectfully submitted,

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